

# Official Journal

## of the European Union

L 247

English edition

### Legislation

Volume 51

16 September 2008

#### Contents

#### I Acts adopted under the EC Treaty/Euratom Treaty whose publication is obligatory

##### REGULATIONS

- ★ **Council Regulation (EC) No 893/2008 of 10 September 2008 maintaining the anti-dumping duties on imports of polyester staple fibres originating in Belarus, the People's Republic of China, Saudi Arabia and Korea following a partial interim review pursuant to Article 11(3) of Regulation (EC) No 384/96** ..... 1
- Commission Regulation (EC) No 894/2008 of 15 September 2008 establishing the standard import values for determining the entry price of certain fruit and vegetables ..... 17
- ★ **Commission Regulation (EC) No 895/2008 of 12 September 2008 amending, for the thirteenth time, Regulation (EC) No 1763/2004 imposing certain restrictive measures in support of effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY)** ..... 19
- Commission Regulation (EC) No 896/2008 of 15 September 2008 fixing the import duties in the cereals sector applicable from 16 September 2008 ..... 20

#### II Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory

##### DECISIONS

##### Council

2008/725/EC:

- ★ **Council Decision of 15 September 2008 appointing a German member of the Committee of the Regions** ..... 23

2008/726/EC:

- ★ **Council Decision of 15 September 2008 appointing an Italian member to the Committee of the Regions** ..... 24

2008/727/EC:

- ★ **Council Decision of 15 September 2008 appointing a Slovak member and a Slovak alternate member of the Committee of the Regions** ..... 25

2008/728/EC:

- ★ **Council Decision of 15 September 2008 appointing a Belgian member and a Belgian alternate member of the Committee of the Regions** ..... 26

**Commission**

2008/729/EC:

- ★ **Commission Decision of 11 December 2007 on the State aid case C 53/06 (ex N 262/05, ex CP 127/04), investment by the city of Amsterdam in a fibre-to-the-home (FtH) network (notified under document number C(2007) 6072) <sup>(1)</sup>** ..... 27

2008/730/EC:

- ★ **Commission Decision of 8 September 2008 authorising the placing on the market of products containing, consisting of, or produced from genetically modified soybean A2704-12 (ACS-GMØØ5-3) pursuant to Regulation (EC) No 1829/2003 of the European Parliament and of the Council (notified under document number C(2008) 4735) <sup>(1)</sup>** ..... 50

III *Acts adopted under the EU Treaty*

ACTS ADOPTED UNDER TITLE V OF THE EU TREATY

2008/731/CFSP:

- ★ **Political and Security Committee Decision CHAD/4/2008 of 2 September 2008 amending Political and Security Committee Decision CHAD/1/2008 on the acceptance of third States' contributions to the European Union military operation in the Republic of Chad and in the Central African Republic and Political and Security Committee Decision CHAD/2/2008 on the setting up of the Committee of Contributors for the European Union military operation in the Republic of Chad and in the Central African Republic** ..... 54
- ★ **Council Decision 2008/732/CFSP of 15 September 2008 implementing Common Position 2004/293/CFSP renewing measures in support of the effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY)** ..... 56
- ★ **Council Decision 2008/733/CFSP of 15 September 2008 implementing Common Position 2004/694/CFSP on further measures in support of the effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY)** ..... 63

**Note to the reader** (see page 3 of the cover)



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

## I

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is obligatory)

## REGULATIONS

## COUNCIL REGULATION (EC) No 893/2008

of 10 September 2008

**maintaining the anti-dumping duties on imports of polyester staple fibres originating in Belarus, the People's Republic of China, Saudi Arabia and Korea following a partial interim review pursuant to Article 11(3) of Regulation (EC) No 384/96**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community<sup>(1)</sup> (the basic Regulation), and in particular Article 11(3),

Having regard to the proposal submitted by the Commission after consulting the Advisory Committee,

Whereas:

## A. PROCEDURE

## 1. Measures in force and subject to review

- (1) The Council, by Regulation (EC) No 428/2005<sup>(2)</sup> imposed a definitive anti-dumping duty on imports of polyester staple fibres (PSF as defined in more detail in recital (15)) originating in the People's Republic of China (PRC) and Saudi Arabia and amended Regulation (EC) No 2852/2000<sup>(3)</sup> imposing a definitive anti-dumping duty on imports of polyester staple fibres originating in the Republic of Korea (Korea). On 8 July 2008, the Court of First instance annulled Article 2 of Regulation (EC) No 428/2005, to a limited extent, in relation to the anti-dumping duty imposed on exports into the European Community of goods produced and exported by the Korean company Huvis Corp<sup>(4)</sup>.

<sup>(1)</sup> OJ L 56, 6.3.1996, p. 1.

<sup>(2)</sup> OJ L 71, 17.3.2005, p. 1.

<sup>(3)</sup> OJ L 332, 28.12.2000, p. 17.

<sup>(4)</sup> Case T-221/05.

## 2. Measures expired and subject to review

- (2) The Council, by Regulation (EC) No 1799/2002<sup>(5)</sup> imposed a definitive anti-dumping duty of imports of PSF originating in Belarus. The measures imposed by that Regulation expired on 11 October 2007.

## 3. Previous investigation concerning imports of PSF originating in Malaysia and Taiwan

- (3) Following a withdrawal of the complaint, the Commission, by Decision 2007/430/EC<sup>(6)</sup> (the termination Decision) terminated an anti-dumping proceeding concerning imports of PSF originating in Malaysia and Taiwan (the previous investigation). In accordance with Article 9(1) of the basic Regulation it was considered that the termination of anti-dumping duties on imports from Malaysia and Taiwan was not against the Community interest.

## 4. Present investigation

- (4) Having determined that there was sufficient *prima facie* evidence that the measures in force at the time could be no longer appropriate because their maintenance could be against the Community interest, the Commission initiated, on its own initiative, on 30 August 2007, by a notice published in the *Official Journal of the European Union*<sup>(7)</sup>, a partial interim review of the measures, in force on that date, applicable to imports of PSF originating in Belarus, Korea, Saudi Arabia and the PRC (the countries concerned). The review is limited to the examination of whether or not the continued imposition of measures is not against the Community interest, with the decision thereon possibly having retroactive effect as of 22 June 2007, i.e. the entry into force of the termination Decision.

<sup>(5)</sup> OJ L 274, 11.10.2002, p. 1.

<sup>(6)</sup> OJ L 160, 21.6.2007, p. 30.

<sup>(7)</sup> OJ C 202, 30.8.2007, p. 4.

(5) As mentioned above, the anti-dumping measures imposed on imports originating in Belarus lapsed on 11 October 2007. As a consequence, the review concerning Belarus has been discontinued. However, it was formally conducted until that date and the Commission considered in particular the question of retroactive repeal of measures in force between 22 June 2007 and 11 October 2007, should the conclusions warrant this.

#### 5. Parties concerned

(6) The Commission officially advised the Community producers, the suppliers, the importers and users as well as associations of users and producers, exporters, and representatives of the countries concerned of the initiation of the proceeding. All interested parties were given the opportunity to make their views known in writing and to request a hearing.

(7) All interested parties who so requested and showed that there were particular reasons why they should be heard, were granted a hearing. Complete questionnaire replies were received from 12 producers, 10 users, three importers, one European association of producers, one Austrian-German association of producers, one German federation of users, two associations belonging to this federation and one European association of users.

(8) Further, the Commission received submissions from other producers, users and importers which did not provide a complete answer to the questionnaire.

(9) Among the producers and users that participated in the investigation there are two vertically integrated groups that produce PSF (in part or in whole) for captive consumption.

(10) Finally, one association of Chinese exporters and two Korean exporters, assisted by their Authorities, have made their views known.

(11) Exporters from Belarus and Saudi Arabia did not make their views known. In addition, no parties made comments regarding the measures in relation to these two countries.

(12) The Commission sought and verified all information it deemed necessary to determine whether or not the continued imposition of the measures is against the Community interest. Verification visits were carried out at the premises of the following interested parties:

##### (a) Community producers

— Silon (Czech Republic),

— Trevira GmbH (Germany),

— Advansa (Germany),

— Wellman International Ltd (Ireland);

##### (b) Community users

— PGI Nonwovens B.V (The Netherlands),

— Libeltex BVBA (Belgium),

— Lück GmbH (Germany);

##### (c) Community user and producer

— ORV Manufacturing SpA (Italy);

##### (d) associations of users

— Gesamtverband Textil + Mode (Confederation of the German Textile and Fashion Industry),

— Edana (European Disposables And Non-woven Applications).

#### 6. Investigation period

(13) The review investigation period (RIP) covered the period from 1 July 2006 to 30 June 2007. The examination of trends relevant for the assessment covered the period from 1 January 2004 to the end of the RIP (the period considered).

(14) It is recalled that in the previous investigation, the investigation period covered the period from 1 January to 31 December 2005 and the examination of trends relevant for the assessment covered the period from 1 January 2002 to 31 December 2005.

#### B. PRODUCT CONCERNED AND LIKE PRODUCT

##### Product concerned

(15) The product concerned is the same as in the investigations mentioned in recitals (1) to (3): synthetic staple fibres of polyesters, not carded, combed or otherwise processed for spinning. It is currently classifiable within CN code 5503 20 00. It is commonly referred to as polyester staple fibres (PSF).

- (16) The product is a basic material used at various stages of the manufacturing process of textile products. The Community consumption of PSF is either used for spinning, i.e. manufacturing filaments for the production of textiles, mixed with other fibres such as cotton and wool or for non-woven applications such as filling, i.e. stuffing or padding of certain textile goods such as cushions, car seats and jackets.

## C. SITUATION ON THE COMMUNITY MARKET

### 1. Consumption in the Community

- (17) The determination of total Community consumption was based on the import and export statistics from Eurostat and the production of the Community industry (as defined in recital (26)), and other Community producers.

Table 1

Community consumption	2004	2005	2006	RIP
Volume (tonnes)	834 141	843 579	822 509	823 667
Index (2004 = 100)	100	101	99	99

- (18) As shown in the table above, consumption of PSF has slightly decreased during the period considered. This trend is in clear contrast with the situation examined in the previous investigation where consumption in the Community, as indicated in the Regulation imposing provisional duties <sup>(8)</sup>, increased by 3 % during the period considered in that investigation (2002 to 2005).

### 2. Imports from Belarus, the PRC, Saudi Arabia and Korea: volume, market share and import prices

- (19) The volume of imports into the Community from the countries concerned decreased by 28 % between 2004 and the RIP and the market share went from 24,4 % to 18 % whereas prices increased by 16 %. The data are based on Eurostat statistics.

Table 2

Imports from the countries concerned	2004	2005	2006	RIP
<b>Korea</b>				
Volume (tonnes)	122 260	108 407	111 967	133 574
Index (2004 = 100)	100	87	92	109
Market share	15,1 %	13,2 %	14,1 %	16,9 %
Prices 000 EUR/tonne	0,987	1,115	1,079	1,114
Index (2004 = 100)	100	113	109	113
<b>PRC</b>				
Volume (tonnes)	45 713	38 103	2 283	8 935
Index (2004 = 100)	100	83	5	20
Market share	5,7 %	4,6 %	0,3 %	1,1 %
Prices 000 EUR/tonne	0,92	0,97	1,06	1,10
Index (2004 = 100)	100	105	115	120

<sup>(8)</sup> Commission Regulation (EC) No 2005/2006 of 22 December 2006 imposing provisional anti-dumping duties on imports of synthetic staple fibres of polyesters (PSF) originating in Malaysia and Taiwan (OJ L 379, 28.12.2006, p. 65).

Imports from the countries concerned	2004	2005	2006	RIP
<b>Belarus</b>				
Volume (tonnes)	1 771	153	81	43
Index (2004 = 100)	100	8	4,5	2,4
Market share	0,2 %	0 %	0 %	0 %
Prices 000 EUR/tonne	0,97	1,17	1,16	1,26
Index (2004 = 100)	100	121	120	130
<b>Saudi Arabia</b>				
Volume (tonnes)	27 805	6 433	450	72
Index (2004 = 100)	100	23	2	0,3
Market share	3,4 %	0,8 %	0,1 %	0 %
Prices 000 EUR/tonne	0,93	1,05	1,21	0,9
Index (2004 = 100)	100	113	130	97
<b>Total countries concerned</b>				
Volume (tonnes)	197 549	153 096	114 781	142 624
Index (2004 = 100)	100	77	58	72
Market share	24,4 %	18,7 %	14,5 %	18 %
Prices 000 EUR/tonne	0,96	1,08	1,08	1,11
Index (2004 = 100)	100	112	112	116

- (20) The sharp increase of imports from Korea during the RIP was mainly due to the imposition of provisional anti-dumping duties on Taiwanese imports during the first semester of 2007 <sup>(9)</sup>. Both Korea and Taiwan are the main suppliers of Low Melt Polyester (LMP) and Hollow Conjugated Siliconised polyester (HCS). Since the level of provisional duties imposed on Taiwanese imports reached 29,5 % for certain companies, Community importers decided to source LMP and HCS from Korea where the level of anti-dumping duties was significantly lower.

### 3. Imports from other third countries: volume, market share and import prices

Table 3

Imports from other third countries	2004	2005	2006	RIP
Volume (tonnes)	171 633	225 748	278 392	256 291
Index (2004 = 100)	100	132	162	149
Market share	21 %	28 %	35 %	32 %
Prices 000 EUR/tonne	1,09	1,20	1,15	1,15
Index (2004 = 100)	100	110	106	106

- (21) During the period considered imports from other third countries have increased by 49 %. The reason for such increase is linked to the imposition in March 2005 of anti-dumping duties on imports from Saudi Arabia and the PRC and the repeal of anti-dumping measures on imports from Indonesia, Thailand and India in October 2006.

<sup>(9)</sup> See footnote 8.

- (22) Globally, imports have therefore increased from approximately 370 KT to approximately 400 KT over the period. If one uses the investigation period of the previous investigation as a starting point, the increase has been from approximately 380 KT to approximately 400 KT.

#### D. SITUATION OF THE COMMUNITY INDUSTRY

##### 1. Level of cooperation

- (23) During the RIP, PSF was manufactured by 19 producers in the Community. Cooperation from Community producers was very high in this investigation. Amongst the 19 community producers, 12 producers accounting for 70 % of production have fully cooperated. Other Community producers have made submissions in relation to the investigation but have not provided full cooperation. Moreover, two associations of producers (CIRFS and IVC)<sup>(10)</sup> have also submitted their comments. In addition, all Community producers have provided information on their production. If all submissions received (individual producers and associations) are taken into account, it can be concluded that Community producers accounting for 88 % of Community production have made their views known and are against the termination of the measures. This level of cooperation is significantly higher than in the previous investigation where only three companies accounting for slightly more than 25 % of Community production and one association of producers (CIRFS) cooperated with the Commission and subsequently withdrew the complaint.
- (24) The Commission examined all relevant economic factors and indices having a bearing on the situation of the Community producers.

##### 2. Definition of Community production and Community industry

- (25) As indicated above, during the RIP, PSF was manufactured by 19 producers in the Community. These 19 producers thus constitute the total Community production within the meaning of Article 4(1) of the basic Regulation.
- (26) Twelve Community producers (Advansa GmbH, Fibracat Europa S.L., Fidion S.r.l., Frana Polifibre SpA, Greenfiber International S.A., IMP Comfort Sp.z o.o., Märkische Faser, Nurel S.A., ORV Manufacturing SpA, Silon s.r.o., Trevira GmbH and Wellman International Ltd) fully cooperated in the investigation. During the RIP they produced 347 640 tonnes and they account for 70 % of Community production. Accordingly they represented a major proportion of the total Community production of the product concerned during the RIP.
- (27) It was therefore considered that the 12 Community producers that have fully cooperated with the investigation represented the Community industry within the meaning of Articles 4(1) and 5(4) of the basic Regulation. They are herein referred to as the 'Community industry'.

##### 3. Economic situation of the Community industry

###### Production

- (28) Between 2004 and the RIP, production and market share of the Community industry evolved as follows:

Table 4

	2004	2005	2006	RIP
Production volume (tonnes)	317 450	307 043	321 127	347 640
Index (2004 = 100)	100	97	101	110
Market share	36,9 %	32,4 %	38,6 %	41,8 %

<sup>(10)</sup> CIRFS (The International Rayon and Synthetic Fibres Committee, the representative body for the European man-made fibre industry) and IVC (Industrievereinigung Chemiefaser e.V., Association of the German and Austrian Man-Made Fibres Industries).

- (29) After a decrease in 2005, Community production has increased by 10 % compared to the situation in 2004. This increase is linked, *inter alia*, to the setting up of new PSF plants in Poland and Romania in 2006. It is expected that production will continue to grow in the future with the consolidation of the activities of the new abovementioned plants and the starting up of another plant in Bulgaria with an annual capacity of between 12 000 and 14 500 tonnes. As for market share, it also decreased in 2005 and rose in 2006 and 2007. If we compare this table with production of the Community industry of the previous investigation (as defined in recital (70) of the Regulation imposing provisional duties) <sup>(1)</sup> during the period considered in that investigation (2002 to 2005), the trend has changed. Indeed, between 2002 and 2005, the production of that Community industry decreased by 9 % whereas during the period considered in this investigation production of Community industry has increased by 10 %. As regards market share the situation is different as well. Indeed, market share of the Community industry in the previous investigation decreased by 2,3 percentage points whereas in the present investigation the market share of the Community industry has increased by almost 5 percentage points.

### 3.1. Production capacity and capacity utilisation

- (30) Between 2004 and 2005 there was a decrease in capacity of 6 %. As from 2006 capacity started to increase and reached a level of almost 413 000 tonnes during the RIP (almost 13 % higher than in 2004). This increase was mainly due to the fact that two of the cooperating producers have installed new plants in Poland and Romania that started to operate in 2006. As for capacity utilisation, it decreased by 2,4 percentage points during the period considered. The cause of this decrease was in all likelihood linked to the installation of new capacities and the decrease in consumption in the Community. Data concerning production capacity are in stark contrast with data obtained in the previous investigation where the capacity of the Community industry decreased by 9 % during the period considered (2002 to 2005).

Table 5

	2004	2005	2006	RIP
Capacity in tonnes	366 062	344 872	378 931	412 916
Index (2004 = 100)	100	94	103,5	112,7
Capacity utilisation	86,8 %	89,3 %	85 %	84,4 %

### 3.2. Turnover and quantities sold

Table 6

	2004	2005	2006	RIP
Turnover 000 EUR	391 259	388 502	403 189	443 540
Index (2004 = 100)	100	99	103	113
Sales in the Community (tonnes)	281 083	259 314	272 553	300 051
Index (2004 = 100)	100	92	97	107

- (31) During the period considered the turnover of the Community industry in the Community and the quantity of PSF sold have increased by 13 % and 7 % respectively. These increases are linked to the starting up of two new plants in 2006 in Poland and Romania. If we compare these data with those of the previous investigation where there was a decrease of 1 % in sales volume during the period considered, the situation has radically changed and evidence shows that Community industry has made a significant effort to meet the demand.

<sup>(1)</sup> See footnote 8.



### 3.3. Sales prices and costs

- (32) The unit sales price of the Community industry in the EU increased by 6,2 % during the period considered (from 1 392 EUR/tonne in 2004 to 1 478 EUR/tonne during the RIP). However, there has been a slight decrease in prices since 2005. The average cost rose by 9,7 % (from 1 388 EUR/tonne in 2004 to 1 523 EUR/tonne during the RIP). This increase in costs was mainly due to the fact that the average cost of most of the raw materials (due *in fine* to the worldwide surge of oil prices) rose significantly. These figures show that, in order to avoid losing market share, the Community industry was not in a position to fully cover its cost of production with its sales prices. Price increases of the Community industry have been far more moderate than in the previous investigation where they rose by 12 % during the period considered.

Table 7

	2004	2005	2006	RIP
Weighted average price (000 EUR/tonne)	1,39	1,50	1,48	1,48
Index	100	107	106	106
Weighted average cost (EUR/tonne)	1,388	1,511	1,556	1,523
Index (2004 = 100)	100	109	112	109,7

### 3.4. Employment and wages

- (33) The level of employment by the Community industry increased by 17,8 % between 2004 and the RIP and the average wage per employee decreased by 10 %. Although the production of PSF is not labour intensive, the capacity and production increase was coupled with a substantial increase in the number of jobs. In the previous investigation the level of employment decreased by 19 % during the period considered and the average labour cost per employee increased by more than 30 % – again a totally different situation.

Table 8

	2004	2005	2006	RIP
Employment	1 743	1 660	1 944	2 053
Index (2004 = 100)	100	95	111,5	118
Average labour cost/employee per month	3 191	3 411	3 015	2 859
Index (2004 = 100)	100	107	94	90

### 3.5. Profitability

- (34) The profitability on sales <sup>(12)</sup> of the product concerned to unrelated customers in the Community has deteriorated significantly, whether the starting point is 2004 or 2005. The situation has therefore significantly worsened.

Table 9

	2004	2005	2006	RIP
Profitability	0,3 %	- 0,8 %	- 5,4 %	- 3,2 %

<sup>(12)</sup> Profitability for companies with start-up operations which take place within or during part of the investigation period has not been taken into account to avoid potential distortions in the figures.

### 3.6. Investments

Table 10

	2004	2005	2006	RIP
Investments in 000 EUR	15 604	16 580	39 865	32 618
Index (2004 = 100)	100	106	255	209

- (35) Between 2004 and the RIP, the level of investments of the Community industry increased by 109 %. This increase is explained to a large extent by the installation of new plants in Poland and Romania that started to operate in 2006.

### 3.7. Conclusion in relation to the situation of producers

- (36) The investigation has concluded that, contrary to the case mentioned under recital (3), the Community industry is expanding its interest in and production of this product, and that its viability has been reinforced.
- (37) The Community industry has been able to increase its market share by almost 5 percentage points during the period considered. However, this increase took place in a period where consumption decreased by more than 1 %.
- (38) Over the period considered the sales price of the Community industry increased by 6 % but there has been a slight decrease since 2005. In this context account should be taken of the fact that, as explained in recital (32) this price increase occurred at a time when costs rose by 10 %.
- (39) Furthermore, there has been a substantial increase in terms of employment due to the opening up of two new plants<sup>(13)</sup>. As far as profitability is concerned, the situation has deteriorated during the last years, although there has been an improvement between 2006 and RIP. In order to be able to maintain its position in the market, the Community industry is obliged to sell at a loss.
- (40) Having regard to the above, it can be concluded that, although the Community industry has benefited to some extent from the anti-dumping measures imposed on imports from the countries concerned, it has not recovered from past dumping and is still in a fragile and vulnerable situation. Should measures disappear, imports at the same and/or increased levels from the countries concerned would in all likelihood aggravate this situation.

## 4. Development of imports should measures be repealed

### 4.1. Unused capacities

- (41) Spare capacity in the PRC accounts for around 3 million tonnes which corresponds to 3,5 times total Community consumption. This spare capacity has increased by 37 % since 2005 (the year when the anti-dumping measures were imposed on imports from the PRC). As for Korea, spare capacity during the next year will be of 114 000 tonnes which corresponds to 14 % of total Community consumption. Even if part of this spare capacity corresponds to the company for which a 0 % anti-dumping duty is applicable, most of it corresponds to companies subject to anti-dumping duties. There is no data available for Saudi Arabia. As for Belarus, there is no need to make a prospective analysis on spare capacity because the measures expired in October 2007. The spare capacity of these countries could be directed to the Community should measures be repealed.

<sup>(13)</sup> In 2005 one Community producer went bankrupt in the UK but new plants based in Poland and Romania have offset the loss of production and employment entailed by this bankruptcy.

#### 4.2. Incentives to re-direct sales volumes to the Community

- (42) Some of the largest export markets in the world are protected by anti-dumping duties for imports of PSF originating in the PRC and Korea. Indeed, duties for imports from the PRC are in place in Turkey and the USA and they reach as much as 44,3 % in the USA. Moreover, Korean exports are subject to anti-dumping duties ranging between 0 % and 24,6 % in Japan, Turkey, Pakistan and the USA. If the measures in question, as outlined in recital (4), are repealed, the European Union will be the one of most important markets of some size for which exports from the PRC and Korea would not be subject to anti-dumping measures.
- (43) It has been claimed by a number of users that the PRC discourages export of raw materials such as PSF. This argument cannot be accepted. According to available statistics, net flow of PSF in the PRC (comparison between production and internal consumption) is steadily increasing and is expected to increase in the coming years as shown in the table below:

Table 11

	2004	2005	2006	2007	2008	2009
Net flow (comparing production and mill consumption) 000 tonnes	- 480	- 200	23	258	449	541

- (44) This is a clear sign that exports of PSF from the PRC are growing and are expected to grow in the future in spite of the claim that the PRC discourages exports of PSF. The argument is therefore rejected.

#### 4.3. Sourcing policies

- (45) An association of users has indicated that producers of yarns and non-wovens made from PSF often have a clear interest to buy fibres originating in the EU in order to produce originating yarns and non-wovens and export them to countries with preferential agreements. However, the data provided by users in the present investigation show that 85-100 % of the turnover of companies in the non-woven sector for products incorporating PSF is made through sales in the Community. Accordingly, the rules of origin for exports to countries with preferential agreements should not play a significant role for users of PSF when making decisions on the origin of the products in the moment of their acquisition. In the absence of evidence to support the association's argument, the argument is therefore dismissed.

#### 4.4. Conclusion on the development of imports should measures be repealed

- (46) It is therefore concluded that, given the incentives observed above, there is a likelihood that significant quantities will be exported to the Community, should anti-dumping measures in force be lifted.

### 5. Conclusion on Community industry

- (47) The Community industry has made a substantial effort in terms of investments which has been translated into a significant expansion. The Community industry situation has changed substantially over the last years, as evidenced in particular by the appearance of new industry in Poland and Romania and the foreseen expansion in Bulgaria.
- (48) Despite these renewed efforts in terms of expansion and investments it should however, as stated before, be noted that the situation of the Community industry in terms of profitability is still precarious. There will be, in all likelihood, a significant quantity of dumped imports if anti-dumping measures were to be removed.

- (49) Large import volumes at dumped prices would lead to additional price pressure on Community industry, reduced profit margins and profitability and increased losses. This could have as a consequence the likely cancellation of further investment, a decline in innovation, the erosion of the competitive position of integrated industry, cutbacks and closures.
- (50) Having regard to the above, if the Community industry were exposed to significant volumes of imports from the PRC, Korea and Saudi Arabia at dumped prices and without measures, this would cause a further deterioration of their financial situation. On this basis, it is therefore concluded that the repeal of the measures would be against the interest of Community industry.

## E. COMMUNITY USERS

- (51) The market for products incorporating PSF is divided into (a) the spinning applications (i.e. the manufacturing of filaments for the production of textiles, after mixing or not with other fibres such as cotton or wool), (b) the non-woven applications: the manufacturing of sheets and webs, not converted into yarns, excluding paper and (c) the filling applications (i.e. the stuffing or padding of certain textile goods, as for example the cushions or car seats).

### 1. Level of cooperation of Community users

- (52) Sixteen industrial users have sent submissions in relation to the present investigation. They represent 17 % of total Community consumption of PSF and around 13 % of imports from the countries concerned. However, full cooperation was obtained only from 10 users <sup>(14)</sup> representing around 12 % of total Community consumption of PSF (all these users that have fully cooperated belong to the non-woven and filling sectors). As regards the other users having partially cooperated, only one operates in the spinning sector.
- (53) Furthermore, Gesamtverband Textil + Mode (the German federation of textile industries representing both the spinning and the non-woven sectors), two associations belonging to the said federation: Industrieverband Garne-Gewebe-Technische Textilien e.V. (IVGT) and Verband der Deutschen Heimtextilien-Industrie e.V. and one European association representing companies of the non-woven sector (EDANA) have made submissions asking the Commission to terminate the existing measures. All the users mentioned above are members of one or more of these associations. The representativity of these associations corresponds to around 30 % of total Community consumption of PSF.
- (54) The level of cooperation of individual users in this proceeding is higher than in the previous investigation. It should also be noted that in the previous investigation only the users in favour of non-imposition of duties (around 10 % of total consumption) made their views known whereas in this proceeding users which are in favour of maintaining the measures have also participated.

### 2. Arguments put forward by users

#### 2.1. Users in favour of termination

- (55) Users representing around 11 % of total PSF consumption and 10 % of imports from the countries concerned have put forward a number of arguments against the maintenance of duties. All of these users are members of one or more of the users' associations mentioned above which are also in favour of termination. The arguments put forward by users and associations in favour of termination are examined below.

<sup>(14)</sup> Libeltex, ORV, PGI Nonwovens, Ziegler, Tharreau, Sandler, Frankenstolz, Lück, TWE Vliesstoffwerke and IMP Comfort.

- (56) First, they claim that they are confronted with a difficult situation because of increasing competition on their finished products from countries which moved from exports of PSF to exports of non-woven products (e.g. the PRC). They argue that in case of termination of the existing measures, they will have the ability to source cheaper fibre and therefore become more competitive against finished products coming from Asia. If the market price for PSF decreases there will be a potential increase in profitability. Account should be taken of the fact that their customers are mainly discount chains for whom a rock-bottom price is decisive and the margin applied to finished products is very low.
- (57) In relation to these arguments, it should be pointed out that the information supplied by users that have cooperated in the investigation shows that their situation in terms of profitability has not changed in spite of the imposition in 2005 of anti-dumping duties on PSF originating in the PRC and the increase of imports from this country of finished products. This is due to the fact that the impact of PSF in their total costs in products incorporation PSF has also remained stable as shown in the table below:

Table 12

	2004	2005	2006	RIP
Profitability	3,48 %	4,07 %	3,88 %	3,79 %
Total costs of PSF as a percentage of total costs	22,3 %	24 %	24 %	24 %

- (58) The situation is thus different from the previous investigation where the imposition of new anti-dumping duties that could reach almost 30 % in certain cases would undoubtedly have had a substantially more negative impact in the costs structure of users of PSF and the possibility to make attractive offers to their clients.
- (59) Furthermore, their turnover in the Community related to products incorporating PSF has increased by more than 10 % during the period considered as indicated in Table 13:

Table 13

	2004	2005	2006	RIP
Turnover (000/EUR)	427 694	452 329	456 445	472 750
Index (2004 = 100)	100	106	107	111

- (60) These figures show that the increase of imports of finished goods from the PRC since 2005 has not prevented the Community users of PSF from expanding and selling their goods to retailers and maintaining their profit margin. As regards the possible impact on final prices paid by consumers, no argument has been put forward in this respect whereas in the previous investigation it was concluded that the imposition of new duties that could reach almost 30 % could have had an impact on consumers.
- (61) The users in favour of termination have also argued that prices of PSF are increasing within the Community despite a falling dollar. This statement does not correspond to the data obtained by the Commission during the investigation. Although the price of PSF rose sharply in 2005, it has remained stable afterwards as shown in Table 7 for PSF produced and sold within the Community and in the Table 14 for imported PSF <sup>(15)</sup>:

<sup>(15)</sup> Source: Eurostat. It has also been put forward by an association of producers that there has been a sharp increase in prices in June 2008 compared to June 2007. This sharp increase corresponds to prices in dollars but if we consider prices in EUR they have remained stable.

Table 14

	2004	2005	2006	2007	1st quarter 2008
Prices 000 EUR/tonne	1,02	1,15	1,13	1,15	1,15
Index (2004 = 100)	100	113	111	113	113

- (62) Having regard to the above, the existing measures do not appear to have had an overwhelming impact on the costs and profitability of the user companies.
- (63) Second, the users which are against the imposition of measures indicate that there is a substantial difference in the level of employment in the Community between the sector concerning production of PSF (around 3 000 people) and the downstream industry (allegedly 70 000 people).
- (64) As regards this claim, although the figure of 70 000 people seems to be exaggerated, it cannot be denied that the user industry is more labour intensive than the producer industry. Given the limited level of full cooperation among users (figures for jobs have only been supplied by users accounting for 12 % of total Community consumption of PSF) it has not been possible for the Commission to obtain accurate data on employment. Nevertheless in Table 15 it is shown that users that have fully cooperated in the investigation employ 5 009 people. This would indicate that at least 40 000-45 000 people would be involved in the production of goods incorporating PSF. The table below also contains indications on how employment has evolved among cooperating users:

Table 15

	2004	2005	2006	RIP
Employment	3 898	4 471	4 854	5 009
Index (2004 = 100)	100	115	125	129

- (65) Although the number of companies that have cooperated is limited, it can nonetheless be concluded that the existing anti-dumping duties have not prevented employment from significantly growing during the period considered. Accordingly this users' argument is rejected. Of course, the situation was different in the previous investigation where the imposition of additional anti-dumping duties that could reach 30 % could have led to job losses in the users' sector.
- (66) Third, the users mentioned in this section point out that there is a growing demand in the non-woven and filling sectors of two special types of PSF: HCS and LMP (as mentioned in recital (20)) and for which there is limited production in the Community whereas the PRC and Korea have large production capacities.
- (67) In this respect, according to best estimates of the Commission in the light of the information put forward by interested parties, total consumption of LMP in the Community during the RIP is in the range of 85 000-90 000 tonnes and total consumption of HCS is in the range of 65 000-70 000 tonnes. The Community industry is currently supplying 2 155 tons of LMP and 21 543 tons of HCS. The demand of these types of PSF is continuously growing and, according to a users' association, there will be a 6 % annual increase for both types in the coming years.
- (68) Community producers of PSF claim that production of these 'specialties' in the Community is limited because the existing level of dumped prices do not allow them to increase production. According to the data collected in the present investigation capacities for HCS and LMP in the Community industry during the period considered have evolved as follows:

Table 16

	2004	2005	2006	RIP
Capacity Community industry HCS	67 050	46 550	61 550	61 550
Index (2004 = 100)	100	69	92	92
Capacity Community industry LMP	32 050	32 050	32 050	32 050
Index (2004 = 100)	100	100	100	100

- (69) This table shows that the Community industry would be in a position to cover 88-95 % of total demand of HCS and around 37 % of total demand for LMP in case prices would reach a certain level. Moreover, even if the Community industry produces limited quantities of these 'specialties', users are able to source them from Korea and the PRC with limited anti-dumping duties (only 5,7 % from Huvis in Korea and 4,9 % from Far Eastern in the PRC). As far as the possibility to source from Taiwan is concerned, it has been claimed that production of PSF in Taiwan is decreasing and this will lead to price increases or shortages of supply and if it is to be substituted by imports from the PRC and Korea, the cost impact of the duties paid for these 'specialties' imported from the PRC and Korea would be significant due to the low profit margin of Community users. These arguments cannot be accepted. On the one hand, even if production of PSF in Taiwan is decreasing, spare capacity is expected to increase (the expected spare capacity for 2008 is around 122 000 tons and for 2 009 150 000 tons). In conclusion, it is not clear that there would be a structural shortage of these specialties.
- (70) As for prices in these 'specialties', there are no official statistics but, as shown in the table below, according to the data supplied by cooperating companies, the price of HCS (including anti-dumping duties) has increased only by 2 % between 2004 and the RIP. There was even a substantial decrease in price in 2006. The increase between 2006 and the RIP was in all likelihood due to the imposition during the first semester of 2007 of provisional anti-dumping duties on imports from Taiwan. As regards LMP, its price has increased by 18 % during the period considered.

Table 17

	2004	2005	2006	RIP
Price HCS '000 EUR/tonne	1,21	1,26	1,05	1,24
Index (2004 = 100)	100	104	87	102
Price LMP '000 EUR/tonne	1,31	1,44	1,43	1,54
Index (2004 = 100)	100	110	109	118

- (71) This data has to be analysed in relation to the weight of these specialties on total costs of products incorporating PSF. On the basis of the data supplied by the cooperating users, the impact of HCS on their total costs for products incorporating PSF would only account for 1,98 % and the impact of LMP would account for 4,38 %. Bearing in mind that the average profitability is around 4 % the impact on total costs linked to these 'specialties', in spite of the substantial increase of the price of LMP, is not significant. This claim is therefore rejected.
- (72) The situation was different in the previous investigation where the imposition of anti-dumping duties of almost 30 % on imports of LMP and HCS originating in Taiwan and the price increases that this would have entailed for the same products would have had a more significant impact on total costs.

## 2.2. Users against termination

- (73) Users representing around 6 % of total Community consumption of PSF and 3 % of imports from the countries concerned have pointed out that the termination of measures will jeopardize the profitability of the downstream industry as the bankruptcy of the PSF sector in the EU will lead to increases in PSF prices in two years time and consequently an increase of imports of goods incorporating PSF can be expected.
- (74) In the light of the arguments developed under D.4 above (likelihood of significant imports should measures be repealed), it is not excluded that this could indeed occur, with the associated risks for the maintenance of effective competition.

## 3. Conclusion

- (75) Taking into account all of the above factors, it is concluded that, although most of the users that have participated in the investigation consider that the maintenance of duties is against their interest, the investigation shows that the continuation of measures would not have a significantly negative effect on their economic and financial situation. Moreover, contrary to the previous investigation, users have varying views on the impact of a possible termination of existing measures on their business. Although, as explained above, most of them have asked the Commission to repeal the anti-dumping duties, among those which have cooperated in the investigation there is also a significant number that is against the termination of duties.

## F. IMPORTERS AND TRADERS

- (76) Six importers/traders made submissions in relation to this investigation within the deadline indicated in the Notice of initiation but only three of them (Saehan Europe, GSI Global Service International and Marubeni) have fully cooperated and provided answers to all the questions raised by the Commission. All are profitable companies and the number of employees related to the import/trade of PSF product is negligible.
- (77) It does not appear that the maintenance of the duties would have any relevant negative impact on their business. Most of them are of the opinion that it is in their interest to terminate the measures imposed on imports from Korea but not on imports from the PRC because it will entail a huge flow of commodities and the price level will go down as well as their margin. On the other hand, according to their views, since Korean unused capacities are more limited than Chinese, they are of the opinion that the impact of the Korean imports on prices will not be to the detriment of their business.
- (78) On this basis, it is concluded that, whether measures are maintained or not, generally speaking, the activity of importers and traders will not be significantly affected.

## G. OTHER CONSIDERATIONS

- (79) It has been argued by the Community producers which allegedly produce 56 % of PSF from recycled materials that imports of dumped PSF have adversely affected the profitability of recycling companies; it has also been claimed that 425 000 people are employed in the collection of polyethylene terephthalate in order to supply the recycling companies. In this respect, it has to be pointed out that recyclers of PET bottles were not interested in participating in this investigation in spite of the invitation made in the Notice of initiation and the questionnaires sent to them by the Commission, to which no reply was received. On the other hand, there is an important and growing demand of recycled PET bottles in Asia and the non-imposition of anti-dumping measures will not preclude PET bottle recyclers from selling their products on the world market. Consequently these claims are rejected.
- (80) Moreover, it has been pointed out by Community producers that making polyester staple fibre from recycled materials uses less energy than the chemical process and transport of imported PSF from Asia produces carbon emissions. Consequently, replacement of Community production by dumped imports, in particular from the PRC and Korea, would increase carbon emissions and set back the EU climate change objectives. In this context it is in any event recalled that the Community interest analysis in anti-dumping proceedings focuses on the economic impact of measures on the economic operators concerned and is not directly related to environmental concerns.
- (81) No arguments have been put forward regarding Saudi Arabia (or Belarus) which would justify a conclusion that maintaining measures would not be in the Community interest.

## H. CONCLUSION

- (82) In the light of the above, it can be concluded that the Community producers of PSF, including the Community industry, are benefiting from the measures in force but are still in a vulnerable situation. During the period considered, they have been able to increase their market share, production, capacity, turnover and the level of employment. Furthermore, they have made substantial efforts in terms of investment, have opened new plants in Poland, Romania and Bulgaria. In addition, Tergal, an important supplier of the spinning industry, has overcome its financial difficulties and, according to the information supplied by the company, is no longer under safeguard procedure (procédure de sauvegarde) as from July 2007. However, their financial situation is still precarious and cannot face a sudden influx of dumped imports. The maintenance of the duties will continue to provide substantial benefits to the Community industry and contribute in all likelihood to the restoration of its viability. This situation is in stark contrast to the picture obtained in the previous investigation where it was



concluded that the supply of PSF could be problematic in the Community market due to industrial conversion of one company (La Seda) in order to increase output of other products, the bankruptcy of another producer (Pennine Fibers) and the former financial difficulties of Tergal.

- (83) As for users and importers, the existing anti-dumping duties on imports from the countries concerned have not jeopardised their viability and capacity to expand. Therefore, if measures are terminated, any advantages for users and importers are likely to be limited, given that the anti-dumping duties did not have a significant effect on their economic situation. Contrary to this conclusion, the analysis of the previous investigation showed that the imposition of new of anti-dumping duties that could reach almost 30 % would have had an impact on prices of PSF, in particular HCS and LMP, that could have potentially put into financial difficulties a substantial number of users.
- (84) It is therefore concluded that the possible limited advantages to be enjoyed by users and importers of PSF in the Community if duties were to be repealed, would clearly be disproportionate compared to the serious disadvantages to the Community industry.
- (85) Accordingly, it can be concluded that termination of the existing measures on imports from the countries concerned on Community interest grounds would not be justified.

#### I. APPLICATION OF THE PRINCIPLE OF NON-DISCRIMINATION

- (86) It has been put forward by a number of interested parties that anti-dumping measures may not be imposed on a discriminatory basis, as stated in Article 9(5) of the basic Regulation which provides that 'an anti-dumping duty shall be imposed in the appropriate amounts in each case, on a non-discriminatory basis on imports of a product from all sources found to be dumped and causing injury, [...]'. It has been indicated as well that this principle of non-discrimination is also a fundamental principle of WTO law.
- (87) According to the interested parties that invoke the application of the principle of non-discrimination, imports of PSF from Taiwan and Malaysia were found to have been dumped and causing injury in Regulation (EC) No 2005/2006. It has been claimed that 'the reason why these two sources of PSF imports were not subject to anti-dumping duties is not that the Commission would have subsequently found that imports of PSF from Malaysia and Taiwan were not dumped or were not causing injury [...]'. Furthermore, it has been argued

that the Commission's Decision not to continue to impose anti-dumping measures on imports of PSF from Malaysia and Taiwan from 22 June 2007 despite the fact that these imports were found to be dumped and causing injury has the effect of invalidating the continued imposition of anti-dumping duties on imports of PSF from other countries.

- (88) First, it is underlined that in the case of Malaysia and Taiwan the complaint was withdrawn and that no definitive finding was made by the Council as to the adequacy of imposing anti-dumping duties. As a result, there is no discrimination.
- (89) Second, the nature of the legal tests regarding Community interest under Articles 9(1) (applicable in the Taiwan and Malaysia case) and 21 (applicable in the current case) of the basic Regulation is different. Under the former, the test is whether the balance of interests at hand is so positive that the Commission should continue the proceedings *ex officio* even in the absence of a supported complaint. Under the latter, the test is whether the balance of interests is so negative that measures should be terminated. Therefore, the different nature of the tests implies that there can be no discrimination.
- (90) Third, even in the hypothetical situation of a definitive decision taken by the Council concerning a non-imposition of anti-dumping duties on imports of PSF originating in Malaysia and Taiwan, there would be no discrimination in this case, given that the said principle is applicable only if similar conclusions are reached for different investigations concerning the same product. In other words, compliance with the principle of non-discrimination as set out in Article 9(5) the basic Regulation and Article 9(2) of the WTO Anti-dumping agreement requires that comparable situations must not be treated differently, and that different situations must not be treated in the same way. As explained above, the facts and conclusions in the present investigation are radically different from the facts and conclusions in the case of Malaysia and Taiwan and, consequently, the two situations are not comparable.
- (91) Having regard to the above the claims put forward in relation to the application of the principle of non-discrimination are rejected.

#### J. FINAL PROVISIONS

- (92) All parties were informed of the essential facts and considerations on the basis of which it is intended to recommend that the existing measures be maintained. They were also granted a period to make representations subsequent to this disclosure.

- (93) On the basis of the above facts and considerations, it is concluded that, in accordance with Article 11(3) of the basic Regulation, the interim review should be terminated and the existing anti-dumping duties imposed on imports of PSF produced and exported to the European Community by the countries concerned should be maintained,

HAS ADOPTED THIS REGULATION:

*Sole Article*

The partial interim review of the anti-dumping measures applicable on imports of synthetic staple fibres of polyesters (PSF) originating in Belarus, the Republic of Korea, Saudi Arabia and the People's Republic of China normally declared under CN code 5503 20 00, is hereby terminated without amending the anti-dumping measures in force.

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

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

Done at Brussels, 10 September 2008.

*For the Council*  
*The President*  
B. KOUCHNER

---

**COMMISSION REGULATION (EC) No 894/2008**  
**of 15 September 2008**  
**establishing the standard import values for determining the entry price of certain fruit and vegetables**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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

Having regard to Commission Regulation (EC) No 1580/2007 of 21 December 2007 laying down implementing rules for Council Regulations (EC) No 2200/96, (EC) No 2201/96 and (EC) No 1182/2007 in the fruit and vegetable sector <sup>(2)</sup>, and in particular Article 138(1) thereof,

Whereas:

Regulation (EC) No 1580/2007 lays down, pursuant to the outcome of the Uruguay Round multilateral trade negotiations, the criteria whereby the Commission fixes the standard values for imports from third countries, in respect of the products and periods stipulated in Annex XV, Part A thereto,

HAS ADOPTED THIS REGULATION:

*Article 1*

The standard import values referred to in Article 138 of Regulation (EC) No 1580/2007 are fixed in the Annex hereto.

*Article 2*

This Regulation shall enter into force on 16 September 2008.

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

Done at Brussels, 15 September 2008.

*For the Commission*

Jean-Luc DEMARTY

*Director-General for Agriculture and  
Rural Development*

---

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

<sup>(2)</sup> OJ L 350, 31.12.2007, p. 1.

## ANNEX

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

(EUR/100 kg)

CN code	Third country code <sup>(1)</sup>	Standard import value
0702 00 00	MK	26,9
	TR	68,0
	ZZ	47,5
0707 00 05	EG	162,5
	JO	156,8
	MK	43,3
	TR	140,9
	ZZ	125,9
0709 90 70	TR	92,6
	ZZ	92,6
0805 50 10	AR	78,8
	TR	104,3
	UY	47,5
	ZA	82,2
	ZZ	78,2
0806 10 10	IL	248,7
	TR	94,9
	US	110,9
	ZZ	151,5
0808 10 80	AR	92,1
	AU	195,4
	BR	74,2
	CL	83,3
	CN	78,4
	NZ	103,9
	US	102,0
	ZA	80,0
	ZZ	101,2
0808 20 50	AR	76,1
	CN	63,1
	TR	144,3
	ZA	99,4
	ZZ	95,7
0809 30	TR	123,8
	US	157,7
	ZZ	140,8
0809 40 05	IL	122,2
	MK	22,0
	TR	77,6
	XS	64,2
	ZZ	71,5

<sup>(1)</sup> Nomenclature of countries laid down by Commission Regulation (EC) No 1833/2006 (OJ L 354, 14.12.2006, p. 19). Code 'ZZ' stands for 'of other origin'.

**COMMISSION REGULATION (EC) No 895/2008****of 12 September 2008****amending, for the thirteenth time, Regulation (EC) No 1763/2004 imposing certain restrictive measures in support of effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY)**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1763/2004 imposing certain restrictive measures in support of effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY) <sup>(1)</sup>, and in particular Article 10(a) thereof,

Whereas:

- (1) Annex I to Regulation (EC) No 1763/2004 lists the persons covered by the freezing of funds and economic resources under that Regulation.
- (2) The Commission is empowered to amend that Annex, taking into account Council Decisions implementing

Common Position 2004/694/CFSP on further measures in support of the effective implementation of the mandate of ICTY <sup>(2)</sup>. Council Decision 2008/733/CFSP <sup>(3)</sup> of 15 September 2008 implements that Common Position. Annex I to Regulation (EC) No 1763/2004 should, therefore, be amended accordingly,

HAS ADOPTED THIS REGULATION:

*Article 1*

Annex I to Regulation (EC) No 1763/2004 is hereby amended as set out in the Annex to this Regulation.

*Article 2*This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

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

Done at Brussels, 12 September 2008.

*For the Commission*

Eneko LANDÁBURU

*Director-General for External Relations*

---

<sup>(1)</sup> OJ L 315, 14.10.2004, p. 14.

---

<sup>(2)</sup> OJ L 315, 14.10.2004, p. 52.<sup>(3)</sup> See page 63 of this Official Journal.

---

**ANNEX**

The following person shall be removed from Annex I to Regulation (EC) No 1763/2004:

Karadžić, Radovan. Date of birth: 19.6.1945. Place of birth: Petnjica, Savnik, Montenegro, Serbia and Montenegro. Nationality: Bosnia and Herzegovina.

**COMMISSION REGULATION (EC) No 896/2008****of 15 September 2008****fixing the import duties in the cereals sector applicable from 16 September 2008**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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

Having regard to Commission Regulation (EC) No 1249/96 of 28 June 1996 laying down detailed rules for the application of Council Regulation (EEC) No 1766/92 in respect of import duties in the cereals sector <sup>(2)</sup>, and in particular Article 2(1) thereof,

Whereas:

- (1) Article 136(1) of Regulation (EC) No 1234/2007 states that the import duty on products falling within CN codes 1001 10 00, 1001 90 91, ex 1001 90 99 (high quality common wheat), 1002, ex 1005 other than hybrid seed, and ex 1007 other than hybrids for sowing, is to be equal to the intervention price valid for such products on importation increased by 55 %, minus the cif import price applicable to the consignment in question. However, that duty may not exceed the rate of duty in the Common Customs Tariff.
- (2) Article 136(2) of Regulation (EC) No 1234/2007 lays down that, for the purposes of calculating the import duty referred to in paragraph 1 of that Article, represen-

tative cif import prices are to be established on a regular basis for the products in question.

- (3) Under Article 2(2) of Regulation (EC) No 1249/96, the price to be used for the calculation of the import duty on products of CN codes 1001 10 00, 1001 90 91, ex 1001 90 99 (high quality common wheat), 1002 00, 1005 10 90, 1005 90 00 and 1007 00 90 is the daily cif representative import price determined as specified in Article 4 of that Regulation.
- (4) Import duties should be fixed for the period from 16 September 2008 and should apply until new import duties are fixed and enter into force.
- (5) However, in accordance with Commission Regulation (EC) No 608/2008 of 26 June 2008 temporarily suspending customs duties on imports of certain cereals for the 2008/2009 marketing year <sup>(3)</sup>, the application of certain duties set by this Regulation is suspended,

HAS ADOPTED THIS REGULATION:

*Article 1*

From 16 September 2008, the import duties in the cereals sector referred to in Article 136(1) of Regulation (EC) No 1234/2007 shall be those fixed in Annex I to this Regulation on the basis of the information contained in Annex II.

*Article 2*

This Regulation shall enter into force on 16 September 2008.

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

Done at Brussels, 15 September 2008.

For the Commission

Jean-Luc DEMARTY

*Director-General for Agriculture and  
Rural Development*

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

<sup>(2)</sup> OJ L 161, 29.6.1996, p. 125.

<sup>(3)</sup> OJ L 166, 27.6.2008, p. 19.

## ANNEX I

**Import duties on the products referred to in Article 136(1) of Regulation (EC) No 1234/2007 applicable from 16 September 2008**

CN code	Description	Import duties <sup>(1)</sup> (EUR/t)
1001 10 00	Durum wheat, high quality	0,00 <sup>(2)</sup>
	medium quality	0,00 <sup>(2)</sup>
	low quality	0,00 <sup>(2)</sup>
1001 90 91	Common wheat seed	0,00
ex 1001 90 99	High quality common wheat, other than for sowing	0,00 <sup>(2)</sup>
1002 00 00	Rye	0,00 <sup>(2)</sup>
1005 10 90	Maize seed other than hybrid	0,00
1005 90 00	Maize, other than seed <sup>(3)</sup>	0,00 <sup>(2)</sup>
1007 00 90	Grain sorghum other than hybrids for sowing	4,22 <sup>(2)</sup>

<sup>(1)</sup> For goods arriving in the Community via the Atlantic Ocean or via the Suez Canal the importer may benefit, under Article 2(4) of Regulation (EC) No 1249/96, from a reduction in the duty of:

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

<sup>(2)</sup> In accordance with Regulation (EC) No 608/2008, application of this duty is suspended.

<sup>(3)</sup> The importer may benefit from a flatrate reduction of EUR 24 per tonne where the conditions laid down in Article 2(5) of Regulation (EC) No 1249/96 are met.

## ANNEX II

## Factors for calculating the duties laid down in Annex I

29.8.2008-12.9.2008

## 1. Averages over the reference period referred to in Article 2(2) of Regulation (EC) No 1249/96:

(EUR/t)

	Common wheat <sup>(1)</sup>	Maize	Durum wheat, high quality	Durum wheat, medium quality <sup>(2)</sup>	Durum wheat, low quality <sup>(3)</sup>	Barley
Exchange	Minnéapolis	Chicago	—	—	—	—
Quotation	223,83	152,19	—	—	—	—
Fob price USA	—	—	305,61	295,61	275,61	127,68
Gulf of Mexico premium	—	13,93	—	—	—	—
Great Lakes premium	4,68	—	—	—	—	—

<sup>(1)</sup> Premium of 14 EUR/t incorporated (Article 4(3) of Regulation (EC) No 1249/96).

<sup>(2)</sup> Discount of 10 EUR/t (Article 4(3) of Regulation (EC) No 1249/96).

<sup>(3)</sup> Discount of 30 EUR/t (Article 4(3) of Regulation (EC) No 1249/96).

## 2. Averages over the reference period referred to in Article 2(2) of Regulation (EC) No 1249/96:

Freight costs: Gulf of Mexico–Rotterdam: 36,78 EUR/t

Freight costs: Great Lakes–Rotterdam: 30,13 EUR/t



## II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

## DECISIONS

## COUNCIL

## COUNCIL DECISION

of 15 September 2008

appointing a German member of the Committee of the Regions

(2008/725/EC)

THE COUNCIL OF THE EUROPEAN UNION,

HAS DECIDED AS FOLLOWS:

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

Having regard to the proposal from the German Government,

Whereas:

(1) On 24 January 2006 the Council adopted Decision 2006/116/EC appointing the members and alternate members of the Committee of the Regions for the period from 26 January 2006 to 25 January 2010 <sup>(1)</sup>.

(2) A member's seat on the Committee of the Regions has become vacant following the resignation of Mr Willi STÄCHELE,

*Article 1*

The following person is hereby appointed to the Committee of the Regions as a member for the remainder of the current term of office, which runs until 25 January 2010:

Prof. Dr Wolfgang REINHART, Minister for Federal and European Affairs, Baden-Württemberg.

*Article 2*

This Decision shall take effect on the date of its adoption.

Done at Brussels, 15 September 2008.

*For the Council*

*The President*

B. KOUCHNER

---

<sup>(1)</sup> OJ L 56, 25.2.2006, p. 75.

**COUNCIL DECISION**  
**of 15 September 2008**  
**appointing an Italian member to the Committee of the Regions**  
(2008/726/EC)

THE COUNCIL OF THE EUROPEAN UNION,

HAS DECIDED AS FOLLOWS:

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

Having regard to the proposal from the Italian Government,

Whereas:

- (1) On 24 January 2006, the Council adopted Decision 2006/116/EC appointing the members and alternate members of the Committee of the Regions for the period from 26 January 2006 to 25 January 2010 <sup>(1)</sup>.
- (2) A member's seat on the Committee of the Regions has become vacant following the expiry of the mandate of Mr Francesco SCOMA,

*Article 1*

The following is hereby appointed to the Committee of the Regions as a member for the remainder of the current term of office, which runs until 25 January 2010:

Mr Francesco MUSOTTO, Deputato dell'Assemblea Regionale Siciliana.

*Article 2*

This Decision shall take effect on the date of its adoption.

Done at Brussels, 15 September 2008.

*For the Council*  
*The President*  
B. KOUCHNER

---

<sup>(1)</sup> OJ L 56, 25.2.2006, p. 75.

**COUNCIL DECISION**  
**of 15 September 2008**  
**appointing a Slovak member and a Slovak alternate member of the Committee of the Regions**  
(2008/727/EC)

THE COUNCIL OF THE EUROPEAN UNION,

(a) as a member:

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

Mr Vladimír BAJAN, predseda Bratislavského samosprávneho kraja (President of the Bratislava Self-governing Region) (change of mandate);

Having regard to the proposal of the Slovak Government,

Whereas:

(b) as an alternate member:

(1) On 24 January 2006, the Council adopted Decision 2006/116/EC appointing the members and alternate members of the Committee of the Regions for the period from 26 January 2006 to 25 January 2010 <sup>(1)</sup>.

Mr Milan MURGAŠ, predseda Banskobystrického samosprávneho kraja (President of the Banská Bystrica Self-governing Region).

(2) A member's seat has become vacant following the resignation of Mr Milan MURGAŠ of the Committee of the Regions. An alternate member's seat becomes vacant following the appointment of Mr Vladimír BAJAN as a member of the Committee of the Regions,

*Article 2*

This Decision shall take effect on the day of its adoption.

HAS DECIDED AS FOLLOWS:

Done at Brussels, 15 September 2008.

*Article 1*

The following are hereby appointed to the Committee of the Regions for the remainder of the current term of office, which runs until 25 January 2010:

*For the Council*  
*The President*  
B. KOUCHNER

---

<sup>(1)</sup> OJ L 56, 25.2.2006, p. 75.

**COUNCIL DECISION**  
**of 15 September 2008**  
**appointing a Belgian member and a Belgian alternate member of the Committee of the Regions**  
(2008/728/EC)

THE COUNCIL OF THE EUROPEAN UNION,

(a) as a member:

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

Mr Patrick LACHAERT, Vlaams Volksvertegenwoordiger (change of mandate);

Having regard to the proposal of the Belgian Government,

and

Whereas:

(1) On 24 January 2006, the Council adopted Decision 2006/116/EC appointing the members and alternate members of the Committee of the Regions for the period from 26 January 2006 to 25 January 2010 <sup>(1)</sup>.

(b) as an alternate member:

Mr Marc VAN DEN ABELEN, Vlaams Volksvertegenwoordiger.

(2) A member's seat on the Committee of the Regions has become vacant following the resignation of Mrs Joëlle KAPOMPOLÉ. An alternate member's seat has become vacant following the appointment of Mr Patrick LACHAERT as a member of the Committee of the Regions,

*Article 2*

This Decision shall take effect on the day of its adoption.

HAS DECIDED AS FOLLOWS:

Done at Brussels, 15 September 2008.

*Article 1*

The following are hereby appointed to the Committee of the Regions for the remainder of the current term of office, which runs until 25 January 2010:

*For the Council*  
*The President*  
B. KOUCHNER

---

<sup>(1)</sup> OJ L 56, 25.2.2006, p. 75.

# COMMISSION

## COMMISSION DECISION

of 11 December 2007

**on the State aid case C 53/06 (ex N 262/05, ex CP 127/04), investment by the city of Amsterdam in a fibre-to-the-home (FttH) network**

(notified under document number C(2007) 6072)

**(Only the Dutch version is authentic)**

**(Text with EEA relevance)**

(2008/729/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

the EC Treaty. The Dutch authorities asked for an extension of the deadline in August 2004 which was accepted by the Commission on 7 September 2004.

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 <sup>(1)</sup> and having regard to their comments,

Whereas:

### I. PROCEDURE

(1) In April 2004, the municipality of Amsterdam contacted the Commission regarding the public procurement aspects of the roll-out of a FttH (fibre-to-the-home) telecommunications access network. In addition, the municipality requested the Commission to confirm that the project did not entail State aid within the meaning of Article 87(1) of the EC Treaty. By letter of 22 July 2004, the Commission informed the municipality of Amsterdam that such a confirmation can only be given after a notification of the measure by the Dutch authorities. The Commission requested the Dutch authorities on 23 July 2004 to provide any information necessary for an assessment of the measure under Article 87(1) of

(2) In September 2004, the Dutch authorities convened with the Commission to present and discuss the plans of the municipality of Amsterdam. On 7 October 2004, the authorities stated in their reply to the Commission's letter of 23 July 2004 that the project in Amsterdam would be notified in the near future. On 17 May 2005, the Dutch authorities notified the project — the participation of the municipality of Amsterdam in an undertaking carrying out the roll-out and owning this network. The Dutch authorities were seeking confirmation from the Commission that the investment of the municipality of Amsterdam in the legal entity owning the network is in line with the Market Economy Investor Principle ('MEIP') and accordingly does not constitute State aid.

(3) Following further information sent by the authorities on 23 June 2005, and a meeting which took place on 28 June 2005 between representatives of the city of Amsterdam and the Commission, the Commission sent on 15 July 2005 a letter containing elements of an explanation of the application of the MEIP together with a second request for information.

(4) The Dutch authorities stated in a letter, registered on 18 November 2005, that there was a delay in the planning and that the municipality of Amsterdam was still working on the setup of the project and the investment conditions. The Dutch authorities declared that they would need more time in order to provide the requested information and asked the Commission to suspend the assessment until all data would be available.

<sup>(1)</sup> OJ C 134, 16.6.2007, p. 9: State aid C 53/06 (ex N 262/05) — *Citynet Amsterdam — investment by the city of Amsterdam in a fibre-to-the-home (FttH) network* — Invitation to submit comments pursuant to Article 88(2) of the EC Treaty.

- (5) The municipality of Amsterdam informed the Commission by e-mail registered on 23 December 2005 that the City council of Amsterdam had by unanimity decided to invest in the roll-out of the FttH network and stated further that negotiations with BAM/DRAKA (for the construction of the network) and with BBned (for the exploitation of the network) and the negotiations with ING RE and five housing corporations (co-investors) were all on track and would be finalised by January 2006.
- (6) By letter registered on 27 December 2005, the Commission received a complaint regarding the project from VECAI (the association of cable operators in the Netherlands, which changed its name in September 2007 into 'NLKabel')<sup>(2)</sup>. UPC Nederland BV (a cable operator present notably in Amsterdam, hereinafter: 'UPC'<sup>(3)</sup>) informed the Commission for the first time about its concerns in March 2005. Both parties — with whom several meetings took place — argue that the participation of the municipality is not in line with the MEIP and constitutes State aid within the meaning of Article 87(1) of the EC Treaty.
- (7) On 3 March 2006, the Commission sent a reminder to the Dutch authorities, referring to the statement of the Dutch authorities in November 2005 that further information would be provided once further progress had been made on the setup of the project and which was foreseen for spring 2006. The Commission also reminded the Dutch authorities of the standstill obligation of Article 88(3) of the EC Treaty.
- (8) The Dutch authorities replied to the Commission's letter of 3 March 2006 on 3 April 2006, and sent additional information by letter of 2 May 2006. On 19 May 2006, the Commission's services sent another letter to the Dutch authorities, referring to the information received from UPC which cast initial doubts on the application of the MEIP and reminded the authorities again of the standstill obligation<sup>(4)</sup>.
- (9) The Dutch authorities sent further information in May and June 2006<sup>(5)</sup>. The Commission sent an additional request for information to the Dutch authorities on 24 July 2006, in answer to which the Dutch authorities submitted several batches of information<sup>(6)</sup>. Following an additional request of information of 29 September 2006, the authorities asked on 13 October 2006 for an extension of the deadline to reply.
- (10) In the meantime, the roll-out of the network commenced on 12 October 2006<sup>(7)</sup>. In view of these developments, the extension of the deadline requested by the Dutch authorities was refused. The Dutch authorities submitted part of their answers before the deadline of 26 October and a substantial amount of information was also provided on 30 October, 16, 20 and 21 November 2006.
- (11) UPC requested the District Court in Amsterdam in a procedure for interim measures to order the municipality of Amsterdam to respect the standstill obligation laid down in Article 88(3) of the EC Treaty and not to continue the project before the Commission has finalised its assessment. The request by UPC was dismissed by the District Court which stated in its judgement of 22 June 2006 that it was not obvious that the municipality's involvement in the project involved State aid. According to the Court, the mere fact that the municipality has initiated the project is not to be considered as State aid. Moreover, the Court concluded that the initial costs incurred by Amsterdam (studies, etc.) would be reimbursed by the joint-venture Glasvezelnet Amsterdam CV and therefore did not constitute aid.
- (12) UPC informed the Commission by letter of 22 September 2006 that it had appealed the decision by the District Court. The municipality of Amsterdam<sup>(8)</sup> informed the Commission in November 2006 that the Court of Appeal proposed to UPC and the municipality of Amsterdam to await the Commission's decision before a judgement by the Court would be rendered. Both parties accepted this proposal<sup>(9)</sup>.

<sup>(2)</sup> VECAI supplied further information by e-mails registered on 27 December 2005, 11 January 2006 and 31 January 2006.

<sup>(3)</sup> UPC Nederland BV is a subsidiary of Liberty Global Inc. UPC Nederland BV acts under the name of UPC in the Netherlands. Liberty Global, Inc. (Liberty Global) is an international cable operator offering video, telephone, and Internet access services. It operates broadband communications networks in several countries.

<sup>(4)</sup> Information supplied by UPC on 12 May and registered on 15 May 2006.

<sup>(5)</sup> The authorities sent information on 19 and 31 May, 1, 7 and 13 June 2006.

<sup>(6)</sup> The authorities sent information on 18, 25 and 29 August 2006.  
<sup>(7)</sup> Cf. based on publicly available information, e.g. articles in newspapers *Parool* (7 October 2006) and *Trouw* (13 October 2006).

<sup>(8)</sup> The last batch of information was submitted by letter registered on 22 September 2006.

<sup>(9)</sup> Minutes of the Court of Appeal dated 21 November 2006, No 200601252.

- (13) By letter dated 20 December 2006, 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.
- (14) By letter of 8 January 2007, the Dutch authorities requested access to several documents submitted by UPC mentioned in the opening decision. By letter registered on 13 February 2007, UPC agreed to share the requested documents with the Dutch authorities, which were forwarded by the Commission to the authorities.
- (15) On 18 January 2007, the Court of Appeal Amsterdam<sup>(10)</sup>, rejected the appeal brought by UPC Nederland against the municipality of Amsterdam to stop further activities related to the measure. The Court of Appeal found that, although the Commission expressed in its opening decision certain doubts as to whether the MEIP is fulfilled, by providing the requested information to the Commission, the municipality of Amsterdam could still prove that the measure is in line with the MEIP and does not constitute aid. Under these circumstances, the Court of Appeal considered it possible that the Commission would conclude that no aid is involved. The Court also found that the municipality would be hurt if it would have to stop all activities related to GNA, while UPC would not significantly suffer from the preparatory activities undertaken by Amsterdam.
- (16) By letter of 5 March 2007, UPC asked the Commission for access to confidential information submitted by the Dutch authorities and to set up a 'data room'<sup>(11)</sup> procedure for the measure at hand, in order to be able to assess the Dutch authorities' claims to substantiate their complaint further. By letter of 26 March 2007, the Commission informed UPC that the State aid procedures do not foresee access for third parties to the requested confidential information or for setting up a 'data room' procedure.
- (17) The Dutch authorities responded by letter registered on 16 March 2007 to the Commission's decision to open the formal investigation procedure.
- (18) After several exchanges of correspondence between the Commission and the Dutch authorities on confidentiality issues, the public version of the opening decision was sent to the complainants on 23 April 2007 and published in the *Official Journal of the European Union* <sup>(12)</sup>. The Commission invited interested parties to submit their comments on the measure.
- (19) Following the opening of procedure, the Commission received comments from five interested parties, namely from Liberty Global/UPC <sup>(13)</sup>, Com Hem <sup>(14)</sup>, Ono <sup>(15)</sup>, France Telecom <sup>(16)</sup> and another party which requested anonymity <sup>(17)</sup>. By letter registered on 30 July 2007, the Commission forwarded the third party comments to the Dutch authorities. The authorities submitted their observations by letter dated on 17 September 2007.
- (20) The Commission services met with representatives of Liberty Global/UPC on 5 July 2007 and with the Dutch authorities on 5 November 2007. The Dutch authorities submitted additional information on 9 November 2007 and on 12 November 2007.

## II. DESCRIPTION OF THE MEASURE

- (21) The municipality of Amsterdam decided in 2004 to investigate the possibility of investing in a fibre-to-the-home (FttH) electronic communications access network<sup>(18)</sup>. Following reports, market analyses and preliminary contacts with potential investors, the municipality decided formally in December 2005 on the said investment and the conditions under which such an investment would take place.
- (22) The planned FttH network in Amsterdam will serve 37 000 households in Amsterdam in the districts of Zeeburg, Osdorp and Oost-Watergraafsmeer, which comprise together about 10 % of the city of Amsterdam. The municipality of Amsterdam also expressed its long-term ambition to extend the project to other parts of Amsterdam, with up to 400 000 household connections altogether. However, this potential extension is not part of the project under assessment.

<sup>(12)</sup> Cf. footnote 1.

<sup>(13)</sup> By letter dated and registered on 17 July 2007.

<sup>(14)</sup> By letter dated and registered on 16 July 2007.

<sup>(15)</sup> By letter dated and registered on 17 July 2007.

<sup>(16)</sup> By letter dated and registered on 17 July 2007.

<sup>(17)</sup> By letter dated and registered on 17 July 2007, non-confidential version received on 27 July 2007.

<sup>(18)</sup> The deployment of fibre access networks is considered to be the next big leap in the electronic communications sector. The new fibre networks when compared with existing copper based networks (such as ADSL or cable) will provide much higher speeds and symmetrical services and are expected to pave the way for numerous new, innovative services and applications based on IP technologies (IPTV, video on demand, telemedicine, etc.).

<sup>(10)</sup> *Gerechtshof*, judgement in case 1252/06 KG of 18 January 2007.

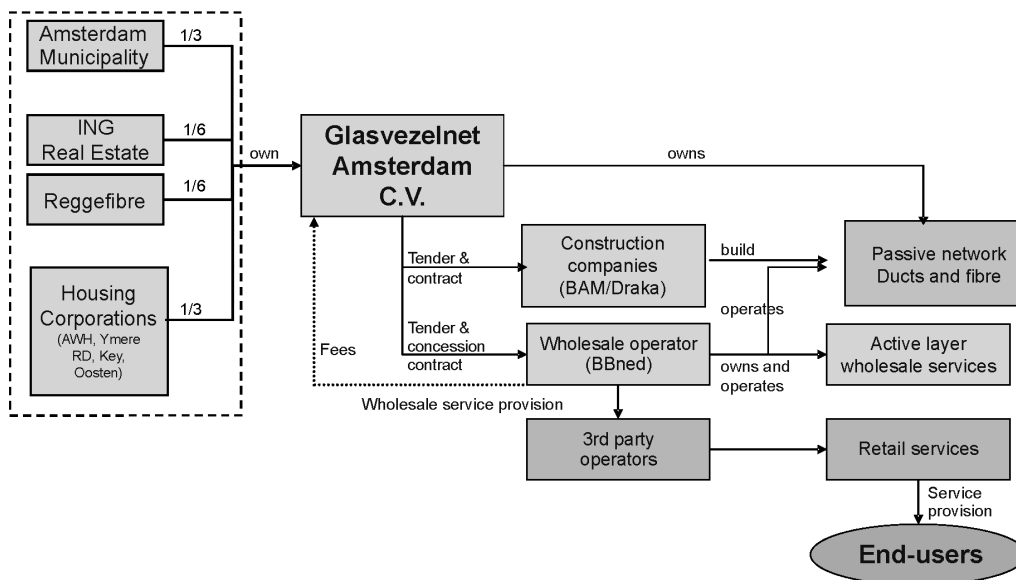
<sup>(11)</sup> 'Data rooms' are typically used, for instance, during the due diligence phase of merger and acquisition transactions and provide access to confidential company data for the prospective bidders.

### The three-layer model

- (23) The project in Amsterdam is based on a 'three-layer model' as outlined below.

Figure 1

### Simplified overview of the Citynet Amsterdam project



- (24) The first layer is the so-called 'passive network infrastructure', which includes ducts, fibre and street cabinets.
- (25) This passive infrastructure is activated by means of telecommunications equipment (the second or 'active layer') by a wholesale operator managing and maintaining the network and providing wholesale services to retail operators. The active layer includes the management, control and maintenance systems necessary to operate the network, such as switches, routers or splitters.
- (26) The wholesale operator will provide an open, non-discriminatory access to retail operators to offer television, broadband, telephony and other Internet-based services to end customers (third or 'retail layer'). In order to be able to provide these services, retail service providers will have to invest, *inter alia*, in equipment, procure content and operate their own service platform (maintenance, customer care, and billing).

### The stakeholders of the project

- (27) The passive infrastructure will be owned and managed by the partnership Glasvezelnet Amsterdam cv ('GNA')<sup>(19)</sup>, whose shareholders are the municipality of Amsterdam, two private investors, namely ING Real Estate (hereinafter: 'ING RE')<sup>(20)</sup> and Reggefiber<sup>(21)</sup>, and five subsidiaries of social housing corporations<sup>(22)</sup>. A cooperation agreement ('Samenwerkingsovereenkomst') was signed by the parties on 11 April 2006 and the investment agreement ('CV-overeenkomst') was signed on 26 May 2006.

<sup>(19)</sup> The successful bidder for the construction is Van den Berg Infrastructuur (BAM)/Draka Comteq Telecom. Van den Berg is a subsidiary of BAM, a major construction company and Draka Comteq is a producer of cables. The successful bidder for the operation of the network, tender 2005/S 79-76325, is BBned.

<sup>(20)</sup> ING RE is a subsidiary of ING, a financial services (banking and insurance) conglomerate.

<sup>(21)</sup> Reggefiber is engaged in several fibre network projects in the Netherlands and linked to the building and construction group Volker Wessels.

<sup>(22)</sup> The financing of the social housing corporations in the Netherlands is currently subject of an existing aid procedure carried out by the Commission (Case E-2/2005 *Bestaande woonwet en financierings-methoden voor woningbouwcorporaties*). By letter dated 20 December 2005 to Commissioner Neelie Kroes, Vecai requested the Commission to investigate the legal status of the housing corporations under the State aid rules. By letter of 3 February 2006, Commissioner Kroes replied, explaining that Competition DG is dealing with the issue within the framework of the before-mentioned ongoing procedure.



(28) The municipality of Amsterdam invests EUR 6 million, ING RE and Reggefiber invest each EUR 3 million, three social housing corporations invest each EUR 1,5 million and two housing corporations invest each EUR 750 000 <sup>(23)</sup>. The total equity investment amounts to EUR 18 million. In addition, GNA acquired loan amounting to EUR [...] (\*) from [...] <sup>(24)</sup>. The total planned budget for the project amounts to EUR 30 million. As also outlined in Figure 1, the Amsterdam municipality owns one third of the shares of GNA, the two private investors together another one third, while the subsidiaries of the housing corporations own the remaining one third.

(29) The passive infrastructure of GNA will be activated and operated by BBned <sup>(25)</sup> on the basis of a contract between GNA and BBned of [...]. The necessary investments to provide wholesale access will have to be undertaken by BBned. BBned will lease fibre from GNA and have the — [...] <sup>(26)</sup> — right to provide wholesale transport and related services to retail operators at its own risk. It will pay a fee per household connected to GNA for the use of the passive network.

(30) The wholesale operator will provide open, non-discriminatory access to retail operators to offer TV, telephony and broadband Internet access services. The services offered via the new network will compete with existing offers of cable and telecommunications companies such as KPN and UPC. Based on publicly available information, it appears that BBned has already contracted with several retail service providers who have started to offer 'triple play' services <sup>(27)</sup> on the GNA fibre network to end users. The Commission notes that BBned is also active, through its affiliated companies Pilmio and Bbeyond, at retail level.

### III. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

(31) On 20 December 2006, the Commission decided to initiate the formal investigation procedure as the Dutch authorities did not provide sufficient evidence for the

Commission to conclude on the conformity of the investment by the city of Amsterdam in GNA with the MEIP. The Commission considered it necessary to open the formal investigation procedure both for substantial and for procedural <sup>(28)</sup> reasons.

(32) In particular, the Commission was not convinced that the investment of the municipality of Amsterdam in GNA had been 'concomitant', i.e. it was performed at the same time with the private investments by ING RE and Reggefiber. Moreover, the Commission was not convinced that *the terms and conditions* of the investment by the municipality of Amsterdam in GNA were equal to the terms and conditions under which the other parties have invested. These concerns derived primarily from the fact that the municipality of Amsterdam spent money on the Citynet project before the establishment of GNA (so-called 'pre-investments') <sup>(29)</sup>. Based on the preliminary assessment, the Commission had also doubts with regard to the feasibility of GNA's business plan. Thus it was not possible at that stage to exclude the presence of State aid.

(33) Taking also into account these difficulties encountered, the impact of potential State aid on the investments of private operators, the opening of procedure was also justified because the Dutch authorities did not submit to the Commission all information necessary to assess the project.

(34) Finally, the Commission initiated the formal investigation procedure also in order to give the Dutch authorities and third parties the opportunity to submit their comments on its provisional assessment of the measure described and to make available to the Commission any relevant information related to the measure.

<sup>(23)</sup> About one third of the houses (13 000) in this area are owned by the social housing corporations.

(\*) [...] The information in brackets is covered by the obligation of professional secrecy.

<sup>(24)</sup> [...]

<sup>(25)</sup> BBned is a private broadband operator, a subsidiary of Telecom Italia. BBned was selected through a tender procedure which was advertised in the *Official Journal of the European Communities* with reference to 2004/S 138-118456, dated 17 July 2004.

<sup>(26)</sup> [...]

<sup>(27)</sup> In telecommunications, 'triple play' is a term for offering high speed Internet access, television and telephone services over a single broadband connection.

<sup>(28)</sup> The Judgement of the Court of First Instance in case T-73/98 *Société chimique Prayon-Rupel SA v Commission* [2001] ECR II-867, recital 93 says 'the fact that the time spent considerably exceeds the time usually required for preliminary examinations under Article 93(3) of the Treaty may, with other factors, justify the conclusion that the Commission encountered serious difficulties off assessment necessitating initiation of the procedure under Article 93(2) of the Treaty'.

<sup>(29)</sup> The municipality commissioned several studies in 2003 and 2004 to prepare the project and organised the tenders for the construction and the exploitation of the network. In addition, the city of Amsterdam financed certain digging activities and purchased software for the construction of the network. These 'pre-investments' of the municipality amount to [...].

## IV. COMMENTS SUBMITTED BY THIRD PARTIES

- (35) UPC submitted its comments by letter registered on 17 July 2007. UPC's submission reiterates its position expressed before the Commission decision to initiate proceedings<sup>(30)</sup> according to which the business plan of the Citynet project is based on unrealistic economic assumptions, in particular regarding penetration rates and wholesale prices, hence the business plan does not appear to be commercially viable. To substantiate this claim, UPC submitted a report prepared by a consultancy firm, RBB Economics, which updates other reports prepared by the same consultancy on the issue<sup>(31)</sup> submitted before the opening of the formal investigation<sup>(32)</sup>.
- (36) As regards the commercial viability of the project, UPC argues that the new fibre network would not enable operators to offer significantly different services from the services offered by the current operators. Consequently, and taking into account that the broadband penetration in the areas to be covered by GNA has already reached 65 % of the households, the new fibre network would fail to attract enough customers for its services to make its business plan viable.
- (37) To support this argument, UPC submitted figures concerning the overall churn rates<sup>(33)</sup> for its own cable network concerning the areas where GNA is already providing<sup>(34)</sup> triple play services. The churn figures cover the periods from 1 January 2006 to 1 June 2007 in the areas where the GNA network is being deployed. The maximum churn figures indicate that UPC's penetration rates for analogue cable TV, Internet access, telephony or digital TV in the concerned areas were stable, and were even increasing for Internet access. Therefore, UPC observes that there are no indications that there was a marked decrease of penetration due to the presence of GNA.
- (38) In addition, UPC argues that the successful fibre deployments in the Dutch towns of Nuenen and Hillegom<sup>(35)</sup> brought forward by the Dutch authorities cannot be considered as a proper comparison with the Amsterdam project, as these projects allegedly received significant subsidies from the Dutch Ministry of Economic Affairs, the networks are jointly owned by the inhabitants and the operators, the projects are relatively small<sup>(36)</sup>, and existing broadband operators only offered basic broadband services in both towns. This was in contrast with the situation in Amsterdam, where high speed offers are available on the existing cable and telecommunications networks.
- (39) According to UPC, as GNA's business plan is unlikely to be realistic, the investment of the Amsterdam municipality in GNA is not in line with the MEIP and amounts to State aid. By reference to the Commission's decision in the Appingedam case<sup>(37)</sup>, UPC also reiterates its prior position that any State aid involved in the project cannot be considered compatible with the Treaty as it would be neither necessary nor proportionate.
- (40) Furthermore, UPC also expresses doubts as to whether the public investment in GNA is made on equal terms with the investments of the other shareholders of GNA. UPC argues that the fact that the municipality of Amsterdam undertook certain pre-investments and other GNA shareholders decided to commit themselves to participate in the project after the municipality performed certain feasibility studies indicates that the investment was not pursued on equal terms by all the shareholders which would shed further doubts on the market conformity of the measure.

<sup>(30)</sup> See recital 30 and following of the opening decision.

<sup>(31)</sup> As the Dutch authorities requested that GNA's business plan was subject to the obligation of professional secrecy, RBB Economics did not have access to GNA's actual business plan and based its study on publicly available information and on the public version of the Commission's opening decision.

<sup>(32)</sup> See recitals 30 and following of the opening decision.

<sup>(33)</sup> The overall churn rates indicated all customers who left UPC to any other operator (for instance to KPN, GNA, moved to other districts, etc.). Therefore, UPC considers this figure as the maximum churn rate that the new GNA fibre network could have achieved at this stage.

<sup>(34)</sup> GNA started to roll out the network in October 2006 and retail operators using the GNA network via BBNet started offering services in March 2007.

<sup>(35)</sup> For instance, in certain parts of Nuenen and Hillegom, market penetration of services over the fibre network is higher than 80 % of all households after one year of service provision. The projects in Nuenen and Hillegom have a different setting than the Amsterdam project, for instance no public investor is present in Hillegom.

<sup>(36)</sup> The Nuenen fibre network passes 7 400 homes, less than 25 % of the current size of the Amsterdam project.

<sup>(37)</sup> See Commission Decision of 19 July 2006, C 35/05, *Broadband development Appingedam* (OJ L 86, 27.3.2007, p. 1), where the Commission considered aid for the development of a optic fibre access network to be incompatible with the common market as the Dutch municipality of Appingedam developed its network with State aid where private broadband network operators in the area already offered similar services. In the Appingedam case, there was no private involvement in the financing of the project and the MEIP was not invoked by the Dutch authorities.

(41) Finally, UPC also points out that if the project fails, the network might be sold cheaply to another operator, which will not have to bear the full investment costs. This operator therefore could strengthen its competitive position by capitalizing on a publicly funded project. UPC also highlights the alleged precedent character of the measure. In case the Commission were to find that the measure does not constitute State aid, other municipalities might follow the example of Amsterdam in deploying FttH networks. UPC highlights that the Dutch Ministry of Economic Affairs and an engineering firm, Arcadis<sup>(38)</sup> have already developed a freely available, on-line business model calculation<sup>(39)</sup> allegedly encouraging municipalities to develop their own FttH networks.

(42) ONO, a Spanish cable operator offering broadcasting transmission and telecommunications services, is of the opinion that the Commission should apply the MEIP test strictly as other municipalities might follow the example and invoke the MEIP in similar projects which could give rise to the proliferation of State subsidies. ONO asserts that public intervention should only take place in specific circumstances such as in the presence of market failure, ensuring the proportionality of the measure and respecting the principle of technological neutrality, which is allegedly not the case in the measure at hand. If the investment of Amsterdam constituted State aid, ONO argues that any aid involved would be incompatible with the common market, as the circumstances are similar to that of Appingedam<sup>(40)</sup>, and in that case any aid granted will be subject to a recovery obligation. ONO points out the alleged precedent character of the decision on the question whether and under which conditions the rollout of FttH networks can be supported with public funding.

(43) France Telecom ('FT'), the incumbent fixed line telecom operator in France, takes a similar view to UPC and ONO. The company expresses its doubts whether the investment of the municipality of Amsterdam in the Citynet project is in line with the MEIP. FT also supports the Commission's approach in distinguishing State aid measures in 'white', 'grey' and 'black' areas, which is applied by the Commission when carrying out

the compatibility assessment in the presence of aid<sup>(41)</sup>. FT asserts that any State intervention in 'black' areas (such as Amsterdam) seems difficult to justify, as it results in serious distortions of competition. According to FT, this was particularly the case for the measure at hand, since the deployment of fibre access networks require heavy investments from market operators.

(44) The comments submitted by COM HEM, a Swedish cable operator, take a similar line to the other operators. COM HEM generally doubts the market conformity of the investment of the Amsterdam municipality. In its observations, COM HEM argues that public funding for broadband projects in urban areas are seldom in line with the MEIP and have strong distortive effects on competition. COM HEM also calls for a strict application of the MEIP and highlights the precedent value of the Amsterdam case to future municipal and other public sector investments.

(45) Another party requiring anonymity, which provides telecommunications services in several European countries, welcomed the Commission decision to initiate the formal investigation procedure. The company argues that its investment is endangered by the initiatives of municipalities using public funds which have a distortive effect on the market. The company expects the Commission to ban any public money in the Citynet Amsterdam project.

#### V. COMMENTS SUBMITTED BY THE DUTCH AUTHORITIES

(46) By letter registered on 16 March 2007, the Dutch authorities submitted their comments in connection with the Commission's decision to initiate the formal investigation procedure. Furthermore, the Dutch authorities also provided comments on non-confidential versions of the studies prepared for UPC by RBB.

(47) Throughout their submissions, the Dutch authorities maintain their position that the investment of the municipality of Amsterdam in GNA is in line with the MEIP and therefore does not constitute State aid.

<sup>(38)</sup> Arcadis is an engineering company that provides project management, consultancy and engineering services for fibre network deployments.

<sup>(39)</sup> The model is available at the following website:  
<http://ngn.arcadis.nl/>

<sup>(40)</sup> See footnote 37.

<sup>(41)</sup> The distinction between 'white', 'grey' and 'black' depends on the level of existing offers of broadband services. In general terms, 'white areas' are rural and scarcely populated zones with no broadband provision at all; 'grey areas' are zones where basic broadband services are already provided in some parts of the concerned territory; and 'black areas' are zones where different broadband services are offered over at least 2 competing infrastructures (such as telephone and cable TV networks).

### V.1. Comments submitted in connection with the decision to initiate procedure

#### General comments

- (48) The Dutch authorities highlight that large-scale fibre deployments are taking place in the US and in Asia, and that Europe, in comparative terms, is lagging behind. The authorities claim that projects similar to the one under assessment are particularly beneficial for the European economy and fully in line with the Lisbon agenda <sup>(42)</sup>.
- (49) The authorities also emphasise the pro-competitive business model of GNA, which provides — contrary to the closed model of cable operators — open and non-discriminatory access to all retail operators. They argue that the new business model, *inter alia*, promotes service competition, boosts innovation and helps to reduce the risk of service providers by allowing them to use funding which matches the characteristics of each individual layer.
- (50) The Dutch authorities take the view that the shareholders of the project provide further evidence that the GNA project is pursued on market terms. In this respect, the authorities emphasize the fact that two private investors and the commercial subsidiaries of the housing corporations are willing to participate in the project under the same terms and conditions as the municipality. They also refer to the open tender procedures for the construction of the network and for the wholesale service provision of the network. They further highlight that the fact that a significant bank loan was offered to GNA on market terms constitutes clear evidence that the project and the underlying business plan are based on prudent market terms.
- (51) The Dutch authorities also stress that numerous similar successful fibre projects all over Europe and especially in the Netherlands <sup>(43)</sup> undertaken by market operators provide sufficient evidence that such investments can be pursued under normal market conditions.
- <sup>(42)</sup> Communication from the Commission to the Council and the European Parliament. *Common Actions for Growth and Employment: The Community Lisbon Programme*, COM(2005) 330 of 20 July 2005.
- <sup>(43)</sup> In the Stratix Consulting/Delft Technical University report prepared for the Dutch authorities on 8 March 2007 and submitted to the Commission on 16 March 2007, the consultant company lists approximately 50 ongoing fibre deployment projects in the Netherlands as of December 2006, with a similar amount of new projects announced and planned to be launched from 2007.
- On the pre-investments*
- (52) Regarding the pre-investments by the municipality of Amsterdam, the Commission noted in the opening decision that the municipality took initiatives before establishing GNA which seemed to go beyond what normal market practice would suggest. The Commission expressed concerns that the pre-investments might have reduced the risks associated with the project for all investing parties. Some of the start-up risk of the business underlying the GNA business plan might have been absorbed or mitigated by the municipality of Amsterdam before the investments by ING and Reggefiber in GNA were made. Based on the information submitted by the Dutch authorities before the opening of the formal investigation, it could not be clarified whether all shareholders in GNA did invest under the same terms and conditions.
- (53) In their reply, the Dutch authorities underline that all investors committed themselves on 24 May 2006 to the investment in GNA on identical terms and conditions.
- (54) As regards the pre-investments (reaching the amount of EUR [...]), the Dutch authorities claim that it has always been the understanding of all GNA shareholders that the pre-investments by the municipality of Amsterdam would have to be repaid by GNA. To support this assertion, the Dutch authorities distinguish between two parts in the pre-investments.
- (55) As regards the first part, the Dutch authorities stress that, although the agreements establishing the GNA were only signed on 24 May 2006 binding all parties to the EUR [...] investment, in the letters of intent of [...], the future GNA shareholders decided together to earmark a lump sum of EUR [...] (ex. VAT) for the preparation costs of the project. Amongst others, this amount also covered the costs of the tender procedures for the selection of the builder of the network (BAM/Draka) and for the wholesale operator (BBNed), certain costs related to the notification procedure and certain digging activities.
- (56) As for the second part of the pre-investments (amounting to EUR [...]), the Dutch authorities argued that such pre-investments are fully in line with normal market practice: prudent market investors would follow the same practice in joint projects as one of the parties usually has to take on the role of 'lead investor'. The authorities also stressed that pre-investments by the municipality of Amsterdam did not reduce the start-up risk of the investment for the other GNA shareholders.

(57) The Dutch authorities also argue that the pre-investments did not provide any advantage to any party, therefore could not constitute State aid within the meaning of Article 87(1) of the EC Treaty. For instance, the start of certain digging activities was triggered by the fact that some civil works took place in areas which were important for the future construction of the GNA network. Since all digging activities are coordinated in Amsterdam, digging just a few months afterwards would have been impossible, which would have caused delays and additional costs for GNA.

(58) Furthermore, the Dutch authorities claim that all these costs were incorporated in the business plan and that no new cost elements emerged that would not have been known by the other GNA shareholders.

(59) To support these claims, the municipality of Amsterdam submitted a report prepared by Deloitte — an accounting firm — of 18 January 2007, auditing the reimbursement of the pre-investments. The report states that the above-mentioned pre-investments, amounting to EUR [...] were entirely reimbursed by GNA at the end of 2006 with interest would be charged. The Dutch authorities informed the Commission that the interest rate applied<sup>(44)</sup> is [...] % in line with the Dutch national law<sup>(45)</sup>, the interest amounts to EUR [...] and were paid on [...] by GNA.

(60) Furthermore, the Dutch authorities do not consider their own feasibility studies as part of the pre-investments. According to the Dutch authorities, all prudent market investors would carry out such studies. The Dutch authorities argue that these studies could not have reduced or absorbed some of the start-up risk for the other GNA shareholders, as the other potential shareholders have to follow their own appraisal as well and assess their own risks and benefits from the project.

(61) Similarly, the feasibility studies of the other GNA shareholders (such as ING RE's or Reggefiber's) carried out before investing into GNA were financed by the respective parties without being charged to GNA.

(62) Therefore, the Dutch authorities assert that the preliminary doubts of the Commission regarding 'concomitance' and 'identical terms and conditions' originating from the pre-investments of the Amsterdam municipality are properly addressed by the above-mentioned explanations provided and by the reimbursement of the relevant pre-financed costs to GNA.

*Comments on the doubts related to the GNA business plan*

(63) With regard to GNA's business plan, the Dutch authorities argue that investments made by public authorities satisfy the conditions of the MEIP if they are pursued under the same terms and conditions as those made by private investors. The presence of private investors should guarantee that the project is done on market terms. Therefore, they argue that it was not strictly necessary for the Commission to analyse GNA's business plan.

(64) Second, the Dutch authorities consider that all assumptions of GNA's business plan were not optimistic, rather conservative ones.

(65) More particularly, regarding the financial indicators in the business plan, in the opening decision the Commission compared the targeted financial indicators with relevant publicly available comparative data, namely the weighted average cost of capital ('WACC')<sup>(46)</sup> of peer companies<sup>(47)</sup>. The Commission came to the preliminary conclusion that overall, GNA's targeted financial indicators do not seem unrealistic, but are highly dependent on the achievement of key success factors. Furthermore, the Commission claimed that the forecasts for the business plan's key success factors are likely to be very uncertain due to the novelty of the Amsterdam project in terms of the technology used (fibre technology), the business model (three-layer model), the limited project size (hence only limited economies of scale) and the expected consumer demand for high bandwidth services.

<sup>(44)</sup> Information submitted on 9 November 2007 and on 12 November 2007.

<sup>(45)</sup> [...]

<sup>(46)</sup> The weighted average cost of capital (WACC) expresses the relative cost of equity and debt capital of a business. WACC is a widely accepted financial indicator to measure for any particular business or project the rate of return required by the providers of capital (both debt and equity) having regard to the risk characteristics inherent in the project. Businesses or projects which are able to earn returns (measured e.g. using the internal rate of return) greater than the cost of capital add value for investors. Conversely, businesses or projects which, while they may still be profitable, produce returns less than the cost of capital 'destroy' investor value.

<sup>(47)</sup> In the Commission's benchmarking analysis, the assumptions of GNA's business plan were compared with the available information of its considered peer companies, mainly European telecom operators.

- (66) The Dutch authorities argue that the project's internal rate of return<sup>(48)</sup> should not be compared with WACC figures of vertically integrated operators, as was done in the Commission's opening decision as these figures include the risk of all three layers of these network operators. On the contrary, GNA is only investing in the passive network, which has an expected economic lifetime of 30 years (or even more) and which is more similar to infrastructure investments from which, generally, lower rates of return are required by investors.
- (67) Regarding the targeted penetration rate, in the opening decision, the Commission came to the preliminary conclusion that, based on the available data, achieving at least [...] % penetration for GNA's 'minimum scenario' seems optimistic. Moreover, the target of [...] % of all households after [...] seems aggressive and will only be possible through a massive 'penetration pricing' strategy shifting existing customers of other operators to the GNA network.
- (68) The Dutch authorities argue that there are already several highly successful fibre projects in the Netherlands, where fibre networks could achieve high penetration ratios. For instance, as regards Nuenen or Hillegom, the authorities claim that fibre penetration reached more than 80 % after one year of operation. Furthermore, the Dutch authorities argue that current broadband penetration rates are not relevant in the case at hand: services provided over fibre networks should be considered as a new market compared to current broadband offers of existing operators. Therefore, current broadband penetration rates should not be used as a benchmark. In addition, the authorities argue that numerous new services and applications<sup>(49)</sup> are emerging that require high speed symmetrical networks which can only be provided on a fibre-to-the-home network. Based on these arguments, the Dutch authorities stress that reaching approximately [...] penetration rate in areas of Amsterdam where the network is rolled out within [...] is not only realistic, but rather a conservative target.
- (69) In relation to the wholesale prices charged by GNA to the wholesale operator, the Commission argues in the opening decision that although experts suggest that fibre networks entail lower operational expenditure than current copper telecommunications and cable networks, the GNA wholesale prices are still considerably lower than what market reports suggest.
- (70) The Dutch authorities argue that fibre networks entail lower operational costs and have a longer economic lifetime than existing networks therefore lower wholesale prices are possible compared to what data on existing networks might suggest. This cost advantage provides sufficient room for relatively low wholesale prices compared to the offers on current copper networks.
- (71) Regarding the validity of the investment cost figures, the Commission found in the opening decision that benchmark figures indicated that the capital expenditure per connection projected by GNA appeared to be low in comparison with data available from market players and other sources.
- (72) The Dutch authorities argue that the feasibility of the planned investment costs are further underpinned by the topology and the characteristics of the geographic area where the network is deployed: the areas concerned in Amsterdam have a high population density and many newly built or renovated and multi-household buildings that help to reduce the costs of the deployment of the network per household.
- (73) Regarding the appraisal of the residual value of the network, the Dutch authorities argue that the estimate in GNA's business plan is realistic, as the economic lifetime of fibre networks can be 30 years or even more. Within this timeframe, no major additional investment or maintenance costs will be necessary, contrary to existing copper or cable networks. Furthermore, the authorities argue that the network in place will have significant 'strategic value' due to the 'natural monopoly characteristics of fibre access networks' that GNA will enjoy due to its first mover advantage.

<sup>(48)</sup> The internal rate of return is used to make decisions on long-term investments and compare different investment projects.

<sup>(49)</sup> Such as peer-to-peer applications, file downloading, HDTV services, etc.

(74) The Dutch authorities also commented on the Commission's preliminary conclusion that all assumptions underlying the business plan seemed optimistic and that there is a high degree of sensitivity for the success of the project if even one of the targets (such as penetration grade) does not materialize.

(75) In this respect, the Dutch authorities had the feasibility of the assumptions reviewed and endorsed by a report by Stratix Consulting/Delft Technical University<sup>(50)</sup>. The submitted report also assessed the feasibility of the planned GNA penetration rate. By analysing similar projects in and outside Europe and in particular in the Netherlands, estimating also the future market demand for high bandwidth symmetrical networks (i.e. for fibre networks), the submitted report argues that the planned GNA penetration figures can be considered as a conservative estimate. Furthermore, the report argues that following increased market demand for the services requiring fibre networks and also due to the pro-competitive nature of the open infrastructure, the demand for fibre networks may evolve even faster and to a higher level than predicted a few years ago.

(76) The main conclusion of the submitted study, shared by the Dutch authorities, is that the investment of the Amsterdam municipality is commercially viable and therefore in line with the MEIP.

## V.2. Comments submitted in connection with Third Party observations

### General comments

(77) First, the Dutch authorities reiterate their position that the doubts of the Commission regarding 'concomitance' and 'identical terms and conditions' originating from the pre-investments of the Amsterdam municipality have been properly addressed by the reimbursement of the relevant pre-financed costs by GNA. Furthermore, they claim that GNA's business plan is feasible and realistic, therefore the investment of the Amsterdam municipality in the GNA project is fully in line with the MEIP.

(78) Second, the Dutch authorities also highlight again that, according to their view, in line with the existing case law<sup>(51)</sup> and Commission's decisions<sup>(52)</sup>, the significant

participation of private investors in a project under identical terms and conditions as the public investor should be considered as 'conclusive evidence' that the MEIP is met and hence no State aid is involved.

### Comments on Third Party observations

(79) The Dutch authorities, by referring to Council Regulation (EC) No 659/1999<sup>(53)</sup>, argue that if an undertaking's competitive position cannot be affected directly by the measure at hand, that party cannot be qualified as an interested party. Therefore, the Dutch authorities call upon the Commission not to take into account the comments of ONO, France Telecom<sup>(54)</sup> and Com Hem, since they do not have any business interest on the Dutch and particularly on the Amsterdam broadband market.

(80) The Dutch authorities argue that all parties providing comments in this case failed to take into account that the investments of private investors are sufficient to conclude the MEIP conformity of the investment. They also claim further that, according to the relevant Court jurisprudence, the analysis of the business plan was not necessary in the presence of these private investors.

(81) Regarding UPC's claim that broadband penetration in the areas to be covered by GNA has already reached 65 %, therefore GNA would fail to reach the targeted penetration ratios, the Dutch authorities argue that the addressable market is much higher for GNA as not only broadband services, but TV, telephony and other new services will be offered to customers over GNA's network. In relation to the churn rates submitted by UPC aiming to demonstrate the lack of sufficient interest for the services which can be provided over the GNA network, the Dutch authorities argue that the data is not relevant as service delivery over the network only started in March 2007, and therefore no conclusions could yet be drawn based on those data<sup>(55)</sup>.

<sup>(50)</sup> See footnote 44.

<sup>(51)</sup> The Dutch authorities are referring in particular to the CFI judgement of 12 December 2000, *Alitalia v Commission*, T-296/97, recitals 80-81, Court Judgement of 21 March 1991, *Italy v Commission*, C-303/88, ECR I-1433, recital 20; and CFI judgement of 12 December 1996, *Air France v Commission*, T-358/94, ECR II-2109, recital 70.

<sup>(52)</sup> The Dutch authorities are referring to Commission Decisions 95/404/EC on a procedure relating to the application of Council Regulation (EEC) No 2407/92 ('Swissair/Sabena') of 19 July 1995, and N 172/00 *Seed and Venture Capital Scheme*, Ireland of 17 October 2000 (OJ C 37, 3.2.2001, p. 48).

<sup>(53)</sup> Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

<sup>(54)</sup> France Telecom has recently sold its subsidiaries, Orange Netherlands and Nederland Breedband to Deutsche Telekom. The transaction was approved by the Commission on 20 August 2007.

<sup>(55)</sup> The last data for the churn figures submitted by UPC relate to the situation as of 1 June 2007.

(82) For the reasons explained in recital 79, the Dutch authorities doubt the qualification of the four other companies as interested parties and are of the opinion that these parties only submitted general observations which are not relevant for the assessment of the measure at hand. Therefore, the Dutch authorities do not consider it necessary to comment these observations. The Dutch authorities also do not provide comments on the observations by third parties on the compatibility of any State aid contained in the measure as according to the authorities, a compatibility assessment is not necessary in the current case as no State aid is involved in the measure.

## VI. STATE AID ASSESSMENT

(83) The Commission has examined whether the measure can be qualified as State aid within the meaning of Article 87(1) of the EC Treaty, which 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'. It follows that in order for a measure to be qualified as State aid, the following cumulative conditions have to be met: 1) the measure has to be granted out of State resources and be imputable to the State, 2) it has to confer an economic advantage to undertakings, 3) the advantage has to be selective and distort or threaten to distort competition, 4) the measure has to affect intra-Community trade.

(84) When assessing the measure, the market context has to be taken into account: the electronic communications sector has been fully liberalized several years ago in Europe. In particular, investments in broadband networks in so-called 'black areas' where different broadband services are offered over at least two competing infrastructures (such as telephone and cable TV networks)<sup>(56)</sup> are primarily driven by private companies. The Commission's policy in this field is to be stricter with regard to projects involving public funds in such areas because of the distortive effect on the business of private operators<sup>(57)</sup>.

<sup>(56)</sup> See also footnote 41.

<sup>(57)</sup> See for instance Commission Decision of 19 July 2006, C 35/05, *Broadband development Appingedam* (OJ L 86, 27.3.2007, p. 1), also footnote 37.

## VI.1. State resources

(85) First, it has to be assessed whether the measure is granted directly or indirectly through State resources and imputable to the State<sup>(58)</sup>.

(86) In the current case, the municipality of Amsterdam invests EUR 6 million in the partnership GNA. Since a municipality is to be considered as an emanation of the State, this is to be considered as an investment with State resources within the meaning of Article 87(1) of the EC Treaty<sup>(59)</sup>. The Dutch authorities have not contested the existence of State resources.

## VI.2. Advantage

### VI.2.1. Market Economy Investor Principle

(87) For the purpose of establishing whether a financial investment by the State in an undertaking involves an advantage within the meaning of Article 87(1) of the EC Treaty, the Commission applies the MEIP in line with the relevant case law of the Court. Pursuant to that principle, a transaction does not involve State aid if it takes place at the same time and under the same terms and conditions that would be acceptable to a private investor operating under normal market economy conditions<sup>(60)</sup>.

<sup>(58)</sup> C-345/02, *Pearle and others* [2004] I-7139, recital 35 with reference to Case C-303/88 *Italy v Commission* [1991] ECR I-1433, recital 11 and C-482/99, *France v. Commission, Stardust Marine* [2002] ECR I-4379, recital 24.

<sup>(59)</sup> Legally, the municipality does not invest itself in GNA but through a special purpose vehicle that has been set up for this project [...] and which is owned by the municipality of Amsterdam via the Development Corporation Amsterdam (OGA, an undertaking owned by the municipality of Amsterdam). The investment therefore stems from State resources which are imputable to the State (the subsidiary is owned by the municipality and the decision to invest itself has been taken by the municipality and is channelled through its subsidiary upon initiative by the municipality). Therefore, the conditions outlined in case C-482/99, recital 37 *Stardust Marine* (see footnote 58) have been met.

<sup>(60)</sup> See for instance Judgment of the Court of 8 May 2003 In Joined Cases C-328/99 and C-399/00: *Italian Republic and SIM 2 Multimedia SpA v Commission* [2003] ECR I-4035, recitals 37-38, 'Seleco judgement'; Joined Cases 296 and 318/82, *Netherlands and Leeuwarder Papierwarenfabriek BV v Commission* [1985] ECR 809, recital 17; Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aid in the aviation sector, op. cit. recitals 25 and 26; Commission Decision of 2 August 2004 (2006/621/EC) on the State Aid implemented by France for France Télécom (OJ L 257, 20.9.2006, p. 11); Communication of the Commission to the Member States 93/C 307/03 on the application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector (OJ C 307, 13.11.1993, p. 3), recital 2.



- (88) According to established case law, capital placed by the state, directly or indirectly, at the disposal of an undertaking in circumstances which correspond to normal market conditions cannot be regarded as State aid. However, if the investment by a public investor disregards any prospect of profitability, even in the long term, such an injection must be regarded as State aid within the meaning of Article 87(1) of the EC Treaty <sup>(61)</sup>.
- (89) On this basis, a capital contribution from public funds must be regarded as satisfying the market economy investor test and not constituting State aid if, *inter alia*, it was made at the same time as a significant capital contribution on the part of a private investor made in comparable circumstances (the 'concomitance' test) <sup>(62)</sup>.
- (90) In the present case, the investment by the municipality of Amsterdam was made jointly with two private investors, namely ING RE and Reggefiber. The Commission will therefore first examine whether the investment of the municipality of Amsterdam fulfils the market economy investor test due to the fact that it was made concomitantly with a significant private investment. For this purpose, the Commission will examine the following criteria:
- (91) *First*, it has to be identified whether these investors are market investors and whether the investments by the private investors have real economic significance. Such significance should be assessed in absolute terms (a significant portion of the total investment) and in relation to the financial strength of the private investor concerned.
- (92) *Second*, it has to be assessed whether the investment by all parties concerned take place at the same time ('concomitance').
- (93) *Third*, it has to be identified whether the terms and conditions of the investment are identical for all shareholders.
- (94) *Fourth*, in cases where the State, other investors or the beneficiary have other relationships outside this investment (for example through a side-letter, providing for a guarantee by the State), there may exist grounds to doubt whether such equivalence in the mere investment terms suffices <sup>(63)</sup>.
- (95) Subsequently, and at a subsidiary level, the Commission will also examine GNA's business plan, in particular in view of the claims of the complainant Liberty Global/UPC and other interested parties, which argued that there is no feasible business case for the network built by GNA.

#### VI.2.2. Assessment of the measure in light of the MEIP

##### VI.2.2.1. Significant participation by private investors

- (96) As the Commission acknowledged in the opening decision <sup>(64)</sup>, both ING RE and Reggefiber can be considered without any doubt as 'private investors' <sup>(65)</sup>. Additionally, both companies' business interests are coherent with the project carried out by GNA: ING RE is active in the real estate business and infrastructure type of investments and Reggefiber is engaged in several fibre network projects in the Netherlands. The Commission also notes that the two different private operators can bring different types of expertise in order to contribute to the successfulness of the project.
- (97) In absolute terms, the two private investors both invest a substantial amount (EUR 3 million, respectively) in the partnership GNA. If an investment of EUR 3 million, compared to the financial strength of both ING RE and Reggefiber, could be considered in relative terms to the size of the investors to be a small investment, such an investment is certainly significant in relative terms to the overall capitalisation of GNA and the capital contribution of the municipality of Amsterdam.

<sup>(61)</sup> See for instance Judgment of the Court in case C-303/88 *Italy v Commission* [1991] ECR I-1433, recital 20, 'ENI-Lanerossi judgement'; Case T-358/94 *Air France v Commission* [1996] ECR II-2109, recital 70.

<sup>(62)</sup> Case T-296/97, *Alitalia* [2000] ECR II-3871, recital 81; case T-385/94, *Air France*, [1996] ECR II-2109, recitals 148-149. Cf. equally the Commission's Position, The Application of Articles 92 and 93 of the EEC Treaty to public authorities' holdings, Bulletin EC-9/1984, para. 3.2(i) and (iii).

<sup>(63)</sup> In other words, the terms and conditions can be identical in one agreement but, at the same time, other agreements can lay down additional clauses with different rights and obligations.

<sup>(64)</sup> Footnote 48 of the opening decision.

<sup>(65)</sup> ING's shares are 100 % floated on the stock exchange without any shareholder owning more than 5 % of its shares. Reggefiber is a subsidiary of Reggeborgh which is an investment vehicle of the family Wessels. See also footnotes 20 and 21.

(98) Together the two private investors take up one third of the total equity. In the context of this project, this stake — while not giving the two companies outright control of GNA — is a significant portion of the overall investment. To this end, the Commission observes that both ING RE and Reggefiber are major shareholders of GNA. Indeed, the largest single shareholder (the Amsterdam municipality) owns 33 % of the equity of GNA. Each ING RE and Reggefiber have a stake equal to half of that of the largest single shareholder; if combined, they hold the same stake as the municipality. The remaining shareholders in the venture, the five housing corporations, hold singularly smaller stakes than ING RE and Reggefiber. It follows that within GNA there is no single shareholder capable of exerting majority control over the company. Moreover, the two private investors can be singularly, and even more if taken together, pivotal in forming a controlling majority within GNA <sup>(66)</sup>.

(99) The Commission also notes that according to Dutch corporate law, one third of the shares are sufficient to form a blocking minority regarding any important decision of GNA. Therefore, the two private investors can jointly form a blocking minority within the company.

(100) To conclude, both ING RE and Reggefiber are market investors and their investments have real economic significance both in absolute and relative terms if seen in the context of the shareholding structure of GNA.

#### VI.2.2.2. Concomitance

(101) In the opening decision <sup>(67)</sup>, the Commission acknowledged that the municipality invested *de jure* at the same time as the private investors in the partnership GNA, but expressed some preliminary doubts about the *de facto* concomitance of the investments of all GNA shareholders, as the municipality had already undertaken initiatives and investments before a final agreement with all other investors was concluded.

(102) The Commission noted that the municipality commissioned several studies in 2003 and 2004 to prepare the project. Furthermore, the municipality took initiatives which seem to go beyond these preliminary steps. Despite the absence of a firm commitment by private investors, the municipality published and organised

tenders and even negotiated contracts for the construction and the exploitation of the network. In addition, the municipality of Amsterdam financed certain digging activities and purchased software for the construction of the network.

(103) In this respect, the Dutch authorities provided further information (audited by Deloitte) on the pre-investments and on their reimbursement of the pre-investments after the opening of the formal investigation. According to the Deloitte audit report, the commonly earmarked funding of the GNA shareholders amounted to EUR [...] out of the total pre-investments of EUR [...]. The remaining EUR [...] were initially financed by the municipality only <sup>(68)</sup>.

(104) The new information received during the formal investigation enabled the Commission to establish the following facts: First, a substantial part of the activities and pre-investments (EUR [...]) was explicitly agreed in the 'Letters of Intent' signed by the prospective shareholders of GNA and co-financed by all of them proportionally to their stake even before the establishment of the company, as all partners in the venture considered necessary to undertake individually and separately certain steps prior to GNA's incorporation.

(105) Second, all pre-investments (including EUR [...] earmarked only by the Amsterdam municipality) were included in the business plan on which the investment was based and hence were agreed between all shareholders of GNA. Thus, all partners in the venture considered those pre-investments as useful steps prior to the establishment of GNA. According to the Dutch authorities, there was agreement among all shareholders that the portion initially financed by the municipality would be reimbursed by GNA. In other words, the municipality's conduct did not pre-empt or influence the behaviour of the other market investors.

(106) On the basis of the above, the Commission considers that the fact that the municipality of Amsterdam did carry out some limited pre-investments prior to the formal setup of GNA does not call into question the fulfilment of the MEIP given that there was agreement among all shareholders that the municipality of Amsterdam would have to be reimbursed for these pre-investments.

<sup>(66)</sup> The significance of private participation also has to be seen in the context that broadband investment in black areas are primarily driven by private operators. See also recital 84.

<sup>(67)</sup> Paragraphs 49 ff. of the opening decision.

<sup>(68)</sup> See also recitals 54-55.

## VI.2.2.3. Terms and conditions

- (107) In the opening decision <sup>(69)</sup>, the Commission expressed preliminary doubts whether the terms and conditions of the investment for all shareholders were identical. More specifically, the Commission expressed its doubts that the pre-investments undertaken by the municipality of Amsterdam might have absorbed or mitigated some start-up risks associated with the project for other investing parties.
- (108) These preliminary doubts derived from the fact that, although the Commission had requested several times a complete overview of the pre-investment costs <sup>(70)</sup>, and the Dutch authorities submitted some information on the settlements between Amsterdam, GNA and its shareholders in this respect, this did not fully clarify all 'pre-financing' activities by the municipality including the amounts actually spent by the municipality of Amsterdam.
- (109) Based on the submissions by the Dutch authorities at the moment the formal investigation was initiated, the Commission was not in a position to calculate or verify the total amount of these 'pre-investments' which the Commission estimated to be in the magnitude of EUR 1,5 million. Furthermore, it was not fully clear to the Commission how those costs were shared between the shareholders and included in the business plan of GNA.
- (110) In particular, the Commission feared that the 'pre-financing' by the municipality — partly without the explicit agreement of some of the other investors — might have reduced the investment risk of the other investors in GNA and could have had a positive impact on their willingness to invest in GNA. The information submitted by the Dutch authorities following the opening of the formal investigation allayed these preliminary doubts.
- (111) First, as clarified by the information provided by the Dutch authorities on the reimbursement of the pre-investment costs and by the submitted audit report, the total pre-investment costs amounted to EUR [...], divided in two parts: EUR [...] agreed and co-financed by all prospective shareholders of GNA in the 'Letters of Intent' proportionally to their stake, and EUR [...] initially financed only by the Amsterdam municipality.
- All these costs were properly charged to GNA, including interest <sup>(71)</sup> and no additional GNA project costs seem to have remained unaddressed.
- (112) Second, all costs related to the pre-investment were also initially included in the business plan of GNA, hence no new costs seem to have emerged after the signing of the GNA agreement that would have altered the terms and conditions for the other shareholders. This is in line with the finding that there was agreement among all shareholders that the municipality of Amsterdam would have to be reimbursed for the pre-investments carried out.
- (113) Third, although the municipality of Amsterdam took the lead and pre-financed part of the project costs, those initiatives and investments could not have reduced the risks involved in the project for the other shareholders. Contrary to the preliminary doubts raised in the opening decision, the Commission comes to the conclusion that the investments initially financed by the municipality in undertaking limited civil works and purchasing software could not, in view of their nature and their limited financial significance, have altered the risk profile of the project. The same is true for the pre-investments co-financed by all prospective shareholders in parallel to the signing of the 'Letters of Intent'. The analysis of the business plan clearly shows that the business risks of the investment in GNA is linked to the success of the project in the years to come, particularly in terms of market evolution, and not to the very first steps preparing the project.
- (114) Fourth, the Commission does not agree with the argument of UPC that the feasibility studies conducted by the Amsterdam municipality might have reduced some risk for the other GNA shareholders, which might have decided to invest in GNA only afterwards. The Commission notes that any prudent market investor would normally carry out its own assessment on the strategy and profitability prospects (feasibility study) of an investment project <sup>(72)</sup> without this being considered a means to reduce the risks involved for other investing parties. In any case, if the project were to fail, all investing parties together would have to shoulder the losses resulting from an underperforming business or, in the worst case, the bankruptcy of GNA.

<sup>(69)</sup> Recitals 52 ff. of the opening decision.

<sup>(70)</sup> For instance in its letter to the Dutch authorities of 29 September 2006.

<sup>(71)</sup> See also recital 59. The Dutch authorities informed the Commission that the interest charge amounted to [...] and was paid on [...] by GNA.

<sup>(72)</sup> See for instance Commission Decision of 7 June 2005 on Alitalia's restructuring plan (OJ L 69, 8.3.2006, p. 1), recital 194: 'In order to present its offer, Deutsche Bank carried out an assessment of the company's strategy and profitability prospects. In addition, before concluding the final contract, it proposes to carry out a due diligence operation which any investor should carry out before initiating the operation'.

(115) In view of this information, the Commission concludes that all shareholders in GNA have invested under the same terms and conditions.

#### VI.2.2.4. Other relationships

(116) UPC argued that ING RE might have decided to invest in the GNA project not on the basis of economic considerations, but rather as part of their marketing strategy to maintain a good relationship with the municipality of Amsterdam, which is allegedly an important business partner of ING RE.

(117) It has to be assessed whether there are any other relationships outside the cooperation and investment agreement which are relevant for the assessment whether the investment meets the MEIP. In this respect, the opening decision<sup>(73)</sup> referred to the fact that the Dutch authorities have provided a statement in which they declare that there are no other relations between the parties concerned, i.e. relations outside the notified agreements, which are relevant for the assessment whether the investment is in line with the MEIP.

(118) The Commission's own investigation and the information submitted by interested parties have not brought forward any elements indicating that the statement of the Dutch authorities is incorrect.

(119) On this basis, the Commission concludes that the investment by the municipality of Amsterdam was made at the same time and in comparable circumstances as the significant capital contributions by the private investors.

(120) Accordingly, the investment made by the municipality of Amsterdam is in line with the market investor principle and does not constitute State aid.

#### VI.2.2.5. Assessment of the business plan

(121) In addition, the Commission has also assessed the business plan of GNA, in particular in view of the doubts raised in its decision initiating the formal investigation and in view of the claims of the interested parties Liberty Global/UPC, ONO, FT, COM HEM and an anonymous party<sup>(74)</sup>.

(122) In the opening decision<sup>(75)</sup>, following the preliminary analysis of GNA's business plan and the critical remarks received from UPC in this respect, the Commission considered that not only the targeted performance indicators, but all assumptions underlying the GNA business plan seemed optimistic. The Commission considered further that there was a high degree of sensitivity for the success of the project if the targets (such as the penetration rate) did not materialize, even more so if one of the underlying assumptions deviated from the targeted levels.

(123) The Commission received comments on the business plan analysis contained in the opening decision both from the Dutch authorities and from UPC which enabled it to deepen its assessment.

(124) The Commission notes that the business plan of GNA relates to a newly formed undertaking with no track record, acting in a new and innovative business segment (FttH technology, 'three-layer model', where passive and active infrastructures are operated and managed separately, with an open and non-discriminatory access offered to all retail operators, see description part recitals 21-30). Thus, in such a case, the assessment of a business plan of a newly formed undertaking is necessarily and inevitably based on future market projections and hypotheses regarding the likely evolution of demand and supply for FttH services.

#### ***Independent reviews conducted in relation to the business plan***

(125) The Commission notes that the methodology of the business plan was audited and accepted by PricewaterhouseCoopers<sup>(76)</sup>, an independent audit company. More specifically, after a first analysis of the first version of the GNA business plan, PricewaterhouseCoopers proposed some modifications to filter out certain preliminary inconsistencies. These proposals were taken into account in the updated GNA business plan. After those modifications, PricewaterhouseCoopers stated that the model does not 'contain technical or economic integrity issues', and the GNA business plan was submitted to the Commission afterwards.

<sup>(73)</sup> Recital 62 of the opening decision.

<sup>(74)</sup> In the following assessment, reference will be made mostly to UPC, as their submissions are the most detailed. However, the assessment also covers the more general remarks submitted by other interested parties.

<sup>(75)</sup> Recitals 63 ff. of the opening decision.

<sup>(76)</sup> Performed on 2 May 2006 on behalf of the Dutch authorities, submitted to the Commission on 11 May 2006.

(126) Following the Commission's decision to open the formal investigation procedure, the Dutch authorities submitted a report prepared by Stratix Consulting/Delft Technical University<sup>(77)</sup>, reviewing and endorsing the feasibility of the GNA business plan, with a special focus on the assumptions which were highlighted by the Commission as 'optimistic' in the opening decision. The report came to the conclusion that the GNA business plan is realistic and that the underlying assumptions are correctly based on current market trends and should be considered as 'conservative' estimates.

### **Financial indicators**

(127) GNA applied three main financial performance indicators to measure the success of the project being the cash-flow generation, the return on equity and the internal rate of return (IRR).

(128) The Commission considers that the IRR ratio appears to be the most appropriate parameter for an analysis of the business plan. The IRR is used to make decisions on long-term investments and to compare different investment projects. The underlying IRR of GNA's business plan is [...] %.

(129) Given the novelty of the project and the dynamic nature of the broadband telecommunication markets, it is difficult to carry out a benchmarking exercise. The public availability of IRR figures from similar projects is limited, not least because these figures are rarely made public as they are considered business secrets. The most relevant publicly available comparative data is that on the weighted average cost of capital ('WACC') of other companies in the same industry. WACC data can be a useful benchmark because a project is considered worth undertaking if the IRR exceeds the WACC. Based on information in the possession of the Commission, industry figures fluctuate in the range between 8,1 % and 10,6 %<sup>(78)</sup>. Based on these figures, the IRR in GNA's business plan appears to be within the acceptable range.

(130) In its submission, UPC argued that due to the novelty and the high risk involved in the project, the targeted IRR

for GNA, which is basically a start-up firm, must be higher than the WACC figures of a well-established company with significant customer base and cash flow generation, such as KPN or UPC.

(131) The Dutch authorities question the Commission's assessment regarding the benchmarks used for the assessment of the IRR in the opening decision. They claim that the WACC figures are related to vertically integrated operators, while GNA is only investing into a passive network, which is more similar to an infrastructure investment for which lower rates of returns are generally required by investors.

(132) The Commission finds that the targeted IRR in GNA's business plan appears to be within the market expectations for companies active in the telecommunications market. In addition, the Commission recognises that the investment project under scrutiny is different from that of a vertically integrated operator and it presents characteristics of an infrastructure type investment, for which a lower IRR is required.

(133) The Commission also assessed the alternative financial indicators used in the business plan, such as the positive cash flow generation and the return on equity. The Commission could not carry out a thorough benchmarking exercise for these indicators due to the lack of publicly available data<sup>(79)</sup>, and therefore assessed them from the point of view of the adequacy and internal consistency within the business plan. Based on this analysis, the Commission concludes that the figures provided in the business plan appear to be acceptable to a market economy investor.

### **Penetration rate**

(134) One of the most important factors for the business plan is the targeted penetration rate. As revenues for GNA will depend to a large extent on the achieved penetration rate, i.e. the percentage of connected households, the feasibility of achieving the targeted penetration rate is of crucial importance for the success of GNA's business.

<sup>(77)</sup> Submitted on 16 March 2007, see also recital 75.

<sup>(78)</sup> UPC (Dutch cable operator) 10,6 %, Fastweb (Italian broadband operator) 9 %, Telenet (Flemish cable operator) 8,5 %, KPN (Dutch incumbent) 8,1 %.

<sup>(79)</sup> It should be noted that in its submissions UPC also did not use these indicators for its observations on GNA's business plan.

- (135) GNA aims at achieving a penetration rate of [...] % of all households within [...] months (and penetration levels are expected to be saturated approximately at this level). In addition [...] <sup>(80)</sup>.
- (136) In its submissions, UPC expressed strong doubts whether any significant market share (such as the 40 % target rate mentioned in an investment report <sup>(81)</sup>) can be achieved by the project. UPC, relying on the report by RBB and figures concerning the overall churn rates for the areas where GNA is already providing triple play services, argues that the current overall broadband penetration in the areas planned to be covered by GNA has already reached 65 %. More particularly, according to UPC, the relatively strong competition in the area and the limited new offers available on GNA's fibre network further supports the view that the retail operators using the GNA network via BBned will fail to attract enough customers.
- (137) UPC also stresses that it does not see any competitive advantage of the new fibre network compared to the existing offers of current broadband operators other than the provision of symmetrical bandwidth to retail customers, for which service demand is however inexistent. Moreover, UPC argues that their most advanced broadband product in terms of available bandwidth <sup>(82)</sup> has not been very successful so far and that customers have a tendency of opting for cheaper and less-sophisticated products whenever more advanced products are offered in the market.
- (138) In contrast, the Dutch authorities argue that new services can be provided over the symmetrical fibre broadband connection (such as file sharing and other 'peer-to-peer applications', HDTV), which belong to a different market than the current asymmetrical connections. Furthermore, the Dutch authorities relying on the already mentioned study prepared by Stratix Consulting and Delft Technical University stress that several successful examples not only from the Netherlands, but also from the US and Japan indicate that the targeted penetration rate is realistic.
- (139) The Commission has assessed the arguments of the various parties in this respect. The Commission notes that GNA, in order to determine the penetration rate curve, [...]. This penetration rate forecast model incorporates all the assumptions required, including take-up rates, speed of take-up rate and churn rates as well as those assumptions that were quoted by the UPC as being important factors to assess the feasibility of the business plan. Therefore, the business plan includes the relevant factors that are necessary for the assessment of the penetration rate.
- (140) On the question whether the penetration rates in the business plan are achievable, the Commission notes that it will depend to a large extent on the evolution of the market, the speed at which new applications and technologies requiring very fast, symmetrical fibre broadband connection will be adopted by service providers and the reaction of customers to these new possibilities. These factors cannot be known with certainty at this point in time, as is demonstrated by the different views between UPC (more sceptical regarding market prospects) and Reggefiber, ING RE and Delft Technical University (who have endorsed the estimates in the business plan either as investors or as independent consultants).
- (141) More specifically on the churn rates submitted by UPC to show that the project is failing to reach any meaningful penetration rates, the Commission notes that the submitted figures cover the period between 1 January 2006 and 1 June 2007, while retail operators using the GNA network started offering the services to customers in limited areas of Amsterdam only in March 2007. Given the very limited amount of time elapsed since services are provided over the GNA network, the Commission is not convinced that meaningful information could be elicited from the churn rates at this stage.
- (142) In relation to UPC's argument that the successful examples of small Dutch cities in fibre deployment, such as Hillegom or Nuenen <sup>(83)</sup> should not be taken into account as these cities are not comparable in terms of size, competitive situation and subsidies to the project of Amsterdam, the Commission considers that although there are certain differences, those projects still provide some useful insights for the benchmarking analysis as examples of fibre deployment projects in the Netherlands.

<sup>(80)</sup> [...]

<sup>(81)</sup> UPC/RBB conducted their analyses on publicly available information, above all on an ING analyst report prepared on the feasibility of a fibre-to-the-home project in Amsterdam: ING analyst report 'European Telecoms', 24 February 2006.

<sup>(82)</sup> Namely Chello Extreme, currently offering 20 Mbps download and 2 Mbps upload speed.

<sup>(83)</sup> Where fibre penetration has reached more than 80 %.

(143) Based on industry analysis <sup>(84)</sup> approximately 20-25 % of the population on average is willing to migrate to a new fibre network. [...].

(144) Moreover, based on current trends, the demand for services being delivered over high bandwidth fibre networks seem to be increasing at a higher pace than what market experts expected a few years ago. The current plans for fibre networks deployment especially in the Netherlands and other European countries <sup>(85)</sup> provide further evidence for the attractiveness of investments in fibre access networks. Therefore, it is not unrealistic that a penetration rate of [...] % of all households could be reached after [...] months.

(145) The Commission therefore concludes that it is conceivable for a market economy investor to invest in the project on that basis of the penetration rates foreseen in the business plan (indeed, this is what Reggefiber and ING RE did).

#### **Wholesale prices**

(146) Wholesale prices per connection charged by GNA to BBned for the exploitation of the passive network [...].

(147) In its submissions, UPC has calculated that GNA has to charge at least EUR 20-EUR 22 per month for a wholesale connection enabling triple-play services on its network. However, at this price level, the final retail service prices would necessarily be more expensive than current similar offers of the existing operators, which allegedly raises doubts about the targeted penetration rate.

(148) To support its arguments, UPC submitted calculations <sup>(86)</sup> for the wholesale prices based on the retail service prices offered by service providers <sup>(87)</sup> on GNA's network. UPC argues that based on the current retail prices, it is unlikely that all three layers (passive, active and retail) will be able to operate profitably at the same time.

<sup>(84)</sup> See for instance JPMorgan (2006) study: The fibre battle — Changing Dynamics in European Wirelines, 4 October 2006. JPMorgan also calculates that the payback time of a fibre to the home infrastructure — providing open access in an average metropolitan market — starts looking attractive from a market share of 25 %.

<sup>(85)</sup> As for instance evidenced by the investments of Reggefiber, Casanet in the Netherlands, Iliad, Free or France Telecom in France and examples from other European countries. See also: The Netherlands: FTTH deployment overview, 4Q2006 prepared by Stratix, January 2007.

<sup>(86)</sup> Source: Supplement to the RBB report on Amsterdam's investment in the FttH Citynet project, 7 November 2006.

<sup>(87)</sup> Undertakings such as Pismo, Unet or InterNLnet are already offering services on the GNA network with a limited geographical scope.

(149) In contrast, the Dutch authorities argue that the new fibre technology requires different cost calculations than the traditional copper or cable lines. For instance, the fibre network requires far lower operational expenditures (such as maintenance, management costs) and also has a longer economic life, i.e. a longer amortisation period (up to 30 years).

(150) UPC also asserted that it is not possible for all three layers <sup>(88)</sup> to be profitable simultaneously. In this respect, the Commission notes that it assessed the wholesale prices charged for access to the passive layer, as this is the layer included in the business plan under assessment, where public funds are involved. The Commission found that these wholesale prices are not unrealistic <sup>(89)</sup>. The viability of the other two layers, operated by private operators, is to a certain extent affected by the wholesale prices charged for using the passive layer. Considering the fact that the operation of the second layer was won by BBned through an open tender, that an open, non-discriminatory access is offered to any operators on the retail layer and taking also into account the wholesale prices of GNA, the Commission does not see a risk that the two other layers might not be operated profitably.

(151) As regards the prices charged by GNA for the wholesale access, there are some indications that fibre networks may entail lower operational expenditure than legacy telecommunication and cable networks. Based on these considerations and also taking into account the benchmark information available and the results of the Stratix Consulting/Delft Technical University report, the Commission concludes that the wholesale prices in the business plan are not unrealistic compared to similar services provided by other operators.

#### **Investment costs**

(152) The Commission also assessed the planned investment costs. GNA calculates EUR [...]. This leads to an overall cost for the passive layer of [...] per household. The benchmark figures, collected by the Commission, for the complete infrastructure (active and passive together) fluctuate between EUR 1 000 and EUR 2 000 <sup>(90)</sup>, while the ratio between the investment needs for passive and active connection is roughly about two to one.

<sup>(88)</sup> For a description of the three layer model see recital 23 ff.

<sup>(89)</sup> For the assessment of the wholesale prices see from recital 146 ff.

<sup>(90)</sup> For the whole infrastructure (active and passive) UPC/RBB estimates EUR 1 500 per home passed (EUR 1 000/EUR 500 respectively), KPN EUR 1 300, Hillegom (Dutch FttH project) EUR 1 200, Corning (fibre optic manufacturer) EUR 1 200, Arthur D. Little (consulting company) EUR 1 000 (EUR 600/EUR 400 respectively), Fastweb (Italian broadband operator) EUR 1 200, ARCEP (French regulator) EUR 2 000 (data from 2005 and 2006), JPMorgan (consulting company) EUR 1 000-EUR 2 000.

- (153) UPC supports the preliminary view of the Commission expressed in the opening decision that the viability of the business plan is highly dependent on the investment costs and emphasizes that the calculated costs are very low estimates. In contrast, the Dutch authorities argue that the investment costs result from the topology of the areas concerned, the high population density and the presence of multi-household dwellings (lowering deployment costs per household). Moreover, the authorities highlight that GNA has already signed a contract with civil engineering companies Van den Berg/BAM and Draka Comteq in [...] 2006 <sup>(91)</sup> at specified conditions which should guarantee that the deployment costs will be in the range included in the business plan.
- (154) Considering also the topography of the areas (densely populated area on a flat terrain), the fact that the civil engineering companies carrying out the works accepted to do them for a price compatible with the business plan, and the available benchmark data, the Commission finds that the planned GNA investment figures appear to be realistic. The Commission also takes note that GNA calculated with a certain level of buffer in case of an overrun of the investment costs which is in line with prudent market investors' practice and provides further evidence for the robustness of the estimates of the investment costs.

#### ***Residual value of the network***

- (155) The estimated residual value of the passive network has a pivotal role in GNA's business plan to achieve the financial targets and to provide a collateral for the investors. GNA applies a multiple-based calculation to determine the residual value of the asset (the projected value of the network in [...] is EUR [...]), the value is depending only on the achieved penetration rate. The Commission also assessed with an alternative multiple-based valuation the residual value of the GNA network, resulting in a value range of EUR [...] million at [...] % penetration rate, which matches GNA's estimate.
- (156) UPC suggests that the benchmark figures used by the Commission in the opening decision <sup>(92)</sup> for assessing the residual value of the network are too optimistic, since those figures are related to an established company with recurring revenues and customers.

Furthermore, UPC asserts that for the expected economic lifetime of the network, an estimation of maximum 20 years appears reasonable (compared to the [...] used in the business plan of GNA). UPC also recommends using a cash flow based assessment to check the residual value of the network.

- (157) The Dutch authorities argue that the calculation of GNA's business plan in relation to the residual value of the network is realistic and based on a correct methodology. In addition, they assert the economic lifetime of fibre networks can be [...] or even more. Furthermore, they assert that the network in place will be valuable due to its first-mover advantage and because the construction of a second similar network might not be economically viable in view of certain natural-monopoly characteristics of fibre access networks. These latter factors allegedly provide further evidence that the network in place will have significant value even if the business plan does not fully materialize.
- (158) Since limited relevant market data were available for this parameter, the Commission analysed the residual value of the network with several alternative methods, including a cash flow based assessment <sup>(93)</sup>. Moreover, industry reports <sup>(94)</sup> support the view of the Dutch authorities that the economic lifetime of fibre networks may reach [...]. Based on the available data, the residual value does not differ significantly from the price range derived from benchmark data. The Commission also takes note that the network is likely to be a tangible asset with significant value for the shareholders of GNA [...] <sup>(95)</sup>.

#### ***Methodological concerns***

- (159) In the opening decision, the Commission also raised certain preliminary methodological concerns regarding GNA's business plan. For instance, corporate tax is not included in the business plan. The Dutch authorities argue that the shareholders of GNA chose the legal form of 'gesloten commanditaire vennootschap' that has no obligation to pay profit tax. Therefore the results of GNA will be consolidated directly by its shareholders and the project is assessed on a 'pre-tax base'.

<sup>(93)</sup> The cash flow based assessment (in line with the comments of UPC) resulted in a value range of EUR [...].

<sup>(94)</sup> See for instance FttH Council documents available at <http://www.ftthcouncil.org/> or Gartner research of 14 February 2006: Governments Can Bring Moore's Law to Broadband Access.

<sup>(95)</sup> The Dutch authorities have also submitted several sensitivity analyses and different business scenarios as part of the GNA business plan. The Dutch authorities argue that even in the 'worst-case scenario' the value of the asset will be sufficient [...].

<sup>(91)</sup> See also footnote 19.

<sup>(92)</sup> Footnote 37 of the opening decision.



(160) Having assessed the measure in more detail during the formal investigation, the Commission finds that the elements of methodological concern are of minor importance, based on the choice of the business plan methodology applied by GNA, and do not put into question the overall viability of the business plan. Furthermore, the Commission notes that both the private investors and also PricewaterhouseCoopers which audited the business plan endorsed<sup>(96)</sup> the methodological choices on which the business plan is based.

***Other considerations regarding the business plan submitted by the complainants***

(161) The Commission would like to point out that the Dutch authorities have also submitted several sensitivity analyses and business scenarios<sup>(97)</sup> to bolster the robustness of GNA's business plan further. This information further demonstrated that GNA's business plan takes into account all risks and opportunities related to the project.

(162) In its submissions, UPC criticised further assumptions of GNA's business plan not explicitly mentioned in the assessment of the business plan outlined in recitals 121 and following, concluding that the plan would not be commercially feasible. The Commission would like to reiterate that neither UPC nor RBB, the consultancy which carried out several reports for UPC in the framework of the investigation of this case, had access to the actual business plan of GNA. Hence, their analyses were based on publicly available information, above all on an analyst report prepared on the feasibility of a fibre-to-the-home project in Amsterdam<sup>(98)</sup>.

(163) The Commission notes that the main determinants of the business plan brought forward by UPC have either already been addressed in the Commission's assessment of GNA's business plan (such as penetration rate, subscriber take-up rate, churn rate, wholesale revenues, investment costs, life-expectancy of the network in the

'residual value' calculation) or are of limited relevance for its assessment (the choice of methodology in the plan)<sup>(99)</sup>.

(164) UPC also stressed that the Commission should take into account not only the individual assumptions but the interrelation between them. For instance, UPC argues that high levels of penetration with high prices together are considered as impossible. The Commission has assessed the methodology and the figures on which the business plan is based and found that they can be considered acceptable to a private investor operating under normal market economy conditions.

(165) UPC also argues that in its calculations about the GNA business plan, it did not take into account that GNA will provide rebates for the users of the network in the first years, as this information was revealed in the Commission's opening procedure. UPC argues that such contribution by GNA to the marketing costs of the complete project further deteriorate any financial return of the project for the investors and provide further evidence that the GNA business plan is not feasible. In this respect, the Commission notes that it is normal market practice that new services are offered at discount prices in the beginning in order to reach a certain customer base. Furthermore, the financial impact of those rebates was fully taken into account in the GNA business plan, which was analysed by the Commission.

(166) As regards the Arcadis model<sup>(100)</sup> indicated by UPC as a possible proxy for the GNA business plan, the Commission notes that the model was not part of the submission of the Dutch authorities, and the authorities confirmed that there is no link between the project under scrutiny and the Arcadis model.

(167) Furthermore, the Commission has no indication that the loan of EUR [...] provided by [...] was not provided on market terms. The interest rate required by [...] <sup>(101)</sup> and the potential collateral value of the asset in place provide sufficient evidence that the loan was granted on market terms.

<sup>(96)</sup> Performed on 2 May 2006 on behalf of GNA, submitted to the Commission on 11 May 2006. See also recital 125.

<sup>(97)</sup> In case of a business plan, sensitivity analysis enables for decision makers to assess the dependency of the financial outcomes of the business plan to the changes in the underlying assumptions. Similarly, different business scenarios also highlight different outcomes of the project in light of different market assumptions.

<sup>(98)</sup> The ING report came to the conclusion that a fibre-to-the-home network in Amsterdam is financially feasible and viable (ING analyst report 'European Telecoms', 24 February 2006). However, the business plan used in the analyst report is significantly different compared to that of GNA (e.g. methodology, projected timeframe, financial targets, etc.).

<sup>(99)</sup> GNA applies a different business plan methodology compared to the one applied in the ING report mentioned in footnote 98. In GNA's methodology, a cost of capital indicator was not required. However, in its analysis, the Commission also used the cost of capital figures to benchmark the IRR rate of GNA's business plan. See also recital 134 and following.

<sup>(100)</sup> See recital 41.

<sup>(101)</sup> The authorities provided the Commission with loan agreements on [...] and it is stated that the interest charged is equal to [...] %.

### **Conclusion on the business plan**

- (168) After the formal investigation and having assessed the additional information received, the Commission comes to the conclusion that the GNA business plan is in line with the MEIP.
- (169) The business plan is based on the main forecast that the evolution of the telecommunication and media markets in the Netherlands will translate in significant demand for high speed broadband services, which will be to a large extent be satisfied by FttH networks. From this forecast, which has been endorsed by the report of Stratix Consulting/Delft Technical University, derive the assumptions regarding prices and penetration rate of the GNA network. Together with other assumptions (e.g. investment costs), these factors drive the result that the project will sufficiently remunerate its investors.
- (170) The Commission has assessed the plan and the assumptions therein by benchmarking it with comparable projects wherever possible, by checking its internal consistency and the feasibility of the assumptions. The conclusion from this assessment is that the business plan is methodologically correct and takes into account all the relevant factors that may impact on the success of the project.
- (171) Furthermore, the Commission finds that GNA's business plan does not contain manifestly erroneous assumptions. The assumptions underlying the plan are realistic if seen against the main forecast on the evolution of the telecommunications and media markets. They also appear realistic when benchmarked against comparable projects. The reservations that may be raised against some of the assumptions of the business plan as a matter of principle or starting from a different forecast about the future evolution of the relevant markets are not sufficient to undermine its overall credibility. Such divergence of views pertains to the wide margin of judgment that comes into entrepreneurial investment decisions.
- (172) It should be underlined that two private investors specialised (also) in communications infrastructure investments, ING RE and Reggefiber, took a significant stake in the project on the basis of the business plan. [...] <sup>(102)</sup>. In addition to the financial returns, the project's strategic value (as a relatively small 'pilot project' to test the potential of FttH technology in densely populated areas and the underlying novel business model <sup>(103)</sup>)

<sup>(102)</sup> [...]

<sup>(103)</sup> Namely the 'three-layer model', where the passive and the active layers are operated and managed separately, with an open and non-discriminatory access offered to all retail operators, see also Figure 1.

may well have contributed to the public and private investors' decision to accept a relatively higher level of risk <sup>(104)</sup>.

- (173) Having these elements in mind, the Commission concludes that a private investor operating under normal market economy conditions could invest in GNA on the basis of its business plan.
- (174) As regards the submissions of UPC, ONO, FT, COM HEM and the anonymous party, asking the Commission to adopt a strict line regarding the application of the MEIP in the present case in view of the alleged 'precedent character' of the project for other broadband investments in Europe, the Commission wishes to highlight that the MEIP assessment always has to be conducted on a case-by-case basis in line with the existing case-law and its decision-making practice in this field.
- (175) Overall, the Commission therefore concludes that the investment by the municipality of Amsterdam does not constitute State aid since it was made at the same time as a significant capital contribution on the part of a private investor made in comparable circumstances. In addition, an examination of the business plan has equally confirmed that the investment is in accordance with the Market Economy Investor Principle.

### VII. CONCLUSION

- (176) Following the opening of the formal investigation procedure, the Dutch authorities addressed the preliminary doubts expressed by the Commission in the opening decision in a satisfactory manner. In particular, all pre-investments by the Amsterdam municipality, which were one of the main concerns of the Commission in the opening decision, were reimbursed by GNA. The Commission finds that the municipality of Amsterdam invests in GNA on the same terms and conditions as the private parties involved in the project, which are investing on the basis of GNA's business plan.

<sup>(104)</sup> Small risky investments can also be explained by real option theory, according to which risky investments can entail a two-stage process. In the first stage, only a small investment is made (i.e. the company is purchasing an option). Some time later, when more information is known, the company can make a larger investment (i.e. exercising this option) or abandon its plans, thereby limiting its losses to the initial small-scale investment (i.e. to the costs of the option). By shouldering higher risk and uncertainty in the first stage (with small commitment), companies can reduce the risks of subsequent (larger) investments.

(177) Consequently, the Commission concludes that the investment of the municipality of Amsterdam in GNA does not constitute State aid within the meaning of Article 87(1) of the EC Treaty as it is in conformity with the Market Economy Investor Principle,

HAS ADOPTED THIS DECISION:

*Article 1*

The investment by the municipality of Amsterdam in Glasvezelnet Amsterdam C.V., which is developing a fibre network in Amsterdam, as notified to the Commission by letter of 17 May 2005, does not constitute State aid within the meaning of Article 87(1) of the EC Treaty.

The measure may accordingly be implemented.

*Article 2*

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 11 December 2007.

*For the Commission*  
Neelie KROES  
*Member of the Commission*

---

## COMMISSION DECISION

of 8 September 2008

authorising the placing on the market of products containing, consisting of, or produced from genetically modified soybean A2704-12 (ACS-GMØØ5-3) pursuant to Regulation (EC) No 1829/2003 of the European Parliament and of the Council

(notified under document number C(2008) 4735)

(Only the German text is authentic)

(Text with EEA relevance)

(2008/730/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed<sup>(1)</sup>, and in particular Articles 7(3) and 19(3) thereof,

Whereas:

- (1) On 1 July 2005, Bayer CropScience AG submitted to the competent authority of the Netherlands an application, in accordance with Articles 5 and 17 of Regulation (EC) No 1829/2003, for the placing on the market of foods, food ingredients, and feed containing, consisting of, or produced from A2704-12 soybean ('the application').
- (2) The application also covers the placing on the market of other products containing or consisting of A2704-12 soybean for the same uses as any other soybean with the exception of cultivation. Therefore, in accordance with the provisions of Articles 5(5) and 17(5) of Regulation (EC) No 1829/2003, it includes the data and information required by Annexes III and IV to Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC<sup>(2)</sup> and information and conclusions about the risk assessment carried out in accordance with the principles set out in Annex II to Directive 2001/18/EC.
- (3) On 10 August 2007, the European Food Safety Authority (EFSA) gave a favourable opinion in

accordance with Articles 6 and 18 of Regulation (EC) No 1829/2003 and concluded that it is unlikely that the placing on the market of the products containing, consisting of, or produced from A2704-12 soybean as described in the application ('the products') will have any adverse effects on human or animal health or the environment in the context of their intended uses<sup>(3)</sup>. In its opinion, EFSA considered all the specific questions and concerns raised by the Member States in the context of the consultation of the national competent authorities as provided for by Articles 6(4) and 18(4) of that Regulation.

- (4) In particular, EFSA concluded that after considering all the data available in the application on the molecular characterisation, compositional analysis and agronomic performance, A2704-12 soybean is equivalent to its non-genetically modified counterpart and, as a consequence, that no further animal safety studies with the whole food/feed (e.g. a 90-day toxicity study in rats) are needed.
- (5) In its opinion, EFSA also concluded that the environmental monitoring plan, consisting of a general surveillance plan, submitted by the applicant is in line with the intended use of the products.
- (6) Taking into account those considerations, authorisation should be granted for the products.
- (7) A unique identifier should be assigned to each genetically modified organism (GMO) as provided for in Commission Regulation (EC) No 65/2004 of 14 January 2004 establishing a system for the development and assignment of unique identifiers for genetically modified organisms<sup>(4)</sup>.

<sup>(1)</sup> OJ L 268, 18.10.2003, p 1.

<sup>(2)</sup> OJ L 106, 17.4.2001, p. 1.

<sup>(3)</sup> [http://www.efsa.europa.eu/EFSA/efsa\\_locale-1178620753816\\_1178620785771.htm](http://www.efsa.europa.eu/EFSA/efsa_locale-1178620753816_1178620785771.htm)

<sup>(4)</sup> OJ L 10, 16.1.2004, p. 5.

- (8) On the basis of the EFSA opinion, no specific labelling requirements other than those provided for in Articles 13(1) and 25(2) of Regulation (EC) No 1829/2003, appear to be necessary for the foods, food ingredients and feed containing, consisting of, or produced from A2704-12 soybean. However, in order to ensure the use of the products within the limits of the authorisation provided by this Decision, the labelling of feed containing or consisting of the GMO and other products than food and feed containing or consisting of the GMO for which authorisation is requested should be complemented by a clear indication that the products in question must not be used for cultivation.
- (9) Similarly, the EFSA opinion does not justify the imposition of specific conditions or restrictions for the placing on the market and/or specific conditions or restrictions for the use and handling, including post-market monitoring requirements, or of specific conditions for the protection of particular ecosystems/environment and/or geographical areas, as provided for in point (e) of Articles 6(5) and 18(5) of Regulation (EC) No 1829/2003.
- (10) All relevant information on the authorisation of the products should be entered in the Community register of genetically modified food and feed, as provided for in Regulation (EC) No 1829/2003.
- (11) Article 4(6) of Regulation (EC) No 1830/2003 of the European Parliament and of the Council of 22 September 2003 concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms and amending Directive 2001/18/EC <sup>(1)</sup>, lays down labelling requirements for products consisting or containing GMOs.
- (12) This decision is to be notified through the Biosafety Clearing House to the Parties to the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, pursuant to Articles 9(1) and 15(2)(c), of Regulation (EC) No 1946/2003 of the European Parliament and of the Council of 15 July 2003 on transboundary movements of genetically modified organisms <sup>(2)</sup>.
- (13) The Standing Committee on the Food Chain and Animal Health has not delivered an opinion within the time limit laid down by its Chairman; the Commission has therefore submitted a proposal to the Council on 28 April 2008 in accordance with Article 5 of the Council Decision 1999/468/EC <sup>(3)</sup>, the Council being required to act within three months.
- (14) However, the Council has not acted within the required time limit; a Decision should now be adopted by the Commission,

HAS ADOPTED THIS DECISION:

#### Article 1

##### Genetically modified organism and unique identifier

Genetically modified soybean (*Glycine max*) A2704-12, as specified in point (b) of the Annex to this Decision, is assigned the unique identifier ACS-GMØØ5-3, as provided for in Regulation (EC) No 65/2004.

#### Article 2

##### Authorisation

The following products are authorised for the purposes of Articles 4(2) and 16(2) of Regulation (EC) No 1829/2003 in accordance with the conditions set out in this Decision:

- (a) foods and food ingredients containing, consisting of, or produced from ACS-GMØØ5-3 soybean;
- (b) feed containing, consisting of, or produced from ACS-GMØØ5-3 soybean;
- (c) products other than food and feed containing or consisting of ACS-GMØØ5-3 soybean for the same uses as any other soybean with the exception of cultivation.

#### Article 3

##### Labelling

1. For the purposes of the labelling requirements laid down in Articles 13(1) and 25(2) of Regulation (EC) No 1829/2003 and in Article 4(6) of Regulation (EC) No 1830/2003, the 'name of the organism' shall be 'soybean'.

2. The words 'not for cultivation' shall appear on the label of and in documents accompanying products containing or consisting of ACS-GMØØ5-3 soybean referred to in Article 2(b) and (c).

#### Article 4

##### Monitoring for environmental effects

1. The authorisation holder shall ensure that the monitoring plan for environmental effects, as set out in the point (h) of the Annex, is put in place and implemented.

<sup>(1)</sup> OJ L 268, 18.10.2003, p. 24.

<sup>(2)</sup> OJ L 287, 5.11.2003, p. 1.

<sup>(3)</sup> OJ L 184, 17.7.1999, p. 23.

2. The authorisation holder shall submit to the Commission annual reports on the implementation and the results of the activities set out in the monitoring activities.

*Article 5*

**Community register**

The information set out in the Annex to this Decision shall be entered in the Community register of genetically modified food and feed, as provided for in Article 28 of Regulation (EC) No 1829/2003.

*Article 6*

**Authorisation holder**

The authorisation holder shall be Bayer CropScience AG.

*Article 7*

**Validity**

This Decision shall apply for a period of 10 years from the date of its notification.

*Article 8*

**Addressee**

This Decision is addressed to Bayer CropScience AG, Alfred-Nobel-Straße 50, D-40789 Monheim am Rhein, Germany.

Done at Brussels, 8 September 2008.

*For the Commission*

Androulla VASSILIOU

*Member of the Commission*

## ANNEX

**(a) Applicant and authorisation holder:**

Name: Bayer CropScience AG.

Address: Alfred-Nobel-Strasse 50, D-40789 Monheim am Rhein, Germany.

**(b) Designation and specification of the products:**

1. Foods and food ingredients containing, consisting of, or produced from ACS-GMØØ5-3 soybean.
2. Feed containing, consisting of, or produced from ACS-GMØØ5-3 soybean.
3. Products other than food and feed containing or consisting of ACS-GMØØ5-3 soybean for the same uses as any other soybean with the exception of cultivation.

The genetically modified ACS-GMØØ5-3 soybean, as described in the application, expresses the PAT protein which confers tolerance to the glufosinate-ammonium herbicide.

**(c) Labelling:**

1. For the purposes of the specific labelling requirements laid down in Articles 13(1) and 25(2) of Regulation (EC) No 1829/2003, and in Article 4(6) of Regulation (EC) No 1830/2003, the 'name of the organism' shall be 'soybean'.
2. The words 'not for cultivation' shall appear on the label of and in documents accompanying products containing or consisting of ACS-GMØØ5-3 soybean referred to in Article 2(b) and (c) of this Decision.

**(d) Method for detection:**

- event specific real-time PCR-based method for the quantification of ACS-GMØØ5-3 soybean,
- validated on seeds by the Community reference laboratory established under Regulation (EC) No 1829/2003, published at <http://gmo-crl.jrc.it/statusofdoss.htm>
- reference material: AOCs 0707-A, AOCs 0707-B and AOCs 0707-C accessible via the American Oil Chemists Society at [http://www.aocs.org/tech/crm/bayer\\_soy.cfm](http://www.aocs.org/tech/crm/bayer_soy.cfm)

**(e) Unique identifier:**

ACS-GMØØ5-3.

**(f) Information required under Annex II to the Cartagena Protocol on Biosafety to the Convention on Biological Diversity:**

Biosafety Clearing House, Record ID: see [to be completed when notified].

**(g) Conditions or restrictions on the placing on the market, use or handling of the products:**

Not required.

**(h) Monitoring plan:**

Monitoring plan for environmental effects conforming with Annex VII to Directive 2001/18/EC.

[Link: *plan published on the Internet*]

**(i) Post-market monitoring requirements for the use of the food for human consumption:**

Not required.

Note: Links to relevant documents may need to be modified over time. Those modifications will be made available to the public via the updating of the Community register of genetically modified food and feed.

---

## III

*(Acts adopted under the EU Treaty)*

## ACTS ADOPTED UNDER TITLE V OF THE EU TREATY

## POLITICAL AND SECURITY COMMITTEE DECISION CHAD/4/2008

of 2 September 2008

**amending Political and Security Committee Decision CHAD/1/2008 on the acceptance of third States' contributions to the European Union military operation in the Republic of Chad and in the Central African Republic and Political and Security Committee Decision CHAD/2/2008 on the setting up of the Committee of Contributors for the European Union military operation in the Republic of Chad and in the Central African Republic**

(2008/731/CFSP)

THE POLITICAL AND SECURITY COMMITTEE,

actions of the European Union which have defence implications,

Having regard to the Treaty on European Union, and in particular the third paragraph of Article 25 thereof,

HAS DECIDED AS FOLLOWS:

Having regard to Council Joint Action 2007/677/CFSP of 15 October 2007 on the European Union military operation in the Republic of Chad and in the Central African Republic <sup>(1)</sup> (Operation EUFOR Tchad/RCA), and in particular Article 10(2) thereof,

*Article 1*

Article 1 of Political and Security Committee Decision CHAD/1/2008 shall be replaced by the following:

Having regard to Political and Security Committee Decision CHAD/1/2008 of 13 February 2008 on the acceptance of third States' contributions to the European Union military operation in Chad and in the Central African Republic <sup>(2)</sup>, and to Political and Security Committee Decision CHAD/2/2008 of 18 March 2008 on the setting-up of the Committee of Contributors for the European Union military operation in the Republic of Chad and in the Central African Republic <sup>(3)</sup>,

*'Article 1***Third States' contributions**

Following the Force Generation Conferences and further consultations, the contributions from the Republic of Albania, the Russian Federation and the Republic of Croatia shall be accepted for the EU military operation in the Republic of Chad and in the Central African Republic.'

Whereas:

*Article 2*

The Annex to Political and Security Committee Decision CHAD/2/2008 shall be replaced by the following:

(1) Following the recommendations on the contribution from the Republic of Croatia by the EU Operation Commander and the European Union Military Committee, the contribution from the Republic of Croatia should be accepted.

'ANNEX

(2) In accordance with Article 6 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not participate in the elaboration and implementation of decisions and

**LIST OF THIRD STATES REFERRED TO IN ARTICLE 2(1)**

— the Republic of Albania

— the Russian Federation

— the Republic of Croatia'.

<sup>(1)</sup> OJ L 279, 23.10.2007, p. 21.<sup>(2)</sup> OJ L 56, 29.2.2008, p. 64.<sup>(3)</sup> OJ L 107, 17.4.2008, p. 60.



*Article 3*

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

Done at Brussels, 2 September 2008.

*For the Political and Security Committee*

*The Chairperson*

C. ROGER

---

**COUNCIL DECISION 2008/732/CFSP****of 15 September 2008****implementing Common Position 2004/293/CFSP renewing measures in support of the effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY)**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to Common Position 2004/293/CFSP <sup>(1)</sup>, and in particular Article 2 thereof, in conjunction with Article 23(2) of the Treaty on European Union,

Whereas:

- (1) By Common Position 2004/293/CFSP the Council adopted measures to prevent the entry into, or transit through, the territories of Member States of persons who are engaged in activities which help individuals indicted by the International Criminal Tribunal for the former Yugoslavia (ICTY) to continue to evade justice, or who are otherwise acting in a manner which could obstruct the ICTY's effective implementation of its mandate.
- (2) Following the transfer of Radovan KARADZIC to the custody of the ICTY on 30 July 2008, certain persons connected with Mr KARADZIC should be removed from the list in the Annex to Common Position 2004/293/CFSP.
- (3) The list contained in the Annex to Common Position 2004/293/CFSP should be amended accordingly,

HAS DECIDED AS FOLLOWS:

*Article 1*

The list of persons set out in the Annex to Common Position 2004/293/CFSP shall be replaced by the list set out in the Annex to this Decision.

*Article 2*

This Decision shall take effect on the date of its adoption.

*Article 3*

This Decision shall be published in the *Official Journal of the European Union*.

Done at Brussels, 15 September 2008.

*For the Council*  
*The President*  
B. KOUCHNER

---

<sup>(1)</sup> OJ L 94, 31.3.2004, p. 65.

## ANNEX

1. BILBIJA, Milorad  
Son of Svetko BILBIJA  
Date of birth/Place of birth: 13.8.1956, Sanski Most, Bosnia and Herzegovina  
Passport No: 3715730  
ID Card No: 03GCD9986  
Personal ID No: 1308956163305  
Aliases:  
Address: Brace Pantica 7, Banja Luka, Bosnia and Herzegovina
2. BJELICA, Milovan  
Date of birth/Place of birth: 19.10.1958, Rogatica, Bosnia and Herzegovina  
Passport No: 0000148, issued on 26.7.1998 in Srpsko Sarajevo (annulled)  
ID Card No: 03ETA0150  
Personal ID No: 1910958130007  
Aliases: Cicko  
Address: CENTREK Company in Pale, Bosnia and Herzegovina
3. ECIM (EĆIM), Ljuban  
Date of birth/Place of birth: 6.1.1964, Sviljanac, Bosnia and Herzegovina  
Passport No: 0144290, issued on 21.11.1998 in Banja Luka (annulled)  
ID Card No: 03GCE3530  
Personal ID No: 0601964100083  
Aliases:  
Address: Ulica Stevana Mokranjca 26, Banja Luka, Bosnia and Herzegovina
4. HADZIC (HADŽIĆ), Goranka  
Daughter of Branko and Milena HADZIC (HADŽIĆ)  
Date of birth/Place of birth: 18.6.1962, Vinkovci Municipality, Croatia  
Passport No:  
ID Card No: 1806962308218 (JMBG), ID Card No 569934/03  
Aliases:  
Address: Aranž Janosa Street 9, Novi Sad, Serbia  
Relationship to person indicted for war crimes (PIFWC): sister of Goran HADZIC (HADŽIĆ)
5. HADZIC (HADŽIĆ), Ivana  
Daughter of Goran and Živka HADZIC (HADŽIĆ)  
Date of birth/Place of birth: 25.2.1983, Vukovar, Croatia  
Passport No:  
ID Card No:  
Aliases:  
Address: Aranž Janosa Street 9, Novi Sad, Serbia  
Relationship to PIFWC: daughter of Goran HADZIC (HADŽIĆ)
6. HADZIC (HADŽIĆ), Srećko (Srećko)  
Son of Goran and Živka HADZIC (HADŽIĆ)  
Date of birth/Place of birth: 8.10.1987, Vukovar, Croatia  
Passport No:  
ID Card No:  
Aliases:  
Address: Aranž Janosa Street 9, Novi Sad, Serbia  
Relationship to PIFWC: son of Goran HADZIC (HADŽIĆ)

7. HADZIC (HADŽIĆ), Zivka (Živka)  
Daughter of Branislav NUDIC (NUDIĆ)  
Date of birth/Place of birth: 9.6.1957, Vinkovci, Croatia  
Passport No:  
ID Card No:  
Aliases:  
Address: Aranž Janosa Street 9, Novi Sad, Serbia  
Relationship to PIFWC: spouse of Goran HADZIC (HADŽIĆ)
8. JOVICIC (JOVIČIĆ), Predrag  
Son of Desmir JOVICIC (JOVIČIĆ)  
Date of birth/Place of birth: 1.3.1963, Pale, Bosnia and Herzegovina  
Passport No: 4363551  
ID Card No: 03DYA0852  
Personal ID No: 0103963173133  
Aliases:  
Address: Milana Simovica 23, Pale, Bosnia and Herzegovina
9. KESEROVIC (KESEROVIĆ), Dragomir  
Son of Slavko  
Date of birth/Place of birth: 8.6.1957, Piskavica/Banja Luka, Bosnia and Herzegovina  
Passport No: 4191306  
ID Card No: 04GCH5156  
Personal ID No: 0806957100028  
Aliases:  
Address:
10. KIJAC, Dragan  
Date of birth/Place of birth: 6.10.1955, Sarajevo, Bosnia and Herzegovina  
Passport No:  
ID Card No:  
Personal ID No:  
Aliases:  
Address:
11. KOJIC (KOJIĆ), Radomir  
Son of Milanko and Zlatana  
Date of birth/Place of birth: 23.11.1950, Bijela Voda, Sokolac, Bosnia and Herzegovina  
Passport No: 4742002, issued in 2002 in Sarajevo (expired in 2007)  
ID Card No: 03DYA1935, issued on 7.7.2003 in Sarajevo  
Personal ID No: 2311950173133  
Aliases: Mineur or Ratko  
Address: 115 Trifka Grabeza, Pale, or Hotel KRISTAL, Jahorina, Bosnia and Herzegovina
12. KOVAC (KOVAČ), Tomislav  
Son of Vaso  
Date of birth/Place of birth: 4.12.1959, Sarajevo, Bosnia and Herzegovina  
Passport No:  
ID Card No:  
Personal ID No: 0412959171315  
Aliases: Tomo  
Address: Bijela, Montenegro; and Pale, Bosnia and Herzegovina

13. KUJUNDZIC (KUJUNDŽIĆ), Predrag  
Son of Vasilija  
Date of birth/Place of birth: 30.1.1961, Suho Pole, Doboj, Bosnia and Herzegovina  
Passport No:  
ID Card No: 03GFB1318  
Personal ID No: 3001961120044  
Aliases: Predo  
Address: Doboj, Bosnia and Herzegovina
14. LUKOVIC (LUKOVIĆ), Milorad Ulemek  
Date of birth/Place of birth: 15.5.1968, Belgrade, Serbia  
Passport No:  
ID Card No:  
Personal ID No:  
Aliases: Legija (forged ID as IVANIC, Zeljko (IVANIĆ, Željko))  
Address: incarcerated (Belgrade District Prison, Bacvanska 14, Belgrade)
15. MALIS (MALIŠ), Milomir  
Son of Dejan MALIS (MALIŠ)  
Date of birth/Place of birth: 3.8.1966, Bjelice  
Passport No:  
ID Card No:  
Personal ID No: 0308966131572  
Aliases:  
Address: Vojvode Putnika, Foca, Bosnia and Herzegovina
16. MANDIC (MANDIĆ), Momcilo (Momčilo)  
Date of birth/Place of birth: 1.5.1954, Kalinovik, Bosnia and Herzegovina  
Passport No: 0121391, issued on 12.5.1999 in Srpsko Sarajevo, Bosnia and Herzegovina (annulled)  
ID Card No:  
Personal ID No: 0105954171511  
Aliases: Momo  
Address: incarcerated
17. MARIC (MARIĆ), Milorad  
Son of Vinko MARIC (MARIĆ)  
Date of birth/Place of birth: 9.9.1957, Visoko, Bosnia and Herzegovina  
Passport No: 4587936  
ID Card No: 04GKB5268  
Personal ID No: 0909957171778  
Aliases:  
Address: Vuka Karadzica 148, Zvornik, Bosnia and Herzegovina
18. MICEVIC (MIČEVIĆ), Jelenko  
Son of Luka and Desanka, maiden name: SIMIC (SIMIĆ)  
Date of birth/Place of birth: 8.8.1947, Borci near Konjic, Bosnia and Herzegovina  
Passport No: 4166874  
ID Card No: 03BIA3452  
Personal ID No: 0808947710266  
Aliases: Filaret  
Address: Milesevo monastery, Serbia

19. MLADIC (MLADIĆ), Biljana (maiden name: STOJCEVSKA (STOJČEVSKA))  
Daughter of Strahilo STOJCEVSKI (STOJČEVSKI) and Svetlinka STOJCEVSKA (STOJČEVSKA)  
Date of birth/Place of birth: 30.5.1972, Skopje, former Yugoslav Republic of Macedonia  
Passport No:  
ID Card No: 3005972455086 (JMBG)  
Aliases:  
Address: registered at Blagoja Parovica 117a, Belgrade, but resides at Vidikovacki venac 83, Belgrade, Serbia  
Relationship to PIFWC: daughter-in-law of Ratko MLADIC (MLADIĆ)
20. MLADIC (MLADIĆ), Bosiljka (maiden name: JEGDIC (JEGDIĆ))  
Daughter of Petar JEGDIC (JEGDIĆ)  
Date of birth/Place of birth: 20.7.1947, Okrugljaca, Virovitica Municipality, Croatia  
ID Card No: 2007947455100 (JMBG)  
Personal ID Card: T77619, issued on 31.5.1992 by SUP Belgrade  
Address: Blagoja Parovica 117a, Belgrade, Serbia  
Relationship to PIFWC: wife of Ratko MLADIC (MLADIĆ)
21. MLADIC (MLADIĆ), Darko  
Son of Ratko and Bosiljka MLADIC (MLADIĆ)  
Date of birth/Place of birth: 19.8.1969, Skopje, former Yugoslav Republic of Macedonia  
Passport No: SCG passport No 003220335, issued on 26.2.2002  
ID Card No: 1908969450106 (JMBG); personal identity card B112059, issued on 8.4.1994 by SUP Belgrade  
Aliases:  
Address: Vidikovacki venac 83, Belgrade, Serbia  
Relationship to PIFWC: son of Ratko MLADIC (MLADIĆ)
22. NINKOVIC (NINKOVIĆ), Milan  
Son of Simo  
Date of birth/Place of birth: 15.6.1943, Doboje, Bosnia and Herzegovina  
Passport No: 3944452  
ID Card No: 04GFE3783  
Personal ID No: 1506943120018  
Aliases:  
Address:
23. OSTOJIC (OSTOJIĆ), Velibor  
Son of Jozo  
Date of birth/Place of birth: 8.8.1945, Celebici, Foca, Bosnia and Herzegovina  
Passport No:  
ID Card No:  
Personal ID No:  
Aliases:  
Address:
24. OSTOJIC (OSTOJIĆ), Zoran  
Son of Mico OSTOJIC (OSTOJIĆ)  
Date of birth/Place of birth: 29.3.1961, Sarajevo, Bosnia and Herzegovina  
Passport No:  
ID Card No: 04BSF6085  
Personal ID No: 2903961172656  
Aliases:  
Address: Malta 25, Sarajevo, Bosnia and Herzegovina

25. PAVLOVIC (PAVLOVIĆ), Petko  
Son of Milovan PAVLOVIC (PAVLOVIĆ)  
Date of birth/Place of birth: 6.6.1957, Ratkovici, Bosnia and Herzegovina  
Passport No: 4588517  
ID Card No: 03GKA9274  
Personal ID No: 0606957183137  
Aliases:  
Address: Vuka Karadjica 148, Zvornik, Bosnia and Herzegovina
26. POPOVIC (POPOVIĆ), Cedomir (Čedomir)  
Son of Radomir POPOVIC (POPOVIĆ)  
Date of birth/Place of birth: 24.3.1950, Petrovici  
Passport No:  
ID Card No: 04FAA3580  
Personal ID No: 2403950151018  
Aliases:  
Address: Crnogorska 36, Bileca, Bosnia and Herzegovina
27. PUHALO, Branislav  
Son of Djuro  
Date of birth/Place of birth: 30.8.1963, Foca, Bosnia and Herzegovina  
Passport No:  
ID Card No:  
Personal ID No: 3008963171929  
Aliases:  
Address:
28. RADOVIC (RADOVIĆ), Nade  
Son of Milorad RADOVIC (RADOVIĆ)  
Date of birth/Place of birth: 26.1.1951, Foca, Bosnia and Herzegovina  
Passport No: old 0123256 (annulled)  
ID Card No: 03GJA2918  
Personal ID No: 2601951131548  
Aliases:  
Address: Stepe Stepanovica 12, Foca/Srbinje, Bosnia and Herzegovina
29. RATIC (RATIĆ), Branko  
Date of birth/Place of birth: 26.11.1957, MIHALJEVCI SLAVONSKA POZEGA, Bosnia and Herzegovina  
Passport No: 0442022, issued on 17.9.1999 in Banja Luka  
ID Card No: 03GCA8959  
Personal ID No: 2611957173132  
Aliases:  
Address: Ulica Krfska 42, Banja Luka, Bosnia and Herzegovina
30. ROGULJIC (ROGULJIĆ), Slavko  
Date of birth/Place of birth: 15.5.1952, SRPSKA CRNJA HETIN, Serbia  
Non-valid passports No 3747158, issued on 12.4.2002 in Banja Luka, expired on 12.4.2007, and No 0020222, issued on 25.8.1988 in Banja Luka, expired on 25.8.2003  
ID Card No: 04EFA1053  
Personal ID No: 1505952103022  
Aliases:  
Address: 21 Vojvode Misica, Laktasi, Bosnia and Herzegovina

31. SAROVIC (ŠAROVIĆ), Mirko  
Date of birth/Place of birth: 16.9.1956, Rusanovici-Rogatica, Bosnia and Herzegovina  
Passport No: 4363471, issued at Istocno Sarajevo, with expiry date 8.10.2008  
ID Card No: 04PEA4585  
Personal ID No: 1609956172657  
Aliases:  
Address: Bjelopoljska 42, 71216 Srpsko Sarajevo, Bosnia and Herzegovina
32. SKOCAJIC (SKOČAJIĆ), Mrksa (Mrkša)  
Son of Dejan SKOCAJIC (SKOČAJIĆ)  
Date of birth/Place of birth: 5.8.1953, Blagaj, Bosnia and Herzegovina  
Passport No: 3681597  
ID Card No: 04GDB9950  
Personal ID No: 0508953150038  
Aliases:  
Address: Trebinjskih Brigade, Trebinje, Bosnia and Herzegovina
33. VRACAR (VRAČAR), Milenko  
Date of birth/Place of birth: 15.5.1956, Nisavici, Prijedor, Bosnia and Herzegovina  
Non-valid passports No 3865548, issued on 29.8.2002 in Banja Luka, expired on 29.8.2007, and No 0280280, issued on 4.12.1999 in Banja Luka, expired on 4.12.2004, and No 0062130, issued on 16.9.1998 in Banja Luka, Bosnia and Herzegovina  
ID Card No: 03GCE6934  
Personal ID No: 1505956160012  
Aliases:  
Address: 14 Save Ljuboje, Banja Luka, Bosnia and Herzegovina
34. ZOGOVIĆ (ZOGOVIĆ), Milan  
Son of Jovan  
Date of birth/Place of birth: 7.10.1939, Dobrusa  
Passport No:  
ID Card No:  
Personal ID No:  
Aliases:  
Address:
-



**COUNCIL DECISION 2008/733/CFSP**

**of 15 September 2008**

**implementing Common Position 2004/694/CFSP on further measures in support of the effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY)**

THE COUNCIL OF THE EUROPEAN UNION,

HAS DECIDED AS FOLLOWS:

Having regard to Common Position 2004/694/CFSP<sup>(1)</sup>, and in particular Article 2 thereof, in conjunction with the second indent of Article 23(2) of the Treaty on European Union,

*Article 1*

The Annex to Common Position 2004/694/CFSP shall be replaced by the Annex to this Decision.

Whereas:

*Article 2*

This Decision shall take effect on the date of its adoption.

(1) Under Common Position 2004/694/CFSP, the Council adopted measures to freeze all funds and economic resources belonging to the natural persons listed in the Annex thereto, who had been indicted by the ICTY.

*Article 3*

This Decision shall be published in the *Official Journal of the European Union*.

(2) Following the transfer of Mr Radovan KARADZIC to the custody of the ICTY on 30 July 2008, his name should be removed from the list.

Done at Brussels, 15 September 2008.

(3) The list annexed to Common Position 2004/694/CFSP therefore needs to be adjusted accordingly,

*For the Council*

*The President*

B. KOUCHNER

<sup>(1)</sup> OJ L 315, 14.10.2004, p. 52.

ANNEX

'ANNEX

**List of persons referred to in Article 1**

	Individual	Reason
1.	Name: HADZIC Goran (male) Date of birth: 7.9.1958 Place of birth: Vinkovci, Croatia National of Serbia	Indicted by the ICTY and still at large Indictment: 4 June 2004 Case No: IT 04 75
2.	Name: MLADIC Ratko (male) Date of birth: 12.3.1948 Place of birth: Bozanovici, Kalinovik municipality, Bosnia and Herzegovina National of Bosnia and Herzegovina	Indicted by the ICTY and still at large Initial indictment: 25 July 1995; second indictment: 16 November 1995; amended indictment: 8 November 2002 Case No: IT-95-5/18'

**NOTE TO THE READER**

The institutions have decided no longer to quote in their texts the last amendment to cited acts.

Unless otherwise indicated, references to acts in the texts published here are to the version of those acts currently in force.