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DECISIONS

Commission

EN

[1] Text with EEA relevance

I

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

REGULATIONS

COMMISSION REGULATION (EC) No 917/2009

of 1 October 2009

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) [1],

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 [2], 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 2 October 2009.

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

Done at Brussels, 1 October 2009.

For the Commission

Jean-Luc DEMARTY

Director-General for Agriculture and Rural Development

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(1) OJ L 299, 16.11.2007, p. 1.

(2) 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 [1]	Standard import value
0702 00 00	MK	29,8
	ZZ	29,8
0707 00 05	TR	114,4
	ZZ	114,4
0709 90 70	TR	110,2
	ZZ	110,2
0805 50 10	AR	96,7
	CL	103,4
	TR	77,4
	UY	88,0
	ZA	75,0
	ZZ	88,1
0806 10 10	BR	195,6
	EG	159,5
	TR	92,9
	US	152,0
	ZZ	150,0
0808 10 80	CL	85,7
	NZ	67,1
	US	83,8
	ZA	74,1
	ZZ	77,7
0808 20 50	AR	82,8
	CN	62,5
	TR	99,5
	ZA	74,6
	ZZ	79,9

[1] 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 918/2009

of 1 October 2009

amending the representative prices and additional import duties for certain products in the sugar sector fixed by Regulation (EC) No 877/2009 for the 2009/2010 marketing year

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) ([1]),

Having regard to Commission Regulation (EC) No 951/2006 of 30 June 2006 laying down detailed rules for the implementation of Council Regulation (EC) No 318/2006 as regards trade with third countries in the sugar sector ([2]), and in particular Article 36(2), second subparagraph, second sentence thereof,

Whereas:

(1) The representative prices and additional duties applicable to imports of white sugar, raw sugar and certain syrups for the 2009/2010 marketing year are fixed by Commission Regulation (EC) No 877/2009 ([3]).

(2) The data currently available to the Commission indicate that those amounts should be amended in accordance with the rules and procedures laid down in Regulation (EC) No 951/2006,

HAS ADOPTED THIS REGULATION:

Article 1

The representative prices and additional duties applicable to imports of the products referred to in Article 36 of Regulation (EC) No 951/2006, as fixed by Regulation (EC) No 877/2009 for the 2009/2010, marketing year, are hereby amended as set out in the Annex hereto.

Article 2

This Regulation shall enter into force on 2 October 2009.

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

Done at Brussels, 1 October 2009.

For the Commission

Jean-Luc DEMARTY

Director-General for Agriculture and Rural Development

([1]) OJ L 299, 16.11.2007, p. 1.

([2]) OJ L 178, 1.7.2006, p. 24.

([3]) OJ L 253, 25.9.2009, p. 3.

ANNEX

Amended representative prices and additional import duties applicable to white sugar, raw sugar and products covered by CN code 1702 90 95 from 2 October 2009

(EUR)

CN code	Representative price per 100 kg net of the product concerned	Additional duty per 100 kg net of the product concerned
1701 11 10 (1)	39,12	0,00
1701 11 90 (1)	39,12	3,17
1701 12 10 (1)	39,12	0,00
1701 12 90 (1)	39,12	2,87
1701 91 00 (2)	42,17	4,82
1701 99 10 (2)	42,17	1,69
1701 99 90 (2)	42,17	1,69
1702 90 95 (3)	0,42	0,27

(1) For the standard quality defined in point III of Annex IV to Regulation (EC) No 1234/2007.
(2) For the standard quality defined in point II of Annex IV to Regulation (EC) No 1234/2007.
(3) Per 1 % sucrose content.

COMMISSION REGULATION (EC) No 919/2009

of 1 October 2009

amending Regulation (EC) No 915/2009 fixing the import duties in the cereals sector applicable from 1 October 2009

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) [1],

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 [2], and in particular Article 2(1) thereof,

Whereas:

(1) The import duties in the cereals sector applicable from 1 October 2009 were fixed by Commission Regulation (EC) No 915/2009 [3].

(2) As the average of the import duties calculated differs by more than EUR 5/tonne from that fixed, a corresponding adjustment must be made to the import duties fixed by Regulation (EC) No 915/2009.

(3) Regulation (EC) No 915/2009 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Annexes I and II to Regulation (EC) No 915/2009 are hereby replaced by the text in the Annex to this Regulation.

Article 2

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

It shall apply from 2 October 2009.

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

Done at Brussels, 1 October 2009.

For the Commission

Jean-Luc DEMARTY

Director-General for Agriculture and Rural Development

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[1] OJ L 299, 16.11.2007, p. 1.

[2] OJ L 161, 29.6.1996, p. 125.

[3] OJ L 258, 1.10.2009, p. 6.

ANNEX I

Import duties on the products referred to in Article 136(1) of Regulation (EC) No 1234/2007 applicable from 2 October 2009

CN code	Description	Import duties [1] (EUR/t)
1001 10 00	Durum wheat, high quality	17,20
	medium quality	27,20
	low quality	47,20
1001 90 91	Common wheat seed	0,00
ex 1001 90 99	High quality common wheat, other than for sowing	0,00
1002 00 00	Rye	74,12
1005 10 90	Maize seed other than hybrid	32,00
1005 90 00	Maize, other than seed [2]	32,00
1007 00 90	Grain sorghum other than hybrids for sowing	74,12

(1) 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.

(2) 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

30.9.2009

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

(EUR/t)

	Common wheat (1)	Maize	Durum wheat, high quality	Durum wheat, medium quality (2)	Durum wheat, low quality (3)	Barley
Exchange	Minnéapolis	Chicago	—	—	—	—
Quotation	137,25	88,56	—	—	—	—
Fob price USA	—	—	115,58	105,58	85,58	58,97
Gulf of Mexico premium	—	18,38	—	—	—	—
Great Lakes premium	10,11	—	—	—	—	—

(1) Premium of 14 EUR/t incorporated (Article 4(3) of Regulation (EC) No 1249/96).
(2) Discount of 10 EUR/t (Article 4(3) of Regulation (EC) No 1249/96).
(3) 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: 17,59 EUR/t

Freight costs: Great Lakes–Rotterdam: 24,24 EUR/t

DIRECTIVES

DIRECTIVE 2009/100/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 16 September 2009

on reciprocal recognition of navigability licences for inland waterway vessels

(codified version)

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 71 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee [1],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [2],

Whereas:

(1) Council Directive 76/135/EEC of 20 January 1976 on reciprocal recognition of navigability licences for inland waterway vessels [3] has been substantially amended [4]. In the interests of clarity and rationality that Directive should be codified.

(2) Reciprocal recognition of navigability licences for inland waterway vessels should be achieved with a view to improving the safety of inland navigation in the Community.

(3) It is necessary to establish under what circumstances and on what conditions Member States may interrupt the passage of a vessel.

(4) It is necessary that the measures provided for in this Directive apply to those vessels which are not covered by Directive 2006/87/EC of the European Parliament and of the Council of 12 December 2006 laying down technical requirements for inland waterway vessels [5].

(5) This Directive should be without prejudice to the obligations of the Member States relating to the time limits for transposition into national law of the Directives set out in Annex II, Part B,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

In accordance with Article 21 of Directive 2006/87/EC, this Directive shall apply to vessels used for goods transport on inland waterways and having a total dead weight of 20 metric tonnes or more:

(a) having a length of less than 20 metres; or

(b) for which the product of length (L), breadth (B) and draught (T) is less than 100 m^3.

This Directive shall not prejudice the provisions laid down in the Rhine Vessel Inspection Regulation and in the Agreement on transport of dangerous goods on the Rhine (ADNR).

Article 2

1. Member States shall, to the extent required, lay down any necessary procedures for the issue of navigability licences.

However, a Member State may exempt from this Directive vessels which do not leave the inland waterways of its territory.

[1] OJ C 204, 9.8.2008, p. 47.
[2] Opinion of the European Parliament of 17 June 2008 (not yet published in the Official Journal) and Council Decision of 13 July 2009.
[3] OJ L 21, 29.1.1976, p. 10.
[4] See Annex II, Part A.
[5] OJ L 389, 30.12.2006, p. 1.

2. Navigability licences shall be issued by the Member State in which the vessel is registered or has its home port or, failing that, by the Member State in which the owner of the vessel is domiciled. Any Member State may request another Member State to issue navigability licences for vessels operated by nationals of the former. Member States may delegate their powers to approved bodies.

3. Navigability licences shall be made out in one of the official languages of the institutions of the European Union; they shall provide at least the information and use the system of numbering specified in Annex I.

Article 3

1. Subject to paragraphs 3 to 6, each Member State shall recognise for navigation on its national waterways the navigability licences issued by another Member State in accordance with Article 2 on the same basis as if it had issued those licences itself.

2. Paragraph 1 shall apply only if the licence was issued or last extended not more than five years previously and has not expired.

A certificate issued pursuant to the Rhine Vessel Inspection Regulation shall be accepted as evidence, within the meaning of paragraphs 3 and 5, for its full duration.

3. Member States may require that the technical specifications laid down in the Rhine Vessel Inspection Regulation be complied with. They may require the certificate referred to in the second subparagraph of paragraph 2 as evidence of this.

4. Member States may require vessels carrying dangerous goods as defined in the ADNR to comply with the requirements laid down in that Agreement. As evidence of this, they may require that the authorisation provided for in that Agreement be produced.

5. Vessels which fulfil the requirements laid down in the Rhine Vessel Inspection Regulation shall be admitted to all inland waterways in the Community. Evidence of compliance with those requirements may be provided by the certificate referred to in the second subparagraph of paragraph 2.

Special conditions for the transport of dangerous goods shall be considered fulfilled in all Community waterways if the vessels meet the requirements of the ADNR. Evidence of compliance with those requirements may be provided by the authorisation referred to in paragraph 4.

6. Member States may require fulfilment in maritime shipping lanes of additional conditions equivalent to those required for their own vessels. Member States shall inform the Commission of their maritime shipping lanes, the list of which shall be drawn up by the Commission on the basis of the information supplied to it by the Member States.

Article 4

1. Any Member State may withdraw a navigability licence which it has issued.

2. Any Member State may interrupt the passage of a vessel, where the vessel is found on inspection to be in a condition which constitutes a danger to the surroundings, until the defects have been corrected. That Member State may also do so where the vessel or its equipment is found on inspection not to satisfy the requirements set out in the navigability licence or in the other documents referred to in Article 3 as the case may be.

3. A Member State which has interrupted the passage of a vessel, or which has indicated its intention to do so if the defects are not corrected, shall inform the competent authorities of the Member State where the navigability licence or the other documents referred to in Article 3 were issued of the reasons for the decision it has taken or it intends to take.

4. All decisions to interrupt the passage of a vessel taken pursuant to measures adopted in implementation of this Directive shall state in detail the reasons on which they are based. A decision shall be notified to the party concerned, who shall at the same time be informed of the remedies available to him under the laws in force in the Member States and of the time limits allowed for the pursuit of such remedies.

Article 5

Directive 76/135/EEC, as amended by the Directive set out in Annex II, Part A, is hereby repealed, without prejudice to the obligations of the Member States relating to the time limit for transposition into national law of the Directive set out in Annex II, Part B.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex III.

Article 6

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Article 7

This Directive is addressed to the Member States.

Done at Strasbourg, 16 September 2009.

For the European Parliament	*For the Council*
The President	*The President*
J. BUZEK	C. MALMSTRÖM

ANNEX I

MINIMUM INFORMATION TO APPEAR ON THE LICENCES

(referred to in Article 2(3))

The information is divided into three categories:

I. Compulsory:	no special sign
II. required if applicable:	(x)
III. useful but optional:	(+)

1. Name of the authority or approved body issuing the document

2. (a) Title of document

   (b) (+) Number of document

3. Issuing State

4. Name and domicile of the owner of the vessel

5. Name of vessel

6. (x) Place and number of registration

7. (x) Home port

8. (+) Construction type

9. (+) Utilisation

10. Main characteristics:

   (a) overall length in metres

   (b) overall breadth in metres

   (c) depth below waterline at maximum draught(s) in metres

11. (x) Dead weight(s) in metric tonnes or displacement(s) in cubic metres at maximum draught(s)

12. (x) Indication of draught marking

13. (x) Maximum authorised number of passengers

14. (x) Total power of propelling engines in HP or kW

15. Minimum freeboard(s) in centimetres

16. (a) Declaration: The vessel indicated above is certified as being suitable for navigation

    (b) (x) Subject to the following conditions

    (c) (x) Indication of navigation restrictions

17. (a) Date of expiry

    (b) Date of issue

18. Stamp and signature of the authority or approved body issuing the licence.

ANNEX II

PART A

Repealed Directive with its amending Directive

(referred to in Article 5)

Council Directive 76/135/EEC (OJ L 21, 29.1.1976, p. 10).

Council Directive 78/1016/EEC (OJ L 349, 13.12.1978, p. 31).

PART B

Time limit for transposition into national law

(referred to in Article 5)

Directive	Time limit for transposition
76/135/EEC	19 January 1977
78/1016/EEC	—

ANNEX III

Correlation table

Directive 76/135/EEC	This Directive
Article 1, introductory wording and point (a)	Article 1, first paragraph, introductory wording
Article 1, point (b)	—
—	Article 1, first paragraph, points (a) and (b)
Article 1, last sentence	Article 1, second paragraph
Articles 2 to 4	Articles 2 to 4
Article 5	—
Article 6	—
Article 7	—
—	Article 5
—	Article 6
Article 8	Article 7
Annex	Annex I
—	Annex II
—	Annex III

DIRECTIVE 2009/109/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 16 September 2009

amending Council Directives 77/91/EEC, 78/855/EEC and 82/891/EEC, and Directive 2005/56/EC as regards reporting and documentation requirements in the case of mergers and divisions

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 44(2)(g) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee [1],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [2],

Whereas:

(1) The European Council agreed, at its meeting on 8 and 9 March 2007, that administrative burdens on companies should be reduced by 25 % by the year 2012 in order to enhance the competitiveness of companies in the Community.

(2) Company law has been identified as one area imposing on companies numerous information obligations, some of which seem outdated or excessive. It is therefore appropriate to review those obligations and, where appropriate, to reduce the administrative burdens weighing on companies within the Community to the minimum needed in order to protect the interests of other stakeholders.

(3) The scope of Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent [3], and of Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54(3)(g) of the Treaty concerning mergers of public limited liability companies [4], should be adapted in order to reflect changes in Finnish company law.

(4) Company websites or other websites offer, in certain cases, an alternative to publication via the companies registers. Member States should be able to designate those other websites which companies may use free of charge for such publication, such as websites of business associations or chambers of commerce or the central electronic platform referred to in First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community [5]. Where the possibility exists of using company or other websites for publication of draft terms of merger and/or division and of other documents that have to be made available to shareholders and creditors in the process, guarantees relating to the security of the website and the authenticity of the documents should be met.

(5) The requirements concerning disclosure of draft terms of merger in cross-border mergers pursuant to Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies [6] should be similar to those applicable to domestic mergers and divisions pursuant to Directive 78/855/EEC and Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies [7].

(6) Member States should be able to provide that the extensive reporting or information requirements relating to the merger or division of companies, laid down in Article 9 and Article 11(1)(c) of Directive 78/855/EEC and in Article 7 and Article 9(1)(c) of Directive 82/891/EEC, need not be complied with if all the shareholders of the companies involved in the merger or division agree that such compliance may be dispensed with.

[1] Opinion of 25 February 2009 (not yet published in the Official Journal).
[2] Opinion of the European Parliament of 22 April 2009 (not yet published in the Official Journal) and Council Decision of 27 July 2009.

[3] OJ L 26, 31.1.1977, p. 1.
[4] OJ L 295, 20.10.1978, p. 36.
[5] OJ L 65, 14.3.1968, p. 8.
[6] OJ L 310, 25.11.2005, p. 1.
[7] OJ L 378, 31.12.1982, p. 47.

(7) Any modification of Directives 78/855/EEC and 82/891/EEC allowing such agreement by shareholders should be without prejudice to the systems of protection of the interests of creditors of the companies involved and to rules aimed at ensuring the provision of necessary information to the employees of those companies and to public authorities, such as tax authorities, controlling the merger or division in accordance with existing Community law.

(8) It is not necessary to impose the requirement to draw up an accounting statement where an issuer whose securities are admitted to trading on a regulated market publishes half-yearly financial reports in accordance with Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market [1].

(9) An independent expert's report as provided for under Directive 77/91/EEC is often not needed where an independent expert's report protecting the interests of shareholders or creditors also has to be drawn up in the context of the merger or the division. Member States should therefore have the possibility in such cases of dispensing companies from the reporting requirement under Directive 77/91/EEC or of providing that both reports may be drawn up by the same expert.

(10) Mergers between parent companies and their subsidiaries have a reduced economic impact on shareholders and creditors where the parent company's holding in the subsidiary amounts to 90 % or more of the shares and other securities conferring the right to vote. The same applies to certain divisions, in particular when companies are split into new companies that are owned by the shareholders in the proportion to their rights in the company being divided. In those cases, the reporting requirements laid down by Directives 78/855/EEC and 82/891/EEC should therefore be reduced.

(11) Since the objective of this Directive, namely to reduce administrative burdens relating in particular to publication and documentation obligations of public limited liability companies within the Community, cannot be sufficiently achieved by Member States and can therefore, by reason of its scale and effects, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

(12) Directives 77/91/EEC, 78/855/EEC, 82/891/EEC and 2005/56/EC should therefore be amended accordingly.

(13) In accordance with point 34 of the Interinstitutional Agreement on better lawmaking [2], Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 77/91/EEC

Directive 77/91/EEC is hereby amended as follows:

1. in Article 1(1), the fourteenth indent is replaced by the following:

   '— in Finland: julkinen osakeyhtiö/publikt aktiebolag';

2. in Article 10, the following paragraph is added:

   '5. Member States may decide not to apply this Article to the formation of a new company by way of merger or division where an independent expert's report on the draft terms of merger or division is drawn up.

   Where Member States decide to apply this Article in the cases referred to in the first subparagraph, they may provide that the report under this Article and the independent expert's report on the draft terms of merger or division may be drawn up by the same expert or experts.';

3. Article 27(3) is replaced by the following:

   '3. Member States may decide not to apply paragraph 2 in the event of an increase in subscribed capital made in order to give effect to a merger, a division or a public offer for the purchase or exchange of shares and to pay the shareholders of the company which is being absorbed or divided or which is the object of the public offer for the purchase or exchange of shares.

(1) OJ L 390, 31.12.2004, p. 38.

(2) OJ C 321, 31.12.2003, p. 1.

In the case of a merger or a division, however, Member States shall apply the first subparagraph only where an independent expert's report on the draft terms of merger or division is drawn up.

Where Member States decide to apply paragraph 2 in the case of a merger or a division, they may provide that the report under this Article and the independent expert's report on the draft terms of merger or division may be drawn up by the same expert or experts.'.

Article 2

Amendments to Directive 78/855/EEC

Directive 78/855/EEC is hereby amended as follows:

1. in Article 1(1), the fourteenth indent is replaced by the following:

   '— Finland: julkinen osakeyhtiö/publikt aktiebolag';

2. in Article 6, the following paragraphs are added:

   'Any of the merging companies shall be exempt from the publication requirement laid down in Article 3 of Directive 68/151/EEC if, for a continuous period beginning at least one month before the day fixed for the general meeting which is to decide on the draft terms of merger and ending not earlier than the conclusion of that meeting, it makes the draft terms of such merger available on its website free of charge for the public. Member States shall not subject that exemption to any requirements or constraints other than those which are necessary in order to ensure the security of the website and the authenticity of the documents, and may impose such requirements or constraints only to the extent that they are proportionate in order to achieve those objectives.

   By way of derogation from the second paragraph, Member States may require that publication be effected via the central electronic platform referred to in Article 3(4) of Directive 68/151/EEC. Member States may alternatively require that such publication be made on any other website designated by them for that purpose. Where Member States avail themselves of one of those possibilities, they shall ensure that companies are not charged a specific fee for such publication.

   Where a website other than the central electronic platform is used, a reference giving access to that website shall be published on the central electronic platform at least one month before the day fixed for the general meeting. That reference shall include the date of publication of the draft terms of merger on the website and shall be accessible to the public free of charge. Companies shall not be charged a specific fee for such publication.

   The prohibition precluding the charging to companies of a specific fee for publication, laid down in the third and fourth paragraphs, shall not affect the ability of Member States to pass on to companies the costs in respect of the central electronic platform.

   Member States may require companies to maintain the information for a specific period after the general meeting on their website or, where applicable, on the central electronic platform or the other website designated by the Member State concerned. Member States may determine the consequences of temporary disruption of access to the website or to the central electronic platform, caused by technical or other factors.';

3. in Article 8, the following paragraph is added:

   'For the purposes of point (b) of the first paragraph, Article 11(2), (3) and (4) shall apply.';

4. Article 9 is replaced by the following:

   '*Article 9*

   1. The administrative or management bodies of each of the merging companies shall draw up a detailed written report explaining the draft terms of merger and setting out the legal and economic grounds for them, in particular the share exchange ratio.

   That report shall also describe any special valuation difficulties which have arisen.

   2. The administrative or management bodies of each of the companies involved shall inform the general meeting of their company and the administrative or management bodies of the other companies involved so that the latter may inform their respective general meetings of any material change in the assets and liabilities between the date of preparation of the draft terms of merger and the date of the general meetings which are to decide on the draft terms of merger.

   3. Member States may provide that the report referred to in paragraph 1 and/or the information referred to in paragraph 2 shall not be required if all the shareholders and the holders of other securities conferring the right to vote of each of the companies involved in the merger have so agreed.';

5. Article 11 is amended as follows:

(a) paragraph 1 is amended as follows:

(i) points (c) and (d) are replaced by the following:

‘(c) where applicable, an accounting statement drawn up as at a date which must not be earlier than the first day of the third month preceding the date of the draft terms of merger, if the latest annual accounts relate to a financial year which ended more than six months before that date;

(d) where applicable, the reports of the administrative or management bodies of the merging companies provided for in Article 9;’;

(ii) the following subparagraph is added:

‘For the purposes of point (c) of the first subparagraph, an accounting statement shall not be required if the company publishes a half-yearly financial report in accordance with Article 5 of Directive 2004/109/EC and makes it available to shareholders in accordance with this paragraph. Furthermore, Member States may provide that an accounting statement shall not be required if all the shareholders and the holders of other securities conferring the right to vote of each of the companies involved in the merger have so agreed.’;

(b) in paragraph 3, the following subparagraph is added:

‘Where a shareholder has consented to the use by the company of electronic means for conveying information, such copies may be provided by electronic mail.’;

(c) the following paragraph is added:

‘4. A company shall be exempt from the requirement to make the documents referred to in paragraph 1 available at its registered office if, for a continuous period beginning at least one month before the day fixed for the general meeting which is to decide on the draft terms of merger and ending not earlier than the conclusion of that meeting, it makes them available on its website. Member States shall not subject that exemption to any requirements or constraints other than those which are necessary in order to ensure the security of the website and the authenticity of the documents and may impose such requirements or constraints only to the extent that they are proportionate in order to achieve those objectives.

Paragraph 3 shall not apply if the website gives shareholders the possibility, throughout the period referred to in the first subparagraph of this paragraph, of downloading and printing the documents referred to in paragraph 1. However, in that case Member States may provide that the company is to make those documents available at its registered office for consultation by the shareholders.

Member States may require companies to maintain the information on their website for a specific period after the general meeting. Member States may determine the consequences of temporary disruption of access to the website caused by technical or other factors.’;

6. in Article 13, paragraph 2 is replaced by the following:

‘2. To that end, the laws of the Member States shall at least provide that such creditors shall be entitled to obtain adequate safeguards where the financial situation of the merging companies makes such protection necessary and where those creditors do not already have such safeguards.

Member States shall lay down the conditions for the protection provided for in paragraph 1 and in the first subparagraph of this paragraph. In any event, Member States shall ensure that the creditors are authorised to apply to the appropriate administrative or judicial authority for adequate safeguards provided that they can credibly demonstrate that due to the merger the satisfaction of their claims is at stake and that no adequate safeguards have been obtained from the company.’;

7. in Article 23, paragraph 4 is deleted;

8. Article 24 is amended as follows:

(a) the second sentence is replaced by the following:

‘Such operations shall be regulated by the provisions of Chapter II.’;

(b) the following sentence is added:

'However, Member States shall not impose the requirements set out in points (b), (c) and (d) of Article 5(2), Articles 9 and 10, Article 11(1)(d) and (e), Article 19(1)(b) and Articles 20 and 21.';

9. Article 25 is amended as follows:

(a) the introductory wording is replaced by the following:

'Member States shall not apply Article 7 to the operations referred to in Article 24 if the following conditions are fulfilled:';

(b) in point (b), the second sentence is deleted;

(c) the following paragraph is added:

'For the purposes of point (b) of the first paragraph, Article 11(2), (3) and (4) shall apply.';

10. Article 27 is amended as follows:

(a) the introductory wording is replaced by the following:

'Where a merger by acquisition is carried out by a company which holds 90 % or more, but not all, of the shares and other securities conferring the right to vote at general meetings of the company or companies being acquired, Member States shall not require approval of the merger by the general meeting of the acquiring company if the following conditions are fulfilled:';

(b) point (b) is replaced by the following:

'(b) at least one month before the date specified in point (a), all shareholders of the acquiring company must be entitled to inspect the documents specified in points (a), (b) and, where applicable, (c), (d) and (e) of Article 11(1) at the company's registered office;';

(c) the following paragraph is added:

'For the purposes of point (b) of the first paragraph, Article 11(2), (3) and (4) shall apply.';

11. Article 28 is amended as follows:

(a) the introductory wording is replaced by the following:

'Member States shall not impose the requirements set out in Articles 9, 10 and 11 in the case of a merger within the meaning of Article 27 if the following conditions are fulfilled:';

(b) in point (c), the following words are added:

'or by an administrative authority designated by the Member State for that purpose.';

(c) the following paragraph is added:

'A Member State need not apply the first paragraph if the laws of that Member State entitle the acquiring company, without a previous public takeover offer, to require all the holders of the remaining securities of the company or companies to be acquired to sell those securities to it prior to the merger at a fair price.'.

Article 3

Amendments to Directive 82/891/EEC

Directive 82/891/EEC is hereby amended as follows:

1. in Article 4, the following paragraphs are added:

'Any of the companies involved in the division shall be exempt from the publication requirement laid down in Article 3 of Directive 68/151/EEC if, for a continuous period beginning at least one month before the day fixed for the general meeting which is to decide on the draft terms of division and ending not earlier than the conclusion of that meeting, it makes the draft terms of division available on its website free of charge for the public. Member States shall not subject that exemption to any requirements or constraints other than those which are necessary in order to ensure the security of the website and the authenticity of the documents and may impose such requirements or constraints only to the extent that they are proportionate in order to achieve those objectives.

By way of derogation from the second paragraph, Member States may require that publication be effected via the central electronic platform referred to in Article 3(4) of Directive 68/151/EEC. Member States may alternatively require that such publication be made on any other website designated by them for that purpose. Where Member States avail themselves of one of those possibilities, they shall ensure that companies are not charged a specific fee for such publication.

Where a website other than the central electronic platform is used, a reference giving access to that website shall be published on the central electronic platform at least one month before the day fixed for the general meeting. That reference shall include the date of publication of the draft terms of division on the website and shall be accessible to the public free of charge. Companies shall not be charged a specific fee for such publication.

The prohibition precluding the charging to companies of a specific fee for publication, laid down in the third and fourth paragraphs, shall not affect the ability of Member States to pass on to companies the costs in respect of the central electronic platform.

Member States may require companies to maintain the information for a specific period after the general meeting on their website or, where applicable, on the central electronic platform or the other website designated by the Member State concerned. Member States may determine the consequences of temporary disruption of access to the website or to the central electronic platform, caused by technical or other factors.';

2. in Article 6, the following paragraph is added:

'For the purposes of point (b) of the first paragraph, Article 9(2), (3) and (4) shall apply.';

3. in Article 7(2), the second subparagraph is replaced by the following:

'Where applicable, it shall disclose the preparation of the report on the consideration other than in cash referred to in Article 27(2) of Directive 77/91/EEC for recipient companies and the register where that report must be lodged.';

4. in Article 8, paragraph 3 is deleted;

5. Article 9 is amended as follows:

(a) paragraph 1 is amended as follows:

(i) points (c) and (d) are replaced by the following:

'(c) where applicable, an accounting statement drawn up as at a date which must not be earlier than the first day of the third month preceding the date of the draft terms of division, if the latest annual accounts relate to a financial year which ended more than six months before that date;

(d) where applicable, the reports of the administrative or management bodies of the companies involved in the division provided for in Article 7(1);';

(ii) the following subparagraph is added:

'For the purposes of point (c) of the first subparagraph, an accounting statement shall not be required if the company publishes a half-yearly financial report in accordance with Article 5 of Directive 2004/109/EC and makes it available to shareholders in accordance with this paragraph.';

(b) in paragraph 3, the following subparagraph is added:

'Where a shareholder has consented to the use by the company of electronic means for conveying information, such copies may be provided by electronic mail.';

(c) the following paragraph is added:

'4. A company shall be exempt from the requirement to make the documents referred to in paragraph 1 available at its registered office if, for a continuous period beginning at least one month before the day fixed for the general meeting which is to decide on the draft terms of division and ending not earlier than the conclusion of that meeting, it makes them available on its website. Member States shall not subject that exemption to requirements or constraints other than those which are necessary in order to ensure the security of the website and the authenticity of the documents, and may impose such requirements or constraints only to the extent that they are proportionate in order to achieve those objectives.

Paragraph 3 shall not apply if the website gives shareholders the possibility, throughout the period referred to in the first subparagraph of this paragraph, of downloading and printing the documents referred to in paragraph 1. However, in that case Member States may provide that the company is to make those documents available at its registered office for consultation by the shareholders.

Member States may require companies to maintain the information on their website for a specific period after the general meeting. Member States may determine the consequences of temporary disruption of access to the website caused by technical or other factors.';

6. in Article 12, paragraph 2 is replaced by the following:

'2. To that end, the laws of the Member States shall at least provide that such creditors shall be entitled to obtain adequate safeguards where the financial situation of the company being divided and that of the company to which the obligation will be transferred in accordance with the draft terms of division make such protection necessary and where those creditors do not already have such safeguards.

Member States shall lay down the conditions for the protection provided for in paragraph 1 and in the first subparagraph of this paragraph. In any event, Member States shall ensure that the creditors are authorised to apply to the appropriate administrative or judicial authority for adequate safeguards provided that they can credibly demonstrate that due to the division the satisfaction of their claims is at stake and that no adequate safeguards have been obtained from the company.';

7. Article 20 is amended as follows:

(a) the introductory wording is replaced by the following:

'Without prejudice to Article 6, Member States shall not require approval of the division by the general meeting of the company being divided if the recipient companies together hold all the shares of the company being divided and all other securities conferring the right to vote at general meetings of the company being divided, and the following conditions are fulfilled:';

(b) in point (b), the second sentence is deleted;

(c) point (c) is deleted;

(d) the following paragraph is added:

'For the purposes of point (b) of the first paragraph, Article 9(2), (3) and (4) and Article 10 shall apply.';

8. Article 22 is amended as follows:

(a) paragraph 4 is deleted;

(b) paragraph 5 is replaced by the following:

'5. Member States shall not impose the requirements set out in Articles 7 and 8 and in points (c), (d) and (e) of Article 9(1) where the shares in each of the new companies are allocated to the shareholders of the company being divided in proportion to their rights in the capital of that company.'.

Article 4

Amendments to Directive 2005/56/EC

Directive 2005/56/EC is hereby amended as follows:

1. in Article 6(1), the following subparagraphs are added:

'Any of the merging companies shall be exempt from the publication requirement laid down in Article 3 of Directive 68/151/EEC if, for a continuous period beginning at least one month before the day fixed for the general meeting which is to decide on the common draft terms of cross-border merger and ending not earlier than the conclusion of that meeting, it makes the common draft terms of such merger available on its website free of charge for the public. Member States shall not subject that exemption to any requirements or constraints other than those which are necessary in order to ensure the security of the website and the authenticity of the documents and may impose such requirements or constraints only to the extent that they are proportionate in order to achieve those objectives.

By way of derogation from the second subparagraph, Member States may require that publication be effected via the central electronic platform referred to in Article 3(4) of Directive 68/151/EEC. Member States may alternatively require that such publication be made on any other website designated by them for that purpose. Where Member States avail themselves of one of those possibilities, they shall ensure that companies are not charged a specific fee for such publication.

Where a website other than the central electronic platform is used, a reference giving access to that website shall be published on the central electronic platform at least one month before the day fixed for the general meeting. That reference shall include the date of publication of the common draft terms of cross-border merger on the website and shall be accessible to the public free of charge. Companies shall not be charged a specific fee for such publication.

The prohibition precluding the charging to companies of a specific fee for publication, laid down in the third and fourth subparagraphs, shall not affect the ability of Member States to pass on to companies the costs in respect of the central electronic platform.

Member States may require companies to maintain the information for a specific period after the general meeting on their website or, where applicable, on the central electronic platform or the other website designated by the Member State concerned. Member States may determine the consequences of temporary disruption of access to the website or to the central electronic platform, caused by technical or other factors.';

2. in Article 15, paragraph 2 is replaced by the following:

'2. Where a cross-border merger by acquisition is carried out by a company which holds 90 % or more, but not all, of the shares and other securities conferring the right to vote at general meetings of the company or companies being acquired, reports by an independent expert or experts and the documents necessary for scrutiny shall be required only to the extent that the national law governing either the acquiring company or the company or companies being acquired so requires, in accordance with Directive 78/855/EEC.'.

Article 5

Review

Five years after the date laid down in Article 6(1), the Commission shall review the functioning of those provisions of Directives 77/91/EEC, 78/855/EEC, 82/891/EEC and 2005/56/EC which are amended or added by this Directive, and in particular their effects on the reduction of administrative burdens on companies, in the light of experience acquired in their application, and shall present a report to the European Parliament and the Council, accompanied if necessary by proposals for further amendments of those directives.

Article 6

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 30 June 2011. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

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

Article 7

Entry into force

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Article 8

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 16 September 2009.

For the European Parliament	*For the Council*
The President	*The President*
J. BUZEK	C. MALMSTRÖM

II

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

DECISIONS

COMMISSION

COMMISSION DECISION

of 2 July 2008

on State Aid C 11/2007 which Italy has implemented in favour of the company Ottana Energia Srl

(notified under document C(2008) 3117)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2009/730/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments pursuant to those provisions [1], and having regard to their comments,

Whereas:

I. **PROCEDURE**

(1) On 23 February 2006, the Italian authorities notified the Commission a rescue aid to Ottana Energia Srl (*Ottana Energia*), which had been put into effect on 29 December 2005, i.e. before the notification.

(2) On 14 July 2006, the Italian authorities notified a restructuring plan. Such plan would have automatically resulted in the prolongation of the rescue aid pursuant to point 26 of the guidelines on State aid for rescuing and restructuring firms in difficulty [2] (hereinafter guidelines).

(3) On 6 December 2006, the Commission with decision C(2006) 5829 (hereafter the rescue decision) indicated that it had no objections against the rescue aid. As the restructuring plan appeared however not credible the decision rejected its capability to prolong the rescue aid and ruled that the rescue aid should end on 8 January 2007.

(4) As the rescue aid was not terminated, the Commission on the basis of point 27 needed to follow up on the illegal rescue aid. By letter dated 4 April 2007 the Commission informed Italy that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in this respect. The Commission also raised doubts about the compatibility of the restructuring aid.

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[1] OJ C 122, 2.6.2007, p. 22.

[2] OJ C 244, 1.10.2004, p. 2.

(5) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* [1]. The Commission invited interested parties to submit their comments on the aid/measure. The Commission received no comments from interested parties.

(6) Italy submitted observations by letter dated 22 May 2007. Additional information was requested by letters of 11 July 2007 and 17 October 2007 and 20 December 2007 which was submitted on 31 August 2007, 12 November 2007 and 13 March 2008. In addition, a meeting was held between Commissions services and the Italian authorities on 7 December 2007. In addition, several e-mail exchanges took place; the latest replies by Italy were provided on 14 May 2008 and 28 May 2008.

II. DETAILED DESCRIPTION OF THE AID

1. The beneficiary

(7) Ottana Energia is a local utility company situated in the province of Nuoro in Sardinia [2]. It is owned by PC holding, which is a holding company for Ottana Energia by a private person and has no significant other activities.

(8) Ottana Energia has about 115 employees and in rescue decision it was held that it can be considered SME [3]. Given that it has more than 50 employees it is however not a small enterprise.

(9) Ottana Energia operates a thermoelectric power station which was built to meet the electrical and thermal needs of the Ottana industrial site. Therefore it is active in electricity generation and provides pressurised steam, water, nitrogen and compressed air. The plant comprises essentially two identical boilers for the production of superheated high pressure steam and two turbo alternators for the production of electrical energy and of process steam at two different pressure levels.

(10) In the electricity market Ottana Energia was active on the Borsa Elettrica selling on the MGP (Day before market) segment mainly at peak hours. It has a capacity of 140 MW of which it sold an average of around 30 MW. The Commission understands that Ottana Energia's market share is 5 % in terms of capacity and 4 % in terms of production the Sardinian electricity market.

(11) In 2005 Ottana Energia experienced financial difficulties resulting mainly from a shortage of funds to pay fuel oil. Fuel price did indeed rose from EUR 140/tonne in 2004 to EUR 279/tonne in the first half of 2006. The increasing prices of oil constituted up to 85 % of the company's costs. Therefore, it was estimated that for the first half of 2006 about EUR 5 million were needed to keep the company afloat.

2. The measure

(12) On 29 December 2005, Ottana Energia received a guarantee for a loan by the Ministry for Economic Development amounting to EUR 5 million. In August 2006, the Ministry later prolonged the same guarantee for a loan on the basis of a restructuring plan as restructuring aid.

(13) The Italian authorities indicated in the meantime that the loan would be reimbursed over five years as of 2009 until 2014 by EUR 1 million per annum.

3. The restructuring plan

(14) The current restructuring plan dates in its first version back to June 2006. In August, it was approved by a Committee in the ministry of economy subject to a final approval by the Commission. It was then submitted for approval to the Sardinia region and trade unions. On 9 January 2007 it was approved. The approval comprises a commitment from the Sardinia region to endeavour to release the necessary authorisations for 'step two' as soon as possible.

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(1) OJ C 122, 2.6.2007, p. 22.
(2) The plant was constructed in 1970 and has changed ownership several times as indicated in the opening decision, op cit fn. 1.
(3) In the light of Article 2(1) in conjunction with Article 4(3) of the Annex of Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

(15) The plan is based on a feasibility study from Electrowatt-Econo-Poyry, a well known consultancy firm which explored several repowering options. Moreover it has in the meantime been supplemented by a market study.

(16) The plan identifies as a main reason for failure its dependence on fuel oil and the inability to pass on price increases in fuel oil via the electricity price. Indeed the Sardinian Electricity reserve is made up of coal power plants which have lower costs than oil. Therefore Ottana Energia aims at reducing direct costs, particularly those connected to fuel and related transport charges. The company prepared a conversion plan for the power plant.

(17) To this end, the Italian authorities provided the Commission with a perspective of the future development of the company which indicates two main restructuring steps, while a third step remains optional and will not neither be subjected to State aid nor to any financing indicated in the present restructuring plan. The Commission thus considers that the restructuring will concentrate on the first and second phase and that the restructuring period ends in 2014 when the aid is reimbursed.

(18) Step one, which is currently ongoing is the re-powering of one boiler of the power plant to use of liquid coal (carbone fluido) while the other continues to run on fuel oil. In addition an automatic control system has been constructed for electrical loads for enabling operation on the secondary regulation services market. Moreover also an inverse osmosis plant is foreseen.

(19) With regard to the provision of electrical and thermal utilities, Ottana Energia has attempted to shift its own production to utilities with a higher added value. With regard to electricity generation, Ottana Energia has also shifted its own electricity production from day-ahead (1) to the balancing market (2), where the assets traded are services provided by the Ottana Energia electricity power station to the national transmission network manager to control the frequency and voltage of the network itself. The balancing market is normally more profitable for electricity producers due to high concentration in the market and long term provisions on supply.

(20) Step two concerns the conversion of the second generator from fuel oil to vegetable oil. In this way a reduction of the emissions is envisaged which can be utilised to acquire and sell 'green certificates'. This seems indispensable for the success of the plan so as to set off the higher prices of bio-fuels compared to fossil fuels, which can at least for the time being not be equalised by excise tax rebates as no authorisation to this respect has been obtained. The technical restructuring envisages installing new equipment in the power plant to enable electricity generation from vegetable oil.

(21) In order to realise the investments foreseen in phase 2, in the beginning of 2007 Ottana Energia won Azienda-Energetica SpA Etschwerke AG (AE-EW) of Bolzano, a leading operator in the energy market in southern Tirol for a joint venture under the name Biopower Sardegna Srl's. Its assets will consist of EUR 14,5 million in equity. EUR 8,5 million will be provided as equity and EUR 6 million in infrastructure and plant, the latter coming from Ottana Energia. The EUR 8,5 million is made up of EUR 1,4 million from PC Holding and a EUR 7,1 million cash transfer from AE-EW. PC Holding will thus have the 51 % share for about 10 % and Ottana Energia about 41 %. The equity is equivalent to 25 % of the project total in conformity with the request of the financial institution.

(22) The agreement with the Sardinia region and trade unions provides also for a reduction of 45 jobs. It is envisaged to take advantage of an 'early retirement' scheme.

(1) On the day ahead market the asset traded is electricity.
(2) The balancing market requires supply of certain amount of electricity to balance it in the national grid. The supply is carried out on request by the national transmission network operator on the basis of a long term contract on electricity supply. Whereas the supply of electricity in the day-ahead market is subject to every day auctions.

(23) Altogether the restructuring costs for phase 1 and 2 are as following:

Table 1

Overview restructuring costs

(EUR)

Restructuring action	Estimated cost	Financing
Modernisation of plant	900 000	Self-financed
Severance pay	1 000 000	Self-financed
Phase 1: Use of coal water	1 090 000	Self-financed
Phase 2: Vegetable-oil engines	42 300 000	25 % Equity, of which: — 51 % Ottana Energia/PC Holding — 49 % AE-EW 75 % Bank financing

(24) Italy clarified that self financing in phase 1 relates to financed from the companies cash flow and is taking place between 2006 and 2008. Phase 2 is financed by equity of the new shareholder and by a bank loan which is backed by guarantees of AE-EW and mortgages on the machinery.

(25) Italy submits that the 2 phase will have a very high internal rate of return (almost 25 %) and a significant net present value. Moreover, as regards the prospects for viability the Italian authorities have updates their financial projections. It was explained although the business projection of phase two last until 2020, they indicate that the company should have a positive operating margin and make profits as of 2010. Also as of 2010 Ottana Energia is expected to have a return on equity (ROE) of 2 % and of 2011 of 3 % average as of 2011 which is according to Italy equal or above those of competitors which are said to have a ROE of 2 %.

(26) Step three would be to use natural gas transmitted in the future via the so-called GALSI pipeline connecting Algeria with Italy via Sardinia (the completion of which is expected not before 2009). As the construction schedule has not been decided upon, this step is hypothetical. This is also the case for the financing of this project which is estimated to require about EUR 250 million. On completion of this phase, Ottana Energia anticipates replacing the existing fuel-oil turbines and boilers with the construction of the new gas plant. However, vegetable oil will continue to be used at least throughout the twelve-year term of the green certificate, i.e. until the end of 2021 if it starts by the end of 2008.

III. **REASONS FOR OPENING**

(27) In the opening decision the Commission noted that the rescue aid has not been terminated. The Commission decided therefore that the rescue aid was illegally maintained and considered itself obliged to open proceedings under point 27 of the guidelines on aid for rescue and restructuring of firms in difficulty [1].

(28) The Commission indicated that it did not see yet how the illegal prolongation of the rescue aid could be compatible restructuring aid as the restructuring plan lacked essential elements indicating how the company would restore long term viability. In particular it found no precise information had been submitted clarifying the restructuring strategy, indicating credible forecasts for the future performance of the company and supporting the existence of a significant own contribution and compensatory measures. To this end the Commission was enjoining Italy to answer several previously raised questions.

[1] OJ C 244, 1.10.2004, p. 2.

(29) Further, the Commission questioned whether a prolongation of the rescue aid for 12 years, as originally foreseen, is necessary. This would put into question that the aid is limited to the strict minimum required. Moreover information on own contribution seemed insufficient as the plan and the explanations by Italy merely indicate that the company will contribute to the restructuring from its own funds and, with external support from a new shareholder, without specifying in detail how these own funds are generated.

(30) Finally, the Commission could not see sufficient compensatory measures, as no such measures are indicated in the plan.

IV. **COMMENTS FROM ITALY**

(31) In its submissions, Italy provided much more information on the restructuring plan. In particular it presented:

— a feasibility study underpinning the choice for the current strategy,

— a market study which indicates that there is no overcapacity in the energy market in Sardinia,

— information on the realisation of phase 1 and phase 2 as indicated in recital 0,

— information on the engagement of a new shareholder as well as on the financing of phase 2 as indicated in recital 0 and following,

— an update of the financial forecast of the company as indicated above in recital 25.

(32) Italy puts forward the following compensatory measures:

— […] (*)

— divestiture of […] operations by the end of 2010 […]

(33) As regards the first issue Italy explains that Ottana Energia has changed *de facto* its reference market and, consequently, its competitors. […]. These divisions are not strategic and could therefore be sold as a compensatory measure. […].

(34) In addition, Italy ensures that Ottana commits not to produce more than 90 MW out of a total possible production capacity of 140 MW before the beginning of Phase 3, and in any event not before the beginning of 2012.

(35) Italy also committed that Ottana Energia will reimburse from 2009 to 2014 EUR 1 million each year and will not receive any other aid before the total reimbursement of the EUR 5 million received

V. **ASSESSMENT**

1. **Existence of aid**

(36) As already indicated in the Decision of 6 December, the measure constitutes State aid pursuant to Article 87(1) of the EC Treaty as it distorts or threatens to distort competition ([1]) by favouring Ottana Energia and in so far affects trade among Member States (see recitals 12 to 15) as it is unlikely that without the State guarantee Ottana Energia could have obtained the same loan conditions on the market.

(*) Confidential information.

([1]) The electricity market is partially liberalised within the Community since the entry into force of Directive 96/92/EC of the European Parliament and of the Council (OJ L 27, 30.1.1997, p. 20) and thus the competition between the electricity suppliers is possible. Consequently the measure may improve the position of Ottana in relation to its competitors in the EU, which may affect trade between the Member States.

2. **Compatibility of the aid**

(37) Given that the rescue aid has not been repaid on 8 January 2007, it became illegal rescue aid on 9 January 2007 (see recital 3).

(38) However, that does alone not suffice to constitute a misuse of the aid, but requires also that the aid is not compatible under Article 87(3) EC. That implies that the Commission has to assess the compatibility of such aid on all other possible grounds [1]. However, point 20 of the guidelines limits the grounds to those stipulated under the guidelines. Consequently the illegal rescue aid may still qualify as restructuring aid.

(39) The Commission indicated in the opening decision that the aid must therefore meet the conditions of points 32 to 51 of the guidelines comprising the provision of a restructuring plan which restores long-term viability as well as that the aid is limited to the minimum and avoids undue distortions of competition. The opening decision had put this into doubt but the investigation confirmed that these conditions are met.

Eligibility

(40) First, the investigation confirmed that Ottana Energia is a company in difficulty. The Commission acknowledges in the rescue decision that Ottana Energia is eligible for restructuring aid. However in the opening decision it was wondering whether this changed since the company was able to obtain loans to finance its restructuring. The doubts could however be allayed, as Italy has substantiated that the loan was not provided only for the rescue phase but that Ottana Energia would not have sufficient funds to reimburse the aid during the restructuring period. As it would generate significant revenues only in 2008, without the guarantee the banks would not have allowed Ottana Energia even to implement the first phase and so would have put Ottana Energia at the risk of insolvency in the sense of point 10(c) of the guidelines.

(41) The investigation also confirmed that PC Holding, the owner of Ottana Energia, was not able to provide the necessary funds to restructure the company, so that eligibility is not questioned by point 13 of the guidelines.

Restructuring plan and restoration of viability

(42) The Commission in the opening of procedure questioned whether there existed a restructuring plan which would enable the company to restore long-term viability.

(43) Italy was in the meantime able to substantiate its restructuring project and to provide the missing elements to make up a credible plan. The Commission acknowledges first that the restructuring plan is based on a feasibility study underpinning the choice for the current strategy (this existed already in 2006 but was simply not furnished to the Commission). Second, Italy explained that the realisation of phase 1 and phase 2 are complementary not alternatively as understood by the Commission initially (this would only be the case for phase 3 after 2020). Third, Italy explained that the beneficiary had found a new shareholder in order to co-finance the second phase as indicated in recital 0. Finally, it was established that already phase 2 should enable the beneficiary to restore viability, and that the necessary authorisation for this project was on its way.

(44) On this basis, the Commission can now identify precise internal measures which are apt to redirect the activities of the firm. Such is first the change from the very expensive fuel oil to liquid coal. Moreover, also the change of electricity provision from day-ahead to the balancing market contributed to viability as it is more profitable for Ottana Energia due to long term provisions on supply.

(45) Second, the Commission concludes that also new investments into bio energy are profitable. They should yield a very high internal rate of return and have a significant net present value (see recital 25).

[1] This is constant practice of the Commission (see Commission Decision 2008/344/EC, in case C 23/2006, *Technologie Buczek* (OJ L 116, 30.4.2008, p. 26)).

(46) Altogether, Italy substantiated that on the basis of credible future energy supply forecasts, which always remain subject to changes, and the proceeds from greengas certificates, it will make significant revenues as off 2008. Moreover, it is indicate that the company should have a positive operating margin and make profits as of 2010. Also its ROE should as of 2010 at least match those of its competitors (see recital 25). On this basis, the Commission considers that Ottana Energia is capable to ensure the restoration of long term viability.

(47) Given that all the necessary elements for the restructuring plan existed already on 9 January 2007, were on this day endorsed by the region, and were at that time — contrary to what was assumed in the opening decision — apt to restore viability, the Commission views the restructuring project now as a continuation of the rescue phase.

(48) Moreover, a committee in the ministry of economy has endorsed the restructuring plan upon presentation of the restructuring plan and proposed a prolongation of the rescue aid measure conditional upon approval of the Commission. Because an approval should not be subject to the Commission's approval this does not correspond exactly with the principles laid down in point 59 of the guidelines. However, such procedural inconsistency can alone not be sufficient to make the restructuring aid incompatible.

Own contribution and minimum necessary

(49) The Commission in the opening of procedure questioned whether the undertaking was making a significant own contributions to the restructuring, as required by point 44 of the guidelines and whether the aid was limited to the minimum necessary as the repayment of the aid was only envisaged after 12 years.

(50) Italy has is in the meantime proven that there exists a significant own contribution. This does however not concern the financing of phase 1, which is financed from regular cash flow, which is not accepted as own contribution as it is seen as being at least induced by State aid [1]. However, the second phase is entirely financed through own contribution, be it either by shareholder equity or by external financing secured by the shareholders or the productions assets (and not by the State guarantee). Therefore, considering that the restructuring costs are roughly EUR 50 million of which 5 million are financed through aid and EUR 42,3 million come from own contribution (see recital 23) Ottana Energia managed to come up with an own contribution of more than 80 %. This clearly exceeds the threshold indicated in point 44 of the guidelines.

(51) Finally, Ottana Energia shortened now the pay back period for the rescue aid loan. The aid shall now be repaid between 2009 and 2014 in tranches of EUR 1 million. This seems reasonable as the company appears to make significant revenues as of 2008.

Compensatory measures

(52) The Commission has during the investigation identified several measures which are apt to mitigate adverse effects of the aid on competitors.

(53) The Commission first accepts that the divestiture of […] can be a compensatory measure as these activities are according to the Italian authorities profitable. However, the Commission does not see that more recourse […] is a compensatory measure because this is in any event a measures which is likely to benefit the company and thus not a sacrifice for the company.

(54) The Commission further observes that Ottana Energia cannot reduce its capacity, as it has only two boilers which are required for restoring the company's viability. Therefore, only production limitations measures are feasible in the present case. Such measures were indeed committed by the company and Italy and can be considered as compensatory measures.

[1] Guidelines, point 43 (See Commission Decision 2002/185/EC in case C 19/2000, *Technische Glaswerke Ilmenau* (OJ L 62, 5.3.2002, p. 30) point 106).

(55) The Commission concluded that the compensatory measures are sufficient to mitigate as far as possible any adverse effects of the aid on competitors, because the beneficiary is small in size and its market position in the relevant Sardinian electricity market is compared to that of its competitors insignificant. Indeed, the survival of Ottana Energia even contributes to stabilise competition in the Sardinian energy market, as Ottana Energia is in fact the only alternative energy supplier to the dominant suppliers *Enel* and *Endessa* which have together more than 95 % market share. Thus, the entering of Ottana Energia […] will further enhance competition in this very concentrated market.

(56) Moreover, the Commission also could not uphold its observation of the opening decision that there was overcapacity in the Sardinian energy market. Although such overcapacity de facto exists it is there only for the purposes of keeping always a certain reserve for supplying the Island.

(57) Finally, the Commission also gives significant consideration to the commitment not to provide any investment aid to Ottana Energia until 2014. In this context, the Commission observes that the Sardinian electricity market is about to change, in particular with the construction of the GALSI pipeline and due to a project to install a very powerful cable with the mainland. At this moment the Sardinian electricity market will be more open for competition and thus more susceptible to distortions provided by State aid. Therefore, the commitment ensures that no distortions would emanate to the third phase, because the restructuring aid is reimbursed before the third phase and cannot be replaced by any other aid be it restructuring or investment aid.

One time, last time condition

(58) Finally, the one time, last time condition as stipulated in point 72 and following of the guidelines is met, as Ottana Energia has not benefited from rescue or restructuring aid in the past. In particular given that all the necessary elements for the restructuring plan existed already on 9 January 2007, the Commission views the restructuring project now as a continuation of the rescue phase. It thus constitutes a single restructuring, which is not caught by the one time, last time condition as indicated in point 73(a) of the guidelines.

Implementation and Monitoring

(59) Ottana must fully implement its restructuring plan pursuant to point 47 of the guidelines. The Commission will need to be kept informed of the progress in the implementation of the abovementioned compensatory measures in the sense of point 50 and 51 of the guidelines.

VI. **CONCLUSION**

(60) In view of the above, the Commission finds that the aid in question can be considered as restructuring aid. The restructuring aid follows up immedoiatly on the rescue aid. Therefore it concludes that although Italy has unlawfully implemented the restructuring aid to Ottana Energia in breach of Article 88(3) of the Treaty the State aid is compatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Italy has implemented for Ottana Energia Srl is compatible with the common market within the meaning of Article 87(3)(c) EC and the Community guidelines on State aid for rescuing and restructuring firms in difficulty of 1999, subject to the fulfilment of the conditions listed in Article 2.

Article 2

1. The restructuring plan shall be fully implemented. All necessary measures shall be taken to ensure that the plan is implemented.

2. Italy ensures that […] operations shall be sold […] by end of 2010.

3. Italy commits to ensure that the following commitments shall be respected:

(a) Ottana Energia Srl shall not produce more than 90 MW out of a total possible production capacity of 140 MW before the beginning of Phase 3, and in any event not before the beginning of 2012,

(b) Ottana Energia will reimburse from 2009 to 2014 EUR 1 million each year and will not receive any other aid before the total reimbursement of the EUR 5 million received.

4. For the purpose of monitoring compliance with the conditions set out in paragraph 1 to 3, Italy shall provide short updates at the end of each year until 2014 on the progress of the implementation of the restructuring plan and the commitments listed above.

Article 3

This Decision is addressed to the Italian Republic.

Done at Brussels, 2 July 2008.

For the Commission

Neelie KROES

Member of the Commission

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