ISSN 1725-2555

Official Journal of the European Union

L 6

English edition

Legislation

Volume 53

9 January 2010

Contents

[1] Text with EEA relevance

(Continued overleaf)

Price: EUR 3

EN

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

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

EN

[1] Text with EEA relevance

II

(Non-legislative acts)

REGULATIONS

COMMISSION REGULATION (EU) No 15/2010

of 7 January 2010

amending Annex I to Regulation (EC) No 689/2008 of the European Parliament and of the Council concerning the export and import of dangerous chemicals

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EC) No 689/2008 of the European Parliament and of the Council of 17 June 2008 concerning the export and import of dangerous chemicals ([1]), and in particular Article 22(4) thereof,

Whereas:

(1) Regulation (EC) No 689/2008 implements the Rotterdam Convention on the Prior Informed Consent Procedure (PIC procedure) for Certain Hazardous Chemicals and pesticides in International Trade, signed on 11 September 1998 and approved, on behalf of the Community, by Council Decision 2003/106/EC of 19 December 2002 concerning the approval, on behalf of the European Community, of the Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade ([2]).

(2) Annex I to Regulation (EC) No 689/2008 should be amended to take into account regulatory action in respect of certain chemicals taken pursuant to Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the registration, evaluation, authorisation and restriction of chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC ([3]), Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market ([4]) and Directive 98/8/EC of the European Parliament and of the Council of 16 February 1998 concerning the placing of biocidal products on the market ([5]).

(3) It has been decided not to include the substances 1,3-dichloropropene, benfuracarb and trifluralin as active substances in Annex I to Directive 91/414/EEC, with the effect that those active substances are banned for pesticide use and thus should be added to the lists of chemicals contained in Parts 1 and 2 of Annex I to Regulation (EC) No 689/2008. Since new applications were submitted that will require new decisions on inclusion in Annex I to Directive 91/414/EEC, the addition to the list of chemicals contained in Part 2 of Annex I to Regulation (EC) No 689/2008 should not be applied until the new decisions on the status of these chemicals.

(4) It has been decided not to include the substance methomyl as active substance in Annex I to Directive 91/414/EEC and not to include the substance methomyl as active substance in Annex I, IA or IB to Directive 98/8/EC with the effect that this active substance is banned for pesticide use and thus should be added to the lists of chemicals contained in Parts 1 and 2 of Annex I to Regulation (EC) No 689/2008. Since a new application was submitted that will require a new decision on inclusion in Annex I to Directive 91/414/EEC, the addition to the list of chemicals contained in Part 2 of Annex I to Regulation (EC) No 689/2008 should not be applied until the new decision on the status of this chemical.

([1]) OJ L 204, 31.7.2008, p. 1.
([2]) OJ L 63, 6.3.2003, p. 27.
([3]) OJ L 396, 30.12.2006, p. 1.
([4]) OJ L 230, 19.8.1991, p. 1.
([5]) OJ L 123, 24.4.1998, p. 1.

(5) It has been decided not to include the substances diazinon, dichlorvos and fenitrothion as active substances in Annex I to Directive 91/414/EEC, with the effect that those active substances are severely restricted for pesticide use and thus should be added to the list of chemicals contained in Part 2 of Annex I to Regulation (EC) No 689/2008 because virtually all use is prohibited despite the fact that those substances have been identified and notified for evaluation under Directive 98/8/EC and may thus continue to be authorised by Member States until a decision under that Directive will be taken.

(6) Directive 91/414/EEC provides in Article 8(2) for a time period of 12 years during which Member States are allowed to authorise the placing on the market of plant protection products containing certain active substances. That time period has been extended by Commission Regulation (EC) No 2076/2002 of 20 November 2002 extending the time period referred to in Article 8(2) of Council Directive 91/414/EEC and concerning the non-inclusion of certain active substances in Annex I to that Directive and the withdrawal of authorisations for plant protection products containing these substances ([1]). However, since the active substances azinphos-methyl and vinclozolin were not approved for inclusion in Annex I to Directive 91/414/EEC before expiry of that time period, Member States were obliged to withdraw national authorisations of plant protection products containing those substances as from 1 January 2007. As a result the active substances azinphos-methyl and vinclozolin are therefore banned for pesticide use and thus should be added to the list of chemicals contained in Part 2 of Annex I to Regulation (EC) No 689/2008.

(7) It has been decided to severely restrict the use of the substances fenarimol, methamidophos and procymidone by several measures including that those active substances were only included for a very short period in Annex I to Directive 91/414/EEC. After expiry of this period those active substances are not authorised to be used any more with the effect that they are banned in the category 'Pesticide' and thus should be added to the list of chemicals contained in Parts 1 and 2 of Annex I to Regulation (EC) No 689/2008.

(8) It has been decided to include the substance paraquat as active substance in Annex I to Directive 91/414/EEC by Commission Directive 2003/112/EC of 1 December 2003 amending Council Directive 91/414/EEC to include paraquat as an active substance ([2]). However, Commission Directive 2003/112/EC was annulled by the judgement of the Court of First Instance of the European Communities of 11 July 2007 in the case T-229/04 ([3]), with the effect that this active substance is banned for pesticide use and thus should be added to the list of chemicals contained in Parts 1 and 2 of Annex I to Regulation (EC) No 689/2008.

(9) It has been decided to restrict the use of plant protection products containing the substance tolylfluanid under certain conditions by Commission Decision 2007/322/EC of 4 May 2007 laying down protective measures concerning uses of plant protection products containing tolylfluanid leading to the contamination of drinking water ([4]). In addition it has been decided by industry to withdraw plant protection products containing the active substance tolylfluanid from the market in order to protect human health with the effect that this active substance is banned for use in the subcategory pesticide in the group of plant protection products. The ban in this subcategory is considered a severe restriction in the category 'Pesticide' and thus the active substance should be added to the list of chemicals contained in Parts 1 and 2 of Annex I to Regulation (EC) No 689/2008.

(10) It has been decided to include the substance diuron as active substance in Annex I to Directive 91/414/EEC with the effect that this active substance is not any more banned for use in the subcategory 'Pesticide' in the group of plant protection products. Consequently the active substance should be deleted from Part 1 of Annex I to Regulation (EC) No 689/2008.

(11) A new application was submitted for the active substances cadusafos, carbofuran, carbosulfan and haloxyfop-R that will require a new decision on inclusion in Annex I to Directive 91/414/EEC and thus the chemicals should be deleted from the list of chemicals contained in Part 2 of Annex I to Regulation (EC) No 689/2008. The decision on addition to the list of chemicals in Part 2 of Annex I should not be taken before the new decision on the status of the substances under Directive 91/414/EEC will be available.

(12) Annex I to Regulation (EC) No 689/2008 should therefore be amended accordingly.

(13) The measures provided for in this Regulation are in accordance with the opinion of the Committee established by Article 133 of Regulation (EC) No 1907/2006,

HAS ADOPTED THIS REGULATION:

Article 1

Annex I to Regulation (EC) No 689/2008 is amended in accordance with the Annex to this Regulation.

([1]) OJ L 319, 23.11.2002, p. 3.
([2]) OJ L 321, 6.12.2003, p. 32.
([3]) OJ C 199, 25.8.2007, p. 32.
([4]) OJ L 119, 9.5.2007, p. 49.

Article 2

This Regulation shall enter into force on the twentieth 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, 7 January 2010.

For the Commission
The President
José Manuel BARROSO

ANNEX

Annex I to Regulation (EC) No 689/2008 is amended as follows:

1. Part 1 is amended as follows:

(a) the following entries are added:

Chemical	CAS No	Einecs No	CN	Subcategory (*)	Use limitation (**)	Countries for which no notification is required
'1,3-dichloropropene ([2])	542-75-6	208-826-5	2903 29 00	p(1)	b	
Benfuracarb	82560-54-1		2932 99 00	p(1)	b	
Fenarimol +	60168-88-9	262-095-7	2933 59 95	p(1)	b	
Methamidophos ([3]) +	10265-92-6	233-606-0	2930 50 00	p(1)	b	
Methomyl	16752-77-5	240-815-0	2930 90 85	p(1)-p(2)	b–b	
Paraquat +	4685-14-7	225-141-7	2933 39 99	p(1)	b	
Procymidone +	32809-16-8	251-233-1	2925 19 95	p(1)	b	
Tolylfluanid +	731-27-1	211-986-9	2930 90 85	p(1)	b	
Trifluralin	1582-09-8	216-428-8	2921 43 00	p(1)	b	

([2]) This entry does not affect the existing entry for cis-1,3-dichloropropene (CAS No 10061-01-5).
([3]) This entry does not affect the existing entry for soluble liquid formulations of methamidophos that exceed 600 g active ingredient/l.'

(b) the following entry is deleted:

Chemical	CAS No	Einecs No	CN	Subcategory (*)	Use limitation (**)	Countries for which no notification is required
'Diuron	330-54-1	006-015-00	2924 21 90	p(1)	b'	

2. Part 2 is amended as follows:

(a) the following entries are added:

Chemical	CAS No	Einecs No	CN	Category (*)	Use limitation (**)
'Azinphos-methyl	86-50-0	201-676-1	2933 99 80	p	b
Diazinon	333-41-5	206-373-8	2933 59 10	p	sr
Dichlorvos	62-73-7	200-547-7	2919 90 00	p	sr
Fenarimol	60168-88-9	262-095-7	2933 59 95	p	b
Fenitrothion	122-14-5	204-524-2	2920 19 00	p	sr
Methamidophos [1]	10265-92-6	233-606-0	2930 50 00	p	b
Paraquat	1910-42-5	217-615-7	2933 39 99	p	b
Procymidone	32809-16-8	251-233-1	2925 19 95	p	b
Tolylfluanid	731-27-1	211-986-9	2930 90 85	p	sr
Vinclozolin	50471-44-8	256-599-6	2934 99 90	p	b

[1] This entry does not affect the entry in Annex I Part 3 for soluble liquid formulations of methamidophos that exceed 600 g active ingredient/l.'

(b) the following entries are deleted:

Chemical	CAS No	Einecs No	CN	Category (*)	Use limitation (**)
'Cadusafos	95465-99-9	n.a.	2930 90 85	p	b
Carbofuran	1563-66-2	216-353-0	2932 99 85	p	b
Carbosulfan	55285-14-8	259-565-9	2932 99 85	p	b
Haloxyfop-R (Haloxyfop-P-methyl ester)	95977-29-0 (72619-32-0)	n.a. (406-250-0)	2933 39 99 (2933 39 99)	p	b'

COMMISSION REGULATION (EU) No 16/2010

of 8 January 2010

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

THE EUROPEAN COMMISSION,

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

Having regard to 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 9 January 2010.

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

Done at Brussels, 8 January 2010.

For the Commission,
On behalf of the President,
Jean-Luc DEMARTY
Director-General for Agriculture and Rural Development

---

[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	MA	51,7
	TN	104,3
	TR	85,9
	ZZ	80,6
0707 00 05	EG	174,9
	JO	115,2
	MA	79,4
	TR	129,4
	ZZ	124,7
0709 90 70	MA	99,2
	TR	109,6
	ZZ	104,4
0805 10 20	EG	46,1
	IL	56,2
	MA	42,4
	TR	54,3
	ZZ	49,8
0805 20 10	MA	73,9
	TR	64,0
	ZZ	69,0
0805 20 30, 0805 20 50, 0805 20 70, 0805 20 90	CN	51,7
	IL	71,3
	JM	118,7
	MA	88,8
	TR	76,7
	US	75,0
	ZZ	80,4
0805 50 10	EG	74,9
	MA	65,5
	TR	63,3
	ZZ	67,9
0808 10 80	CA	84,4
	CN	86,0
	MK	25,2
	US	110,5
	ZZ	76,5
0808 20 50	CN	54,9
	US	110,2
	ZZ	82,6

(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'.

DECISIONS

COMMISSION DECISION

of 5 January 2010

exempting certain financial services in the postal sector in Italy from the application of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors

(notified under document C(2009) 10382)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2010/12/EU)

THE EUROPEAN COMMISSION,

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

Having regard to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [1], and in particular Article 30(4) and (6) thereof,

Having regard to the four requests submitted by the Italian Republic by e-mail received on 8 July 2009,

After consulting the Advisory Committee for Public Contracts,

Whereas:

I. FACTS

(1) On 8 July 2009, the Commission received four Italian requests pursuant to Article 30(4) of Directive 2004/17/EC, transmitted to the Commission by e-mail. The Commission requested additional information by e-mail of 24 September 2009, which, following a prolongation of the initial deadline, was transmitted by the Italian authorities by e-mail of 16.10.2009.

(2) The requests submitted by the Italian Republic on behalf of Poste Italiane SpA (in the following referred to as 'Poste') concern various financial services provided by Poste. In their turn, each of the four separate requests pursuant to Article 30(4) concerns various financial services that have been grouped under four different headings. In the requests, these services are described as follows:

(a) Collection of savings from the public through a current account (in the following referred to as 'savings').

(b) Lending on behalf of banks and accredited financial intermediaries (in the following referred to as 'financing'). As described, this group of services would notably cover Poste's acting as a distributor of third party

— lending (in particular mortgages and loans),

— consumer credit, and

— financial leasing.

(c) Investment services and activities (in the following referred to as 'investments'). Besides custody and management of financial instruments, this group of services is described as covering the downstream (distribution) phase for:

— the placement of financial instruments (bonds in particular), and

[1] OJ L 134, 30.4.2004, p. 1.

— the placement of supplementary pension and financial/insurance products (in particular personal pension policies).

(d) Payment and money transfer services (in the following referred to as 'payments'). As described, this group of services comprise two distinct categories, namely:

— payment services, defined as covering credit card services and debit card services, and

— money transfer services, including international funds transfer through the Eurogiro system or by international money order and transfer of funds within Italy by postal money order.

(3) The request is accompanied by two resolutions from an independent national authority (Autorità per la vigilanza sui contratti pubblici di lavori, servizi e forniture, the Italian Supervisory Authority for Public Contracts). In its final resolution of 12 November 2008, it stresses that, should Article 30(1) be found to be applicable to some or all of the services concerned here, then there would be a need for specific surveillance measures to ensure that Community rules on public procurement continue to be applied as appropriate to all procurements made by Poste for the pursuit of activities other than those to which Article 30(1) would have been found to be applicable. The resolution consequently concludes that Poste should take adequate measures to separate procurements according to the activities for which they are intended.

(4) The request is furthermore also accompanied by an opinion issued by an independent national authority, Autorità garante della concorrenza e del mercato (the Italian competition authority). It stresses the openness of the Italian financial sector in general with over 800 banks and more than 80 banking groups and more than 170 companies operating in the insurance sector, 68 of which are active providers in the life assurance branch only, 77 in non-life insurance only and 17 in both life and non-life. The sector would also be characterised by relatively low degrees of concentration, as the aggregate market shares in 2007 of the five biggest groups amounted to approximately 51,5 % in the banking sector and, in respect of all life insurance branches, about 53 %. In its general comments, the authority also points to the fact that Poste provides its financial services through 'a distribution network based on its postal business, which is very comprehensive and is not comparable to that of any other operator. The network consists of some 14 000 post offices [1], whereas the leading banking group operating in Italy has an overall network of slightly over 6 000 branches.'

(5) Based on its practice in the field of bank mergers, the authority set out detailed comments on the various services covered by the request and concludes: 'The procedure launched by Poste Italiane relates to a wide range of activities inherent in the banking, insurance and managed savings sectors. As regards those sectors, access to which can be considered to be unrestricted, the Competition Authority has found the typical characteristics of open markets […] In this context, Poste Italiane for its part is seen as a particular operator, both because of the normative constraints regulating the services of Bancoposta and because of the customer base it serves. This is confirmed by Authority's precedents, according to which Poste Italiane has never been fully assimilated either to banks or to other financial intermediaries operating on the markets concerned. Bancoposta services have on the whole been found to be complementary and close to those of the banks rather than substitutable for them […] despite the specific nature of Poste Italiane, the conclusion is that the provision of banking, financial and insurance services in Italy can be considered as taking place in the contexts of markets to which access is not restricted, on which there are various operators and where the degrees of concentration are comparable to the European averages.'

(6) Nevertheless the Italian competition authority has since opened a procedure against Poste Italiane SpA for abuse of domination in the field of payments, more specifically credit transfers by means of postal accounts. Commitments by Poste Italiane to solve the issue are under discussion with the Competition Authority [2].

II. **LEGAL FRAMEWORK**

(7) It should be recalled that, in accordance with Article 6(2)(c) of Directive 2004/17/EC, the provision of financial services as defined in the fourth indent of said point (c) are covered by that Directive only to the extent that such services are provided by entities which also provide postal services within the meaning of point (b) of that provision. Poste is the only contracting entity in Italy which offers the services concerned here.

[1] See Corte dei Conti [Court of Auditors] Report on the financial management of Poste Italiane for financial year 2006.

[2] Provvedimento N.19778. Poste Italiane-Aumento Commissione bolletini, available on www.agcm.it

(8) Article 30 of Directive 2004/17/EC provides that contracts intended to enable the performance of one of the activities to which the Directive applies shall not be subject to the Directive if, in the Member State in which it is carried out, the activity is directly exposed to competition on markets to which access is not restricted. Direct exposure to competition is assessed on the basis of objective criteria, taking account of the specific characteristics of the sector concerned. Access is deemed to be unrestricted if the Member State has implemented and applied the relevant Community legislation opening a given sector or a part of it. Where no relevant Community legislation is listed in the Directive's Annex XI, as is the case in respect of the services concerned here, then Article 30(3), second subparagraph requires that it 'must be demonstrated that access to the market in question is free de facto and de jure'.

(9) Regarding financial services, it should be recalled that a large body of legislation has been adopted at Community level aiming at liberalising establishment and provision of services in this sector. Furthermore, the Commission has already found in the context of different State aid cases concerning Poste that 'the banking sector has been open to competition for many years. Progressive liberalisation has enhanced the competition that may already have resulted from the free movement of capital provided for in the EC Treaty' [1]. The condition set out in Article 30(3) relating to free access to the market can therefore be taken to be met.

(10) Direct exposure to competition in a particular market should be evaluated on the basis of various criteria, none of which are, *per se*, decisive. In respect of the markets concerned by this decision, the market share of the main players on a given market constitutes one criterion which should be taken into account. Another criterion is the degree of concentration on those markets. As the conditions vary for the different activities that are concerned by this Decision, the examination of the competitive situation should take into account the different situations on different markets.

(11) Although narrower market definitions might be envisaged in certain cases, the precise definition of the relevant market can be left open for the purposes of this Decision as far as a number of the services listed in the request submitted by Poste are concerned to the extent that the result of the analysis remains the same whether it is based on a narrow or a broader definition.

(12) This Decision is without prejudice to the application of the rules on competition.

III. **ASSESSMENT**

Savings

(13) As mentioned under recital 5 above, the Italian competition authority has dealt with various mergers [2] between banks or other financial institutions in Italy and found the financial services provided by Poste in connection with its postal accounts to be 'complementary' to rather than 'substitutable' for the services provided by banks through the various forms of bank accounts. This practice must, however, be seen in its context, namely, an examination of Poste's possibilities of bringing competitive pressure to bear on banks [3]. The detailed analysis carried out by or for the Italian competition authority shows that a large majority of customers [4] having a bank account would not consider closing that account and opening a postal account. Thus, in 2005, over 28 million (legal or natural) persons had a bank account only, over 3 million had both a bank account and a postal account and less than 2,3 million persons had only a postal account. It is also noteworthy that the number of persons having a postal account only was found to grow less than the number of persons having both a postal account and a bank account. These facts may to a large extent be explained through the normative restraints under which Poste operates and the ensuing fact that it offers a more restricted range of services connected to its accounts. Customers whose needs include a broad range of services would therefore be reticent to consider changing to a postal account not offering the accustomed range of services [5]. The reason most frequently given for having both types of accounts was the 'possibility to choose from time to time the most practical/easy and or the most advantageous/economic [means]'.

[1] See Commission Decision C(2006) 4207 final of 26.9.2006 in State aid case C 42/06 (ex NN 52/06) — Italy — Poste Italiane — BancoPosta, point 59 and, in the same sense, Commission Decision C(2006) 5478 final of 22.11.2006 in State aid case C 49/06 (ex NN 65/06) — Italy — Poste Italiane — BancoPosta, point 72.

[2] See in particular the authority's ruling of 20 December 2007, No 16249, C8027 Intesa/Sanpaolo, in Bull. 49/2006.

[3] In fact, the detailed analysis carried out in the abovementioned Intesa/Sanpaolo case, looked, inter alia, at the degree to which bank customers would be inclined to change to the services provided by Poste.

[4] 78,1 % would not consider changing to a postal account as opposed to 10,1 % who would. Globally, the same tendency was also found when examining the willingness of bank customers to change when faced with 5 % rises in charges related to the use of a bank account. Here also, a majority was not willing to abandon their bank account in favour of a postal account.

[5] While the normative restraints will remain unchanged, Poste has started broadening the range of services it offers, which should intensify competition.

(14) The aim of the present Decision is to establish whether the services offered by Poste are exposed to such a level of competition (on markets to which access is free) that this will ensure that, also in the absence of the discipline brought about by the detailed procurement rules set out in Directive 2004/17/EC, Poste's procurement for the pursuit of the activities concerned here will be carried out in a transparent, non-discriminatory manner based on criteria allowing it to identify the solution which overall is the economically most advantageous one. For this purpose it is therefore necessary to examine whether the banks have the possibility to bringing competitive pressure to bear on Poste.

(15) The facts set out in recital 13 above — in particular, the fact that for a customer of Poste, the choice of a bank account may offer either new services or, at least, more options when using services offered by both types of accounts — seem to strongly suggest that Poste is indeed subject to competitive pressure from the banks. This is also indicated by the Commission's Decision C(2006) 4207 final of 26.9.2006 ([1]), in which the Commission, focusing on Poste's competitive situation on the market for financial services, stated explicitly that 'notably, the post office current accounts are in competition with bank current accounts, where both banks and PI have outlets' ([2]). However, it is worth noting that in the State aid field market analysis is carried out in a very general way, in the sense that markets are not defined and no specific market tests are performed. Therefore there is no market investigation organised such as those launched by the Commission for antitrust decisions.

(16) Consequently, for the purposes of Article 30 and without prejudice to the application of the rules on competition, it is necessary to take into account the services offered by banks and other financial institutions when establishing whether Poste is or not directly exposed to competition when offering savings services.

(17) Geographically, the markets for savings collection are regional in extension and Poste's market share varies from one region to the next. According to the latest available information, transmitted by the Italian authorities on 16 October 2009, Poste's market shares stay within a band that varies between 1,4 % in Trentino Alto Adige to a regional maximum of 11,8 % in Molise. According to the available figures, Poste's share on a nationwide basis amounted to 5,6 % in 2006 and would seem to have remained at a comparable or even slightly lower level in the subsequent years. Considering the degree of concentration on this market, where the two biggest competitors have an aggregate market share at the national level, which, for 2008, was estimated at 44,7 %, these factors should be taken as an indication of direct exposure to competition.

Financing

(18) The services concerned under this heading are described as covering lending, i.e. (third party) mortgages and loans, consumer credit, and financial leasing. Given the normative constraints under which Poste operates (it may not grant credit to the public) it operates essentially as an intermediary which places the services concerned on behalf of banks and accredited financial intermediaries. Poste, through its internal division, BancoPosta, operates 'principally in the retail market for consumer banking and financial services and only marginally in the business services and public administration market'.

(19) The services concerned here can in turn be subdivided in many different ways according to factors such as the purposes for which a loan is taken ([3]) or the typical customer (consumers, SMEs, larger undertakings or public administrations) etc. As indicated in recital 11 above, the exact definition can, however, be left open for the purposes of the present Decision.

(20) Depending on the computations, Poste's market share as distribution outlet for personal loans amounted to approximately 4,8 % ([4]) – 5 % in 2008, whereas the aggregate market shares of its three biggest competitors in the field of personal loans amounted to 43,6 % in that same year. For financial leasing, its market share was negligible in 2008, amounting to a mere 0,03 %. Its market share in respect of mortgages, even though higher, can still be considered as being fairly negligible as it only amounted to 1,6 % in 2008. For the purposes of this Decision, these factors should therefore be taken as an indication of direct exposure to competition.

Investments

(21) In the field of investment Poste is mainly active in the downstream (distribution) phase for the placement of financial instruments (bonds in particular), and the placement of supplementary pension and financial/insurance products (in particular personal pension policies). These services can be divided in many different ways (according to the type of financial instrument, the stage in the management chain (upstream/downstream), according to the type of customers etc. Here as well, the exact definition can be left open for the purposes of the present Decision (see recital 11 above).

([1]) The Commission's Decision on State aid C 42/06 (ex NN 52/06) — Italy Poste Italiane — BancoPosta 'Remuneration of current accounts deposited with the Treasury', published in OJ C 290, 29.11.2006, p. 8.

([2]) Point 60 of the Decision. In the same sense, see also point 73 of Commission Decision C(2006) 5478 final of 22.11.2006 in State aid case C 49/06 (ex NN 65/06) Italy — Poste Italiane — Postal savings, published in OJ C 31, 13.2.2007, p. 11.

([3]) For example, for general purposes or for the purchase of a specific good such as a vehicle.

([4]) Including both its placement of Deutsche Bank loans and of Compass loans.

(22) In fact, according to the available information, Poste's market share in the various fields concerned here varied between relatively limited — 19,8 % of the entire indirect intake, including BancoPosta bonds — to negligible, such as is the case in the field of mutual funds, where its market share amounted to 0,7 % in 2008. In the latter field, the aggregate market shares of its two main competitors amounts to 43,4 %; when looking at the various distribution channels for mutual funds the competitive pressure becomes even more marked as distribution through banks [1] and promoters [2] account for an aggregate share of 78,3 % as opposed to the 0,7 distributed through postal offices. In the field of life insurances, in 2008 Poste offered various types of insurances within branches I and III and was not active in branches IV, V and VI. Measured in number of policies its market share of branch I life insurances amounted to 17,03 %, while the corresponding figure for Branch III amounted to 19,4 %. Looking at the aggregates for all the branches, its overall share amounts to 17,5 % of the number of life policies in 2008. Considering the collection of life insurance premiums (i.e. looking at the value side), Poste obtained a market share of 10,1 % of the total in 2008 as opposed to 43,6 % collected through banks and the share collected by agents amounting to 23,8 % in that same year. For the purposes of this Decision, these factors should therefore be taken as an indication of direct exposure to competition.

Payment and money transfer services

(23) The payment services concerned here cover credit card services, including revolving credit cards, debit card services and prepaid card services. The abovementioned normative restrictions on Poste have the effect that, in respect of credit cards, it operates essentially as an intermediary placing cards issued by others who take the full insolvency risk. It may, on the other hand, issue debit cards (Postamat) and prepaid cards. According to the information submitted, Poste's market share, measured in terms of value, amounted to 0,8 % in 2008 [3] in respect of credit cards. Looking at debit cards, Poste obtained a market share of 16,74 % of this market, which constitutes 44,6 % of the overall sector for payment cards in Italy. The remaining part of the debit card sector is made up of bank debit cards authorised at the POS (point of sale) for payments. Concerning in particular prepaid cards, Poste has obtained a quite substantial part since the introduction of its PostePay card in November 2003, and currently holds a market share which fell from 59,8 % in 2007 to 56,5 % in 2008, Conversely, over the same period, the aggregate market shares for the two biggest competitors rose from 15,7 % to 20,4 %, while the aggregate market shares for the three biggest competitors rose from 18,8 % in 2007 to 24,6 % in 2008. Even though Poste's position on this market, which represents 9,7 % of the overall sector for payment cards in Italy, continues to be strong, the aggregate (and rising) market shares of its three biggest competitors amounts to slightly less than half that of Poste, at which level they are able to bring a significant competitive pressure to bear on Poste [4]. For the purposes of this Decision, these factors should therefore be taken as an indication of direct exposure to competition in the field of credit cards, debit cards and prepaid cards.

(24) As recalled under recital 2(d) above, the request also covers money transfer services. According to the available information, Poste's market share in respect of money orders and banker's orders amounted to 16 % in 2008. Discussions are underway to facilitate interoperability and competition between banker's orders and postal orders. For international money orders, the available information does not include specific market shares for Poste due to apparent problems in obtaining comparable statistics on international money transfers within the banking system. However, considering that the number of international money orders only reaches slightly over 2 % of the total number of money orders and banker's orders, it may be considered to be negligible for the purposes of this Decision, given also the ever increasing liberalisation initiatives in respect of money transfers across borders, such as the single euro payment area. These factors should therefore be taken as an indication of direct exposure to competition in the field of money transfer services.

IV. **CONCLUSIONS**

(25) In view of the factors examined in recitals 13 to 24, the condition of direct exposure to competition laid down in Article 30(1) of Directive 2004/17/EC should be considered to be met in Italy:

(a) Collection of savings from the public through a current account.

(b) Lending on behalf of banks and accredited financial intermediaries.

(c) Investment services and activities.

(d) Payment and money transfer services.

[1] 58,1 %.
[2] 20,2 %.
[3] 1,9 % if measured in terms of the number of active credit cards.
[4] This is, *mutatis mutandis*, the reasoning applied in previous Decisions. See, for example, recital 17 of Commission Decision 2009/46/EC of 19 December 2008 exempting certain services in the postal sector in Sweden from the application of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 19, 23.1.2009, p. 50).

(26) Since the condition of unrestricted access to the market is also met, Directive 2004/17/EC should not apply when contracting entities award contracts intended to enable the services listed in points (a) to (d) of recital 25 to be carried out in Italy, nor when design contests are organised for the pursuit of such an activity in Italy.

(27) This Decision is based on the legal and factual situation as of July to October 2009 as it appears from the information submitted by the Italian Republic. It may be revised, should significant changes in the legal or factual situation mean that the conditions for the applicability of Article 30(1) of Directive 2004/17/EC are no longer met,

HAS ADOPTED THIS DECISION:

Article 1

Directive 2004/17/EC shall not apply to contracts awarded by contracting entities and intended to enable the following services to be carried out in Italy:

(a) Collection of savings from the public through a current account.

(b) Lending on behalf of banks and accredited financial intermediaries.

(c) Investment services and activities.

(d) Payment and money transfer services.

Article 2

This Decision is addressed to the Italian Republic.

Done at Brussels, 5 January 2010.

For the Commission
Charlie McCREEVY
Member of the Commission

RULES OF PROCEDURE

COMMITTEE OF THE REGIONS

RULES OF PROCEDURE

TABLE OF CONTENTS

*

* *

INTRODUCTION

On 3 December 2009 the Committee of the Regions adopted the following Rules of Procedure on the basis of Article 306, second paragraph, of the Treaty on the Functioning of the European Union

PRELIMINARY COMMENT

The terms used in these Rules of Procedure for the various offices are not gender-specific.

TITLE I

MEMBERS AND CONSTITUENT BODIES OF THE COMMITTEE

CHAPTER 1

CONSTITUENT BODIES

Rule 1 — Constituent bodies of the Committee

The constituent bodies of the Committee shall be the Plenary Assembly, the President, the Bureau and the commissions.

CHAPTER 2

MEMBERS OF THE COMMITTEE

Rule 2 — Status of members and alternates

Pursuant to Article 300 of the Treaty on the Functioning of the European Union, the members and alternates shall be representatives of regional and local bodies. They shall hold a regional or local authority electoral mandate or shall be politically accountable to an elected assembly. They may not be bound by any mandatory instructions and shall be completely independent in the performance of their duties, in the general interest of the Union.

Rule 3 — Term of office

1. The term of office of a member or alternate shall commence on the date on which his appointment by the Council takes effect.

2. The term of office of a member or alternate shall be terminated by resignation, the end of the electoral mandate on the basis of which he was appointed, or death.

3. A resigning member or alternate must notify the President of the Committee of his intention in writing, specifying the date on which his resignation is to take effect. The President shall inform the Council, which shall confirm the vacancy and implement the replacement procedure.

4. A member or alternate whose term of office at the Committee ends because the electoral mandate, on the basis of which he was appointed, expires shall immediately inform the President of the Committee of the fact in writing.

5. In the cases referred to in Rule 3(2), a replacement shall be appointed by the Council for the remainder of the term.

Rule 4 — Privileges and immunities

Members and their duly mandated alternates shall enjoy privileges and immunities in accordance with the Protocol on the Privileges and Immunities of the European Union.

Rule 5 — Attendance of members and alternates

1. Any member prevented from taking part in a Plenary Session may be represented by an alternate from his national delegation; he may also be represented for a period limited to individual days of the Plenary Session. All members and their duly mandated alternates shall sign an attendance list.

2. Any member prevented from taking part in a commission meeting or any other meeting which has been approved by the Bureau may be represented by another member or an alternate from his national delegation, political group or interregional group. All members and their duly mandated alternates shall sign an attendance list.

3. A member or alternate appointed to the list of replacements for the members of a working group, established on the basis of Rule 36 or 57 of the Rules of Procedure, may replace any member of that working group belonging to the same political group.

4. An alternate or a member acting as an alternate can stand in for one member only. They shall exercise the same powers as a member at the relevant meeting. The Secretariat-General must be notified in line with notification requirements of the delegation of vote, which must be received no later than the day before the meeting.

5. At a Plenary Session the expenses of only the member or the alternate shall be reimbursed. The detailed provisions shall be laid down by the Bureau in the implementing arrangements regarding travel and subsistence expenses.

6. An alternate who has been appointed rapporteur may present the draft opinion or report for which he is responsible at the Plenary Session at which the draft opinion or report is on the agenda. This shall apply even if the member whom he has been designated to replace is also at the meeting. The member may delegate his vote to his alternate while the draft opinion or report in question is being discussed. The Secretary-General must be notified in writing of the delegation of vote before the relevant meeting.

7. Without prejudice to Rule 23(1), any delegation shall cease to have effect from the moment the member who is unable to attend ceases to be a member of the Committee of the Regions.

Rule 6 — Delegation of vote

Except as provided for in Rules 5 and 30, the right to vote may not be delegated.

Rule 7 — National delegations and political groups

National delegations and political groups shall help in a balanced way with the organisation of the Committee's work.

Rule 8 — National delegations

1. The members and alternates from each Member State shall form a national delegation. Each national delegation shall adopt its own internal rules and shall elect a chairman. The Committee President shall be officially informed of the name of the person elected.

2. The Secretary-General shall make arrangements, within the Committee's administration, for national delegations to receive assistance. These arrangements shall also permit each individual member to receive information and assistance in his official language. The arrangements shall form part of a specific service consisting of Committee of the Regions officials or other servants and shall ensure that national delegations can make appropriate use of the Committee's facilities. Specifically, the Secretary-General shall provide the national delegations with suitable means for holding meetings immediately before or during Plenary Sessions.

3. The national delegations shall also be assisted by national coordinators, who are not part of the staff of the Secretariat-General. They contribute to members efficiently executing their responsibilities as members of the Committee.

4. The Secretary-General provides the national coordinators with appropriate support, in particular to enable them to make proper use of the Committee's infrastructures.

Rule 9 — Political groups and non-attached members

1. Members and alternates may form groups which reflect their political affinities. The criteria for membership shall be laid down in the internal rules of each political group.

2. At least 18 members/alternates, half of whom at least must be members, representing at least one fifth of the Member States, shall be needed to form a political group. A member/alternate may belong to only one political group. A political group shall be dissolved if its membership falls below the required number.

3. The Committee President shall be notified in a statement when a political group is set up, dissolved or otherwise changed. The statement notifying the formation of a political group shall specify the name of the political group, its members and its bureau.

4. Each political group shall be assisted by a secretariat staffed by Secretariat-General personnel. The political groups may submit proposals to the appointing authority for the selection, appointment and promotion of such staff and for extending their contracts. The appointing authority shall make its decision after consulting the chairman of the political group concerned.

5. The Secretary-General shall provide the political groups and their constituent bodies with adequate resources for meetings, activities and publications and for the work of their secretariats. The resources for each political group shall be earmarked in the budget. The political groups and their secretariats may make appropriate use of the Committee's facilities.

6. The political groups and their bureaux may meet immediately before or during Plenary Sessions. They may hold extraordinary meetings twice a year. An alternate attending these meetings is only entitled to travel and subsistence expenses if he is representing a member from his political group.

7. Non-attached members shall be provided with administrative support. The detailed arrangements shall be laid down by the Bureau on a proposal from the Secretary-General.

Rule 10 — Interregional groups

Members and alternates may form interregional groups. They shall inform the Committee President thereof. An interregional group shall be duly formed by decision of the Bureau.

*

* *

TITLE II

ORGANISATION AND PROCEDURE OF THE COMMITTEE

CHAPTER 1

INITIAL CONVENING AND INSTALLATION IN OFFICE OF THE COMMITTEE

Rule 11 — Convening the first meeting

The Committee shall be convened, after each five-yearly renewal, by the outgoing President, or failing that, the outgoing first vice-president or, failing that, the oldest outgoing vice-president or, failing that, the oldest member and shall meet not later than one month after the appointment of its members by the Council.

The member acting as interim president under the first paragraph of this rule shall also take on the role of representing the Committee during this period and shall chair the first meeting in his capacity as interim president.

He, together with the four youngest members present and the Secretary-General of the Committee, shall constitute the interim bureau.

Rule 12 — Installation in office of the Committee and verification of credentials

1. At the first meeting, the interim president shall inform the Committee of the communication from the Council concerning the appointment of its members and report on any action he has undertaken to represent the Committee. If requested, the interim president may decide to verify the appointment and credentials of members, after which he shall declare the Committee installed in office for the new term.

2. The interim bureau shall remain in office until the results of the elections of the members of the Bureau have been declared.

CHAPTER 2

PLENARY ASSEMBLY

Rule 13 — Tasks of the Plenary Assembly

The Committee shall meet as a Plenary Assembly. Its main tasks shall be:

(a) to adopt opinions, reports and resolutions;

(b) to adopt the draft estimates of expenditure and revenue of the Committee;

(c) to adopt the political programme of the Committee at the beginning of every term;

(d) to elect the President, the first Vice-President and the remaining members of the Bureau;

(e) to set up commissions;

(f) to adopt and revise the Rules of Procedure of the Committee;

(g) having verified that there is a quorum under the first sentence of Rule 21(1) of the Rules of Procedure, to take a decision, by a majority of the votes cast, on a proposal by the President of the Committee, or the competent commission acting in accordance with Rules 53 and 54, to bring an action before the Court of Justice of the European Union. When such a decision is adopted, the action shall be brought by the President on behalf of the Committee.

Rule 14 — Convening the Plenary Assembly

1. The President of the Committee shall convene the Plenary Assembly at least once every three months. The dates of the Plenary Sessions are to be fixed by the Bureau during the third quarter of the previous year. A Plenary Session can meet on one or more days.

2. At the written request of at least one quarter of the members, the President shall be obliged to convene an extraordinary Plenary Session, which shall take place not sooner than one week and not later than one month after the date of the request. The written request shall state the subject matter which is to be discussed at the extraordinary Plenary Session. No other matter may be dealt with.

Rule 15 — Agenda for the Plenary Session

1. The preliminary draft agenda containing a provisional list of the draft opinions, reports and resolutions to be discussed at the next but one Plenary Session together with all the other documents requiring a decision shall be prepared by the Bureau.

2. The draft agenda accompanied by all the documents requiring a decision listed therein shall be emailed by the President to the members and alternates in each respective official language at least 20 working days before the opening of the Plenary Session. Documents shall also be made accessible electronically at the same time.

3. The draft opinions, reports and resolutions shall in principle be put on the agenda in the order in which they were adopted by the commissions or submitted in accordance with the Rules of Procedure. Account shall also be taken of agenda items which deal with related subject matter.

4. In exceptional and duly motivated cases where the deadline referred to in paragraph 2 cannot be met, the President may decide to include a document requiring a decision on the draft agenda provided the relevant document has been received by the members and alternates in their official language not later than one week before the opening of the Plenary Session. The reason for the application of this procedure shall be indicated by the President on the cover page of the document requiring a decision.

5. Written amendments to the draft agenda must be submitted to the Secretary-General not later than three working days before the opening of the Plenary Session.

6. The Bureau shall finalise the draft agenda at its meeting immediately prior to the opening of the Plenary Session. At this meeting the Bureau may decide, by a two-thirds majority of the votes cast, to include on the agenda matters of an urgent or topical nature whose discussion cannot be deferred until the next Plenary Session.

7. On a proposal from the President, a political group or 32 members, the Bureau or the Plenary Assembly may decide to:

— defer discussion of a document for decision to a future plenary session,

or

— refer back a document for decision to the relevant commission for review.

This provision shall not apply in cases where a deadline set by the Council, the Commission or the European Parliament makes it impossible to defer the adoption of a document for decision.

A document for decision deferred to a future session of the Plenary Assembly shall be accompanied by all the related duly tabled amendments.

When a document is referred back to the relevant commission, the related amendments shall lapse and the rapporteur shall assess the extent to which their content:

— requires him to undertake a prior revision of the text, taking account of the deadline,

and/or

— may give rise to the tabling of amendments by the rapporteur, in accordance with the procedure for tabling of amendments in commission.

The document shall be placed on the agenda of the commission for decision.

Rule 16 — Opening of the Plenary Session

The President shall open the Plenary Session and call for the adoption of the final draft agenda.

Rule 17 — Admission of the public, guests and guest speakers, topical debate slot

1. Plenary Sessions shall be open to the public, unless the Plenary Assembly decides otherwise in respect of the whole meeting or a specific item on the agenda.

2. Representatives of the European Parliament, Council and Commission may attend Plenary Sessions. They may be asked to take the floor.

3. The President, acting on his own initiative or at the request of the Bureau, may also invite other distinguished guests to address the Plenary Assembly. A general debate may follow, during which the general rules on speaking time shall apply.

4. The Bureau may, in accordance with Rule 15(1) and (6), propose to the Plenary Assembly that a general debate be held on topical political issues of regional and local relevance (topical debate slot). The general rules on speaking time shall apply.

Rule 18 — Speaking time

1. The Plenary Assembly shall, at the beginning of its meeting and acting on a proposal from the Bureau, allocate speaking time for every item on the agenda. During a Plenary Session the President, acting on his own initiative or at the request of a member, shall arrange for a decision to be taken to limit speaking time.

2. The President, acting on a proposal from the Bureau, may propose to the Plenary Assembly that when debates are held on general or specific issues, speaking time should be divided among the political groups and national delegations.

3. As a general rule, speaking time shall be limited to one minute for comments on minutes, for points of order and for comments on amendments to the final draft agenda or the agenda.

4. If a speaker exceeds his allotted speaking time, the President may, after an initial call to order, forbid him to speak.

5. Any request by a member that the debate be brought to a close shall be put to the vote by the President.

Rule 19 — List of speakers

1. The names of members who ask to speak shall be entered in a list in the order in which their requests are received. The President shall call upon members to speak on the basis of this list, ensuring as far as possible that speakers of different political views and from different national delegations are heard in turn.

2. Priority may be given, however, to the rapporteur of the commission concerned and to the representatives of the political groups and national delegations wishing to speak on behalf of their group or delegation.

3. No-one may take the floor more than twice on the same subject, except by leave of the President. The chairman and the rapporteur of the commission concerned shall, however, be allowed to speak at their request for a period to be decided by the President.

Rule 20 — Points of order

1. A member shall be allowed to speak to raise a point of order or to draw the attention of the President to any failure to respect the Rules of Procedure. The point of order must concern the agenda or the subject under discussion.

2. A request to raise a point of order shall take precedence over all other requests to speak.

3. The President shall take an immediate decision on points of order in accordance with the Rules of Procedure and shall announce his ruling immediately after the Rules of Procedure have been invoked. No vote shall be taken on the President's ruling.

Rule 21 — Quorum

1. A quorum shall exist at a Plenary Session if a majority of the members is present. The quorum shall be verified at the request of a member if at least 15 members vote in favour of the request. If the verification of a quorum is not requested, all votes shall be valid regardless of the number of members present. The President may interrupt the Plenary Session for up to 10 minutes before proceeding with a verification of the quorum. Members who have requested verification of the quorum but are no longer present in the Plenary Session chamber shall be considered to be present for the purposes of the count. If fewer than 15 members are present, the President may rule that there is no quorum.

2. If it is established that there is no quorum, all items on the agenda which require voting shall be postponed until the following meeting day, when the Plenary Assembly may hold a valid vote on these items whatever the number of members present.

Rule 22 — Voting

1. The Plenary Assembly shall decide by a majority of the votes cast, save where otherwise provided in these rules.

2. The valid forms of vote shall be 'for', 'against' and 'abstention'. In calculating the majority, only the votes cast for and against shall be taken into account. In the event of a tied vote, the text or proposal shall be deemed rejected.

3. If the result of the count is queried, a fresh vote may be called for by the President or may take place at the request of a member, provided that at least 15 members vote in favour of the request.

4. At the proposal of the President, a political group or 32 members, submitted before the final agenda is adopted, the Plenary Assembly may decide to hold a roll call vote for one or more agenda items, which shall be recorded in the plenary session minutes. Unless the Plenary Assembly decides otherwise, the use of a roll call vote shall not apply to amendments.

5. At the proposal of the President, a political group or 32 members, a decision may be taken to vote by secret ballot if the decision concerns persons.

6. The President may at any time decide that a vote shall be conducted by electronic means.

Rule 23 — Tabling of amendments

1. Only members and duly mandated alternates — and, for his own opinion, any non-mandated alternate appointed as rapporteur — may table amendments to documents requiring a decision, in accordance with rules on tabling amendments.

   The right to table amendments at a plenary session may only be exercised either by a member or by his duly mandated alternate. Amendments validly tabled by a member or alternate who subsequently loses that office, or before the granting or withdrawal of a delegation, shall remain valid.

2. Without prejudice to the provisions of Rule 26(1), amendments to documents requiring a decision must be submitted either by a political group, or by at least six members or duly mandated alternates and must bear their names. National delegations with fewer than six members may submit amendments, provided that these amendments are submitted by and bear the names of all the members of the delegation or their duly appointed alternates.

3. They must reach the Secretary-General at least nine working days before the opening of the Plenary Session. Amendments must be electronically retrievable as soon as they have been translated, but not later than four working days prior to the Plenary Session.

   The amendments shall be translated as a matter of priority and sent to the rapporteur to allow him or her to forward his or her own amendments to the Secretariat-General no later than two working days before the opening of the plenary session. The rapporteur's amendments must be associated and related to one or more amendments referred to in paragraph 1. The rapporteur's amendments shall be retrievable only at the opening of the plenary session.

   The deadline for the submission of amendments can be reduced to three working days by the President in cases where Rule 15(4) is applied. The deadline shall also not apply in the case of amendments to urgent matters pursuant to Rule 15(6).

4. All amendments shall be distributed to members before the beginning of the Plenary Session.

Rule 24 — Procedure for dealing with amendments

1. If one or more amendments have been tabled to a part of a text, the President, the rapporteur or the authors of these amendments may in exceptional cases propose compromise amendments during the debate. Where possible, the text of a compromise amendment should be forwarded in advance and in writing to the President and to the Secretariat-General before the subject concerned is discussed.

2. Voting on amendments shall follow the order of the points in the text and the following order of priority:

   — rapporteur's amendments,

   — compromise amendments, unless one of the authors of the original amendments is opposed,

   — other amendments.

   Once adopted, rapporteur's amendments and compromise amendments replace the amendments from which they derive.

   The President may order a joint vote on amendments with a similar content and objective.

3. A rapporteur may draw up a list of amendments tabled to his draft opinion or report which he recommends be adopted (voting recommendation). If the rapporteur has made a voting recommendation, the President may decide that all the amendments covered by the recommendation are to be voted on together. Any member may, however, object to the voting recommendation, specifying amendments which should be voted on separately.

4. Amendments shall have priority over the text to which they relate and shall be put to the vote before that text.

5. If two or more mutually exclusive amendments have been tabled to the same part of a text, the amendment that departs furthest from the original text shall have priority and shall be put to the vote first.

   The President shall announce before the vote is taken whether the adoption of an amendment would negate one or more other amendments, either because these amendments are mutually exclusive if they refer to the same passage, or because they are contradictory. An invalid amendment shall not be put to a vote unless its authors dispute its invalidity and the Plenary Assembly agrees to put the disputed amendment to a vote.

6. The final vote shall be on the text as a whole, whether amended or not. An opinion which does not obtain an absolute majority of the votes cast shall be returned to the competent commission or shall lapse.

Rule 25 — Urgent opinions and reports

In urgent cases where a deadline set by the Council, Commission or European Parliament cannot be met under the normal procedure, and the relevant commission has adopted its draft opinion or report unanimously, the President shall transmit this draft opinion or report to the Council, Commission and European Parliament for information. The draft opinion or report shall be submitted to the following Plenary Session for adoption without amendment. All documents relating to the said opinion or report must testify to the urgent nature of the opinion or report.

Rule 26 — Simplified procedures

1. Draft opinions or reports adopted unanimously by a (lead) commission shall be submitted to the Plenary Assembly for adoption without change unless at least 32 members or duly mandated alternates or a political group table an amendment in accordance with the first sentence of Rule 23(3). In this case, the amendment shall be dealt with by the Plenary Assembly. The draft opinion or report shall be presented by the rapporteur at the Plenary Session and may be the subject of a debate. It shall be forwarded to members together with the draft agenda.

2. If the (lead) commission is of the view that the Committee has no reason to comment on or propose changes to a document referred to it by the Bureau, it may propose that no objections be raised to the document. The proposal shall be submitted to the Plenary Assembly for adoption without debate.

Rule 27 — Closing of the Plenary Session

Before the closing of the Plenary Session, the President shall announce the time and place of the following Plenary Session together with any items already on the agenda.

Rule 28 — Symbols

1. The Committee recognises and adopts the following Union symbols:

   (a) the flag representing a circle of 12 gold stars on a blue background;

   (b) the anthem entitled 'Ode to Joy' from Beethoven's Ninth Symphony;

   (c) the motto 'United in Diversity'.

2. The Committee shall celebrate Europe Day on 9 May.

3. The flag shall be displayed in the buildings of the Committee and to mark official occasions.

4. The anthem shall be played at the opening of every inaugural session at the beginning of a term of office and to mark other commemorative sessions, e.g. when welcoming heads of state or government, or new members following an enlargement.

CHAPTER 3

THE BUREAU AND THE PRESIDENT

Rule 29 — Composition of the Bureau

The Bureau shall consist of:

(a) the President;

(b) the first Vice-President;

(c) one Vice-President per Member State;

(d) 27 other members;

(e) the chairmen of the political groups.

Seats on the Bureau (excluding the seats of the President, the first Vice-President and the chairmen of the political groups) shall be divided among the national delegations as follows:

— 3 seats: Germany, Spain, France, Italy, Poland, United Kingdom,

— 2 seats: Belgium, Bulgaria, Czech Republic, Denmark, Greece, Ireland, Lithuania, Hungary, the Netherlands, Austria, Portugal, Romania, Slovakia, Finland, Sweden,

— 1 seat: Estonia, Cyprus, Latvia, Luxembourg, Malta, Slovenia.

Rule 30 — Replacements at Bureau meetings

1. The national delegations shall appoint a member or alternate from the delegation as *ad personam* replacement for each of their members of the Bureau, except for the President and the first Vice-President.

2. For each political group chairman, the political group in question shall name one of its members or alternates as *ad personam* replacement.

3. An *ad personam* replacement shall be entitled to participate in meetings with speaking and voting rights only when he is replacing the Bureau member in question. The delegation of vote must be notified in writing to the Secretary-General prior to the relevant meeting.

Rule 31 — Election rules

1. The Bureau shall be elected by the Plenary Assembly for two and a half years.

2. The election shall be held under the chairmanship of the interim president in accordance with Rules 11 and 12. All candidatures must be submitted in writing to the Secretary-General at least one hour before the beginning of the Plenary Session. The elections shall take place only if at least two-thirds of the members are present.

Rule 32 — Election of the President and the first Vice-President

1. Before the elections, candidates for the posts of President and first Vice-President may make a short statement before the Plenary Assembly. The speaking time for candidates shall be of equal length and shall be laid down by the interim president.

2. The election of the President and the first Vice-President shall take place separately. They shall be elected by a majority of the votes cast.

3. The valid forms of vote shall be a vote for and an abstention. In calculating the majority, only the votes cast for shall be taken into account.

4. If no candidate obtains a majority in the first ballot, a second ballot shall be held in which the candidate receiving the highest number of votes shall be deemed to be elected. In the event of a tied vote, a decision shall be taken by drawing lots.

Rule 33 — Election of the members of the Bureau

1. A joint list may be drawn up for the candidates from those national delegations which nominate only one candidate for each of the seats allocated to them on the Bureau. This list may be adopted in a single ballot if it obtains a majority of the votes cast.

   In cases where a joint list of candidates is not adopted, or where the number of candidates exceeds the number of seats allocated to a national delegation on the Bureau, each of these seats shall be decided in separate ballots; in this case the provisions on the election of the President and the first Vice-President shall be applicable in accordance with Rules 31 and 32(2) to (4).

2. With a view to the election of the chairmen of the political groups as members of the Bureau, a list of their names shall be submitted to the Plenary Assembly for adoption.

Rule 34 — Election of replacements

When a candidate for a seat on the Bureau is elected, his *ad personam* replacement shall also be elected automatically.

Rule 35 — By-elections for vacant Bureau seats

In the event of termination of Committee membership or of resignation from the Bureau, a member of the Bureau and/or his *ad personam* replacement shall be replaced for the remainder of his term of office in accordance with the procedures laid down in Rules 29 to 34. The by-election for a vacant Bureau seat shall take place at a Plenary Session chaired by the President or by his representative, in accordance with Rule 38(3).

Rule 36 — Tasks of the Bureau

The Bureau shall have the following tasks:

(a) establishment and submission to the Plenary Assembly of its policy programme at the beginning of its term, and monitoring of its implementation; at the end of its term, submission to the Plenary Assembly of a report on the implementation of the programme;

(b) organisation and coordination of the work of the Plenary Assembly and the commissions;

(c) adoption, on the proposal of the commissions, of their annual work programme;

(d) overall responsibility for financial, organisational and administrative matters concerning members and alternates; internal organisation of the Committee, its Secretariat-General, including the establishment plan, and its constituent bodies;

(e) The Bureau may:

— set up working groups of Bureau members or of Committee members to advise it in specific areas; such working groups may have up to eight members,

— invite other members of the Committee, by virtue of their expertise or mandate, and persons not belonging to the Committee, to attend its meetings;

(f) engagement of the Secretary-General and the officials and other servants listed in Rule 69;

(g) submission of the draft estimates of expenditure and revenue to the Plenary Assembly in accordance with Rule 72;

(h) authorisation of meetings away from the usual place of work;

(i) drawing-up of provisions for the membership and working methods of working groups, joint committees with applicant countries and other political bodies in which Committee members participate;

(j) having verified that there is a quorum under the first sentence of Rule 37(2), taking a decision to bring an action before the Court of Justice of the European Union, when the Plenary Assembly is not able to take a decision within the deadline, by a majority of the votes cast, on a proposal by the President of the Committee or the competent commission acting in accordance with Rules 53 and 54. When such a decision is adopted, the President shall bring the action on behalf of the Committee and shall ask the Plenary Assembly at its next session to decide whether to maintain the action. If, having verified the existence of the quorum referred to in the first sentence of Rule 21(1), the Plenary Assembly takes a decision by the majority required in Rule 13(g) not to bring the action, the President shall withdraw the action.

Rule 37 — Convening of the Bureau, quorum and decision

1. The Bureau shall be convened by the President, who shall set the date of the meeting and the agenda in agreement with the first Vice-President. The Bureau shall meet at least once every three months, or within 14 days following receipt of a written request by at least one quarter of its members.

2. A quorum shall exist at a Bureau meeting if at least one half of its members are present. The quorum shall be verified at the request of a member, provided that at least six members vote in favour of the request. If the verification of a quorum is not requested, all votes shall be valid regardless of the number of members present. If it is established that there is no quorum, the Bureau may continue its discussions but voting shall take place at the next meeting.

3. The Bureau shall decide by a majority of the votes cast, save where otherwise provided for in these rules. Rule 22(2) and (5) shall also apply.

4. In preparation for the Bureau decisions, the President shall ask the Secretary-General to draw up discussion documents and recommendations for a decision on each item to be discussed; these documents and recommendations shall be enclosed with the draft agenda.

5. The documents must be emailed to members at least 10 days before the opening of the meeting. Amendments to Bureau documents must reach the Secretary-General not later than the third working day before the opening of the Bureau meeting, in accordance with the applicable rules, and shall be electronically retrievable as soon as they have been translated.

6. In exceptional circumstances, the President may have recourse to a written procedure for the adoption of a decision other than a decision relating to individuals. The President shall send members the proposed decision and ask them to inform him in writing, within five working days, of any objections they may have. If no objections are received, the decision shall be adopted.

Rule 38 — The President

1. The President shall direct the work of the Committee.

2. The President shall be the Committee's representative. He may delegate these powers.

3. If the President is absent or unable to attend, he shall be represented by the first Vice-President; if the first Vice-President is absent or unable to attend, the President shall be represented by one of the other Vice-Presidents.

Opinions, reports and resolutions — Procedure in Bureau

Rule 39 — Opinions — Legal bases

The Committee shall adopt its opinions pursuant to Article 307 of the Treaty on the Functioning of the European Union.

(a) when it is consulted by the European Parliament, by the Council or by the Commission where the Treaties so provide and in all other cases, in particular those which concern cross-border cooperation, in which one of these institutions considers it appropriate;

(b) on its own initiative when it considers it appropriate;

(c) when, in the event of the Economic and Social Committee being consulted under Article 304 of the Treaty on the Functioning of the European Union, it considers that specific regional interests are involved.

Rule 40 — Opinions and reports — Designation of commission

1. The President shall assign documents received from the Council, Commission or European Parliament to the responsible commission; the Bureau shall be informed of this at its next meeting.

2. If the subject of an opinion or report falls within the area of competence of more than one commission, the President shall designate a lead commission and, where necessary may propose that the Bureau set up a working party comprising representatives of the commissions concerned.

3. If a commission does not agree with a decision of the President taken under Rule 40(1) and (2), it may via its chairman submit an application for a Bureau decision.

Rule 41 — Appointment of a rapporteur-general

1. If the commission concerned cannot draw up a draft opinion or report by the deadline set by the Council, Commission or European Parliament, the Bureau may propose that the Plenary Assembly appoint a rapporteur-general, who shall submit his draft opinion or report straight to the Plenary Assembly.

2. When a deadline set by the Council, Commission or European Parliament does not give the Plenary Assembly time to appoint a rapporteur-general, the rapporteur-general may be appointed by the President; when this is the case, the Plenary Assembly shall be informed at its next meeting.

3. In both cases, the commission concerned shall meet, where possible, to hold a general exploratory debate on the subject.

Rule 42 — Own-initiative opinions and reports

1. Applications for own-initiative opinions or reports may be submitted to the Bureau by three of its members, by a commission via its chairman or by 32 members of the Committee. These applications must be submitted, with reasons, and together with all the other discussion documents in accordance with Rule 37(4), wherever possible, before the annual work programme is adopted.

2. The Bureau shall decide on applications for own-initiative opinions or reports by a majority of three quarters of the votes cast. The opinions or reports shall be referred to the relevant commissions in accordance with Rule 40. The President shall inform the Plenary Assembly of all Bureau decisions approving and allocating own-initiative opinions or reports.

3. This rule shall apply *mutatis mutandis* in the case of opinions which come under Rule 39(c).

Rule 43 — Tabling of resolutions

1. Resolutions are to be put on the agenda only if they refer to the activities of the European Union, deal with important concerns of regional and local authorities and are of topical interest.

2. Draft resolutions or applications for the drafting of a resolution may be submitted to the Committee by at least 32 members or a political group. All drafts or applications, indicating the names of the members or political group supporting them, shall be submitted to the Bureau in writing. They must reach the Secretary-General not later than three working days before the opening of the Bureau meeting.

3. If the Bureau decides that the Committee is to discuss a draft resolution or an application for the drafting of a resolution, it may

(a) put the draft resolution on the Plenary Session preliminary draft agenda in accordance with Rule 15(1);

(b) appoint a commission to draw up a draft resolution by a specific deadline under the procedure used for drawing up draft opinions or reports. Rule 51 shall not apply in such cases;

(c) in accordance with the second sentence of Rule 15(6), place a draft resolution on the agenda for the next Plenary Session. Such draft resolutions shall be dealt with on the second day of the session.

4. Draft resolutions referring to an unforeseeable event occurring after the expiry of the deadline stipulated in Rule 43(2) (urgent resolutions) and complying with the provisions of Rule 43(1) may be submitted at the beginning of the Bureau meeting. If the Bureau decides that the proposal concerns the key tasks of the Committee, the proposal shall be dealt with under Rule 43(3)(c). Amendments to urgent resolutions may be tabled by any member during the Plenary Session.

Rule 44 — Promotion of opinions, reports and resolutions

The Bureau shall be responsible for promoting the Committee's opinions, reports and resolutions.

CHAPTER 4

COMMISSIONS

Rule 45 — Composition and powers

1. At the beginning of each five-year term, the Plenary Assembly shall set up commissions to prepare its work. It shall decide on their composition and powers on a proposal from the Bureau.

2. The composition of the commissions shall reflect the national composition of the Committee.

3. Members of the Committee must belong to at least one commission but may not belong to more than two. Exceptions may be made by the Bureau for members belonging to national delegations which have fewer members than the number of commissions.

Rule 46 — Chairman and vice-chairmen

1. At its first meeting each commission shall appoint from among its members a chairman, a first vice-chairman and no more than two vice-chairmen.

2. Where the number of candidates corresponds to the number of seats to be filled, the election may take place by acclamation. Where this is not the case, or one sixth of the members of the commission so request, the election shall be in accordance with the provisions laid down in Rule 32(2) to (4) for the election of the Committee President and first Vice-President.

3. If a commission bureau member terminates his Committee membership or resigns as a commission chairman or vice-chairman, the vacancy shall be filled in accordance with the provisions of this rule.

Rule 47 — Tasks of commissions

1. In accordance with the powers assigned to them by the Plenary Assembly on the basis of Rule 45, the commissions shall debate Union policies. They shall in particular draw up the draft versions of opinions, reports and resolutions. These drafts shall be submitted to the Plenary Assembly for adoption.

2. They shall draw up their annual work programmes in accordance with the Committee's political priorities and submit them to the Bureau for adoption.

Rule 48 — Convening of commissions and their agendas

1. The dates of meetings and their agendas shall be set by the chairman of each commission acting in agreement with the first vice-chairman.

2. A commission shall be convened by its chairman. The convening notice for an ordinary meeting together with the agenda must reach members not later than four weeks before the date of the meeting.

3. At the written request of at least one quarter of its members, the chairman shall be obliged to convene an extraordinary commission meeting, which must be held not later than four weeks after the submission of the request. The agenda for an extraordinary meeting shall be set by the members submitting the request for such a meeting. It shall be forwarded to members together with the convening notice.

4. All draft opinions and other discussion documents to be translated and made available before a meeting shall be sent to the secretariat of the commission in question not later than five weeks before the date set for the meeting. They shall then be emailed to members not later than 10 working days before the date of the meeting. In exceptional cases the above time limits may be amended by the chairman.

Rule 49 — Admission of the public

1. The proceedings of the commissions shall be open to the public, unless a commission decides otherwise in respect of the whole meeting or of a specific item on the agenda.

2. Representatives of the European Parliament, Council and Commission as well as other visitors may be invited to participate in the meetings of the commissions and to reply to questions from members.

Rule 50 — Time limits for drawing up opinions and reports

1. The commissions shall present their draft opinions or reports within the time limits set out in the interinstitutional calendar. The discussion of a draft opinion or report shall require no more than two meetings, not including the first meeting at which the work shall be organised.

2. In exceptional cases the Bureau may authorise further meetings to discuss a draft opinion or report, or may extend the time limit for the presentation of the draft.

Rule 51 — Content of opinions and reports

1. A Committee opinion or report shall set out the Committee's views and recommendations on the question under consideration, if appropriate together with specific proposals for changes to the document under consideration.

2. Committee opinions shall contain an explicit reference to the application of the subsidiarity and proportionality principles.

3. These opinions and reports shall also, wherever possible, address the expected impact on administration and regional and local finances.

4. If necessary, an explanatory statement shall be drawn up under the responsibility of the rapporteur and shall not be put to the vote. It must, however, accord with the text of the opinion that was put to the vote.

Rule 52 — Follow-up to Committee opinions

1. During the period following the adoption of an opinion, the chairman and the rapporteur of the commission appointed to draw up the draft opinion shall, with the assistance of the Secretariat- General, monitor the course of the procedure underlying the Committee's consultation.

2. If the commission deems it necessary, it may ask the Bureau for permission to draw up a revised draft opinion on the same subject and, where possible, with the same rapporteur, in order to take account of and respond to developments in the procedure underlying the Committee's consultation.

3. The commission shall meet, where possible, to hold a debate and adopt the revised draft opinion, which shall be sent to the next plenary session.

4. In the event that progress in the procedure underlying the Committee's consultation does not allow enough time for the commission to state its views, the chairman of this commission shall immediately inform the Committee President in order to allow the procedure for appointing a rapporteur-general under Rule 41 to be invoked.

Rule 53 — Action for infringement of the subsidiarity principle

1. The President of the Committee or the commission responsible for drawing up the draft opinion may propose bringing an action before the Court of Justice of the European Union for infringement of the subsidiarity principle by a legislative act on which the Treaty on the Functioning of the European Union provides that the Committee be consulted.

2. The commission shall take its decision by a majority of the votes cast, having verified the existence of the quorum referred to in Rule 59(1). The commission proposal shall be sent for decision to the Plenary Assembly in accordance with Rule 13(g) or to the Bureau in the cases referred to in Rule 36(j). The commission shall state the reasons for its proposal in a detailed report, including, where appropriate, the reasons for the urgency of the decision on the basis of Rule 36(j).

Rule 54 — Failure to carry out obligatory consultation of the Committee

1. When the Committee has not been consulted in cases provided for by the Treaty on the Functioning of the European Union, the President of the Committee or a commission may propose to the Plenary Assembly, in accordance with Rule 13(g), or to the Bureau in the cases referred to in Rule 36(j), that an action be brought before the Court of Justice of the European Union.

2. The commission shall take its decision by a majority of the votes cast, having previously verified that the quorum referred to in Rule 59(1) exists. The commission shall state the reasons for its proposal in a detailed report, including, where appropriate, the reasons for the urgency of the decision on the basis of Rule 36(j).

Rule 55 — Report on the impact of opinions

At least once a year the Secretariat-General shall submit to the Plenary Assembly a report on the impact of Committee opinions on the basis, inter alia, of contributions sent to it to this effect by each competent commission and information collected from the institutions concerned.

Rule 56 — Rapporteurs

1. Each commission, acting on a proposal from its chairman, shall appoint a rapporteur or, in duly motivated cases, two rapporteurs to draw up a draft opinion or report.

2. In appointing rapporteurs each commission ensures a fair and balanced allocation of opinions and reports.

3. In urgent cases the commission chairman may apply a written procedure to appoint a rapporteur. The chairman shall ask the members of the commission to submit any objections to the appointment of the proposed rapporteur in writing within three working days. In the event of objection, the chairman and first vice-chairman shall decide by mutual agreement.

4. If the chairman or one of the vice-chairmen of a commission is appointed rapporteur, he shall, during the discussion of his draft opinion or report, hand over the chairmanship of the meeting to a vice-chairman or to the oldest member present.

5. If a rapporteur ceases to be a member or alternate of the Committee, a new rapporteur of the same political group shall be appointed within the commission, if necessary by following the procedure provided for in paragraph 3.

Rule 57 — Working parties

1. In duly motivated cases the commissions may set up working parties, with the approval of the Bureau. Working party members may also come from other commissions.

2. A working party member who is unable to attend a meeting may be represented by a member or alternate from his political group and from the list of replacements for the working party.

3. Each working party can appoint a chairman and a vice-chairman from among its members.

Rule 58 — Experts

1. The members of the commissions may call on the services of an expert.

2. A commission may appoint experts to assist it in its work and to assist any working parties which it has set up. At the invitation of the chairman, these experts may take part in meetings of the commission or of one of its working parties.

3. Only rapporteurs' experts and experts invited by the commission shall be entitled to travel and subsistence expenses.

Rule 59 — Quorum

1. A quorum shall exist at a commission meeting if more than one half of its members are present.

2. The quorum shall be verified at the request of a member if at least 10 members vote in favour of the request. If the verification of a quorum is not requested, all votes shall be valid regardless of the number of members present. If it is established that there is no quorum, the commission may address the remaining items on the agenda that do not require a vote, postponing discussion and voting on the suspended agenda items to the next meeting.

Rule 60 — Voting

1. Decisions shall be taken by a majority of the votes cast. Rule 22(2) shall also apply.

2. If a commission has interrupted voting on an opinion, it may decide, by a majority of the votes cast, to resubmit the amendments already adopted to a vote when it takes a decision on the text as a whole.

Rule 61 — Amendments

1. Amendments must be sent to commission secretariats at least seven working days before the date of the meeting. In exceptional cases the above time limit may be amended by the chairman.

Commission amendments may be tabled only by the members of that commission, or members or alternates duly mandated under the conditions set out in Rule 5(2), and, for his own opinion, by any non-mandated alternate appointed as rapporteur.

The right to table commission amendments may only be exercised either by a member of that commission or by another duly mandated member or alternate. Amendments validly tabled by a member or alternate who subsequently loses that office, or before the granting or withdrawal of a delegation, shall remain valid.

The amendments shall be translated as a matter of priority and sent to the rapporteur to allow him to forward his own amendments to the Secretariat-General no later than two working days before the date of the meeting. The rapporteur's amendments must be associated and related to one or more amendments referred to in paragraph 1. The rapporteur's amendments shall be electronically retrievable as soon as they have been translated and must be distributed in written form at the latest at the opening of the meeting.

The provisions of Rule 24(1) to (5) shall apply *mutatis mutandis*.

2. Voting on amendments shall follow the order of the points in the draft opinion or report under discussion. Thereafter the whole text shall be voted on.

3. Once a draft opinion or report has been adopted by a commission, it shall be forwarded by the commission chairman to the President of the Committee.

Rule 62 — Decision not to draw up an opinion or report

Where the (lead) commission considers that a document referred to it has no regional or local interest, or is not of political importance, it may decide not to draw up an opinion or report.

Rule 63 — Written procedure

1. In exceptional circumstances, the commission chairman may have resort to a written procedure for the adoption of a decision on the operation of his commission.

2. The chairman shall send the proposal for a decision to the members and ask them to send him any objections in writing within three days.

3. If there is no objection, the decision shall be adopted.

Rule 64 — Opinions in the form of a letter

1. In the case of referrals where a Committee response is deemed desirable but, for reasons of priority and/or because relevant opinions have already been adopted in the recent past, a new opinion is not considered necessary, the concerned commission may decide not to issue an opinion. In this case, the Committee may respond to the European Union Institutions in the form of a letter signed by the Committee President.

2. The letter shall be prepared by the chairman of the responsible commission in consultation with the rapporteurs of the previous opinions on the same subject.

3. If deadlines allow, the letter shall be presented for discussion at the first available meeting of the relevant commission, before it is submitted to the Committee President for signature.

Rule 65 — Provisions applicable to commissions

Rules 11, 12(2), 17(1) to (3) and 20 shall apply, *mutatis mutandis*, to the commissions.

CHAPTER 5

ADMINISTRATION OF THE COMMITTEE

Rule 66 — Secretariat-General

1. The Committee shall be assisted by a Secretariat-General.

2. The Secretariat-General shall be headed by a Secretary-General.

3. The Bureau, acting on a proposal from the Secretary-General, shall organise the Secretariat-General in such a way that it can ensure the efficient functioning of the Committee and its constituent bodies and help the members of the Committee in the performance of their duties. The services to be provided by the Secretariat-General for members, national delegations, political groups and non-attached members shall be determined in the process.

4. The Secretariat-General shall draw up the minutes of the meetings of the Committee's constituent bodies.

Rule 67 — Secretary-General

1. The Secretary-General shall be responsible for giving effect to the decisions taken by the Bureau or the President pursuant to these Rules of Procedure and the applicable legal provisions. The Secretary-General shall attend the meetings of the Bureau in an advisory capacity and shall keep the minutes of those meetings.

2. The Secretary-General shall discharge his duties under the direction of the President, representing the Bureau.

Rule 68 — Engagement of Secretary-General

1. The Bureau shall engage the Secretary-General on the basis of a decision adopted by a two-thirds majority of the votes cast, the existence of a quorum having been verified in accordance with the first sentence of Rule 37(2), pursuant to the provisions of Article 2 and related provisions of the Conditions of Employment of other servants of the European Communities.

2. The Secretary-General shall be engaged for five years. The detailed provisions of his contract of employment shall be laid down by the Bureau.

   The Secretary-General's term of office may be renewed once only for a maximum of five years.

3. The powers which the Conditions of Employment of other servants of the European Communities confer on the authority responsible for concluding contracts shall be exercised, in the case of the Secretary-General, by the Bureau.

Rule 69 — Staff Regulations of officials and Conditions of Employment of other servants

1. The powers which the Staff Regulations of officials of the European Communities confer on the appointing authority shall be exercised as follows:

— for officials in grades 5 to 12 of function group AD and for officials in function group AST, by the Secretary-General,

— for other officials, by the Bureau, acting on a proposal from the Secretary-General.

2. The powers which the Conditions of Employment of other servants of the European Communities confer on the authority competent to conclude contracts of employment shall be exercised as follows:

— for temporary staff in grades 5 to 12 of function group AD and for temporary staff in function group AST, by the Secretary-General,

— for other temporary staff, by the Bureau, acting on a proposal from the Secretary-General,

— for temporary staff in the private office of the President or the first Vice-President:

— for grades 5 to 12 of function group AD and function group AST, by the Secretary-General, acting on a proposal from the President,

— for other grades in function group AD, by the Bureau, acting on a proposal from the President.

Temporary staff employed in the private office of the President or the first Vice-President shall be engaged until the end of the President's or the first Vice-President's term of office:

— for contract staff, special advisers and local staff, by the Secretary-General in accordance with the conditions set out in the Conditions of Employment of other servants of the European Communities.

Rule 70 — Meetings in camera

The Bureau shall meet in camera when it takes the decisions referred to in Rules 68 and 69.

Rule 71 — Commission for Financial and Administrative Affairs

1. The Bureau shall, in accordance with Rule 36, set up an advisory Commission for Financial and Administrative Affairs, chaired by a member of the Bureau.

2. The Commission for Financial and Administrative Affairs shall have the following responsibilities:

(a) advising on and adopting, in accordance with Rule 72, the preliminary draft estimates of the Committee's expenditure and revenue submitted by the Secretary-General;

(b) drawing up draft Bureau implementing provisions and decisions in the financial, organisational and administrative areas, including those relating to members and alternates.

3. The chairman of the Commission for Financial and Administrative Affairs shall represent the Committee vis-à-vis the budget authorities of the Union.

Rule 72 — Budget

1. The Commission for Financial and Administrative Affairs shall submit the preliminary draft estimates of the Committee's expenditure and revenue for the following financial year to the Bureau. The Bureau shall submit the draft to the Plenary Assembly for adoption.

2. The Plenary Assembly shall adopt the estimates of the Committee's expenditure and revenue and forward them to the Commission, Council and European Parliament in good time to ensure that the deadlines laid down in the financial provisions are met.

3. The Committee President, after consulting the Commission for Financial and Administrative Affairs, shall execute, or cause to be executed, the statement of revenue and expenditure, in accordance with the internal financial rules adopted by the Bureau. He shall perform these functions in accordance with the provisions of the Financial Regulation applicable to the general budget of the European Communities.

*

* *

TITLE III

GENERAL PROVISIONS

CHAPTER 1

COOPERATION WITH OTHER EU BODIES

Rule 73 — Cooperation agreements

In the framework of the powers of the Committee, the Bureau, acting on a proposal from the Secretary-General, may conclude agreements with other organisations and bodies.

Rule 74 — Forwarding and publication of opinions, reports and resolutions

1. The Committee's opinions and reports, as well as any communication relating to the use of a simplified procedure under Rule 26 or a decision not to draw up an opinion or report under Rule 62, shall be addressed to the Council, Commission and European Parliament. As in the case of resolutions, they shall be forwarded by the President.

2. The opinions, reports and resolutions of the Committee shall be published in the *Official Journal of the European Union*.

CHAPTER 2

OPENNESS TO THE PUBLIC AND TRANSPARENCY

Rule 75 — Public access to documents

1. Any citizen of the Union and any natural or legal person residing or established in a Member State has a right of access to the documents of the Committee of the Regions in accordance with the provisions of the Treaty on the Functioning of the European Union, subject to the principles, conditions and limits laid down in Regulation (EC) No 1049/2001 of the European Parliament and of the Council and to the arrangements laid down by the Committee Bureau. Access to Committee documents shall as far as possible be granted in the same way to other natural or legal persons.

2. The Committee shall establish a register of Committee documents. The Bureau shall adopt the internal rules governing access and shall draw up a list of directly accessible documents.

CHAPTER 3

USE OF LANGUAGES

Rule 76 — Interpreting arrangements

The following principles shall as far as possible be observed in relation to interpreting arrangements:

(a) The Committee's debates shall be accessible in the official languages unless the Bureau decides otherwise.

(b) All members shall have the right to address the plenary session in whichever official language they choose. Statements in one of the official languages shall be interpreted into the other official languages and any other language the Bureau considers necessary.

(c) At Bureau, commission and working party meetings, interpreting shall be available from and into the languages used by the members that have confirmed they will attend the meeting.

CHAPTER 4

RULES OF PROCEDURE

Rule 77 — Revision of Rules of Procedure

1. The Plenary Assembly shall decide by a majority of its members if there is a need to amend these Rules of Procedure, either in part or in full.

2. It shall appoint an ad hoc commission to draw up a report and a draft text as a basis for the adoption of new rules by a majority of its members. The new rules shall enter into force the day after their publication in the *Official Journal of the European Union*.

Rule 78 — Bureau instructions

The Bureau may give instructions determining the procedure for implementing the provisions of these Rules of Procedure, in compliance with the latter.

Rule 79 — Entry into force of Rules of Procedure

These Rules of Procedure shall enter into force the day after their publication in the *Official Journal of the European Union*.

IV

(Acts adopted before 1 December 2009 under the EC Treaty, the EU Treaty and the Euratom Treaty)

COMMISSION DECISION

of 30 September 2009

on aid scheme No C2/09 (ex N 221/08 and N 413/08) which Germany intends to grant to modernise the general conditions for capital investments

(notified under document C(2009) 7387)

(only the German text is authentic)

(Text with EEA relevance)

(2010/13/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

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

Whereas:

1. PROCEDURE

(1) By letter dated 30 April 2008, registered at the Commission on the same day, the German authorities notified the Commission of two measures relating to liability for trade tax and exemption from the restriction on loss carry forward (N 221/08), for the purpose of legal certainty. By letters dated 26 June and 23 October 2008 the Commission asked for additional information. Germany responded by letters dated 24 July and 21 November 2008, registered on the same day.

(2) By letter dated 22 August 2008, registered at the Commission on the same day, the German authorities notified the Commission of a third measure concerning tax benefits for private investors (N 413/08), for the purpose of legal certainty. A meeting between the German authorities and DG COMP took place on 9 October 2008. Germany then submitted additional information by letter dated 19 November 2008, registered on the same day.

(3) On 28 January 2009 the Commission initiated the formal investigation procedure for all three measures. The summary of the decision was published in the Official Journal on 14 March 2009 [2]. The German authorities submitted their observations in a letter dated 3 March 2009, registered on the same day. Third parties submitted their comments in letters dated 9 and 14 April 2009, registered on the same day. Germany was informed of these comments on 23 April 2009 and submitted its response thereto in a letter dated 22 May 2009, registered on the same day.

2. DESCRIPTION

2.1. Objective of the measures and budget

(4) The notifications relate to three tax measures and include two definitions of beneficiaries. All measures have been incorporated into the Bill to Modernise the General Conditions for Capital Investments (*Gesetz zur Modernisierung der Rahmenbedingungen für Kapitalbeteiligungen,* hereinafter 'MoRaKG'). These measures have the common objective of facilitating the provision of private venture capital to a specific group of companies, defined as 'target enterprises' (hereinafter TE).

(5) The first measure (registered under N 221/08) aims to facilitate the provision of risk capital by applying specific eligibility criteria for 'venture capital companies' (hereinafter VCC) to be exempted from the *liability for trade tax* (*Gewerbesteuerpflicht*). Germany estimates the annual tax loss from this measure at EUR 90 million.

(6) The second measure (also registered under N 221/08) mitigates the restrictive anti-abuse rules on loss deduction, allowing TEs to *carry forward the losses* if a VCC acquires their shares. Germany estimates the annual tax loss from this measure at EUR 385 million.

[1] OJ C 60, 14.3.2009, p. 9.

[2] See footnote 1.

(7) Under the third measure (registered under N 413/08), natural persons investing in TEs (hereinafter also referred to as 'private investors') are entitled to *income tax benefits* in the case of capital gains on divestures. Although the tax advantage is granted directly to the private investors, TEs may benefit indirectly from this measure in that they receive more investment. Germany estimates the annual tax loss from this measure at EUR 30 million.

2.2. **Beneficiaries of the measures**

(8) The beneficiaries of the three tax measures in the MoRaKG are VCCs and TEs as defined by the MoRaKG and private investors, mostly business angels, as follows:

	Trade tax measure	Exemption from the prohibition on loss carry forward	Income tax benefit
VCCs	Directly	Indirectly	No
TEs	No	Directly	Indirectly
Individuals	No	No	Directly

(9) VCCs are companies which are recognised as such by the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht — BaFin*) and which are not simultaneously registered as an equity investment company ([3]) (*Unternehmensbeteiligungsgesellschaft*). Further criteria for qualification as a VCC are as follows:

— their articles of association must have as their object the acquisition, holding, management and sale of venture capital participations. 70 % of the total assets managed by VCCs must be equity holdings in TEs,

— they must have their legal domicile (*Sitz*) and their corporate management (*Geschäftsleitung*) in Germany,

— their initial capital (*Grundkapital*) or the contributions made by their members under the company's memorandum of association must amount to no less than EUR 1 million,

— they must have at least two managers, who must be trustworthy and suitably qualified to manage a VCC.

(10) TEs must be incorporated enterprises (*Kapitalgesellschaft*) and fulfil the following conditions:

— they must have their legal domicile and corporate management in a State that is a contracting party to the Agreement on the European Economic Area,

— at the time when the participation is acquired by a VCC, they must have owner's equity of not more than EUR 20 million,

— they must have been set up not more than ten years before the time when the participation is acquired by a VCC,

— at the time when the participation is acquired by a VCC, they must not have had any securities (*Wertpapiere*) admitted to or traded on an organised market or an equivalent market.

(11) The measure does not elaborate on the definition of a TE as regards the definition of firms in difficulty ([4]).

2.3. **Trade tax**

2.3.1. *Background*

(12) German trade tax (*Gewerbesteuer*) is raised by local authorities with respect to economic activities carried out by permanent business establishments on the territory of a community/municipality. The idea is that these permanent business establishments should contribute to the cost of the local infrastructure they use. Trade tax has to be paid by all undertakings, irrespective of their legal status, if they are engaged in trading activities (*gewerblich tätig*) in the sense of trade tax and income tax law. Incorporated firms (*Kapitalgesellschaften*) are always considered to be engaged in trading activities. For partnerships (*Personengesellschaft*), a distinction is made with regard to their activity: if an undertaking is a partnership and it carries out exclusively asset management activities (*vermögensverwaltend*), it is not subject to trade tax. On the other hand, partnerships which are engaged in trading activities are subject to trade tax.

([3]) Equity investment companies are registered with the competent Supreme Federal State Authority *(Oberste Landesbehörde)*. Under this registration, such companies may engage in all types of private equity investments.

([4]) Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).

(13) The Federal Ministry of Finance issued a letter ([5]) (hereinafter letter of 2003) on the distinction between trading activities and asset management activities of venture capital funds and private equity funds (hereinafter VCF/PEF). On the basis of this letter, VCFs/PEFs are subject to trade tax if their activity is considered to be a trading activity. However, if they pursue only asset management, they are not subject to trade tax. This letter of 2003 is based on a judgment of the Federal Financial Court (BFH) of 25 July 2001 ([6]), according to which VCFs/PEFs do not pursue a trading activity where the following criteria are complied with:

— no use of bank loans/no acceptance of collateral,

— no extensive separate organisation to manage the fund portfolio, office use not more than what a large private fortune would require ([7]),

— no market exploitation using professional experience,

— no public offering/own-account trading,

— no short-term investment,

— no reinvestment of the proceeds of sale,

— no own commercial activity in portfolio companies (*eigenes unternehmerisches Tätigwerden in den Protfoliogesellschaften*),

— no commercial character or 'commercial infection' (*gewerbliche Infektion*) ([8]).

([5]) Income tax treatment of venture capital und private equity funds; delimitation of private fortune administration; BMF letter of 20 November 2003, Federal Fiscal Gazette (*Bundessteuerblatt — BStBl*), 2004, Part I, No 1, p. 40.

([6]) BStBl II 2001, p. 809.

([7]) The fund may not maintain an extensive separate organisation to manage the fund portfolio. If the fund operates a separate office, this is not harmful provided the office is not used more that what a large private fortune would require.

([8]) A commercial infection, referred to as income requalification (*Abfärbetheorie*), would occur, for instance, if an entity which is exempted from trade tax started an additional commercial activity, which in turn caused a contamination and resulted in the entire entity becoming liable to trade tax, even if the trading activity only represented a minor part of the overall activity.

(14) In substance, these criteria are intended to clarify the traditional distinction enshrined in German tax law between trading and non-trading activities of VCFs/PEFs. Asset management is seen as a non-trading activity. The distinction between trading and non-trading activities is very fine and the subject of numerous court decisions, inter alia, by the Federal Financial Court. As a general rule, VCFs or PEFs are engaged in trading activities whenever the trading of assets (short periods between purchasing and selling assets, such as securities) represents a significant part of their activities ([9]).

2.3.2. *Clarification on trade tax under the MoRaKG*

(15) According to the notification, Article 1 Section 19 of the MoRaKG includes a 'clarification' of the letter of 2003, and allegedly there is no substantial difference between the two.

(16) Under the above provision, VCCs in the legal form of a partnership which are engaged only in the acquisition, holding, management and sale of venture capital holdings and which have holdings only in incorporated companies shall be treated for income tax purposes as companies carrying out asset management activities. VCCs shall be deprived of their non-trading status especially where they engage in any of the following or similar activities:

— short-term sale of venture capital holdings and other holdings in companies with their legal domicile and corporate management in a State that is a contracting party to the Agreement on the European Economic Area,

— transactions involving money market instruments ([10]); transactions involving bank deposits with credit institutions having their legal domicile in a State that is a contracting party to the Agreement on the European Economic Area; transactions involving investment participations ([11]),

([9]) A trade activity is defined as an independent, lasting activity which is exercised with an aim for profit (not a hobby) and may be characterised as a participation in general economic transactions (which goes beyond services performed for family or friends) and is neither an agricultural activity nor a profession (lawyer, doctor, artist or teacher). Asset administration is defined as an activity which is characterised by the use of assets in the sense of collecting the benefits from intrinsic values which are to be maintained and where the exploitation of substantial assets by reallocation is not given definite priority. The characterisation as a trading activity or asset management is of particular importance for investments in securities or real estate. If there is trade income, all capital gains are taxable and also subject to trade tax. Where the activity is purely asset administration (*Vermögensverwaltung*), the income from the various sources is taxed, but a possible sale of the underlying source may be exempted from capital gains tax (and also from trade tax).

([10]) Within the meaning of Section 48 of the Investment Act.

([11]) Within the meaning of Section 50 of the Investment Act.

— advising a TE in which a VCC has a holding, granting loans and guarantees to a TE in which a VCC has a holding, taking out loans and issuing profit participation rights (*Genussrechte*) and bonds,

— reinvestment of proceeds from the sale of venture capital holdings and other holdings in companies having their legal domicile and centre of management in a State that is a contracting party to the Agreement on the European Economic Area,

— exploitation of a market using its professional experience.

(17) Acquiring and maintaining its own business premises and a proper business organisation shall not prevent a VCC from being considered to conduct asset management activities. The activities under recital 16 above may, however, be carried out by a subsidiary which is wholly owned by the VCC.

2.4. **Loss carry forward**

2.4.1. *Introduction*

(18) The losses a company incurs in a tax year may normally be carried forward. This means that they may be offset against profits in future tax years. Loss carry forward enables those losses to be taken into account over the life cycle of a company. However, this can also lead to abuse in the form of 'shell companies' which are companies that have ceased their activities but are nevertheless sold since their loss carry forward represents a real value: purchasers of such shell companies benefit from an offsetting of future taxable profits and thus pay less tax depending on the applicable tax rate.

(19) Germany introduced anti-abuse measures regarding the trafficking of losses in the German Corporate Income Tax Act (hereinafter: CITA). The Company Tax Reform Continuation Law of 1997 stopped the trafficking of losses in the form of shell companies. Germany tightened the anti-abuse measures by means of the 2008 Company Taxation Reform Act (*Unternehmenssteuerreformgesetz 2008*). This Act has an impact on all changes in direct and indirect shareholding of more than 25 % within five years. The CITA provides for a pro-rata deduction of losses if, within a period of five years, more than 25 % of the subscribed capital, membership rights, participation rights or the right to vote directly or indirectly is transferred to an acquirer. Unused losses are not deductible at all if within five years more than 50 % of the subscribed capital or of the above rights are transferred directly or indirectly to an acquirer.

2.4.2. *The MoRaKG*

(20) The MoRaKG would relax the loss carry forward rules for TEs acquired by VCCs, as it would enable TEs with a significantly modified ownership structure to carry forward losses which would otherwise lapse under the basic rule.

(21) According to Article 4 of the MoRaKG, in the event of a direct acquisition by a VCC of a participation in a TE, the losses of the TE continue to be deductible to the extent of the hidden reserves of the TE taxable domestic assets. The same applies in the event of a direct acquisition from a non-VCC of a participation in a TE from a VCC, if:

— when the participation is acquired, the TE has equity of no more than EUR 20 million, or

— when the participation is acquired, the TE has equity of no more than EUR 100 million and the increase in equity in excess of EUR 20 million derives from annual profits in the four financial years preceding the sale,

— the period between the purchase and sale of the participation in the TE by the VCC is at least four years.

(22) Up to one fifth of the loss deductible may be deducted under the arrangements for the deduction of losses of the Income Tax Act in the year of acquisition; in each of the following four years this figure shall increase by a further fifth of the deductible loss.

2.5. **Tax benefits for private investors**

2.5.1. *Introduction*

(23) The MoRaKG aims to encourage private investors such as business angels to invest in TEs by offering tax advantages for the profits derived from their investment.

(24) According to Article 1 Section 20 of the MoRaKG, the capital gains on the sale of shares in a TE shall be divided proportionally among the investors according to their participation. The resulting amount is taken into account for the income taxation of the private investors/business angels.

(25) The tax advantage would only take effect in the event of a realised capital gain. The participation of private investors/business angels in TEs must be between 3 % and 25 % at any moment within the preceding five years with a maximum holding time of ten years. Each private investor/business angel is entitled to tax-free profits of up to EUR 50 000 (EUR 200 000 times 0,25) per investment, which corresponds to the maximum participation of 25 %. Hence the maximum tax advantage per business angel and per investment is approximately EUR 22 500, according to Germany's calculations. The tax advantage would be proportionally reduced for profits above EUR 800 000 per investment, and fully disappear if total profits reached EUR 1 000 000.

3. DOUBTS EXPRESSED IN THE OPENING DECISION

(26) As set out in recital 3, the Commission decided on 28 January 2009 to initiate the formal investigation procedure (hereinafter opening decision). In the opening decision the Commission expressed its preliminary view that all three measures constitute State aid.

3.1. Existence of State aid in the trade tax measure

(27) On the basis of its comparison of the letter of 2003 with the 'clarification' in the MoRaKG, the Commission expressed doubts as to whether the German claim that the MoRaKG only creates a statutory 'clarification' of the letter of 2003 is correct as it seems that the law would provide certain tax advantages for the newly-created specific category of venture capital companies defined by the MoRaKG. Indeed, it seemed that the 'clarification' deviates from the letter of 2003, and may provide for less stringent criteria for certain VCCs to benefit from the trade tax exemption.

(28) On the basis of these doubts the Commission noted that the trade tax measure would favour certain VCCs over other investment companies which may pursue exactly the same or similar activities. Moreover, the exemption from trade tax would involve an annual tax loss estimated at around EUR 90 million, which may indicate that the MoRaKG does not merely 'clarify' the letter of 2003.

3.2. Existence of State aid in the loss carry forward measure

(29) In principle Germany has not excluded that the measure on loss carry forward is selective and hence favours TEs and VCCs. Germany claimed, however, that this is justified by the nature and logic of the German tax system. Since, according to Germany, the introduction of the general restriction on the exploitation of tax losses in 2008 hit the venture capital market particularly hard, the possibility of exploiting tax losses should continue to exist for this market, and thus the measure meets the criteria set out in the Commission Notice on the application of the State aid rules to measures relating to direct business taxation [12] (hereinafter Notice on Business Taxation).

(30) The Commission noted, however, that other investment companies (falling outside the scope of the VCC definition) should not be excluded, if the measure is justified by the nature and logic of the German tax system, since non-VCCs may also invest in TEs and should also benefit from the same right to exploit the losses. But this is not the case, as TEs co-owned by non-VCCs can only carry over their losses if the non-VCC has bought its participation from a VCC under the conditions described in recital 21.

(31) Germany also claimed that the measure does not affect trade between the Member States within the meaning of Article 87(1) of the EC Treaty, since it has an 'internal objective' which is compatible with the Notice on Business Taxation. The measure only represents an exception to a strict rule, of which there is no equivalent in other Member States; therefore the measure cannot have a cross-border effect on competition or trade.

(32) However, the Commission stressed that the beneficiaries of this measure could be involved in trading with other Member States and that therefore the measure could have an effect on trade. Moreover, in determining whether a tax measure grants a selective advantage to certain undertakings, one must look at the generally applicable system in the Member State concerned; the question of which rules should apply in other Member States is, in principle, irrelevant.

[12] OJ C 384, 10.12.1998, p. 3.

3.3. **Existence of State aid in the tax benefits to private investors**

(33) Germany claimed that the beneficiaries of this measure are natural persons and that therefore it does not constitute State aid. However, since the measure makes investments in certain companies (TEs) more appealing for investors, it may indirectly favour certain undertakings, namely TEs ([13]).

(34) The Commission therefore considered that the criteria of 'advantage' and 'selectivity' are met. Moreover, the implementation of the measure would involve an annual tax loss estimated at around EUR 30 million.

3.4. **Compatibility with the Community guidelines on State aid to promote risk capital investments in small and medium-sized enterprises**

(35) The Commission questioned the compatibility of the measures with the Community guidelines on State aid to promote risk capital investments in small and medium-sized enterprises ([14]) (hereinafter RC Guidelines), since the RC Guidelines provide that State aid in the form of risk capital cannot be granted to large enterprises ([15]), firms in difficulty and firms in the shipbuilding, coal and steel industry. In the case at hand, however, the above undertakings may benefit from the measures; therefore the scope of the measures (with regards to the beneficiaries) is not defined in compliance with the RC Guidelines.

(36) In addition, according to point 4.3 of the RC Guidelines, State aid must target a specific market failure for the existence of which there is sufficient evidence. Such evidence has not been submitted by Germany.

(37) Finally, the Commission also questioned whether the other requirements set out in Chapter 4 of the RC Guidelines were met. Furthermore, the Commission noted that restricting the tax advantage to VCCs investing in incorporated enterprises appeared to contradict the alleged objective of the measure, namely to promote the provision of risk capital to all companies that need it. Indeed, young innovative companies in need of risk capital might take legal forms other than that of incorporated companies. Hence, young innovative companies in the form of a partnership would not benefit from the measure.

3.5. **Compatibility with the common market**

(38) The Commission questioned the compatibility of the measures with the rules of the common market. In order to qualify as a VCC, an undertaking must have its legal domicile (*Sitz*) and its corporate management in Germany. It appears that certain undertakings, in particular permanent business establishments/branches and subsidiaries of EU and EEA companies with a legal domicile (*Sitz*) outside Germany, would not be eligible. This condition could hinder freedom of establishment within the meaning of Article 43 of the EC Treaty.

(39) Germany claims that companies with a legal domicile outside Germany cannot be supervised by BaFin and would enjoy an unjustified competitive advantage over German VCCs. But the Commission queried the idea that permanent business establishments of foreign companies registered in Germany, which are de facto in competition with VCCs, could not be supervised by other means. At that time, the Commission therefore came to the conclusion that there was no justification for excluding such undertakings from the scheme. This is why the Commission also doubted whether the measures at issue could be declared compatible with the common market.

4. **GERMANY'S COMMENTS ON THE OPENING DECISION**

(40) By letter dated 3 March 2009, Germany submitted its comments on the decision to initiate the procedure laid down in Article 88(2) of the EC Treaty. The comments concerned all three measures. In summary, Germany reiterated its view that those measures did not constitute State aid.

4.1. **Trade tax measure**

(41) Germany reiterated its view that the trade tax measure does not exempt companies from trade tax. Rather, it clarifies the distinction between trading and asset managing activities and thus has only declaratory value (*deklaratorische Bedeutung*). The final assessment of

([13]) The fact that a tax advantage to individuals investing in certain companies may represent aid to these companies has been confirmed by the Court (see Case C-156/98, *Germany* v *Commission*, [2000], ECR I-6857).

([14]) OJ C 194, 18.8.2006, p. 2.

([15]) The definition of a TE in the MoRaKG does not match the SME definition of the EU. For example, regarding the condition that a TE must have, at the time when the participation is acquired by a VCC, owner's equity of not more than EUR 20 million, the Commission notes the following: the balance sheet total equals the sum of the owner's equity and the liabilities. The liabilities normally represent a significantly higher amount than the owner's equity. Hence, the EUR 43 million balance sheet total threshold for SMEs is easily exceeded by TEs. Furthermore, the limit of 250 on headcount and EUR 50 million on turnover are not included in the TE definition.

whether a venture capital company is engaged in trading or asset managing activities is to be made in line with German supreme court precedents, which are summarised in the letter of 2003.

(42) As regards the estimated losses of EUR 90 million in tax revenue, Germany explained that it expects that the clarification of the MoRaKG will lead to fewer 'faulty' contractual arrangements (*verunglückte Vertragsgestaltungen*), in which the taxes are only due because of the contract's faulty arrangements.

4.2. **Loss carry forward measure**

(43) Germany reiterated its view that the rules on loss deduction at TE level are justified due to the nature and logic of the tax system, even if investment companies which fall outside the scope of the MoRaKG definition also invest in TEs.

(44) Germany argued that making a distinction between VCCs and other investment companies lies within the legislator's room for manoeuvre (*Gestaltungsspielraum*) as there are objective differences between VCCs and other investment companies. Accordingly, pursuant to paragraph 24 of the Notice on Business Taxation, a different treatment is justified.

(45) Furthermore, VCCs are in a special situation. As they typically invest in TEs with loss carry forward, the second measure is therefore not State aid but a compensation arrangement for the specific disadvantages (*Nachteilsausgleichsregelung*) of the current system with regards to the venture capital sector.

4.3. **Tax benefits for private investors**

(46) Germany considers that the tax benefit measure has no appreciable effect on trade between Member States, in particular as the tax benefit per investor is limited to EUR 22 500. In addition, those rules apply equally to TEs with legal domiciles in the other Member States, with no distinction between German TEs and TEs from other Member States.

(47) Germany also stresses that the direct beneficiaries are natural persons who are not covered by State aid rules. Furthermore, it underlines that due to the specific structure of the measure TEs are not granted any quantifiable advantage (*kein irgendwie quantifizierbarer Vorteil*), which in turn rules out any aid element in the measure.

(48) Germany states that the tax benefit is related to the disposal of the participation in the TE (*Veräußerungsvorgang*), and hence has no direct link to the investment.

4.4. **Infringement of the freedom of establishment**

(49) In Germany's opinion, the MoRaKG does not infringe freedom of establishment under Article 43 of the EC Treaty, as a restriction of the freedom of establishment would be justified if the legal domicile requirement afforded the only opportunity to ensure compliance with the legal conditions.

5. **COMMENTS BY THIRD PARTIES**

(50) In letters dated 9 April 2009 (*Bundesverband Deutscher Kapitalbeteilungsgesellschaften* — German Private Equity and Venture Capital Association e.V. (BVG)) and 14 April 2009 (*Biotechnologie-Industrie-Organisation Deutschland e.V.* (BIO) and *Business Angels Network* Deutschland e.V. (BAND)), three interested parties submitted their comments on the opening decision.

5.1. **Observations by third parties on trade tax**

(51) BVK stated that the introduction of legal criteria in the MoRaKG for the classification of a VCC as non-trading for tax purposes does not result in a tax incentive for VCCs. On the contrary, the MoRaKG will further contribute to uncertainty in the sector.

(52) According to BVK, the 'clarification' is not less stringent than the letter of 2003, as the Finance Committee of the German Bundestag took the view that the letter of 2003 also continues to apply alongside the MoRaKG ([16]). As a result, the general statements set out in Article 1 Section 19 of the MoRaKG are to be given concrete effect by means of the letter of 2003. Owing to this unsatisfactory regulatory technique, the criteria contained in the letter of 2003 also continue to apply to VCCs. Therefore, in the view of BVK, the loss in tax revenue, estimated by the Federal Government at approximately EUR 90 million, is difficult to substantiate.

(53) BVK expressly advocates uniform framework conditions for domestic and foreign private equity companies — in particular those from other EU Member States — and their domestic and foreign investors in Germany.

([16]) See the Opinion of the Bundestag Finance Committee, BT-Drucks. 16/9829, p. 5 *et seq.*: 'For the interpretation of the legal regulation, the previous order remains subsidiarily applicable' ('*zur Auslegung der gesetzlichen Regelung bleibe deshalb der bisherige Verwaltungserlass ergänzend anwendbar*').

(54) BIO argues that the MoRaKG does not provide venture capital companies with preferential exemption from trade tax. The MoRaKG is intended to lay down in law the already common practice, attested by the letter of 2003, of exempting asset management funds from trade tax.

5.2. **Observations by third parties on loss carry forward**

(55) BVK is of the opinion that the German legislature should treat both domestic and foreign venture capital and private equity companies in the same way as venture capital companies within the meaning of the MoRaKG. The BVK also takes the view that this objective can be achieved only by means of uniform legal and fiscal framework conditions for all private equity companies. BVK suggests that those venture capital companies which do not fall under the definition of the MoRaKG should be afforded the possibility of taking advantage of loss deduction in a non-discriminatory manner. BVK reiterates that the prohibition on loss deduction contained in the CITA greatly impedes the investments of venture capital and private equity companies.

(56) BIO Deutschland sees the MoRaKG as an improvement on the status quo as regards loss carry forward. BIO concentrates on loss carry forward and finds that the targeted mitigation of a disadvantage does not constitute aid. Since innovative SMEs in particular are disadvantaged by the existing loss deduction rules, the MoRaKG should be seen as a tax disadvantage compensation regulation (*Steuerbenachteiligungsausgleichsregelung*). BIO states that the MoRaKG makes it possible to distinguish capital investment companies which provide capital to the enterprise in a clear and necessary way.

5.3. **Observations by third parties on tax benefits to private investors**

(57) BVK welcomes the general objective of tax benefits for private investors set out in the MoRaKG. For BVK the tax benefit measure constitutes a reasonable incentive for individuals who invest in the high-risk sector of early-stage financing addressed in the MoRaKG.

(58) BAND stresses that such tax benefits for private persons investing in young companies are common and more generous in other Member States. BAND welcomes the introduction of tax benefits for private investors and hence welcomes the MoRaKG. At the same time, BAND expresses doubts as to whether the MoRaKG will have any appreciable incentive effect on business angels, given the rather low tax advantages which only materialise after a successful exit. BAND considers that due to the partial income procedure (*Teileinkünfteverfahren*), the maximum tax advantage per investor is around EUR 14 210 and not, as indicated by Germany, around EUR 22 500. BAND also considers that the indirect aid to TEs would in reality always be below the thresholds of the de minimis limit of EUR 200 000. The advantage would only occur, if at all, at the time of the exit of the investor.

(59) BIO finds that the maximum advantage granted to a private investor, which is conceivable only where specific conditions are met, is EUR 22 500. This amount is minimal, unconnected to the investment (resulting rather from the sale of holdings) and therefore not transferable to the TEs.

6. **GERMANY'S COMMENTS ON THE OBSERVATIONS BY THIRD PARTIES**

(60) By letter dated 22 May 2009 Germany reacted to the observations of the interested parties.

6.1. **Trade tax measure**

(61) Germany notes that despite its criticism of the MoRaKG, BVK confirms that the MoRaKG does not deviate from the law as regards the distinction between trading and asset management activities.

6.2. **Loss carry forward measure**

(62) Germany notes that BVK's proposal to extend the measure to the entire private equity sector would cause unjustified windfall profits (*ungerechtfertigte Mitnahmeeffekte*). In order to clearly target the measure, Germany decided in favour of the necessary differentiation.

(63) Germany underlines that BIO's arguments support its view that the MoRaKG provides for a coherent differentiation based on objective criteria in order to avoid an excessive exploitation of losses (*Verlustausnutzung*).

6.3. **Tax benefits for private investors**

(64) Germany considers that the comments by the interested parties support its view that the measure, being indirect and insignificant, profit oriented and aimed at TEs located anywhere in the EU, does not constitute State aid.

7. **ASSESSMENT**

7.1. **Existence of State aid**

7.1.1. *Trade tax measure*

(65) The formal investigation procedure has not dispelled the doubts of the Commission concerning the alleged legal 'clarification' in the MoRaKG of the letter of 2003 with regard to the exemption from the liability for trade tax.

(66) Germany estimates that this measure will imply a yearly loss of tax revenue of EUR 90 million. It explains this loss by fewer 'faulty contractual arrangements'. The Commission does not find this justification convincing. It is indeed hard to believe that venture capital companies have such a bad knowledge of tax law that they cannot avoid such 'faulty contractual arrangements' and the corresponding tax liability. Furthermore, the Commission's view is clearly confirmed by third parties, as BVK finds that the MoRaKG will further contribute to uncertainty in the sector.

(67) In any case, the Commission notes that it is undisputed that the measure would imply a loss of State resources which would otherwise (in the previous situation) have accrued to the State. The Commission therefore concludes that the measure is granted from State resources.

(68) Regardless of the question of the compatibility of the 2003 letter with the nature and logic of the German tax system, which is irrelevant to the present case, the Commission noted in its opening decision that the MoRaKG appears to deviate from the letter, given that:

— VCCs may find investors through marketing to a wide public, while this is excluded in the letter of 2003,

— VCCs may have business premises and organise their activities in a 'business like' (*geschäftsmässig*) manner, while the letter of 2003 prevents them from having a 'substantial own organisation' and limits the number of employees and office use to what a 'large private fortune' (*privates Großvermögen*) would normally require,

— the MoRaKG does not explicitly exclude VCCs from having a commercial activity in portfolio companies, while the letter of 2003 does not allow 'commercial activity in portfolio companies' as stated in recital 13.

(69) The comments received during the formal investigation have not dispelled these doubts. Hence the Commission must conclude that the MoRaKG enlarges the potential group of beneficiaries who are not liable to trade tax as some VCCs which, under the letter of 2003, were liable to trade tax may possibly be exempt from trade tax under the MoRaKG. Therefore, the measure under examination grants a tax advantage to certain VCCs in that it allows them to carry out certain activities and still enjoy the tax liability exemption, unlike all other VCFs/PEFs, which are only subject to the letter of 2003 and would therefore become liable to tax if they carried out these activities.

(70) Moreover, the measure grants a selective advantage only to certain VCCs falling under the scope of the MoRaKG as compared to VCFs/PEFs. Indeed, VCCs benefit from this measure only if they comply with the definition set out in the MoRaKG. Hence VCFs/PEFs with less than 70 % of their total assets in equity holding in TEs may not benefit from the measure even if they carry out substantially identical activities. The same reasoning holds for VCFs/PEFs which do not have both their legal domicile and their corporate management in Germany. As a result, VCFs/PEFs that only have a permanent business establishment in Germany cannot benefit from the MoRaKG, even if they carry out exactly the same activities as VCCs.

(71) Therefore, only companies which belong to this limited group are relieved, by means of State resources, of a part of their operating costs (namely liability for a certain tax) which they would normally have to bear under the current legal framework. The beneficiaries of this advantage are essentially active in the provision of private equity and venture capital and are in competition with other providers established in Germany or other Member States. Consequently, this fiscal measure, by increasing the financial means available to the beneficiaries to carry out their activity, strengthens their position in relation to their competitors in the EU. The aid measure is therefore capable of affecting competition and trade between Member States.

(72) The Commission therefore concludes that the notified trade tax measure constitutes State aid to certain VCCs within the meaning of Article 87(1) of the EC Treaty.

7.1.2. *Loss deduction*

(73) As stated under point 4.2, Germany agrees in principle that the re-establishment of loss carry forward for VCCs investing in TEs is selective and favours TEs and VCCs. However, Germany argues that VCCs and TEs were differentiated in an acceptable and practical manner and that the distinction is justified by objective differences between taxable persons in compliance with paragraph 24 of the Notice on Business Taxation (which states that some differentiations in the tax system may be justified by objective differences between taxpayers), because the introduction of the general restriction on the exploitation of tax losses in 2008 hit the venture capital market particularly hard.

(74) First, the Commission emphasises that the measure is clearly linked to a loss of State resources and is therefore granted through State resources. This tax loss benefits TEs and VCCs since they are the beneficiaries of this measure. The more generous terms for tax deduction of loss carry forward which apply to TEs if they are acquired by VCCs constitute an economic advantage for these two groups of companies as it allows them to realise tax savings. Indeed, TEs benefit from loss carry forward since it enables them to offset a loss and thus pays less tax, which would otherwise be excluded by the anti-abuse rules. VCCs are also almost direct beneficiaries in the sense that other purchasers cannot benefit from the additional offsetting.

(75) As the tax saving is essentially only available if VCCs invest in TEs, the measure also favours TEs indirectly. Indeed, it constitutes an incentive for VCCs to invest in TEs rather than other companies that may be targeted by venture capital investors on the basis of purely economic considerations. TEs are thereby in a position to receive risk capital in amounts and under conditions that would not have been the case without the measure. The measure is thus capable of indirectly reinforcing the capital base of TEs.

(76) It also seems appropriate to reject Germany's argument according to which, even if it cannot be excluded that the definition of TEs covers firms in difficulty, this measure does not represents an advantage for such companies. Indeed, Germany argues that if a TE is in difficulty, it will not make profits that would offset its losses and could be taxed. So it is irrelevant whether or not such a firm can exploit the losses of earlier periods. As a result, according to Germany, the MoRaKG does not offer any advantage to firms in difficulty as defined by Community law. The Commission finds that this argument is not plausible, since an acquirer of a firm in difficulty or of a 'shell company' may in fact be particularly interested in the loss carry forward for tax purposes.

(77) These advantages are capable of affecting trade and competition. For VCCs, the Commission examined this requirement with regard to the trade tax rule in recital 71. With regard to TEs, the Commission notes that these companies can operate in any economic sector, including those that involve or could involve intra-Community trade. Therefore, the economic advantage granted to them is apt to affect competition and trade between Member States.

(78) Secondly, the Commission notes that the measure is undisputedly selective.

(79) Thirdly, the Commission finds that Germany has not succeeded in demonstrating that the measure is compatible with the nature and logic of the German tax system. Even if it were true that the venture capital market were particularly affected by the restriction on exploitation of tax losses and thus justified special treatment, the Commission finds that the distinction drawn up by Germany between taxpayers is not justified by this reasoning since only part of the venture capital sector is exempted from the prohibition on loss carry forward. If Germany's claims were correct, there would be no objective reason for non-VCCs not to benefit from the measure when they invest in the same TEs. However, non-VCCs only benefit from the measure in the rare case when they acquire a participation in a TE from a VCC. These views are also confirmed by BVK's comments in point 5.2.

(80) Moreover, the measure does not seem to comply with the nature and logic of the German tax system as Germany has not demonstrated why VCCs would be particularly affected by the restriction on the exploitation of tax losses when they invest in TEs and not when they carry out the same activity of providing capital to other companies such as partnerships which might also have difficulties in accessing risk capital (notably young innovative companies).

(81) The Commission notes furthermore that when Germany tightened the anti-abuse measures on loss carry forward by means of the 2008 Company Taxation Reform Act, as stated in point 2.4.1, it set out the new general tax regulation in this area. By allowing more generous terms for loss carry forward for a selected group of companies, these anti-abuse measures would be partly reversed; this does not seem to be justified by the nature and logic of the tax system in force since 2008.

(82) The Commission therefore concludes that the notified measure on loss carry forward constitutes State aid to TEs and VCCs within the meaning of Article 87(1) of the EC Treaty.

7.1.3. *Tax benefits for private investors*

(83) As stated under point 4.3, Germany claims that since the beneficiaries are natural persons, the measure cannot constitute State aid. Germany also claims that the measure has no verifiable and quantifiable advantage for TEs and hence has no impact on the price of shares. The tax amount saved by private investors is quite small and granted only in the event of a successful exit by the investor. Therefore, as Germany argues, the measure is likely to have only a limited incentive effect for individuals to invest in TEs. Hence it would also have a limited distortive effect on competition between TEs and non-TEs.

(84) As stated under point 2.1, this measure implies a loss of State resources estimated by Germany at EUR 30 million per year. The measure is therefore granted through State resources.

(85) The measure in question provides individuals with tax incentives to invest in a selected group of enterprises (i.e. TEs) rather than in other companies that may be targeted by venture capital investors on the basis of purely economic considerations. TEs are thereby in a position to receive risk capital in amounts and under conditions that would not have been the case without the measure and under normal market conditions. The measure is thus capable of indirectly reinforcing the capital base of TEs. This analysis holds even if the fiscal advantage granted to investors is contingent on future profits and the amount is relatively limited, as underlined by Germany and third parties. Indeed, because of the nature of the measure it is extremely difficult to precisely quantify the advantage that TEs will receive ex ante ([17]). Consequently, it is impossible to conclude that the aid granted to TEs will always be de minimis. Moreover, the fact that a tax advantage to individuals investing in certain companies may involve aid to these companies, regardless of the magnitude of such advantages, has been confirmed by the Court ([18]).

(86) Therefore, the Commission concludes that the income tax benefit measure is selective and favours a limited number of companies by giving them better access to risk capital than under normal market conditions. This advantage is granted through State resources because it is basically the loss of tax revenues that creates the market incentive for private individuals to provide capital to TEs rather than to other enterprises that would normally have been targeted on the basis of the prospects of return on the investment that they offer.

(87) The extent to which this aid could affect competition and trade between Member States is set out in recital 77 above.

(88) The Commission therefore concludes that the modified income tax benefit measure constitutes State aid to TEs within the meaning of Article 87(1) of the EC Treaty.

7.2. **Compatibility with the State aid rules**

7.2.1. *Notification of the measure*

(89) By notifying the MoRaKG before implementing it, the German authorities fulfilled their obligations under Article 88(3) of the EC Treaty. Given that all the measures in the MoRaKG pursue a common objective of supporting the provision of private venture capital to companies, the Commission analysed their compatibility with the common market on the basis of the rules established in the RC Guidelines.

(90) The Commission also assessed the applicability of other State aid frameworks and regulations to the measures at hand, namely the Community framework for State aid for research and development and innovation ([19]), Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation) ([20]) (hereinafter GBER) and Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid ([21]). Unlike the measures under examination, these frameworks and regulations exclude from the scope of the aid firms in difficulty and firms in the shipbuilding, coal and steel industry and/or limit the aid to SMEs. In the light of the above the Commission is of the opinion that due to the scope of these frameworks and regulations, they are not applicable to the notified measures.

([17]) It is extremely difficult to establish ex ante the difference between the amount/conditions under which capital would have been available in the absence of the measure and the amount/conditions brought about by the measure.

([18]) Case C-156/98, *Germany* v *Commission*, [2000], ECR I-6857, point 64: 'As a preliminary point, it should be borne in mind that, as has been noted in paragraph 30 above, the aid scheme in issue must be regarded as granting operating aid to the recipient undertakings …'.

([19]) OJ C 323, 30.12.2006, p. 1.

([20]) OJ L 214, 9.8.2008, p. 3.

([21]) OJ L 379, 28.12.2006, p. 5.

7.2.2. *Trade tax measure*

(91) As stated in point 7.1.1, the trade tax measure constitutes State aid to VCCs. However, this measure does not explicitly provide incentives to VCCs to undertake risk capital investments, it merely enables them to have greater financial resources at their disposal, that they may use for any purpose (i.e. increased benefits distribution to their partners).

(92) Unlike the present measure, under the RC Guidelines, State aid in the form of risk capital cannot be granted to large enterprises, firms in difficulty or firms in the shipbuilding, coal and steel industry. The trade tax measure, on the other hand, could benefit such undertakings, especially large enterprises. Therefore, the scope of this measure is not compatible with the Guidelines.

(93) The measure cannot be considered to be compatible with Chapter 4 of the RC Guidelines because the specific conditions for the application of this Chapter are not fulfilled. For instance, Chapter 4 requires that the maximum level of investment tranches may not exceed EUR 1,5 million per beneficiary over a period of 12 months. The measure under examination does not contain such a ceiling. Moreover, the RC Guidelines also require that the measure be restricted to providing financing up to the expansion stage for small enterprises or up to the early stage for medium-sized enterprises. These provisions are not met because TEs can be large undertakings.

(94) The measure does not comply with the cumulation and reporting requirements set out in Chapter 6 and point 7.1 of the RC Guidelines.

(95) Finally, the Commission is not in a position to assess the measure's compatibility under Chapter 5 of the RC Guidelines. Indeed, according to the RC Guidelines, State aid must target a specific market failure for the existence of which there is sufficient evidence. Germany has not submitted any evidence that TEs are affected by a particular market failure.

(96) The Commission therefore concludes that the trade tax measure is not compatible with the common market.

7.2.3. *Loss deduction*

(97) As set out in point 7.1.2, the measure on loss carry forward constitutes State aid at VCC and TE level. The form of the aid measure is a fiscal incentive within the meaning of point 4.2(d) of the RC Guidelines.

(98) For the same reasons as highlighted above in recitals 92, 93, 94 and 95, the Commission cannot consider the present measure to be compatible with the common market as it meets neither the exclusion criteria of point 2.1 of the RC Guidelines, nor the cumulation and reporting requirements referred to in Chapter 6 and point 7.1 of the Guidelines, nor the conditions set out in Chapter 4 of the Guidelines; neither is there any evidence of a particular market failure affecting TEs and VCCs that would allow the Commission to launch a detailed assessment of the compatibility of these measures under Chapter 5 of the RC Guidelines.

(99) This measure does not exclude the purchase of existing shares (replacement capital) in TEs. Replacement finance is, however, excluded by the definition of venture capital in the RC Guidelines.

(100) Furthermore, the Commission notes that restricting the tax advantage to VCCs investing in incorporated enterprises appears to contradict the declared objective of the measure, namely to promote risk capital. Indeed, young innovative companies in need of risk capital might take legal forms other than that of incorporated companies. Hence, young innovative companies in the form of a partnership would not benefit from the measure.

(101) The Commission therefore concludes that measure on loss carry forward is not compatible with the common market.

7.2.4. *Tax benefits for private investors*

(102) As set out in point 7.1.3, the income tax benefit measure constitutes indirect State aid at TE level. Since the measure creates incentives for private investors to invest in TEs, it may favour risk capital investments pursuant to point 4.2(d) of the RC Guidelines.

(103) For the same reasons as highlighted above in recitals 92, 93, 94 and 95, the Commission cannot consider the present measure to be compatible with the common market as it meets neither the exclusion criteria of point 2.1 of the RC Guidelines, nor the cumulation and reporting requirements referred to in Chapter 6 and point 7.1 of the Guidelines, nor the conditions set out in Chapter 4 of the Guidelines; neither is there any evidence of a particular market failure affecting TEs and VCC that would allow the Commission to launch a detailed assessment of the compatibility of these measures under Chapter 5 of the RC Guidelines.

(104) Therefore, the Commission concludes that the income tax benefit measure as it stands cannot be considered compatible with the common market on the basis of the RC Guidelines. However, the measure should have only a limited distortive effect on competition between TEs and non-TEs given that the incentive granted to individuals for providing capital in favour of TEs is relatively limited and thus presumably the advantage granted to TEs will also be limited. Moreover, the measure is capable of having a general positive effect in the sense of stimulating the provision of risk capital to companies which may be in need of risk capital, on the basis of a proper economic assessment. Indeed, private investors will select the TEs at issue on the basis of the prospect of making a return on their investment. Therefore, the Commission finds that the measure may be adjusted to the requirements of the RC Guidelines by ensuring that the conditions in Article 3 below are met.

7.3. **Compatibility with the common market**

(105) The trade tax measure and the loss carry forward measure, which can favour VCCs, are in breach of common market rules, in particular with regard to freedom of establishment within the meaning of Article 43 of the EC Treaty (see point 3.5).

(106) According to Germany, the MoRaKG contains detailed rules relating to the structure and business activities of VCCs. These include in particular regulations concerning transaction types and the investment policy of VCCs, the question of their integration into group structures and the minimum denomination of investments in such companies. These regulations would apply to all VCCs. In the case of German permanent establishments of foreign investment companies, it is not possible to guarantee that the company as a whole will comply with the regulations. Merely limited recognition of the German permanent establishment would allow for the possibility of the rules being circumvented and therefore, de facto, invalidated. Financial market regulators monitor the undertakings within their own areas of responsibility according to their own national regulations, a significant proportion of which are harmonised with EU law. In the field of venture capital financing, however, the supervisory regulations are not harmonised with EU law in this way.

(107) The Commission's doubts have not been dispelled. First, EC and EEA companies with a legal domicile (Sitz) outside Germany and a permanent business establishment in Germany should in principle be eligible where they can show that they comply with the conditions set out in the aid schemes and with the rules relating to the structure and business activities of VCCs (assuming they are compatible with the EC Treaty). The argument that BaFin is not in a position to supervise these companies does not necessarily imply that they enjoy a competitive advantage over companies established in Germany, nor that they do not comply de facto with the conditions set out in the aid schemes and with the rules relating to the structure and business activities of VCCs. Therefore this argument is not sufficient per se to derogate from a fundamental rule of the EC Treaty.

(108) In summary, it would appear that Germany could achieve the same objective using less discriminatory means ([22]). Compliance with the conditions set out in the aid schemes could be verified, for instance, through a voluntary submission to an examination by the BaFin, through confirmations by the foreign supervisory authority or through independent audit reports. Germany should give foreign companies with a permanent establishment in Germany the possibility to prove that they comply with the conditions set out in the aid schemes and with the rules relating to the structure and business activities of VCCs.

(109) Therefore, the Commission finds that the trade tax measure and the loss carry forward measure are not compatible with the common market because they infringe freedom of establishment within the meaning of Article 43 of the EC Treaty.

([22]) For instance in State aid N 629/07 (OJ C 206, 1.9.2009, p. 1), the French authorities provided for the possibility of also granting aid to foreign investment structures equivalent to the French-based structures targeted by the aid under examination in that case. To the same effect, see State aid case N 36/09 (OJ C 186, 8.8.2009, p. 3).

8. **CONCLUSION**

(110) The Commission considers that the aid measure on trade tax liability for VCCs is not compatible with the EC Treaty.

(111) The Commission considers that the aid measure on loss carry forward for TEs acquired by VCCs is not compatible with the EC Treaty.

(112) The Commission considers that the measure on tax benefits for private investors can be made compatible with the EC Treaty subject to the conditions listed below in Article 3,

HAS ADOPTED THIS DECISION:

Article 1

The State aid schemes which Germany is planning to implement under Article 1 Section 19 and Article 4 of the Bill to Modernise the General Conditions for Capital Investments (MoRaKG) are incompatible with the common market.

These State aid schemes may therefore not be implemented.

Article 2

The State aid scheme which Germany is planning to implement under Article 1 Section 20 of the MoRaKG is compatible with the common market, subject to the conditions set out in Article 3.

Article 3

The State aid scheme under Article 1 Section 20 of the MoRaKG shall be adjusted so that the following conditions are met:

— the definition of target enterprises shall be limited to small and medium-sized enterprises (SMEs) as defined in Annex I to the General block exemption Regulation ([23]),

— the definition of target enterprises shall exclude companies in difficulties and companies from the shipbuilding, coal and steel industry,

— maximum investment tranches shall not exceed EUR 1,5 million per target SME over each period of twelve months and shall be restricted to seed, start-up and expansion financing,

— Germany shall develop a mechanism to ensure that the measure complies with the cumulation and reporting rules set out in Chapter 6 and point 7.1 of the RC Guidelines,

— the purchase of existing shares (replacement capital) in a target SME shall be excluded,

— there shall be no special requirements with regard to the legal form of the target enterprise.

Article 4

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

Article 5

This Decision is addressed to Federal Republic of Germany.

Done at Brussels, 30 September 2009.

For the Commission

Neelie KROES

Member of the Commission

([23]) See footnote 20.

2010 SUBSCRIPTION PRICES (excluding VAT, including normal transport charges)

EU Official Journal, L + C series, paper edition only	22 official EU languages	EUR 1 100 per year
EU Official Journal, L + C series, paper + annual CD-ROM	22 official EU languages	EUR 1 200 per year
EU Official Journal, L series, paper edition only	22 official EU languages	EUR 770 per year
EU Official Journal, L + C series, monthly CD-ROM (cumulative)	22 official EU languages	EUR 400 per year
Supplement to the Official Journal (S series), tendering procedures for public contracts, CD-ROM, two editions per week	multilingual: 23 official EU languages	EUR 300 per year
EU Official Journal, C series — recruitment competitions	Language(s) according to competition(s)	EUR 50 per year

Subscriptions to the *Official Journal of the European Union*, which is published in the official languages of the European Union, are available for 22 language versions. The Official Journal comprises two series, L (Legislation) and C (Information and Notices).

A separate subscription must be taken out for each language version.

In accordance with Council Regulation (EC) No 920/2005, published in Official Journal L 156 of 18 June 2005, the institutions of the European Union are temporarily not bound by the obligation to draft all acts in Irish and publish them in that language. Irish editions of the Official Journal are therefore sold separately.

Subscriptions to the Supplement to the Official Journal (S Series — tendering procedures for public contracts) cover all 23 official language versions on a single multilingual CD-ROM.

On request, subscribers to the *Official Journal of the European Union* can receive the various Annexes to the Official Journal. Subscribers are informed of the publication of Annexes by notices inserted in the *Official Journal of the European Union*.

CD-Rom formats will be replaced by DVD formats during 2010.

Sales and subscriptions

Subscriptions to various priced periodicals, such as the subscription to the *Official Journal of the European Union*, are available from our commercial distributors. The list of commercial distributors is available at:

http://publications.europa.eu/others/agents/index_en.htm

EUR-Lex (http://eur-lex.europa.eu) offers direct access to European Union legislation free of charge. The *Official Journal of the European Union* can be consulted on this website, as can the Treaties, legislation, case-law and preparatory acts.

For further information on the European Union, see: http://europa.eu

Publications Office of the European Union
2985 Luxembourg
LUXEMBOURG

EN