ISSN 1725-2555

Official Journal of the European Union

L 122

English edition

Legislation

Volume 54

11 May 2011

Contents

(Continued overleaf)

Price: EUR 7

[1] Text with EEA relevance

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

COUNCIL IMPLEMENTING REGULATION (EU) No 443/2011

of 5 May 2011

extending the definitive countervailing duty imposed by Regulation (EC) No 598/2009 on imports of biodiesel originating in the United States of America to imports of biodiesel consigned from Canada, whether declared as originating in Canada or not, and extending the definitive countervailing duty imposed by Regulation (EC) No 598/2009 to imports of biodiesel in a blend containing by weight 20 % or less of biodiesel originating in the United States of America, and terminating the investigation in respect of imports consigned from Singapore

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to Council Regulation (EC) No 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community [1] ('the basic Regulation'), and in particular Article 23(4) thereof,

Having regard to the proposal submitted by the European Commission after having consulted the Advisory Committee,

Whereas:

1. PROCEDURE

1.1. Existing measures

(1) The Commission, by Regulation (EC) No 194/2009 [2] imposed a provisional countervailing duty on imports of biodiesel originating in the United States of America('USA').

(2) By Regulation (EC) No 598/2009 [3] (the 'definitive Regulation'), the Council imposed a definitive countervailing duty ranging from EUR 211,2 to EUR 237 per tonne on imports of biodiesel, as defined in Article 1(1) of the said Regulation ('the product concerned') originating in the USA ('the existing measures'). The investigation leading to the adoption of the definitive Regulation is hereafter referred to as 'the original investigation'.

(3) It should also be noted that by Regulation (EC) No 599/2009 [4], the Council imposed a definitive anti-dumping duty ranging from EUR 0 to EUR 198 per tonne on imports of the product concerned.

1.2. Request

(4) On 30 June 2010, the Commission received a request pursuant to Article 23(4) of the basic Regulation to investigate the possible circumvention of the countervailing measures imposed on imports of the product concerned. The request was submitted by the European Biodiesel Board ('EBB') on behalf of the Union producers of biodiesel.

(5) The request alleged that the countervailing measures on imports of the product concerned were being circumvented by means of transhipment via Canada and Singapore and by exports of biodiesel in a blend containing by weight 20 % or less of biodiesel.

(6) The request alleged that a significant change in pattern of trade involving exports from the USA, Canada and Singapore has taken place following the imposition of measures on the product concerned, and that there is insufficient due cause or justification other than the imposition of the duty for this change. This change in pattern of trade stemmed allegedly from the transhipment of the product concerned via Canada and Singapore.

[1] OJ L 188, 18.7.2009, p. 93.
[2] OJ L 67, 12.3.2009, p. 50.
[3] OJ L 179, 10.7.2009, p. 1.
[4] OJ L 179, 10.7.2009, p. 26.

(7) The request further alleged that following the imposition of the measures, exports of biodiesel in blends containing 20 % or less of biodiesel from the USA had begun to arrive in the Union, allegedly taking advantage of the biodiesel content threshold set in the description of the product concerned.

(8) Furthermore, the request alleged that the remedial effects of the existing countervailing measures on the product concerned were being undermined both in terms of quantity and price. It was alleged that significant volumes of imports of biodiesel in pure form or in a blend containing by weight more than 20 % of biodiesel from Canada and Singapore and of biodiesel in blends containing 20 % or less of biodiesel, appeared to have replaced imports of the product concerned. In addition, there was sufficient evidence that this increased volume of imports were made at prices well below the non-injurious price established in the investigation that led to the existing measures.

(9) Finally, the request alleged that the prices of the product concerned continue to be subsidised as previously established.

1.3. **Initiation**

(10) Having determined, after consulting the Advisory Committee, that sufficient prima facie evidence existed for the initiation of an investigation pursuant to Article 23 of the basic Regulation, the Commission initiated an investigation by Regulation (EU) No 721/2010 [1] (the 'initiation Regulation'). Pursuant to Article 24(5) of the basic Regulation, the Commission, by the initiation Regulation, also directed the customs authorities to register imports consigned from Canada and Singapore as well as imports originating in the USA of biodiesel in a blend containing by weight 20 % or less of fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin.

(11) The Commission also initiated a parallel investigation by Regulation (EU) No 720/2010 [2] concerning the possible circumvention of anti-dumping measures on imports of biodiesel originating in the USA by imports of biodiesel consigned from Canada and Singapore and by imports of biodiesel in a blend containing by weight 20 % or less of biodiesel originating in the USA.

1.4. **Investigation**

(12) The Commission officially advised the authorities of the USA, Canada and Singapore. Questionnaires were sent to known producers/exporters in the USA, Canada and Singapore. Interested parties were given the opportunity to make their views known in writing and to request a hearing within the time limit set in the initiation Regulation.

(13) The following companies submitted replies to the questionnaires and verification visits were subsequently carried out at their premises:

Producers/exporters in Canada:

— BIOX Corporation

— Rothsay Biodiesel

Traders in Singapore:

— Trafigura Pte Ltd

— Wilmar Trading Pte Ltd

Producers/exporters in the USA:

— Archer Daniels Midland Company

— BP Products North America Inc

— Louis Dreyfus Corporation

Related importers:

— BP Oil International Ltd

— Cargill BV

(14) Moreover, visits were made to the relevant competent authorities of the Government of Canada and the Government of Singapore.

1.5. **Investigation period**

(15) The investigation period covered the period from 1 April 2009 to 30 June 2010 (the 'IP'). Data was collected for the period from 2008 up to the end of the IP to investigate the alleged change in the pattern of trade.

[1] OJ L 211, 12.8.2010, p. 6.
[2] OJ L 211, 12.8.2010, p. 1.

2. PRODUCT FORMING THE OBJECT OF THE CIRCUMVENTION INVESTIGATION

(16) The product concerned by the possible circumvention, i.e. the product at issue in the original investigation, is fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, commonly known as 'biodiesel', in pure form or in a blend containing by weight more than 20 % of fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, currently falling within CN codes ex 1516 20 98, ex 1518 00 91, ex 1518 00 99, ex 2710 19 41, 3824 90 91, ex 3824 90 97, and originating in the USA.

(17) The product forming the object of the circumvention investigation is twofold. Firstly, regarding the allegations of transhipment through Canada and Singapore, it is identical to the product at issue in the original investigation, as described in the previous paragraph. Regarding shipments directly from the USA, the product under investigation is biodiesel in a blend containing by weight 20 % or less of fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, originating in the USA.

3. IMPORTS OF BIODIESEL INTO THE UNION VS. EXPORTS FROM THE USA

(18) Following the imposition of provisional countervailing measures in March 2009, imports of the product concerned have practically ceased. The below table summarises the situation:

Imports of biodiesel and certain biodiesel blends into the European Union

under CN code 3824 90 91 (in tonnes)

	2008	share	2009	share	IP	share
USA	1 487 790	83,62 %	381 227	22,29 %	24	0,00 %
Canada	1 725	0,10 %	140 043	8,19 %	197 772	9,28 %
Singapore	179	0,01 %	20 486	1,20 %	32 078	1,50 %

Source: Eurostat.

(19) The above Eurostat data cover all biodiesel containing 96,5 % or more of esters.

(20) In comparison, the USA report exports of biodiesel and biodiesel blends under code HTS 3824 90 40 00 (mixtures of fatty substances, animal or vegetable origin) as follows:

US exports of biodiesel and biodiesel blends

under code HTS 3824 90 40 00 (in tonnes)

	2008	2009	IP
European Union	2 241 473	335 577	358 291
Canada	967	128 233	161 841
Singapore	311	42 056	27 415
	2 242 751	505 866	547 547

Source: US Department of Commerce.

(21) Comparing the two above tables leads to the conclusion that the 358 291 tonnes exported to the Union during the IP are blends with a biodiesel content of 96,5 % and below.

4. CANADA

4.1. General considerations

(22) There was a high level of cooperation by producers/exporters in Canada. Two producers representing approximately 90 % of Canadian production of biodiesel submitted a questionnaire reply and fully cooperated with the investigation. Moreover, the Canadian Renewable Fuels Association and relevant authorities of the Government of Canada cooperated with the investigation.

(23) In accordance with Article 23(3) of the basic Regulation, the assessment of the existence of circumvention should be made by analysing successively whether there was a change in the pattern of trade between USA, Canada and the Union, if this change stemmed from a practice, process or work for which there was insufficient due cause or economic justification other than the imposition of the duty, if there was evidence of injury or that the remedial effects of the duty were being undermined in terms of the prices and/or quantities of the like product, and that the imported like product still benefits from the subsidy.

4.2. Change in patterns of trade

4.2.1. *Imports into the Union*

(24) Imports of biodiesel from the USA dropped from 1 487 790 tonnes in 2008, to 381 227 tonnes in 2009 and to close to zero during the IP.

(25) On the other hand, according to Eurostat data total imports of biodiesel from Canada to the Union increased significantly between 2008 and the IP from 1 725 tonnes in 2008 to 140 043 tonnes in 2009 and 197 772 tonnes during the IP.

4.2.2. *US exports of biodiesel to Canada*

(26) There are no customs duties applicable for sales of biodiesel between the USA and Canada or other kinds of imports restrictions.

(27) According the USA statistics, exports of biodiesel from the USA to Canada increased from 967 tonnes in 2008 to 128 233 tonnes in 2009 and 161 841 tonnes during the IP.

(28) A comparison of the export statistics provided by the US authorities with the import statistics provided on-spot by the Canadian authorities showed significant discrepancies on a monthly basis. According to the Canadian statistics, imports of US biodiesel increased from 11 757 tonnes in 2008 to 18 673 tonnes in 2009 and 174 574 tonnes during the IP.

(29) According to the Canadian authorities, there is no specific code to declare biodiesel. They noted that Canada and the USA exchange import data for use as their respective export data. As such, at the six-digit level Canadian import data and US export data should match, which they do quite closely under HTS 38.24.90. However, beyond six digits they each have their own classification systems. Also it should be noted that the Canadian statistics only cover imports which have been customs cleared in Canada and not transhipped goods.

(30) In conclusion, despite the discrepancies between the two data sources, it is clear that US export of biodiesel to Canada increased from 2008 to the IP, and in particular following the imposition of countervailing measures. The Canadian biodiesel market is currently not able to absorb such quantities of biodiesel. Genuine Canadian biodiesel producers are in fact export oriented.

4.2.3. *Production in Canada and sales of genuine Canadian biodiesel to the Union*

(31) The two cooperating producers in Canada did not purchase any biodiesel from the USA or from any other sources during the IP.

(32) Production of biodiesel in Canada is an infant industry. Some six production facilities were in place during the IP, but the two facilities in Eastern Canada, which are in fact owned and run by the two cooperating producers, alone account for approximately 90 % of total production.

(33) From the production volumes sold by the cooperating producers, sales where end-customers were certainly in North America, i.e. in the USA or Canada were determined. The remainder of the sales were sold to customers who either traded the goods and/or blended the goods with other biodiesel. The two companies did not know whether the customers sold the products to the Union as Canadian biodiesel, whether they blended it, or whether the biodiesel was sold to end customers in the USA or in Canada.

(34) Even if in an extreme case it was assumed that all genuine Canadian biodiesel ended up in the Union, this would account for only 20 % of total imports into the Union from Canada during the IP.

4.3. Conclusion on the change in the pattern of trade

(35) The reconciliation of statistics with the data obtained from the cooperating producers showed that Canadian biodiesel producers could not have produced the volume exported from Canada into the Union. This therefore strongly suggests that the surge of imports from Canada into the Union relates to exports of US biodiesel consigned from Canada.

(36) The overall decrease of US exports to the Union as from 2008 and the parallel increase of exports from Canada to the Union and of exports from the USA to Canada after the imposition of the original measures can thus be considered as a change in the pattern of trade.

4.4. **Insufficient due cause or economic justification other than the imposition of the countervailing duty**

(37) The investigation did not bring to light any other due cause or economic justification for the transhipment than the avoidance of the payment of the countervailing duty in force on biodiesel originating in the USA.

4.5. **Undermining the remedial effect of the countervailing duty**

(38) Eurostat data was used to assess whether the imported products had, in terms of quantities, undermined the remedial effects of the countervailing measures in force on imports of biodiesel from the USA. The quantities and prices of exports from Canada were compared with the injury elimination level established in the original investigation.

(39) As mentioned above, imports from Canada into the Union increased from 1 725 tonnes in 2008 to 197 772 tonnes during the IP, the latter representing a share of imports of 9,2 %. The increase of imports from Canada could not be considered to be insignificant bearing in mind the size of the Union market as determined in the original investigation. Considering the non-injurious price level established in the original investigation, Canadian imports into the Union during the IP showed underselling in the region of 50 %, while undercutting the Union producers' sales prices by approximately 40 %.

(40) It was therefore concluded that the measures are being undermined in terms of quantities and prices.

4.6. **Evidence of subsidisation**

(41) Regarding subsidisation, it should be noted that the US biodiesel tax credit, the main subsidy scheme found in the original investigation, was retroactively reinstated in December 2010. On this basis, it is concluded that the imported like product still benefited from subsidies during the IP.

4.7. **Conclusion**

(42) The investigation concluded that the definitive countervailing duties imposed on imports of biodiesel originating in the USA were circumvented by transhipment via Canada pursuant to Article 23 of the basic Regulation.

5. **SINGAPORE**

(43) Two traders located in Singapore cooperated with the investigation. In addition, cooperation was received from the relevant authorities of the Government of Singapore.

(44) The criteria for the assessment of the existence of circumvention have been described in recital 23 above.

(45) According to Eurostat figures total exports of biodiesel from Singapore to the Union increased from 179 tonnes in 2008 to 20 486 tonnes in 2009 and to 32 078 tonnes during the IP. Exports from the USA to Singapore have also increased over the same period.

(46) According to the relevant authorities of the Government of Singapore the biodiesel produced locally is sold mostly within Singapore to cater to domestic demand. However, they do note a growing industry in Singapore with the recent construction of new production facilities.

(47) Exports from Singapore have traditionally been low. Imports of biodiesel into the Union were closely examined in the Article 14(6) database and checked with the relevant national customs authorities. It appears that imports have arrived in a few spikes. The analysis showed that the majority of these imports were genuine Singaporean origin. However, not all imports could be accounted for.

(48) Compared to the Union consumption established in the original investigation the import volumes from Singapore to the Union which could not be accounted for were found to be extremely low. Furthermore, their share of Union consumption, taking account of EBB's estimation of the considerable increase in Union consumption since the original investigation, would be negligible.

(49) In view of the above, it can be concluded that the remedial effects of the countervailing measures have not been undermined in terms of quantities from Singapore.

(50) Regarding transhipment, it is well-known that Singapore is a huge shipping hub in Asia where regional ships arrive and unload goods which are later reloaded to ships sailing, among others, to Europe. In this investigation, one of the cooperating traders transhipped biodiesel with Malaysian or Indonesian origin through Singapore with a final destination in the Union. During the IP, this trader alone exported a significant quantity of biodiesel to the Union via transhipment in Singapore and customs cleared the biodiesel in the Union as Malaysian or Indonesian origin. The verification did not reveal indications to put in question the declared Indonesian or Malaysian origin.

(51) In the light of the above, the investigation concerning the possible circumvention of countervailing measures by imports of biodiesel consigned from Singapore should be terminated.

6. USA

6.1. Preliminary remarks

(52) Five US producers of biodiesel or biodiesel blends cooperated in the investigation, three of which were included in the sample of the original investigation. The US Government cooperated by providing exports statistics and their interpretation of the statistics.

(53) All three producers which were included in the sample in the original investigation had stopped exporting biodiesel after the imposition of definitive measures.

(54) Only one of the five cooperating companies, BP North America which did not cooperate in the original investigation, exported biodiesel blends containing by weight 20 % or less of biodiesel ('B20 and below') to the Union during the IP.

(55) The National Biodiesel Board ('NBB') which represents the US biodiesel industry argued that a product which was according to them explicitly found to be outside of the product scope of the existing measures cannot become subject to countervailing measures without a *de* novo anti-subsidy investigation. NBB argued that the definitive Regulation in explicit terms established the 'product concerned' and 'like product' at the level of biodiesel or biodiesel in blends with biodiesel representing more than 20 %. According to NBB, this was not an artificial threshold but corresponded to the market reality found during the original investigation. It was, e.g. found that the threshold of 20 % was appropriate to allow a clear distinction between the various types of blends which were available on the US market.

(56) In the view of NBB and other interested parties, an anti-circumvention investigation can only extend countervailing measures on a product concerned to a like product that is only a slightly modified product compared to the product concerned. Again, NBB argued that the Council itself in the definitive Regulation had established that biodiesel in blends with a volume of biodiesel of 20 % or less is not a like product. Therefore, according to NBB, in the structure of the provisions of the basic Regulation there is no other option but to initiate a new investigation in order to determine whether these blends should become subject to measures.

(57) In reply to these arguments, it should first of all be noted that the purpose of the anti-circumvention provisions in Article 23 of the basic Regulation is to counteract any alleged attempts to evade the measures in force. If sufficient prima facie evidence exists showing that circumvention is taking place within the meaning of Article 23(3) of the basic Regulation, the Commission will initiate an investigation in order to determine whether circumvention takes place. In accordance with Article 23(3) of the basic Regulation, the assessment of the existence of circumvention should be made, e.g. by analysing successively whether there was a change in the pattern of trade between USA and the Union, if this change stemmed from a practice, process or work for which there was insufficient due cause or economic justification other than the imposition of the duty and if there was evidence of injury or that the remedial effects of the duty were being undermined in terms of the prices and/or quantities.

(58) It should also be recalled that an anti-circumvention investigation is not a review of the product scope based on Article 19 of the basic Regulation and does not change the definition of the product concerned and the like product. The provisions under Article 23 of the basic Regulation provide for the relevant legal basis for an investigation of whether there is circumvention with regard to a product subject to measures.

(59) In this respect, the request the Commission received pursuant to Article 23(4) of the basic Regulation alleged that following the imposition of the measures, exports of biodiesel in blends containing 20 % or less biodiesel from the USA had begun to arrive in the Union, allegedly taking advantage of the biodiesel content threshold set in the description of the product concerned and the like product. The investigation examined whether such practice could be considered as circumvention pursuant to the provisions of Article 23 of the basic Regulation. Finally, it should be noted that alleged circumvention practices can only be examined under Article 23 of the basic Regulation.

6.2. Exports of B20 and below from the USA to the Union

(60) As mentioned above in recital 20, the US HTS code 3824 90 40 00 contains also blends with a biodiesel content of 96,5 % and below. According to the US export statistics a total quantity of 358 291 tonnes of this type of blend was exported to the Union during the IP.

(61) BP Products North America ('BPNA') during the IP exported a significant proportion of the above-mentioned quantity.

(62) BPNA did not participate in the original investigation because it started up its biodiesel activities only in the beginning of 2009 in anticipation of a growing biodiesel market in the future, in response to government mandates both in the USA and abroad. BPNA started to export to the Union in December 2009. In this respect it is recalled that definitive measures were imposed in July 2009.

(63) In the Union, BP sold US origin biodiesel blend containing by weight 15 % or less of biodiesel ('B15') in the UK, France and the Netherlands. In all cases, the product is further blended in order to respect the relevant legislation in force in certain Member States to promote the consumption of biofuels at the pump because they are currently considered environmentally sustainable.

(64) BPNA argued that blends less than 15 % are not a like product for the product concerned. The characteristics and market realities are very different. The logistics involved (including shipping restrictions) in the production and importing of lower blends are very different to those of higher grades. According to BPNA, when transporting blends less than 15 %, such products are classified as a petroleum product for shipping as opposed to a chemical product which makes the shipment less costly. BPNA also argued that there are differences in performance between higher and lower grade biodiesel blends when used in diesel engines.

(65) The objective of a circumvention investigation is to establish whether biodiesel in a blend containing by weight 20 % or less of biodiesel has circumvented the measures in force. It may well be the case that lower blends attract lower shipping costs. However, it should be noted that a blend of B20 and below is effectively only a different composition of the blend, in comparison to the process of producing biodiesel in a blend above B20. It is a simple process to change the composition of a blend. Putting into existence B20 and below is considered to be merely a slight modification of the product concerned, the only difference being the biodiesel proportion in the blend. It should also be noted that the product concerned as well as B20 and below ultimately are destined for the same uses in the Union. Furthermore, biodiesel in blends of B20 and below as well as biodiesel in blends above B20 have the same essential characteristics.

6.3. **Change in patterns of trade**

(66) Imports of the product concerned from the USA dropped from 1 487 790 tonnes in 2008 to 381 227 tonnes in 2009 and to close to zero during the IP.

(67) In this regard, it should be noted that though there was mandatory blending of, e.g. B5 in the Union during the original investigation, exports of B20 and below from the USA to the Union only came into existence following the imposition of definitive measures. During the original investigation, mainly exports of B99,9 were exported to the Union according to the data obtained from the sampled cooperating exporting producers. The reason for this was that it maximised the subsidy on the exported goods (USD 1 biodiesel tax credit per gallon).

(68) It is therefore difficult to see what the economic justification would be for starting to export B20 and below other than the avoidance of the countervailing measures in place.

(69) The proportion of biodiesel in the blend is still subsidised and the importer avoids the payment of the countervailing duty due. In this respect, it should be noted that the countervailing duty on blends is applicable in proportion to the biodiesel in the blend, i.e. in the case of imports of B15 the countervailing duty not paid would be up to around EUR 35 per tonne.

6.4. **Insufficient due cause or economic justification other than the imposition of the countervailing duty**

(70) According to BNPA, the creation of less than B15 biodiesel was not created specifically to avoid duties. The company argued that it did not participate in the original investigation because it started up its biodiesel activities beginning of 2009 in anticipation of a future active biodiesel market in response to government mandates, both in the USA and abroad. The specific structure of the company, its activity as a petroleum company and its logistic presence in the USA, made blending in the USA and exporting to the Union a logical commercial decision. The blend exported was always B15 and below, because of the less stringent security measures: up to B15 the blend is not considered a chemical product according to maritime regulations.

(71) It is noted that this company's activity in regard to exports to the Union only started after the imposition of measures. It is considered that there is insufficient due cause or economic justification other than the avoidance of the payment of the countervailing duty in force on biodiesel originating in the USA.

6.5. **Undermining the remedial effect of the countervailing duty**

(72) Considering the non-injurious price level of the original investigation, US imports of B20 and below into the Union during the IP showed both undercutting and underselling. The imports of B20 and below only came into existence following the imposition of definitive measures and the quantities involved are not insignificant.

(73) It was therefore concluded that the measures are being undermined in terms of quantities and prices.

6.6. **Evidence of subsidisation**

(74) Regarding subsidisation, it should be noted that the US biodiesel tax credit, the main subsidy scheme found in the original investigation, was retroactively reinstated in December 2010. On this basis, it is concluded that the imported like product still benefited from subsidies during the IP.

6.7. **Conclusion**

(75) The investigation concluded that the definitive countervailing duties imposed on imports of biodiesel originating in the USA were circumvented by imports into the Union of biodiesel in a blend containing by weight 20 % or less of biodiesel.

(76) It was concluded that the only economic justification for exporting blends of B20 and below was prompted by the subsidisation in the USA on the one hand, and the avoidance of paying any countervailing duties when importing into the Union on the other hand.

(77) BPNA requested an exemption from the possible extended measures. However, as the investigation clearly showed that imports of B20 and below were only done in order to circumvent the measures in force, such exemption cannot be granted. Pursuant to the provisions of Article 23(6) of the basic Regulation, exemptions may be granted to producers of the product concerned who can show that they are not related to any producer subject to measures and that they are found not to be engaged in circumvention practices. In these investigations, it was found that BPNA is involved in the circumvention practices by starting to export B20 and below after the imposition of anti-dumping and countervailing measures without sufficient due cause or economic justification other than the imposition of the measures. Moreover, there is evidence that the effects of the measures are being undermined in terms of prices and quantities, and the imported product is still being subsidised.

(78) Some biodiesel producers cooperating in the original investigations requested exemptions from any extended measures due to circumvention. It was found that these US producers did not produce or sell B20 and below. Pursuant to Article 23(6) of the basic Regulation, only producers' request for exemption can be considered in the course of an anti-circumvention investigation. However, it should be noted that Article 23 of the basic Regulation contains new-comer provisions.

7. **MEASURES**

7.1. **Canada**

(79) Given the above, it was concluded that the definitive countervailing duty imposed on imports of biodiesel originating in the USA was circumvented by transhipment via Canada pursuant to Article 23 of the basic Regulation.

(80) In accordance with the first sentence of Article 23(1) of the basic Regulation, the measures in force on imports of the product concerned originating in the USA, should be therefore extended to imports of the same product consigned from Canada, whether declared as originating in Canada or not.

(81) In order to avoid evasion of the duty by unverifiable allegations that the product transhipped through Canada has been produced by a company subject to an individual duty in the definitive Regulation, the measure to be extended should be the one established for 'All other companies' in Article 1(2) of Regulation (EC) No 598/2009, which is a definitive countervailing duty of EUR 237 per tonne.

(82) The countervailing duty on blends shall be applicable in proportion,in the blend, by weight, of the total content of fatty-acid mono alkyl esters and of paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin (biodiesel content).

(83) In accordance with Articles 23(4) and 24(5) of the basic Regulation, which provide that any extended measure shall apply to imports which entered the Union under registration imposed by the initiation Regulation, duties should be collected on those registered imports of biodiesel consigned from Canada.

7.2. **USA**

(84) Given the above, it was concluded that the definitive countervailing duty imposed on imports of biodiesel originating in the USA was circumvented by imports into the Union of B20 and below pursuant to Article 23 of the basic Regulation.

(85) In accordance with the first sentence of Article 23(1) of the basic Regulation, the measures in force on imports of the product concerned originating in the USA should therefore be extended to imports of B20 and below.

(86) The measures to be extended should be those established in Article 1(2) of Regulation (EC) No 598/2009.

(87) The extended countervailing duty on blends shall be applicable in proportion, in the blend, by weight, of the total content of fatty-acid mono alkyl esters and of paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin (biodiesel content).

(88) In accordance with Articles 23(4) and 24(5) of the basic Regulation, which provides that any extended measure should apply to imports which entered the Union under registration imposed by the initiation Regulation, duties should be collected on those registered imports of B20 and below originating in the USA.

8. TERMINATION OF THE INVESTIGATION AGAINST SINGAPORE

(89) In view of the findings regarding Singapore, the investigation concerning the possible circumvention of countervailing measures by imports of biodiesel consigned from Singapore should be terminated and the registration of imports of biodiesel consigned from Singapore, introduced by the initiation Regulation, should be discontinued.

9. REQUEST FOR EXEMPTION

(90) The two cooperating companies in Canada submitting a questionnaire reply requested an exemption from the possible extended measures in accordance with Article 23(6) of the basic Regulation.

(91) It was found that the two cooperating Canadian producers were not engaged in the circumvention practices which are subject of this investigation. Furthermore, these producers could demonstrate that they are not related to any of US producers/exporters of biodiesel. Therefore, their requests for exemption can be granted.

(92) It is considered that special measures are needed in this case in order to ensure the proper application of such exemptions. These special measures consist in the presentation to the Customs authorities of the Member States of a valid commercial invoice, which shall conform to the requirements set out in the Annex to this Regulation. Imports not accompanied by such an invoice shall be made subject to the extended countervailing duty.

(93) One cooperating party in the USA that submitted a questionnaire reply also requested an exemption from the possible extended measures in accordance with Article 23(6) of the basic Regulation.

(94) As explained in recital 77 above, the investigation clearly showed that this party was engaged in the circumvention practices by importing B20 and below. Consequently, such exemption cannot be granted.

(95) However, it should be underlined that, should any exporting producer(s) concerned not be availing from subsidisation anymore, such parties can request a review pursuant to Article 19 of the basic Regulation.

10. DISCLOSURE

(96) All interested parties were informed of the essential facts and considerations leading to the above conclusions and were invited to comment. The oral and written comments submitted by the parties were considered,

HAS ADOPTED THIS REGULATION:

Article 1

1. The definitive countervailing duty imposed by Regulation (EC) No 598/2009 on imports of fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, commonly known as 'biodiesel', in pure form or in a blend containing by weight more than 20 % of fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, originating in the United States of America, is hereby extended to imports into the Union of fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, commonly known as 'biodiesel', in pure form or in a blend containing by weight more than 20 % of fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, consigned from Canada, whether declared as originating in Canada or not, currently falling within CN codes ex 1516 20 98 (TARIC code 1516 20 98 21), ex 1518 00 91 (TARIC code 1518 00 91 21), ex 1518 00 99 (TARIC code 1518 00 99 21), ex 2710 19 41 (TARIC code 2710 19 41 21), ex 3824 90 91 (TARIC code 3824 90 91 10) and ex 3824 90 97 (TARIC code 3824 90 97 01), with the exception of those produced by the companies listed below:

Country	Company	TARIC additional code
Canada	BIOX Corporation, Oakville, Ontario, Canada	B107
Canada	Rothsay Biodiesel, Guelph, Ontario, Canada	B108

The duty to be extended shall be the one established for 'All other companies' in Article 1(2) of Regulation (EC) No 598/2009, which is a definitive countervailing duty of EUR 237 per tonne net.

The countervailing duty on blends shall be applicable in proportion, in the blend, by weight, of the total content of fatty-acid mono-alkyl esters and of paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin (biodiesel content).

2. The application of exemptions granted to the companies mentioned in paragraph 1 or authorised by the Commission in accordance with Article 4(2) shall be conditional upon presentation to the customs authorities of the Member States of a valid commercial invoice, which shall conform to the requirements set out in the Annex. If no such invoice is presented, the countervailing duty as imposed by paragraph 1 shall apply.

3. The duty extended by paragraph 1 of this Article shall be collected on imports consigned from Canada, whether declared as originating in Canada or not, registered in accordance with Article 2 of Regulation (EU) No 721/2010 and Articles 23(4) and 24(5) of Regulation (EC) No 597/2009, with the exception of those produced by the companies listed in paragraph 1.

4. The provisions in force concerning customs duties shall apply.

Article 2

1. The definitive countervailing duty imposed by Regulation (EC) No 598/2009 on imports of fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, commonly known as 'biodiesel', in pure form or in a blend containing by weight more than 20 % of fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, originating in the United States of America, is hereby extended to imports into the Union of biodiesel in a blend containing by weight 20 % or less of fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, originating in the United States of America, and currently falling within CN codes ex 1516 20 98 (TARIC code 1516 20 98 30), ex 1518 00 91 (TARIC code 1518 00 91 30), ex 1518 00 99 (TARIC code 1518 00 99 30), ex 2710 19 41 (TARIC code 2710 19 41 30) and ex 3824 90 97 (TARIC code 3824 90 97 04).

The duties to be extended shall be those established in Article 1(2) of Regulation (EC) No 598/2009.

The countervailing duty on blends shall be applicable in proportion, in the blend, by weight, of the total content of fatty-acid mono-alkyl esters and of paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin (biodiesel content).

2. The duties extended by paragraph 1 of this Article shall be collected on imports originating in the United States of America, registered in accordance with Article 2 of Regulation (EU) No 721/2010 and Articles 23(4) and 24(5) of Regulation (EC) No 597/2009.

3. The provisions in force concerning customs duties shall apply.

Article 3

The investigation initiated by Regulation (EU) No 721/2010 concerning the possible circumvention of countervailing measures imposed by Regulation (EC) No 598/2009 on imports of biodiesel originating in the United States of America by imports of biodiesel consigned from Singapore, whether declared as originating in Singapore or not, and making such imports subject to registration, is hereby terminated.

Article 4

1. Requests for exemption from the duty extended by Article 1(1) and Article 2(1) shall be made in writing in one of the official languages of the European Union and must be signed by a person authorised to represent the entity requesting the exemption. The request must be sent to the following address:

European Commission
Directorate-General for Trade
Directorate H
Office: N-105 04/92
1049 Brussels
BELGIUM

Fax + 32 22956505

2. In accordance with Article 23(6) of Regulation (EC) No 597/2009, the Commission, after consulting the Advisory Committee, may authorise, by decision, the exemption of imports from companies which do not circumvent the countervailing measures imposed by Regulation (EC) No 598/2009, from the duty extended by Article 1(1) and Article 2(1).

Article 5

Customs authorities are hereby directed to discontinue the registration of imports, established in accordance with Article 2 of Regulation (EU) No 721/2010.

Article 6

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

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

Done at Brussels, 5 May 2011.

For the Council
The President
MARTONYI J.

ANNEX

A declaration signed by an official of the entity issuing the commercial invoice, in the following format, must appear on the valid commercial invoice referred to in Article 1(2):

1. The name and the function of the official of the entity issuing the commercial invoice.

2. The following declaration: 'I, the undersigned, certify that the (volume) of (product concerned) sold for export to the European Union covered by this invoice was manufactured by (company name and address) (TARIC additional code) in (country concerned). I declare that the information provided in this invoice is complete and correct.'

3. Date and signature.

COUNCIL IMPLEMENTING REGULATION (EU) No 444/2011

of 5 May 2011

extending the definitive anti-dumping duty imposed by Regulation (EC) No 599/2009 on imports of biodiesel originating in the United States of America to imports of biodiesel consigned from Canada, whether declared as originating in Canada or not, and extending the definitive anti-dumping duty imposed by Regulation (EC) No 599/2009 to imports of biodiesel in a blend containing by weight 20 % or less of biodiesel originating in the United States of America, and terminating the investigation in respect of imports consigned from Singapore

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community [1] (the basic Regulation), and in particular Article 13(3) thereof,

Having regard to the proposal submitted by the European Commission after having consulted the Advisory Committee,

Whereas:

1. PROCEDURE

1.1. Existing measures

(1) The Commission, by Regulation (EC) No 193/2009 [2] imposed a provisional anti-dumping duty on imports of biodiesel originating in the United States of America (USA).

(2) By Regulation (EC) No 599/2009 [3] (the definitive Regulation), the Council imposed a definitive anti-dumping duty ranging from EUR 0 to EUR 198 per tonne on imports of biodiesel, as defined in Article 1(1) of the said Regulation (the product concerned) originating in the USA (the existing measures). The investigation leading to the adoption of the definitive Regulation is hereafter referred to as 'the original investigation'.

(3) It should also be noted that by Regulation (EC) No 598/2009 [4], the Council imposed a definitive countervailing duty ranging from EUR 211,2 to EUR 237 per tonne on imports of the product concerned.

1.2. Request

(4) On 30 June 2010, the Commission received a request pursuant to Article 13(3) of the basic Regulation to investigate the possible circumvention of the anti-dumping measures imposed on imports of the product concerned. The request was submitted by the European Biodiesel Board (EBB) on behalf of the Union producers of biodiesel.

(5) The request alleged that the anti-dumping measures on imports of the product concerned were being circumvented by means of transhipment via Canada and Singapore and by exports of biodiesel in a blend containing by weight 20 % or less of biodiesel.

(6) The request alleged that a significant change in pattern of trade involving exports from the USA, Canada and Singapore has taken place following the imposition of measures on the product concerned, and that there is insufficient due cause or justification other than the imposition of the duty for this change. This change in pattern of trade stemmed allegedly from the transhipment of the product concerned via Canada and Singapore.

(7) The request further alleged that following the imposition of the measures, exports of biodiesel in blends containing 20 % or less of biodiesel from the USA had begun to arrive in the Union, allegedly taking advantage of the biodiesel content threshold set in the description of the product concerned.

(8) Furthermore, the request alleged that the remedial effects of the existing anti-dumping measures on the product concerned were being undermined both in terms of quantity and price. It was alleged that significant volumes of imports of biodiesel in pure form or in a blend containing by weight more than 20 % of biodiesel from Canada and Singapore and of biodiesel in blends containing 20 % or less of biodiesel, appeared to have replaced imports of the product concerned. In addition, there was sufficient evidence that this increased volume of imports were made at prices well below the non-injurious price established in the investigation that led to the existing measures.

(9) Finally, the request alleged that the prices of the product concerned continued to be subsidised as previously established.

1.3. Initiation

(10) Having determined, after consulting the Advisory Committee, that sufficient *prima facie* evidence existed for the initiation of an investigation pursuant to Article 13 of the basic Regulation, the Commission initiated an investigation by Regulation (EU) No 720/2010 [5] (the initiation Regulation). Pursuant to

[1] OJ L 343, 22.12.2009, p. 51.
[2] OJ L 67, 12.3.2009, p. 22.
[3] OJ L 179, 10.7.2009, p. 26.
[4] OJ L 179, 10.7.2009, p. 1.
[5] OJ L 211, 12.8.2010, p. 1.

Article 14(5) of the basic Regulation, the Commission, by the initiation Regulation, also directed the customs authorities to register imports consigned from Canada and Singapore as well as imports originating in the USA of biodiesel in a blend containing by weight 20 % or less of fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin.

(11) The Commission also initiated a parallel investigation by Regulation (EU) No 721/2010 [1] concerning the possible circumvention of countervailing measures on imports of biodiesel originating in the USA by imports of biodiesel consigned from Canada and Singapore and by imports of biodiesel in a blend containing by weight 20 % or less of biodiesel originating in the USA.

1.4. **Investigation**

(12) The Commission officially advised the authorities of the USA, Canada and Singapore. Questionnaires were sent to known producers/exporters in USA, Canada and Singapore. Interested parties were given the opportunity to make their views known in writing and to request a hearing within the time limit set in the initiation Regulation.

(13) The following companies submitted replies to the questionnaires and verification visits were subsequently carried out at their premises:

Producers/exporters in Canada:

— BIOX Corporation,

— Rothsay Biodiesel.

Traders in Singapore:

— Trafigura Pte Ltd,

— Wilmar Trading Pte Ltd.

Producers/exporters in the USA:

— Archer Daniels Midland Company,

— BP Products North America Inc.,

— Louis Dreyfus Corporation.

Related importers

— BP Oil International Limited,

— Cargill BV.

(14) Moreover, visits were made to the relevant competent authorities of the Government of Canada and the Government of Singapore.

1.5. **Investigation period**

(15) The investigation period covered the period from 1 April 2009 to 30 June 2010 (the IP). Data was collected for the period from 2008 up to the end of the IP to investigate the alleged change in the pattern of trade.

2. **PRODUCT FORMING THE OBJECT OF THE CIRCUMVENTION INVESTIGATION**

(16) The product concerned by the possible circumvention, i.e. the product at issue in the original investigation, is fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, commonly known as 'biodiesel', in pure form or in a blend containing by weight more than 20 % of fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, currently falling within CN codes ex 1516 20 98, ex 1518 00 91, ex 1518 00 99, ex 2710 19 41, 3824 90 91, ex 3824 90 97, and originating in the USA.

(17) The product forming the object of the circumvention investigation is twofold. Firstly, regarding the allegations of transhipment through Canada and Singapore, it is identical to the product at issue in the original investigation, as described in the previous paragraph. Regarding shipments directly from the USA, the product under investigation is biodiesel in a blend containing by weight 20 % or less of fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, originating in the USA.

3. **IMPORTS OF BIODIESEL TO THE UNION V EXPORTS FROM THE USA**

(18) Following the imposition of provisional anti-dumping measures in March 2009, imports of the product concerned have practically ceased. The below table summarises the situation:

Imports of biodiesel and certain biodiesel blends into the European Union

under code CN 3824 90 91 (in tonnes)

	2008	Share	2009	Share	IP	Share
USA	1 487 790	83,62 %	381 227	22,29 %	24	0,00 %
Canada	1 725	0,10 %	140 043	8,19 %	197 772	9,28 %
Singapore	179	0,01 %	20 486	1,20 %	32 078	1,50 %

Source: Eurostat.

[1] OJ L 211, 12.8.2010, p. 6.

(19) The above Eurostat data cover all biodiesel containing 96,5 % or more of esters.

(20) In comparison, the USA report exports of biodiesel and biodiesel blends under code HTS 3824.90.40.00 (mixtures of fatty substances, animal or vegetable origin) as follows:

US exports of biodiesel and biodiesel blends

under code HTS 3824.90.40.00 (in tonnes)

	2008	2009	IP
European Union	2 241 473	335 577	358 291
Canada	967	128 233	161 841
Singapore	311	42 056	27 415
	2 242 751	505 866	547 547

Source: US Department of Commerce

(21) Comparing the two above tables leads to the conclusion that the 358 291 tonnes exported to the Union during the IP are blends with a biodiesel content of 96,5 % and below.

4. CANADA

4.1. General considerations

(22) There was a high level of cooperation by producers/exporters in Canada. Two producers representing approximately 90 % of Canadian production of biodiesel submitted a questionnaire reply and fully cooperated with the investigation. Moreover, the Canadian Renewable Fuels Association and relevant authorities of the Government of Canada cooperated with the investigation.

(23) In accordance with Article 13(1) of the basic Regulation, the assessment of the existence of circumvention should be made by analysing successively whether there was a change in the pattern of trade between USA, Canada and the Union, if this change stemmed from a practice, process or work for which there was insufficient due cause or economic justification other than the imposition of the duty, if there was evidence of injury or that the remedial effects of the duty were being undermined in terms of the prices and/or quantities of the like product, and that there is evidence of dumping in relation to the normal values previously established for the like product.

4.2. Change in patterns of trade

4.2.1. *Imports into the Union*

(24) Imports of biodiesel from the USA dropped from 1 487 790 tonnes in 2008, to 381 227 tonnes in 2009 and to close to zero during the IP.

(25) On the other hand, according to Eurostat data total imports of biodiesel from Canada to the Union increased significantly between 2008 and the IP from 1 725 tonnes in 2008 to 140 043 tonnes in 2009 and 197 772 tonnes during the IP.

4.2.2. *US exports of biodiesel to Canada*

(26) There are no customs duties applicable for sales of biodiesel between the USA and Canada or other kinds of imports restrictions.

(27) According to the US statistics, exports of biodiesel from the USA to Canada increased from 967 tonnes in 2008 to 128 233 tonnes in 2009 and 161 841 tonnes during the IP.

(28) A comparison of the export statistics provided by the US authorities with the import statistics provided on-spot by the Canadian authorities showed significant discrepancies on a monthly basis. According to the Canadian statistics, imports of US biodiesel increased from 11 757 tonnes in 2008 to 18 673 tonnes in 2009 and 174 574 tonnes during the IP.

(29) According to the Canadian authorities, there is no specific code to declare biodiesel. They noted that Canada and the USA exchange import data for use as their respective export data. As such, at the six-digit level Canadian import data and US export data should match, which they do quite closely under HTS 3824.90. However, beyond six digits they each have their own classification systems. Also it should be noted that the Canadian statistics only cover imports which have been customs cleared in Canada and not transhipped goods.

(30) In conclusion, despite the discrepancies between the two data sources, it is clear that US export of biodiesel to Canada increased from 2008 to the IP, and in particular following the imposition of anti-dumping measures. The Canadian biodiesel market is currently not able to absorb such quantities of biodiesel. Genuine Canadian biodiesel producers are in fact export oriented.

4.2.3. *Production in Canada and sales of genuine Canadian biodiesel to the Union*

(31) The two cooperating producers in Canada did not purchase any biodiesel from the USA or from any other sources during the IP.

(32) Production of biodiesel in Canada is an infant industry. Some six production facilities were in place during the IP, but the two facilities in eastern Canada, which are in fact owned and run by the two cooperating producers, alone account for approximately 90 % of total production.

(33) From the production volumes sold by the cooperating producers, sales where end-customers were certainly in North America, i.e. in the USA or Canada, were determined. The remainder of the sales were sold to customers who either traded the goods and/or blended the goods with other biodiesel. The two companies did not know whether the customers sold the products to the Union as Canadian biodiesel, whether they blended it, or whether the biodiesel was sold to end-customers in the USA or in Canada.

(34) Even if in an extreme case it was assumed that all genuine Canadian biodiesel ended up in the Union, this would account for only 20 % of total imports into the Union from Canada during the IP.

4.3. **Conclusion on the change in the pattern of trade**

(35) The reconciliation of statistics with the data obtained from the cooperating producers showed that Canadian biodiesel producers could not have produced the volume exported from Canada into the Union. This therefore strongly suggests that the surge of imports from Canada to the Union market relates to exports of US biodiesel consigned from Canada.

(36) The overall decrease of US exports to the Union as from 2008 and the parallel increase of exports from Canada to the Union and of exports from the USA to Canada after the imposition of the original measures can thus be considered as a change in the pattern of trade.

4.4. **Insufficient due cause or economic justification other than the imposition of the anti-dumping duty**

(37) The investigation did not bring to light any other due cause or economic justification for the transhipment than the avoidance of the payment of the anti-dumping duty in force on biodiesel originating in the USA.

4.5. **Undermining the remedial effect of the anti-dumping duty**

(38) Eurostat data was used to assess whether the imported products had, in terms of quantities, undermined the remedial effects of the anti-dumping measures in force on imports of biodiesel from the USA. The quantities and prices of exports from Canada were compared with the injury elimination level established in the original investigation.

(39) As mentioned above, imports from Canada into the Union increased from 1 725 tonnes in 2008 to 197 772 tonnes during the IP, the latter representing a share of imports of 9,2 %. The increase of imports from Canada could not be considered to be insignificant bearing in mind the size of the Union market as determined in the original investigation. Considering the non-injurious price level established in the original investigation, Canadian imports into the Union during the IP showed underselling in the region of 50 %, while undercutting the Union producers' sales prices by approximately 40 %.

(40) It was therefore concluded that the measures are being undermined in terms of quantities and prices.

4.6. **Evidence of dumping**

(41) In accordance with Article 13(1) and (2) of the basic Regulation it was examined whether there was evidence of dumping in relation to the normal value established in the original investigation.

(42) In the original investigation normal value was established on the basis of domestic sales prices in the ordinary course of trade and constructed based on the cost of production plus a reasonable profit margin where there were no domestic sales or where they were not in the ordinary course of trade.

(43) Export prices from Canada were established on the basis of the average import price of biodiesel during the IP as reported in Eurostat.

(44) For the purpose of a fair comparison between the normal value and export price, due allowance, in the form of adjustments, was made for differences which affect prices and price comparability in accordance with Article 2(10) of the basic Regulation. Accordingly, in the absence of information relating to a number of costs items, only transport costs and insurance based on the observed average costs for ocean freight of biodiesel from the USA to the Union during the original investigation period, were deducted from the Eurostat CIF prices in order to arrive at the FOB prices at the Canadian border.

(45) In accordance with Article 2(11) and (12) of the basic Regulation, dumping was calculated by comparing the weighted average normal value as established in the original investigation and the weighed average export prices during the IP, expressed as a percentage of the CIF price at the Union frontier duty unpaid.

(46) This comparison showed the existence of dumping.

4.7. **Conclusion**

(47) The investigation concluded that the definitive anti-dumping duties imposed on imports of biodiesel originating in the USA were circumvented by transhipment via Canada pursuant to Article 13 of the basic Regulation.

5. SINGAPORE

(48) Two traders located in Singapore cooperated with the investigation. In addition, cooperation was received from the relevant authorities of the Government of Singapore.

(49) The criteria for the assessment of the existence of circumvention have been described in recital 23 above.

(50) According to Eurostat figures total exports of biodiesel from Singapore to the Union increased from 179 tonnes in 2008 to 20 486 tonnes in 2009 and to 32 078 tonnes during the IP. Exports from the USA to Singapore have also increased over the same period.

(51) According to the relevant authorities of the Government of Singapore the biodiesel produced locally is sold mostly within Singapore to cater to domestic demand. However, they do note a growing industry in Singapore with the recent construction of new production facilities.

(52) Exports from Singapore have traditionally been low. Imports of biodiesel into the Union were closely examined in the Article 14(6) database and checked with the relevant national customs authorities. It appears that imports have arrived in a few spikes. The analysis showed that the majority of these imports were of genuine Singaporean origin. However, not all imports could be accounted for.

(53) Compared to the Union consumption established in the original investigation the import volumes from Singapore to the Union, which could not be accounted for, were found to be extremely low. Furthermore, their share of Union consumption, taking account of EBB's estimation of the considerable increase in Union consumption since the original investigation, would be negligible.

(54) In view of the above, it can be concluded that the remedial effects of the anti-dumping measures have not been undermined in terms of quantities consigned from Singapore.

(55) Regarding transhipment, it is well known that Singapore is a huge shipping hub in Asia where regional ships arrive and unload goods which are later reloaded to ships sailing, among others, to Europe. In this investigation, one of the cooperating traders transhipped biodiesel with Malaysian or Indonesian origin through Singapore with a final destination in the Union. During the IP, this trader alone exported a significant quantity of biodiesel to the Union via transhipment in Singapore and customs cleared the biodiesel in the Union as Malaysian or Indonesian origin. The verification did not reveal indications to put in question the declared Indonesian or Malaysian origin.

(56) In the light of the above, the investigation concerning the possible circumvention of anti-dumping measures by imports of biodiesel consigned from Singapore should be terminated.

6. USA

6.1. Preliminary remarks

(57) Five US producers of biodiesel or biodiesel blends cooperated in the investigation, three of which were included in the sample of the original investigation. The US Government cooperated by providing exports statistics and their interpretation of the statistics.

(58) All three producers which were included in the sample in the original investigation had stopped exporting biodiesel after the imposition of definitive measures.

(59) Only one of the five cooperating companies, BP North America which did not cooperate in the original investigation, exported biodiesel blends containing by weight 20 % or less of biodiesel (B20 and below) to the Union during the IP.

(60) The National Biodiesel Board (NBB) which represents the US biodiesel industry argued that a product which was according to them explicitly found to be outside of the product scope of the existing measures cannot become subject to anti-dumping measures without a *de novo* anti-dumping investigation. NBB argued that the definitive Regulation in explicit terms established the 'product concerned' and 'like product' at the level of biodiesel or biodiesel in blends with biodiesel representing more than 20 %. According to NBB, this was not an artificial threshold but corresponded to the market reality found during the original investigation. It was, for example, found that the threshold of 20 % was appropriate to allow a clear distinction between the various types of blends which were available on the US market.

(61) In the view of NBB and other interested parties, an anti-circumvention investigation can only extend anti-dumping measures on a product concerned to a like product that is only a slightly modified product compared to the product concerned. Again, NBB argued that the Council itself, in the definitive Regulation, had established that biodiesel in blends with a volume of biodiesel of 20 % or less is not a like product. Therefore, according to NBB, in the structure of the provisions of the basic Regulation there is no other option but to initiate a new investigation in order to determine whether these blends should become subject to measures.

(62) In reply to these arguments, it should first of all be noted that the purpose of the anti-circumvention provisions in Article 13 of the basic Regulation is to counteract any alleged attempts to evade the measures in force. If sufficient *prima facie* evidence exists showing that circumvention is taking place within the meaning of Article 13(1) of the basic Regulation, the Commission will initiate an investigation in order to determine whether circumvention takes place. In accordance with Article 13(1) of the basic Regulation, the assessment of the existence of circumvention should be made, for example, by analysing successively whether there was a

change in the pattern of trade between USA and the Union, if this change stemmed from a practice, process or work for which there was insufficient due cause or economic justification other than the imposition of the duty and if there was evidence of injury or that the remedial effects of the duty were being undermined in terms of the prices and/or quantities.

(63) It should also be recalled that an anti-circumvention investigation is not a review of the product scope based on Article 11(3) of the basic Regulation and does not change the definition of the product concerned and the like product. The provisions under Article 13 of the basic Regulation provide for the relevant legal basis for an investigation of whether there is circumvention with regard to a product subject to measures.

(64) In this respect, the request the Commission received pursuant to Article 13(3) of the basic Regulation alleged that, following the imposition of the measures, exports of biodiesel in blends containing 20 % or less biodiesel from the USA had begun to arrive in the Union, allegedly taking advantage of the biodiesel content threshold set in the description of the product concerned and the like product. The investigation examined whether such practice could be considered as circumvention pursuant to the provisions of Article 13 of the basic Regulation. Finally, it should be noted that alleged circumvention practices can only be examined under Article 13 of the basic Regulation.

6.2. **Exports of B20 and below from the USA to the Union**

(65) As mentioned above in recital 20, the US HTS code 3824.90.40.00 contains also blends with a biodiesel content of 96,5 % and below. According to the US export statistics a total quantity of 358 291 tonnes of this type of blend was exported to the Union during the IP.

(66) BP Products North America (BPNA) during the IP exported a significant proportion of the abovementioned quantity.

(67) BPNA did not participate in the original investigation because it started up its biodiesel activities only in the beginning of 2009 in anticipation of a growing biodiesel market in the future, in response to government mandates both in the USA and abroad. BPNA started to export to the Union in December 2009. In this respect it is recalled that definitive measures were imposed in July 2009.

(68) In the Union, BP sold US origin biodiesel blend containing by weight 15 % or less of biodiesel (B15) in the UK, France and the Netherlands. In all cases, the product is further blended in order to respect the relevant legislation in force in certain Member States to promote the consumption of biofuels at the pump because they are currently considered environmentally sustainable.

(69) BPNA argued that blends less than 15 % are not a like product for the product concerned. The characteristics and market realities are very different. The logistics involved (including shipping restrictions) in the production and importing of lower blends are very different to those of higher grades. According to BPNA, when transporting blends less than 15 %, such products are classified as a petroleum product for shipping as opposed to a chemical product which makes the shipment less costly. BPNA also argued that there are differences in performance between higher and lower grade biodiesel blends when used in diesel engines.

(70) The objective of a circumvention investigation is to establish whether biodiesel in a blend containing by weight 20 % and less of biodiesel has circumvented the measures in force. It may well be the case that lower blends attract lower shipping costs. However, it should be noted that a blend of B20 and below is effectively only a different composition of the blend, in comparison to the process of producing biodiesel in a blend above B20. It is a simple process to change the composition of a blend. Putting into existence B20 and below is considered to be merely a slight modification of the product concerned, the only difference being the biodiesel proportion in the blend. It should also be noted that the product concerned, as well as B20 and below, ultimately are destined for the same uses in the Union. Furthermore, biodiesel in blends of B20 and below as well as biodiesel in blends above B20 have the same essential characteristics.

6.3. **Change in patterns of trade**

(71) Imports of the product concerned from the USA dropped from 1 487 790 tonnes in 2008 to 381 227 tonnes in 2009 and to close to zero during the IP.

(72) In this regard, it should be noted that though there was mandatory blending of, for example, B5 in the Union during the original investigation, exports of B20 or below from the USA to the Union only came into existence following the imposition of definitive measures. During the original investigation, mainly exports of B99,9 were exported to the Union according

to the data obtained from the sampled cooperating exporting producers. The reason for this was that it maximised the subsidy on the exported goods (USD 1 biodiesel tax credit per gallon).

(73) It is therefore difficult to see what the economic justification would be for starting to export B20 and below other than the avoidance of the anti-dumping measures in place.

(74) The proportion of biodiesel in the blend is still subsidised and the importer avoids the payment of the anti-dumping duty due. In this respect, it should be noted that the anti-dumping duty on blends is applicable in proportion to the biodiesel in the blend, i.e. in the case of imports of B15 the anti-dumping duty not paid would be up to around EUR 26 per tonne.

6.4. **Insufficient due cause or economic justification other than the imposition of the anti-dumping duty**

(75) According to BNPA, the creation of less than B15 biodiesel was not created specifically to avoid duties. The company argued that it did not participate in the original investigation because it started up its biodiesel activities beginning of 2009 in anticipation of a future active biodiesel market in response to government mandates, both in the USA and abroad. The specific structure of the company, its activity as a petroleum company and its logistic presence in the USA, made blending in the USA and exporting to the Union a logical commercial decision. The blend exported was always B15 or below, because of the less stringent security measures: up to B15 the blend is not considered a chemical product according to maritime regulations.

(76) It is noted that this company's activity in regard to exports to the Union only started after the imposition of measures. It is considered that there is insufficient due cause or economic justification other than the avoidance of the payment of the anti-dumping duty in force on biodiesel originating in the USA.

6.5. **Undermining the remedial effect of the anti-dumping duty**

(77) Considering the non-injurious price level of the original investigation, US imports of B20 and below into the Union during the IP showed both undercutting and underselling. The imports of B20 and below only came into existence following the imposition of definitive measures and the quantities involved are not insignificant.

(78) It was therefore concluded that the measures are being undermined in terms of quantities and prices.

6.6. **Evidence of dumping**

(79) In accordance with Article 13(1) and (2) of the basic Regulation it was examined whether there was evidence of dumping in relation to the normal value established in the original investigation. The comparison of the weighted average normal value and the weighted average export price showed the existence of dumping.

6.7. **Conclusion**

(80) The investigation concluded that the definitive anti-dumping duties imposed on imports of biodiesel originating in the USA were circumvented by imports into the Union of biodiesel in a blend containing by weight 20 % or less of biodiesel.

(81) It was concluded that the only economic justification for exporting blends of B20 and below was prompted by the subsidisation in the USA on the one hand, and the avoidance of paying any anti-dumping duties when importing into the Union on the other hand.

(82) BPNA requested an exemption from the possible extended measures. However, as the investigation clearly showed that imports of B20 and below were only done in order to circumvent the measures in force, such exemption cannot be granted. Pursuant to the provisions of Article 13(4) of the basic Regulation, exemptions may be granted to producers of the product concerned who can show that they are not related to any producer subject to measures and that they are found not to be engaged in circumvention practices. In these investigations, it was found that BPNA is involved in the circumvention practices by starting to export B20 and below after the imposition of anti-dumping and countervailing measures without sufficient due course or economic justification other than the imposition of the measures. Moreover, there is evidence that the effects of the measures are being undermined in terms of prices and quantities, and that dumping in relation to the normal values previously established exists.

(83) Some biodiesel producers cooperating in the original investigations requested exemptions from any extended measures due to circumvention. It was found that these US producers did not produce or sell biodiesel B20 and below. Pursuant to Article 13(4) of the basic Regulation,

only producers' request for exemption can be considered in the course of an anti-circumvention investigation. However, it should be noted that Article 13 of the basic Regulation contains newcomer provisions.

7. MEASURES

7.1. Canada

(84) Given the above, it was concluded that the definitive anti-dumping duty imposed on imports of biodiesel originating in the USA was circumvented by transhipment via Canada pursuant to Article 13 of the basic Regulation.

(85) In accordance with the first sentence of Article 13(1) of the basic Regulation, the measures in force on imports of the product concerned originating in the USA, should therefore be extended to imports of the same product consigned from Canada, whether declared as originating in Canada or not.

(86) In order to avoid evasion of the duty by unverifiable allegations that the product transhipped through Canada has been produced by a company subject to an individual duty in the definitive Regulation, the measure to be extended should be the one established for 'All other companies' in Article 1(2) of Regulation (EC) No 599/2009, which is a definitive anti-dumping duty of EUR 172,2 per tonne.

(87) The anti-dumping duty on blends shall be applicable in proportion in the blend, by weight, of the total content of fatty-acid mono alkyl esters and of paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin (biodiesel content).

(88) In accordance with Articles 13(3) and 14(5) of the basic Regulation, which provides that any extended measure should apply to imports which entered the Union under registration imposed by the initiation Regulation, duties should be collected on those registered imports of biodiesel consigned from Canada.

7.2. USA

(89) Given the above, it was concluded that the definitive anti-dumping duty imposed on imports of biodiesel originating in the USA was circumvented by imports into the Union of B20 and below pursuant to Article 13 of the basic Regulation.

(90) In accordance with the first sentence of Article 13(1) of the basic Regulation, the measures in force on imports of the product concerned originating in the USA, should therefore be extended to imports of B20 and below.

(91) The measures to be extended shall be those established in Article 1(2) of Regulation (EC) No 599/2009.

(92) The extended anti-dumping duty on blends shall be applicable in proportion in the blend, by weight, of the total content of fatty-acid mono alkyl esters and of paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin (biodiesel content).

(93) In accordance with Articles 13(3) and 14(5) of the basic Regulation, which provides that any extended measure should apply to imports which entered the Union under registration imposed by the initiation Regulation, duties should be collected on those registered imports of B20 and below originating in the USA.

8. TERMINATION OF THE INVESTIGATION AGAINST SINGAPORE

(94) In view of the findings regarding Singapore, the investigation concerning the possible circumvention of anti-dumping measures by imports of biodiesel consigned from Singapore should be terminated and the registration of imports of biodiesel consigned from Singapore, introduced by the initiation Regulation, should be discontinued.

9. REQUEST FOR EXEMPTION

(95) The two cooperating companies in Canada submitting a questionnaire reply requested an exemption from the possible extended measures in accordance with Article 13(4) of the basic Regulation.

(96) It was found that the two cooperating Canadian producers were not engaged in the circumvention practices which are the subject of this investigation. Furthermore, these producers could demonstrate that they are not related to any of US producers/exporters of biodiesel. Therefore, their requests for exemption can be granted.

(97) It is considered that special measures are needed in this case in order to ensure the proper application of such exemptions. These special measures consist in the presentation to the Customs authorities of the Member States of a valid commercial invoice, which shall conform to the requirements set out in the Annex to this Regulation. Imports not accompanied by such an invoice shall be made subject to the extended anti-dumping duty.

(98) One cooperating party in the USA submitting a questionnaire reply requested an exemption from the possible extended measures in accordance with Article 13(4) of the basic Regulation.

(99) As explained in recital 82 above, the investigation clearly showed this party was engaged in the circumvention practices by importing B20 and below. Consequently, such exemption cannot be granted.

(100) However, it should be underlined that, should any exporting producer(s) concerned not be dumping anymore, such parties can request a review pursuant to Article 11(3) of the basic Regulation.

10. **DISCLOSURE**

(101) All interested parties were informed of the essential facts and considerations leading to the above conclusions and were invited to comment. The oral and written comments submitted by the parties were considered,

HAS ADOPTED THIS REGULATION:

Article 1

1. The definitive anti-dumping duty imposed by Regulation (EC) No 599/2009 on imports of fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, commonly known as 'biodiesel', in pure form or in a blend containing by weight more than 20 % of fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, originating in the United States of America, is hereby extended to imports into the Union of fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, commonly known as 'biodiesel', in pure form or in a blend containing by weight more than 20 % of fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, consigned from Canada, whether declared as originating in Canada or not, currently falling within CN codes ex 1516 20 98 (TARIC code 1516 20 98 21), ex 1518 00 91 (TARIC code 1518 00 91 21), ex 1518 00 99 (TARIC code 1518 00 99 21), ex 2710 19 41 (TARIC code 2710 19 41 21), ex 3824 90 91 (TARIC code 3824 90 91 10) and ex 3824 90 97 (TARIC code 3824 90 97 01), with the exception of those produced by the companies listed below:

Country	Company	TARIC additional code
Canada	BIOX Corporation, Oakville, Ontario, Canada	B107
Canada	Rothsay Biodiesel, Guelph, Ontario, Canada	B108

The duty to be extended shall be the one established for 'All other companies' in Article 1(2) of Regulation (EC) No 599/2009, which is a definitive anti-dumping duty of EUR 172,2 per tonne net.

The anti-dumping duty on blends shall be applicable in proportion in the blend, by weight, of the total content of fatty-acid mono-alkyl esters and of paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin (biodiesel content).

2. The application of exemptions granted to the companies mentioned in paragraph 1 or authorised by the Commission in accordance with Article 4(2) shall be conditional upon presentation to the customs authorities of the Member States of a valid commercial invoice, which shall conform to the requirements set out in the Annex. If no such invoice is presented, the anti-dumping duty as imposed by paragraph 1 shall apply.

3. The duty extended by paragraph 1 of this Article shall be collected on imports consigned from Canada, whether declared as originating in Canada or not, registered in accordance with Article 2 of Regulation (EU) No 720/2010 and Articles 13(3) and 14(5) of Regulation (EC) No 1225/2009, with the exception of those produced by the companies mentioned in paragraph 1.

4. The provisions in force concerning customs duties shall apply.

Article 2

1. The definitive anti-dumping duty imposed by Regulation (EC) No 599/2009 on imports of fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, commonly known as 'biodiesel', in pure form or in a blend containing by weight more than 20 % of fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, originating in the United States of America, is hereby extended to imports into the Union of biodiesel in a blend containing by weight 20 % or less of fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, originating in the United States of America, and currently falling within CN codes ex 1516 20 98 (TARIC code 1516 20 98 30), ex 1518 00 91 (TARIC code 1518 00 91 30), ex 1518 00 99 (TARIC code 1518 00 99 30), ex 2710 19 41 (TARIC code 2710 19 41 30) and ex 3824 90 97 (TARIC code 3824 90 97 04).

The duties to be extended shall be those established in Article 1(2) of Regulation (EC) No 599/2009.

The anti-dumping duty on blends shall be applicable in proportion in the blend, by weight, of the total content of fatty-acid mono-alkyl esters and of paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin (biodiesel content).

2. The duty extended by paragraph 1 of this Article shall be collected on imports originating in the United States of America, registered in accordance with Article 2 of Regulation (EU) No 720/2010 and Articles 13(3) and 14(5) of Regulation (EC) No 1225/2009.

3. The provisions in force concerning customs duties shall apply.

Article 3

The investigation initiated by Regulation (EU) No 720/2010 concerning the possible circumvention of the anti-dumping measures imposed by Regulation (EC) No 599/2009 on imports of biodiesel originating in the United States of America by imports of biodiesel consigned from Singapore, whether declared as originating in Singapore or not, and making such imports subject to registration, is hereby terminated.

Article 4

1. Requests for exemption from the duty extended by Article 1(1) and Article 2(1) shall be made in writing in one of the official languages of the European Union and must be signed by a person authorised to represent the entity requesting the exemption. The request must be sent to the following address:

European Commission
Directorate-General for Trade
Directorate H
Office: N-105 04/92
1049 Brussels
BELGIUM

Fax + 32 2 295 65 05

2. In accordance with Article 13(4) of Regulation (EC) No 1225/2009, the Commission, after consulting the Advisory Committee, may authorise, by decision, the exemption of imports from companies which do not circumvent the anti-dumping measures imposed by Regulation (EC) No 599/2009, from the duty extended by Article 1(1) and by Article 2(1).

Article 5

Customs authorities are hereby directed to discontinue the registration of imports, established in accordance with Article 2 of Regulation (EU) No 720/2010.

Article 6

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

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

Done at Brussels, 5 May 2011.

For the Council
The President
MARTONYI J.

ANNEX

A declaration signed by an official of the entity issuing the commercial invoice, in the following format, must appear on the valid commercial invoice referred to in Article 1(2):

1. The name and the function of the official of the entity issuing the commercial invoice.

2. The following declaration: 'I, the undersigned, certify that the (volume) of (product concerned) sold for export to the European Union covered by this invoice was manufactured by (company name and address) (TARIC additional code) in (country concerned). I declare that the information provided in this invoice is complete and correct.'

3. Date and signature.

COMMISSION REGULATION (EU) No 445/2011

of 10 May 2011

on a system of certification of entities in charge of maintenance for freight wagons and amending Regulation (EC) No 653/2007

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 on safety on the Community's railways and amending Council Directive 95/18/EC on the licensing of railway undertakings and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification [1], and in particular Article 14a thereof,

Having regard to the Recommendation of the European Railway Agency of 8 July 2010 on a System of Certification for Entities in Charge of Maintenance,

Whereas:

(1) Directive 2004/49/EC aims to improve access to the market for rail transport services by defining common principles for the management, regulation and supervision of railway safety. Directive 2004/49/EC also provides for a framework to be put in place to ensure equal conditions for all entities in charge of maintenance for freight wagons through application of the same certification requirements across the Union.

(2) The purpose of the certification system is to provide a framework for the harmonisation of requirements and methods to assess the ability of entities in charge of maintenance across the Union.

(3) Without prejudice to the responsibility of railway undertakings and infrastructure managers for the safe operation of trains, the entity in charge of maintenance should ensure that the freight wagons for which it is in charge of maintenance are in a safe state of running by means of a system of maintenance. Taking into account the wide variety of design and maintenance methods, this system of maintenance should be a process-oriented system.

(4) Infrastructure managers need to use freight wagons to transport materials for construction or for infrastructure maintenance activities. When they operate freight wagons for this purpose, infrastructure managers do so in the capacity of a railway undertaking. The assessment of the infrastructure manager's capacity to operate freight wagons for this purpose should be part of its assessment for a safety authorisation under Article 11 of Directive 2004/49/EC.

(5) Inspections and monitoring undertaken before the departure of a train or en route are generally performed by operational staff of the railway undertakings or infrastructure managers, following the process described in their safety management system in accordance with Article 4(3) of Directive 2004/49/EC.

(6) The railway undertakings or the infrastructure managers should ensure, through their safety management system, the control of all risks related to their activity, including the use of contractors. To this end, a railway undertaking should rely on contractual arrangements involving entities in charge of maintenance for all wagons it operates. This could be a contract between the railway undertaking and the entity in charge of maintenance or a chain of contracts involving other parties, such as the keeper. These contracts should be consistent with the procedures outlined by a railway undertaking or an infrastructure manager in its safety management system, including for the exchange of information.

(7) In accordance with Directive 2004/49/EC, a certificate for an entity in charge of maintenance (ECM certificate) is valid throughout the Union. Certificates issued by bodies in third countries appointed under equivalent criteria and meeting equivalent requirements to those contained in this Regulation should normally be accepted as being equivalent to the ECM certificates issued in the Union.

(8) The assessment by a certification body of an application for an ECM certificate is an assessment of the applicant's ability to manage maintenance activities and to deliver the operational functions of maintenance either by itself or through contracts with other bodies, such as maintenance workshops, charged with delivering these functions or parts of these functions.

(9) A system of accreditation should provide a tool for managing risks by assuring that accredited bodies are competent to carry out the work they undertake. Furthermore, accreditation is regarded as a means to secure national and international recognition of ECM certificates issued by accredited bodies.

[1] OJ L 164, 30.4.2004, p. 44.

(10) In order to have a system allowing certification bodies to perform checks on certified entities in charge of maintenance across the Union, it is important that all bodies able to award certificates to any entity in charge of maintenance (the 'certification bodies') should cooperate with each other in order to harmonise approaches to certification. Specific requirements for accreditation should be developed and approved in line with the provisions of Regulation (EC) No 765/2008 of the European Parliament and of the Council ([1]).

(11) To evaluate the certification process set out in this Regulation, it is important that the European Railway Agency (the Agency) oversees the development of the system of certification. To be able to perform this function, the Agency needs to collect information on the nature of the certification bodies active in this field and the number of certificates issued to entities in charge of maintenance. It is also important for the Agency to facilitate coordination of the certification bodies.

(12) Commission Regulation (EC) No 653/2007 of 13 June 2007 on the use of a common European format for safety certificates and application documents in accordance with Article 10 of Directive 2004/49/EC of the European Parliament and of the Council and on the validity of safety certificates delivered under Directive 2001/14/EC ([2]) provides the standard format for safety certificates. This format must be updated to include further information on entities in charge of maintenance. Regulation (EC) No 653/2007 should therefore be amended accordingly.

(13) Pending the full application of the certification system of the entity in charge of maintenance provided for in this Regulation, the validity of existing practices to certify entities in charge of maintenance and maintenance workshops should be recognised during a period of transition in order to ensure the uninterrupted provision of rail freight services, in particular at international level. During this period the national safety authorities should pay particular attention to the equivalence and the consistency of the different certification practices.

(14) The measures provided for in this Regulation are in accordance with the opinion of the Committee established by Article 27 of Directive 2004/49/EC,

HAS ADOPTED THIS REGULATION:

Article 1

Purpose

1. This Regulation establishes a system of certification of entities in charge of maintenance for freight wagons as referred to in Article 14a of Directive 2004/49/EC.

2. The purpose of the system of certification is to provide evidence that an entity in charge of maintenance has established its maintenance system and can meet requirements laid down in this Regulation to ensure the safe state of running of any freight wagon for which it is in charge of maintenance.

Article 2

Scope

1. The system of certification shall apply to any entity in charge of maintenance for freight wagons to be used on the railway network within the Union.

2. Maintenance workshops or any organisation taking on a subset of the functions specified in Article 4 may apply the system of certification on a voluntary basis, based on the principles specified in Article 8 and Annex I.

3. References to an infrastructure manager in Articles 5, 7 and 12 shall be understood as relating to its operations with freight wagons for transporting materials for construction or for infrastructure maintenance activities. When it operates freight wagons for this purpose, an infrastructure manager shall be deemed to do so in the capacity of a railway undertaking.

Article 3

Definitions

1. For the purposes of this Regulation, the definitions laid down in Article 3 of Directive 2004/49/EC apply.

2. In addition, the following definitions apply:

(a) 'accreditation' means accreditation as defined in Article 2(10) of Regulation (EC) No 765/2008;

(b) 'ECM certificate' means a certificate issued to an entity in charge of maintenance for the purposes of Article 14a(4) of Directive 2004/49/EC;

(c) 'certification body' means a body, designated in accordance with Article 10, responsible for the certification of entities in charge of maintenance, on the basis of the criteria in Annex II;

(d) 'freight wagon' means a non-self-propelled vehicle designed for the purpose of transporting freight or other materials to be used for activities such as construction or infrastructure maintenance;

(e) 'maintenance workshop' means a mobile or fixed entity composed of staff, including those with management responsibility, tools and facilities organised to deliver maintenance of vehicles, parts, components or sub-assemblies of vehicles;

([1]) OJ L 218, 13.8.2008, p. 30.
([2]) OJ L 153, 14.6.2007, p. 9.

(f) 'release to service' means the assurance given to the fleet maintenance manager by the entity delivering the maintenance that maintenance has been delivered according to the maintenance orders;

(g) 'return to operation' means the assurance, based on a release to service, given to the user, such as a railway undertaking or a keeper, by the entity in charge of maintenance that all appropriate maintenance works have been completed and the wagon, previously removed from operation, is in a condition to be used safely, possibly subject to temporary restrictions of use.

Article 4

Maintenance system

1. The maintenance system shall be composed of the following functions:

(a) the management function, which supervises and coordinates the maintenance functions referred to in points (b) to (d) and ensures the safe state of the freight wagon in the railway system;

(b) the maintenance development function, which is responsible for the management of the maintenance documentation, including the configuration management, based on design and operational data as well as on performance and return on experience;

(c) the fleet maintenance management function, which manages the freight wagon's removal for maintenance and its return to operation after maintenance; and

(d) the maintenance delivery function, which delivers the required technical maintenance of a freight wagon or parts of it, including the release to service documentation.

2. The entity in charge of maintenance shall ensure that the functions referred to in paragraph 1 comply with the requirements and assessment criteria set out in Annex III.

3. The entity in charge of maintenance shall carry out the management function itself, but may outsource the maintenance functions referred to in points (b) to (d) of paragraph 1, or parts of them, to other contracting parties subject to the provisions of Article 8. Where it resorts to outsourcing, the entity in charge of maintenance shall ensure that the principles set out in Annex I are applied.

4. Regardless of the outsourcing arrangements in place, the entity in charge of maintenance shall be responsible for the outcome of the maintenance activities it manages and shall establish a system to monitor performance of those activities.

Article 5

Relationships between parties involved in the maintenance process

1. Each railway undertaking or infrastructure manager shall ensure that the freight wagons it operates, before their departure, have a certified entity in charge of maintenance and that the use of the wagon corresponds to the scope of the certificate.

2. All parties involved in the maintenance process shall exchange relevant information about maintenance in accordance with the criteria listed in sections I.7 and I.8 of Annex III.

3. Following contractual arrangements, a railway undertaking may request information for operational purposes on the maintenance of a freight wagon. The entity in charge of the maintenance of the freight wagon shall respond to such requests either directly or through other contracting parties.

4. Following contractual arrangements, an entity in charge of maintenance may request information on the operation of a freight wagon. The railway undertaking or the infrastructure manager shall respond to such requests either directly or through other contracting parties.

5. All contracting parties shall exchange information on safety-related malfunctions, accidents, incidents, near-misses and other dangerous occurrences as well as on any possible restriction on the use of freight wagons.

6. The certificates of entities in charge of maintenance shall be accepted as proof of the ability of a railway undertaking or infrastructure manager to meet the requirements governing maintenance and the control of contractors and suppliers specified in Annex II, points B.1, B.2, B.3 and C.1, to Commission Regulation (EU) No 1158/2010 of 9 December 2010 on a common safety method for assessing conformity with the requirements for obtaining railways safety certificates [1] and Commission Regulation (EU) No 1169/2010 of 10 December 2010 on a common safety method for assessing conformity with the requirements for obtaining a railways safety authorisation [2], unless the national safety authority can demonstrate the existence of a substantial safety risk.

7. If a contracting party, in particular a railway undertaking, has a justified reason to believe that a particular entity in charge of maintenance does not comply with the requirements of Article 14a(3) of Directive 2004/49/EC or with the certification requirements of this Regulation, it shall promptly inform the certification body thereof. The certification body shall take appropriate action to check if the claim of non-compliance is justified and shall inform the parties involved (including the competent national safety authority if relevant) of the results of its investigation.

[1] OJ L 326, 10.12.2010, p. 11.
[2] OJ L 327, 11.12.2010, p. 13.

8. When there is a change of entity in charge of maintenance, the registration holder as indicated in Article 33(3) of Directive 2008/57/EC of the European Parliament and of the Council [1], shall inform in due time the registration entity, as defined in Article 4(1) of Commission Decision 2007/756/EC [2], so that the latter may update the national vehicle register.

The former entity in charge of maintenance shall deliver the maintenance documentation to either the registration holder or the new entity in charge of maintenance.

The former entity in charge of maintenance is relieved of its responsibilities when it is removed from the national vehicle register. If on the date of de-registration of the former entity in charge of maintenance any new entity has not acknowledged its acceptance of entity in charge of maintenance status, the registration of the vehicle is suspended.

Article 6

Certification bodies

1. ECM certificates shall be awarded by any competent certification body, chosen by the applicant entity in charge of maintenance.

2. Member States shall ensure that the certification bodies comply with the general criteria and principles set out in Annex II and with any subsequent sectoral accreditation schemes.

3. Member States shall take the measures necessary to ensure that decisions taken by the certification bodies are subject to judicial review.

4. In order to harmonise approaches to the assessment of applications, the certification bodies shall cooperate with each other both within the Member States and across the Union.

5. The Agency shall organise and facilitate cooperation between the certification bodies.

Article 7

System of certification for entities in charge of maintenance

1. Certification shall be based on an assessment of the ability of the entity in charge of maintenance to meet the relevant requirements in Annex III and to apply them consistently. It shall include a system of surveillance to ensure continuing compliance with the applicable requirements after award of the ECM certificate.

2. The entities in charge of maintenance shall apply for certification using the relevant form in Annex IV and providing documentary evidence of the procedures specified in Annex III. They shall promptly submit all supplementary information requested by the certification body. In assessing applications, certification bodies shall apply the requirements and assessment criteria set out in Annex III.

3. The certification body shall take a decision no later than 4 months after all the information required and any supplementary information requested has been submitted to it by the entity in charge of maintenance applying for the certificate. The certification body shall undertake the necessary assessment at the site or sites of the entity in charge of maintenance prior to the award of the certificate. The decision on the award of the certificate shall be communicated to the entity in charge of maintenance using the relevant form in Annex V.

4. An ECM certificate shall be valid for a period up to 5 years. The holder of the certificate shall without delay inform the certification body of all significant changes in the circumstances applying at the time the original certificate was awarded to allow the certification body to decide whether to amend, renew or revoke it.

5. The certification body shall set out in detail the reasons on which each of its decisions is based. The certification body shall notify its decision and the reasons to the entity in charge of maintenance, together with an indication of the process, time limit for appeal and the contact details of the appeal body.

6. The certification body shall conduct surveillance at least once a year at selected sites, geographically and functionally representative of all the activities of those entities in charge of maintenance it has certified, to verify that the entities still satisfy the criteria set out in Annex III.

7. If the certification body finds that an entity in charge of maintenance no longer satisfies the requirements on the basis of which it issued the ECM certificate, it shall agree an improvement plan with the entity in charge of maintenance, or limit the scope of application of the certificate, or suspend the certificate, depending on the degree of non-compliance.

In the event of continuous non-compliance with the certification requirements or any improvement plan, the certification body shall limit the scope of or revoke the ECM certificate, giving reasons for its decision, together with an indication of the process and time limit for appeal and the contact details of the appeal body.

8. When a railway undertaking or an infrastructure manager applies for a safety certificate or safety authorisation, the following shall apply concerning the freight wagons it uses:

(a) where the freight wagons are maintained by the applicant, either the applicant shall include as part of its application a valid ECM certificate, if available, or its capacity as entity in charge of maintenance shall be assessed as part of its application for a safety certificate or safety authorisation;

(b) where the freight wagons are maintained by parties other than the applicant, the applicant shall ensure, through its safety management system, the control of all risks related to its activity, including the use of such wagons, whereby, in particular, the provisions of Article 5 of this Regulation shall apply.

[1] OJ L 191, 18.7.2008, p. 1.
[2] OJ L 305, 23.11.2007, p. 30.

Certification bodies and national safety authorities shall conduct an active exchange of views in all circumstances in order to avoid any duplication of assessment.

Article 8

System of certification for outsourced maintenance functions

1. Where the entity in charge of maintenance decides to outsource one or more of the functions referred to in Article 4(1)(b), (c) and (d), or parts of them, voluntary certification of the contractor under the certification system of this Regulation shall create a presumption of conformity of the entity in charge of maintenance with the relevant requirements set out in Annex III, as far as these requirements are covered by the voluntary certification of the contractor. In the absence of such certification, the entity in charge of maintenance shall demonstrate to the certification body how it complies with all the requirements set out in Annex III with regard to the functions it decides to outsource.

2. Certification in respect of outsourced maintenance functions, or parts of them, shall be issued by the certification bodies, following the same procedures in Articles 6, 7, and 10(3), adapted to the specific case of the applicant. They shall be valid throughout the Union.

In assessing applications for certificates in respect of outsourced maintenance functions, or parts of them, certification bodies shall follow the principles set out in Annex I.

Article 9

Role of the supervision regime

If a national safety authority has a justified reason to believe that a particular entity in charge of maintenance does not comply with the requirements of Article 14a(3) of Directive 2004/49/EC or with the certification requirements of this Regulation, it shall immediately take the necessary decision and inform the Commission, the Agency, other competent authorities, the certification body and other interested parties of its decision.

Article 10

Provision of information to the Commission and the Agency

1. By no later than 30 November 2011, Member States shall inform the Commission whether the certification bodies are accredited bodies, recognised bodies or national safety authorities. They shall also notify any change in this situation to the Commission within 1 month of the change.

2. By no later than 31 May 2012, Member States shall notify the Agency of the certification bodies recognised. The accreditation bodies as defined in Regulation (EC) No 765/2008 shall inform the Agency of the certification bodies accredited. Any change shall also be notified to the Agency within 1 month of the change.

3. Certification bodies shall notify the Agency of all issued, amended, renewed or revoked ECM certificates or certificates for specific functions according to Article 4(1), within 1 week from its decision, using the forms in Annex V.

4. The Agency shall keep a record of all information notified under paragraphs 2 and 3 and shall make it publicly available.

Article 11

Amendment to Regulation (EC) No 653/2007

Annex I to Regulation (EC) No 653/2007 is replaced by the text set out in Annex VI to this Regulation.

Article 12

Transitional provisions

1. The following transitional provisions shall apply without prejudice to Article 9.

2. Starting from 31 May 2012, any ECM certificate shall be issued in accordance with this Regulation to entities in charge of maintenance for freight wagons, without prejudice to Article 14a(8) of Directive 2004/49/EC.

3. Certificates issued by a certification body by no later than 31 May 2012 on the basis of principles and criteria equivalent to those of the Memorandum of Understanding establishing the basic principles of a common system of certification of entities in charge of maintenance for freight wagons, signed by Member States on 14 May 2009, shall be recognised as being equivalent to ECM certificates issued under this Regulation for their original validity period until at the latest 31 May 2015.

4. Certificates issued by a certification body to entities in charge of maintenance by no later than 31 May 2012 on the basis of national laws existing before the entry into force of this Regulation and equivalent to this Regulation, in particular Articles 6 and 7 and Annexes I and III, shall be recognised as being equivalent to ECM certificates issued under this Regulation for their original period of validity until at the latest 31 May 2015.

5. Certificates issued to maintenance workshops by no later than 31 May 2014 on the basis of national laws existing before the entry into force of this Regulation and equivalent to this Regulation shall be recognised as being equivalent to certificates

for maintenance workshops taking on the maintenance delivery function issued under this Regulation for their original period of validity until at the latest 31 May 2017.

6. Without prejudice to paragraphs 3 to 5, entities in charge of maintenance for freight wagons registered in the national vehicle register by no later than 31 May 2012 shall be certified in accordance with this Regulation by no later than 31 May 2013. During this period, self declarations of conformity of entities in charge of maintenance to the relevant requirements of the present Regulation or of the Memorandum of Understanding establishing the basic principles of a common system of certification of entities in charge of maintenance for freight wagons, signed by Member States on 14 May 2009 shall be recognised as being equivalent to ECM certificates issued under this Regulation.

7. Railway undertakings and infrastructure managers which are already certified in accordance with Articles 10 and 11 of Directive 2004/49/EC by no later than 31 May 2012 need not apply for an ECM certificate for the original period of validity of their certificates for maintaining the wagons they are responsible for as entity in charge of maintenance.

Article 13

Entry into force

This Regulation shall enter into force on the 20th day following the date 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, 10 May 2011.

For the Commission
The President
José Manuel BARROSO

ANNEX I

Principles to be used for organisations applying for a certificate in respect of maintenance functions outsourced by an entity in charge of maintenance

1. For certification of an entity or organisation taking on one or more maintenance functions of an entity in charge of maintenance (maintenance development, fleet maintenance management, maintenance delivery) or parts of them, the following requirements and assessment criteria contained in Annex III apply:

   (a) requirements and assessment criteria set out in section I of Annex III, adapted to the organisation's type and extent of service;

   (b) requirements and assessment criteria describing the specific maintenance function or functions.

2. For certification of a maintenance workshop taking on the maintenance delivery function, the following requirements and assessment criteria contained in Annex III apply:

   (a) the requirements and assessment criteria set out in section I of Annex III, which must be adapted to the specific activity of a maintenance workshop providing the maintenance delivery function;

   (b) the processes describing the maintenance delivery function.

ANNEX II

Criteria for accreditation or recognition of certification bodies involved in the assessment and award of ECM certificates

1. ORGANISATION

The certification body must document its organisational structure, showing the duties, responsibilities and authorities of management and other certification staff and any committees. Where the certification body is a defined part of a legal entity, the structure must include the line of authority and the relationship to other parts within the same legal entity.

2. INDEPENDENCE

The certification body must be organisationally and functionally independent in its decision-making from railway undertakings, infrastructure managers, keepers, manufacturers and entities in charge of maintenance and shall not provide similar services.

The independence of the staff responsible for the certification checks must be guaranteed. No official must be remunerated on the basis of either the number of checks performed or the results of those checks.

3. COMPETENCE

The certification body and the staff deployed must have the required professional competence, in particular regarding the organisation of the maintenance of freight wagons and the appropriate maintenance system.

The certification body must demonstrate:

(a) sound experience in assessing management systems;

(b) knowledge of the applicable requirements of the legislation.

The team established for surveillance of the entities in charge of maintenance must be experienced in the relevant fields, and in particular must demonstrate:

(a) appropriate knowledge and understanding of the applicable European legislation;

(b) relevant technical competence;

(c) a minimum of 3 years of relevant experience in maintenance in general;

(d) sufficient experience in freight wagon maintenance or at least in maintenance in equivalent industrial sectors.

4. IMPARTIALITY

The certification body's decisions must be based on objective evidence of conformity or non-conformity obtained by the certification body, and must not be influenced by other interests or by other parties.

5. RESPONSIBILITY

The certification body is not responsible for ensuring ongoing conformity with the requirements for certification.

The certification body has the responsibility to assess sufficient objective evidence upon which to base a certification decision.

6. OPENNESS

A certification body needs to provide public access to, or disclosure of, appropriate and timely information about its audit process and certification process. It also needs to provide information about the certification status (including the granting, extension, maintenance, renewal, suspension, reduction in scope, or withdrawal of certification) of any organisation, in order to develop confidence in the integrity and credibility of certification. Openness is a principle of access to, or disclosure of, appropriate information.

7. CONFIDENTIALITY

To gain the privileged access to information needed to assess conformity with the requirements for certification adequately, a certification body must keep confidential any commercial information about a client.

8. RESPONSIVENESS TO COMPLAINTS

The certification body must establish a procedure to handle complaints about decisions and other certification-related activities.

9. LIABILITY AND FINANCING

The certification body must be able to demonstrate that it has evaluated the risks arising from its certification activities and that it has adequate arrangements (including insurance or reserves) to cover liabilities arising from its operations in each field of its activities and the geographic areas in which it operates.

ANNEX III

Requirements and assessment criteria for organisations applying for an ECM certificate or for a certificate in respect of maintenance functions outsourced by an entity in charge of maintenance

I. **Management function requirements and assessment criteria**

1. Leadership — *commitment to the development and implementation of the maintenance system of the organisation and to the continuous improvement of its effectiveness*

The organisation must have procedures for:

(a) establishing a maintenance policy appropriate to the organisation's type and extent of service and approved by the organisation's chief executive or his or her representative;

(b) ensuring that safety targets are established, in line with the legal framework and consistent with an organisation's type, extent and relevant risks;

(c) assessing its overall safety performance in relation to its corporate safety targets;

(d) developing plans and procedures for reaching its safety targets;

(e) ensuring the availability of the resources needed to perform all processes to comply with the requirements of this Annex;

(f) identifying and managing the impact of other management activities on the maintenance system;

(g) ensuring that senior management is aware of the results of performance monitoring and audits and takes overall responsibility for the implementation of changes to the maintenance system;

(h) ensuring that staff and staff representatives are adequately represented and consulted in defining, developing, monitoring and reviewing the safety aspects of all related processes that may involve staff.

2. Risk assessment — *a structured approach to assess risks associated with the maintenance of freight wagons, including those directly arising from operational processes and the activities of other organisations or persons, and to identify the appropriate risk control measures*

2.1. The organisation must have procedures for:

(a) analysing risks relevant to the extent of operations carried out by the organisation, including the risks arising from defects and construction non-conformities or malfunctions throughout the lifecycle;

(b) evaluating the risks referred to in point (a);

(c) developing and putting in place risk control measures.

2.2. The organisation must have procedures and arrangements in place to recognise the need and commitment to collaborate with keepers, railway undertakings, infrastructure managers, or other interested parties.

2.3. The organisation must have risk assessment procedures to manage changes in equipment, procedures, organisation, staffing or interfaces, and to apply Commission Regulation (EC) No 352/2009 [1].

2.4. When assessing risk, an organisation must have procedures to take into account the need to determine, provide and sustain an appropriate working environment which conforms to Union and national legislation, in particular Council Directive 89/391/EEC [2].

3. Monitoring — *a structured approach to ensure that risk control measures are in place, working correctly and achieving the organisation's objectives*

3.1. The organisation must have a procedure to regularly collect, monitor and analyse relevant safety data, including:

(a) the performance of relevant processes;

(b) the results of processes (including all contracted services and products);

[1] OJ L 108, 29.4.2009, p. 4.
[2] OJ L 183, 29.6.1989, p. 1.

(c) the effectiveness of risk control arrangements;

(d) information on experience, malfunctions, defects and repairs arising from day-to-day operation and maintenance.

3.2. The organisation must have procedures to ensure that accidents, incidents, near-misses and other dangerous occurrences are reported, logged, investigated and analysed.

3.3. For a periodic review of all processes, the organisation must have an internal auditing system which is independent, impartial and acts in a transparent way. This system must have procedures in place to:

(a) develop an internal audit plan, which can be revised depending on the results of previous audits and monitoring of performance;

(b) analyse and evaluate the results of the audits;

(c) propose and implement specific corrective measures/actions;

(d) verify the effectiveness of previous measures/actions.

4. Continuous improvement — *a structured approach to analyse the information gathered through regular monitoring, auditing, or other relevant sources and to use the results to learn and to adopt preventive or corrective measures in order to maintain or improve the level of safety*

The organisation must have procedures to ensure that:

(a) identified shortcomings are rectified;

(b) new safety developments are implemented;

(c) internal audit findings are used to bring about improvement in the system;

(d) preventive or corrective actions are implemented, when needed, to ensure compliance of the railway system with standards and other requirements throughout the lifecycle of equipment and operations;

(e) relevant information relating to the investigation and causes of accidents, incidents, near-misses and other dangerous occurrences is used to learn and, where necessary, to adopt measures in order to improve the level of safety;

(f) relevant recommendations from the national safety authority, from the national investigation body and from industry or internal investigations are evaluated and implemented if appropriate;

(g) relevant reports/information from railway undertakings/infrastructure managers and keepers or other relevant sources are considered and taken into account.

5. Structure and responsibility — *a structured approach to define the responsibilities of individuals and teams for secure delivery of the organisation's safety objectives*

5.1. The organisation must have procedures to allocate responsibilities for all relevant processes throughout the organisation.

5.2. The organisation must have procedures to clearly define safety-related areas of responsibility and the distribution of responsibilities to specific functions associated with them as well as their interfaces. These include the procedures indicated above between the organisation and the keepers and, where appropriate, railway undertakings and infrastructure managers.

5.3. The organisation must have procedures to ensure that staff with delegated responsibilities within the organisation have the authority, competence and appropriate resources to perform their functions. Responsibility and competence should be coherent and compatible with the given role, and delegation must be in writing.

5.4. The organisation must have procedures to ensure the coordination of activities related to relevant processes across the organisation.

5.5. The organisation must have procedures to hold those with a role in the management of safety accountable for their performance.

6. Competence management — *a structured approach to ensure that employees have the competences required in order to achieve the organisation's objectives safely, effectively and efficiently in all circumstances*

6.1. The organisation must set up a competence management system providing for:

(a) the identification of posts with responsibility for performing within the system all the processes necessary for compliance with the requirements of this Annex;

(b) the identification of posts involving safety tasks;

(c) the allocation of staff with the appropriate competence to relevant tasks.

6.2. Within the organisation's competence management system, there must be procedures to manage the competence of staff, including at least:

(a) identification of the knowledge, skills and experience required for safety-related tasks as appropriate for the responsibilities;

(b) selection principles, including basic educational level, mental aptitude and physical fitness;

(c) initial training and qualification or certification of acquired competence and skills;

(d) assurance that all staff are aware of the relevance and importance of their activities and how they contribute to the achievement of safety objectives;

(e) ongoing training and periodical updating of existing knowledge and skills;

(f) periodic checks of competence, mental aptitude and physical fitness where appropriate;

(g) special measures in the case of accidents/incidents or long absences from work, as required.

7. Information — *a structured approach to ensure that important information is available to those making judgments and decisions at all levels of the organisation*

7.1. The organisation must have procedures to define reporting channels to ensure that, within the entity itself and in its dealings with other actors, including infrastructure managers, railways undertakings and keepers, information on all relevant processes is duly exchanged and submitted to the person having the right role both within its own organisation and in other organisations, in a prompt and clear way.

7.2. To ensure an adequate exchange of information, the organisation must have procedures:

(a) for the receipt and processing of specific information;

(b) for the identification, generation and dissemination of specific information;

(c) for making available reliable and up-to-date information.

7.3. The organisation must have procedures to ensure that key operational information is:

(a) relevant and valid;

(b) accurate;

(c) complete;

(d) appropriately updated;

(e) controlled;

(f) consistent and easy to understand (including the language used);

(g) made known to staff before it is applied;

(h) easily accessible to staff, with copies provided to them where required.

7.4. The requirements set out in points 7.1, 7.2 and 7.3 apply in particular to the following operational information:

(a) checks of the accuracy and completeness of national vehicle registers regarding the identification (including means) and registration of the freight wagons maintained by the organisation;

(b) maintenance documentation;

(c) information on support provided to keepers and, where appropriate, to other parties, including railway undertakings/infrastructure managers;

(d) information on the qualification of staff and subsequent supervision during maintenance development;

(e) information on operations (including mileage, type and extent of activities, incidents/accidents) and requests of railway undertakings, keepers and infrastructure managers;

(f) records of maintenance performed, including information on deficiencies detected during inspections and corrective actions taken by railway undertakings or by infrastructure managers such as inspections and monitoring undertaken before the departure of the train or en route;

(g) release to service and return to operation;

(h) maintenance orders;

(i) technical information to be provided to railway undertakings/infrastructure managers and keepers for maintenance instructions;

(j) emergency information concerning situations where the safe state of running is impaired, which may consist of:

(i) the imposition of restrictions of use or specific operating conditions for the freight wagons maintained by the organisation or other vehicles of the same series even if maintained by other entities in charge of maintenance, whereby this information should also be shared with all involved parties;

(ii) urgent information on safety-related issues identified during maintenance, such as deficiencies detected in a component common to several types or series of vehicles;

(k) all relevant information/data needed to submit the annual maintenance report to the certification body and to the relevant customers (including keepers), whereby this report must also be made available upon request to national safety authorities.

8. Documentation — *a structured approach to ensure the traceability of all relevant information*

8.1. The organisation must have adequate procedures in place to ensure that all relevant processes are duly documented.

8.2. The organisation must have adequate procedures in place to:

(a) regularly monitor and update all relevant documentation;

(b) format, generate, distribute and control changes to all relevant documentation;

(c) receive, collect and archive all relevant documentation.

9. Contracting activities — *a structured approach to ensure that subcontracted activities are managed appropriately in order for the organisation's objectives to be achieved*

9.1. The organisation must have procedures in place to ensure that safety related products and services are identified.

9.2. When making use of contractors and/or suppliers for safety related products and services, the organisation must have procedures in place to verify at the time of selection that:

(a) contractors, subcontractors and suppliers are competent;

(b) contractors, subcontractors and suppliers have a maintenance and management system that is adequate and documented.

9.3. The organisation must have a procedure to define the requirements that such contractors and suppliers have to meet.

9.4. The organisation must have procedures to monitor the awareness of suppliers and/or contractors of risks they entail to the organisation's operations.

9.5. When the maintenance/management system of a contractor or supplier is certified, the monitoring process described in point 3 may be limited to the results of the contracted operational processes referred to in point 3.1(b).

9.6. At least the basic principles for the following processes must be clearly defined, known and allocated in the contract between the contracting parties:

(a) responsibilities and tasks relating to railway safety issues;

(b) obligations relating to the transfer of relevant information between both parties;

(c) the traceability of safety-related documents.

II. **Requirements and assessment criteria for the maintenance development function**

1. The organisation must have a procedure to identify and manage all maintenance activities affecting safety and safety-critical components.

2. The organisation must have procedures to guarantee conformity with the essential requirements for interoperability, including updates throughout the lifecycle, by:

(a) ensuring compliance with the specifications related to the basic parameters for interoperability as set out in the relevant technical specifications for interoperability (TSIs);

(b) verifying in all circumstances the consistency of the maintenance file with the authorisation of placing-in-service (including any national safety authority requirements), the declarations of conformity to TSIs, the declarations of verification, and the technical file;

(c) managing any substitution in the course of maintenance in compliance with the requirements of the Directive 2008/57/EC and the relevant TSIs;

(d) identifying the need for risk assessment regarding the potential impact of the substitution in question on the safety of the railway system;

(e) managing the configuration of all technical changes affecting the system integrity of the vehicle.

3. The organisation must have a procedure to design and to support the implementation of maintenance facilities, equipment and tools specifically developed and required for maintenance delivery. The organisation must have a procedure to check that these facilities, equipment and tools are used, stored and maintained according to their maintenance schedule and in conformity with their maintenance requirements.

4. When freight wagons start operations, the organisation must have procedures to:

(a) obtain the initial documentation and to collect sufficient information on planned operations;

(b) analyse the initial documentation and to provide the first maintenance file, also taking into account the obligations contained in any associated guarantees;

(c) ensure that the implementation of the first maintenance file is done correctly.

5. To keep the maintenance file updated throughout the lifecycle of a freight wagon, the organisation must have procedures to:

(a) collect at least the relevant information in relation to:

(i) the type and extent of operations effectively performed, including, but not limited to, operational incidents with a potential to affect the safety integrity of the freight wagon;

(ii) the type and extent of operations planned;

(iii) the maintenance effectively performed;

(b) define the need for updates, taking into account the limit values for interoperability;

(c) make proposals for and approve changes and their implementation, with a view to a decision based on clear criteria, taking into account the findings from risk assessment;

(d) ensure that the implementation of changes is done correctly.

6. When the competence management process is applied to the maintenance development function, at least the following activities affecting safety must be taken into account:

(a) assessment of the significance of changes for the maintenance file and proposed substitutions in the course of maintenance;

(b) engineering disciplines required for managing the establishment and the changes of maintenance file and the development, assessment, validation and approval of substitutions in the course of maintenance;

(c) joining techniques (including welding and bonding), brake systems, wheel sets and draw gear, non-destructive testing techniques and maintenance activities on specific components of freight wagons for the transport of dangerous goods such as tanks and valves.

7. When the documentation process is applied to the maintenance development function, the traceability of at least the following elements needs to be guaranteed:

(a) the documentation relating to the development, assessment, validation and approval of a substitution in the course of maintenance;

(b) the configuration of vehicles, including, but not limited to, components related to safety;

(c) records of the maintenance performed;

(d) results of studies concerning return on experience;

(e) all the successive versions of the maintenance file, including risk assessment;

(f) reports on the competence and supervision of maintenance delivery and fleet maintenance management;

(g) technical information to be provided to support keepers, railway undertakings and infrastructure managers.

III. **Requirements and assessment criteria for the fleet maintenance management function**

1. The organisation must have a procedure to check the competence, availability and capability of the entity responsible for maintenance delivery before placing maintenance orders. This requires that the maintenance workshops are duly qualified to decide upon the requirements for technical competences in the maintenance delivery function.

2. The organisation must have a procedure for the composition of the work package and for the issue and release of the maintenance order.

3. The organisation must have a procedure to send freight wagons for maintenance in due time.

4. The organisation must have a procedure to manage the removal of freight wagons from operation for maintenance or when defects have been identified.

5. The organisation must have a procedure to define the necessary control measures applied to the maintenance delivered and the release to service of the freight wagons.

6. The organisation must have a procedure to issue a notice to return to operation, taking into account the release to service documentation.

7. When the competence management (CM) process is applied to the fleet maintenance management function, at least the return to operation must be taken into account.

8. When the information process is applied to the fleet maintenance management function, at least the following elements need to be provided to the maintenance delivery function:

   (a) applicable rules and technical specifications;

   (b) the maintenance plan for each freight wagon;

   (c) a list of spare parts, including a sufficiently detailed technical description of each part to allow like-for-like replacement with the same guarantees;

   (d) a list of materials, including a sufficiently detailed description of their use and the necessary health and safety information;

   (e) a dossier that defines the specifications for activities affecting safety and contains intervention and in-use restrictions for components;

   (f) a list of components or systems subject to legal requirements and a list of these requirements (including brake reservoirs and tanks for the transport of dangerous goods);

   (g) all additional relevant information related to safety according to the risk assessment performed by the organisation.

9. When the information process is applied to the fleet maintenance management function, at least the return to operation, including restrictions on use relevant to users (railway undertakings and infrastructure managers), needs to be communicated to interested parties.

10. When the documentation process is applied to the fleet maintenance management function, at least the following elements need to be recorded:

    (a) maintenance orders;

    (b) return to operation, including restrictions on use relevant to railway undertakings and infrastructure managers.

IV. **Requirements and assessment criteria for the maintenance delivery function**

1. The organisation must have procedures to:

   (a) check the completeness and appropriateness of the information delivered by the fleet maintenance management function in relation to the activities ordered;

   (b) control the use of the required, relevant maintenance documents and other standards applicable to the delivery of maintenance services in accordance with maintenance orders;

   (c) ensure that all relevant maintenance specifications in the maintenance orders are available to all involved staff (e.g. they are contained in internal working instructions);

   (d) ensure that all relevant maintenance specifications, as defined in applicable regulations and specified standards contained in the maintenance orders, are available to all involved staff (e.g. they are contained in internal working instructions).

2. The organisation must have procedures to ensure that:

   (a) components (including spare parts) and materials are used as specified in the maintenance orders and supplier documentation;

(b) components and materials are stored, handled and transported in a manner that prevents wear and damage and as specified in the maintenance orders and supplier documentation;

(c) all components and materials, including those provided by the customer, comply with relevant national and international rules as well as with the requirements of relevant maintenance orders.

3. The organisation must have procedures to determine, identify, provide, record and keep available suitable and adequate facilities, equipment and tools to enable it to deliver the maintenance services in accordance with maintenance orders and other applicable specifications, ensuring:

(a) the safe delivery of maintenance, including the health and safety of maintenance staff;

(b) ergonomics and health protection, also including the interfaces between users and information technology systems or diagnostic equipment.

4. Where necessary to ensure valid results, the organisation must have procedures to ensure that its measuring equipment is:

(a) calibrated or verified at specified intervals, or prior to use, against international, national or industrial measurement standards — where no such standards exist, the basis used for calibration or verification must be recorded;

(b) adjusted or re-adjusted as necessary;

(c) identified to enable the calibration status to be determined;

(d) safeguarded from adjustments that would invalidate the measurement result;

(e) protected from damage and deterioration during handling, maintenance and storage.

5. The organisation must have procedures to ensure that all facilities, equipment and tools are correctly used, calibrated, preserved and maintained in accordance with documented procedures.

6. The organisation must have procedures to check that the performed maintenance tasks are in accordance with the maintenance orders and to issue the notice to release to service that includes eventual restrictions of use.

7. When the risk assessment process (in particular point 2.4 of section I) is applied to the maintenance delivery function, the working environment includes not only the workshops where maintenance is done but also the tracks outside the workshop buildings and all places where maintenance activities are performed.

8. When the competence management process is applied to the maintenance delivery function, at least the following activities affecting safety must be taken into account:

(a) joining techniques (including welding and bonding);

(b) non-destructive testing;

(c) final vehicle testing and release to service;

(d) maintenance activities on brake systems, wheel sets and draw gear and maintenance activities on specific components of freight wagons for the transport of dangerous goods, such as tanks, valves, etc.;

(e) other identified specialist areas affecting safety.

9. When the information process is applied to the maintenance delivery function, at least the following elements must be provided to the fleet maintenance management and maintenance development functions:

(a) works performed in accordance with the maintenance orders;

(b) any possible fault or defect regarding safety which is identified by the organisation;

(c) the release to service.

10. When the documentation process is applied to the maintenance delivery function, at least the following elements must be recorded:

(a) clear identification of all facilities, equipments and tools related to activities affecting safety;

(b) all maintenance works performed, including personnel, tools, equipment, spare parts and materials used and taking into account:

(i) relevant national rules where the organisation is established;

(ii) requirements laid down in the maintenance orders, including requirements regarding records;

(iii) final testing and decision regarding release to service;

(c) the control measures required by maintenance orders and the release to service;

(d) the results of calibration and verification, whereby, for computer software used in the monitoring and measurement of specified requirements, the ability of the software to perform the desired task must be confirmed prior to initial use and reconfirmed as necessary;

(e) the validity of the previous measuring results when a measuring instrument is found not to conform to requirements.

ANNEX IV

APPLICATION FOR AN ENTITY IN CHARGE OF MAINTENANCE CERTIFICATE

Application for a certificate confirming acceptance of the maintenance system of an entity in charge of maintenance (ECM) in conformity with Directive 2004/49/EC and Regulation (EU) No 445/2011

Certification body contact information

1.1 Organisation addressed for the application _____

1.2 Certification body reference number _____

1.3 Complete postal address (street, postal code, city, country) _____

_____

Applicant information

2.1 Legal title _____

2.2 Complete postal address (street, postal code, city, country) _____

_____

2.3 Phone number _____ 2.4 Fax number _____

2.5 E-mail address _____ 2.6 Website _____

2.7 Registration business number _____ 2.8 VAT No _____

2.9 Other information _____

Contact person information

3.1 Family name and first name _____

3.2 Complete postal address (street, postal code, city, country) _____

_____

3.3 Phone number _____ 3.4 Fax number _____

3.5 E-mail address _____

Application details

4.1 Application reference (given by the applicant)

This application is for a

4.1.1 new certificate ☐ 4.1.2 updated/amended certificate ☐

4.1.3 renewed certificate ☐

Operational details

Type of company

5.1 RU/IM ☐ 5.2 Keeper ☐

5.3 others ☐ specify: _____

Scope of ECM activities

5.4 Covers tank wagons for dangerous goods: YES/NO
Covers other wagons specialised in transport of dangerous goods: YES/NO

ECM operational functions

		own	partially	fully
5.5	Maintenance development	5.4.1 ☐	5.4.2 ☐	5.4.3 ☐
5.6	Fleet maintenance management	5.5.1 ☐	5.5.2 ☐	5.5.3 ☐
5.7	Maintenance delivery	5.6.1 ☐	5.6.2 ☐	5.6.3 ☐

Submitted documents

6.1 Maintenance system documentation ☐

6.2 Other ☐ specify: _____

Signatures

Applicant _____

(first name, family name)

Date _____ Signature _____

Certification body _____

Internal reference number

_____ Date application received _____

Date _____ Signature _____

SPACE RESERVED FOR THE ADDRESSED OFFICE/AUTHORITY

APPLICATION FOR A MAINTENANCE FUNCTIONS CERTIFICATE

Application for a certificate confirming acceptance of the maintenance system within the European Union in conformity with Directive 2004/49/EC and Regulation (EU) No 445/2011

Certification body contact information

1.1 Organisation addressed for the application _____

1.2 Certification body reference number _____

1.3 Complete postal address (street, postal code, city, country) _____

_____

Applicant information

2.1 Legal title _____

2.2 Complete postal address (street, postal code, city, country) _____

_____

2.3 Phone number _____ 2.4 Fax number _____

2.5 E-mail address _____ 2.6 Website _____

2.7 Registration business number _____ 2.8 VAT No _____

2.9 Other information _____

Contact person information

3.1 Family name and first name _____

3.2 Complete postal address (street, postal code, city, country) _____

_____

3.3 Phone number _____ 3.4 Fax number _____

3.5 E-mail address _____

Application details

4.1 Application reference (given by the applicant)

This application is for a

4.1.1 new certificate ☐ 4.1.2 updated/amended certificate ☐

4.1.3 renewed certificate ☐

Operational details

Type of company

5.1 RU/IM ☐ 5.2 Keeper ☐

5.3 others ☐ specify: _____

Scope of activities

5.4 Covers tank wagons for dangerous goods: YES/NO
Covers other wagons specialised in transport of dangerous goods: YES/NO

Maintenance functions

5.5	Maintenance development	YES ☐	NO ☐	Partial ☐
5.6	Fleet maintenance management	YES ☐	NO ☐	Partial ☐
5.7	Maintenance delivery	YES ☐	NO ☐	Partial ☐

For partial maintenance functions, the sub-functions for which this application is submitted (cf. list in Annex III to Regulation (EU) No 445/2011):

_____

_____

_____

Submitted documents

6.1 Maintenance system documentation ☐

6.2 Other ☐ specify: _____

Signatures

Applicant _____

(first name, family name)

Date _____ Signature _____

Certification body _____

Internal reference number

_____ Date application received _____

Date _____ Signature _____

SPACE RESERVED FOR THE ADDRESSED OFFICE/AUTHORITY

ANNEX V

ENTITY IN CHARGE OF MAINTENANCE CERTIFICATE

confirming acceptance of the maintenance system of an entity in charge of maintenance (ECM) within the European Union in conformity with Directive 2004/49/EC and Regulation (EU) No 445/2011

1. **CERTIFIED ENTITY IN CHARGE OF MAINTENANCE**

Legal title:	
Commercial designation or acronym (voluntary)	
Complete postal address (street, postal code, city, country)	
Registration business number:	VAT No:

2. **CERTIFICATION BODY**

Legal title:
Complete postal address (street, postal code, city, country)
Certification body reference number:

3. **CERTIFICATE INFORMATION**

This is a	— new certificate	☐	
	— renewed certificate	☐	
	— updated/amended certificate	☐	ECM Identification Number of the previous certificate:
Validity from:			to:
Type of company: (railway undertaking, keeper, maintenance supplier, etc.)			

4. **SCOPE OF ECM ACTIVITIES**

Covers tank wagons for dangerous goods	YES/NO
Covers other wagons specialised in transport of dangerous goods	YES/NO

5. **ADDITIONAL INFORMATION**

Date issued and validity

Signature

Internal reference number

Certification body's stamp

MAINTENANCE FUNCTIONS CERTIFICATE

confirming acceptance of the maintenance system within the European Union in conformity with Directive 2004/49/EC and Regulation (EU) No 445/2011

1. **CERTIFIED ORGANISATION**

Legal title:	
Commercial designation or acronym (voluntary)	
Complete postal address (street, postal code, city, country)	
Registration business number:	VAT No:

2. **CERTIFICATION BODY**

Legal title:
Complete postal address (street, postal code, city, country)
Certification body reference number:

3. **CERTIFICATE INFORMATION**

This is a	— new certificate ☐ — renewed certificate ☐ — updated/amended certificate ☐	ECM Identification Number of the previous certificate:
Validity from:		to:
Type of company: (railway undertaking, keeper, maintenance supplier, etc.)		

4. **SCOPE OF MAINTENANCE ACTIVITIES**

Covers tank wagons for dangerous goods	YES/NO
Covers other wagons specialised in transport of dangerous goods	YES/NO

5. **MAINTENANCE FUNCTIONS**

Maintenance development	YES	☐	NO	☐
Fleet maintenance management	YES	☐	NO	☐
Maintenance delivery	YES	☐	NO	☐

For partial maintenance functions, the sub-functions for which this certificate is valid (cf. list in Annex III to Regulation (EU) No 445/2011):

6. **ADDITIONAL INFORMATION**

Date issued and validity

Signature

Internal reference number

Certification body's stamp

ANNEX VI

'ANNEX I

SAFETY CERTIFICATE — PART A

Safety Certificate confirming acceptance of the Safety Management System within the European Union in conformity with Directive 2004/49/EC and applicable national legislation

EU IDENTIFICATION NUMBER:

1. **CERTIFIED RAILWAY UNDERTAKING**

Legal title:	
Railway undertaking name:	Acronym:
National registration number:	VAT No:

2. **ORGANISATION ISSUING CERTIFICATE**

Organisation:
Country:

3. **CERTIFICATE INFORMATION**

This is a	— new certificate ☐	ECM (entity in charge of maintenance) certificate Yes/No
	— renewed certificate ☐	ECM certificate number:
	— updated/amended certificate ☐	EU Identification Number of the previous Part A certificate
Validity from:		to:
Type(s) of service(s):		
Transportation volume:		
Railway undertaking size:		
Scope of ECM activities: Covers tank wagons for dangerous goods: YES/NO Covers other wagons specialised in transport of dangerous goods: YES/NO		

4. **APPLICABLE NATIONAL LEGISLATION**

5. **ADDITIONAL INFORMATION**

Date issued

Signature

Internal reference number

Authority's stamp

'

COMMISSION REGULATION (EU) No 446/2011

of 10 May 2011

imposing a provisional anti-dumping duty on imports of certain fatty alcohols and their blends originating in India, Indonesia and Malaysia

THE EUROPEAN COMMISSION,

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

Having regard to Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community [1] (the basic Regulation), and in particular Article 7 thereof,

After consulting the Advisory Committee,

Whereas:

1. PROCEDURE

1.1. Initiation

(1) On 13 August 2010, the European Commission (the Commission) announced, by a notice published in the *Official Journal of the European Union* [2] (Notice of initiation), the initiation of an anti-dumping proceeding with regard to imports into the Union of certain fatty alcohols and their blends (the product investigated) originating in India, Indonesia, and Malaysia (the countries concerned).

(2) The anti-dumping proceeding was initiated following a complaint lodged on 30 June 2010 by two Union producers, Cognis GmbH and Sasol Olefins & Surfactants GmbH (the complainants). Both these companies are incorporated under German law, with production sites in Germany, France and Italy. These two companies represent a major proportion, in this case more than 25 % of total Union production of the product investigated. The complaint contained prima facie evidence of dumping of the said product originating in the countries concerned and of material injury resulting therefrom, which was considered sufficient to justify the initiation of a proceeding.

1.2. Parties concerned by the proceeding

(3) The Commission officially advised the complainants, other known Union producers, importers/traders and users known to be concerned, the known exporting producers and representatives of the exporting countries concerned of the initiation of the proceeding. Interested parties were given the opportunity to make their views known in writing and to request a hearing within the time limit set in the Notice of initiation.

(4) All interested parties, who so requested and showed that there were particular reasons why they should be heard, were granted a hearing.

(5) In view of the large number of importers identified from the complaint, sampling was envisaged for importers in the Notice of initiation in accordance with Article 17(1) of the basic Regulation. Four importers provided the requested information and agreed to be included in the sample within the deadline set in the Notice of initiation. Given this low number of importers who made themselves known, it was decided not to apply sampling.

(6) The Commission sent questionnaires to exporting producers, Union producers, importers and to all users and suppliers known to be concerned as well as to all other parties who requested so within the deadlines set out in the Notice of initiation.

(7) Questionnaire replies were received from 5 Union producers, 2 importers, 21 users in the Union, 2 exporting producer in India, 2 exporting producers in Indonesia and their related traders, and 3 exporting producers in Malaysia and their related traders.

(8) The Commission sought and verified all the information deemed necessary for a preliminary determination of dumping, resulting injury and Union interest. Verification visits were carried out at the premises of the following companies:

(a) producers in the Union:

— Cognis GmbH, Germany,

— Cognis France S.A.S., France,

— Sasol Olefins & Surfactants GmbH, Germany;

[1] OJ L 343, 22.12.2009, p. 51.
[2] OJ C 219, 13.8.2010, p. 12.

(b) importers in the Union:

— Oleo solutions Ltd, United Kingdom;

(c) users in the Union:

— Henkel AG & Co., Germany,

— PCC Rokita SA, Poland,

— Procter & Gamble International Operations SA, Switzerland,

— Unilever, Netherlands,

— Zshimmer & Schwarz italiana SpA, Italy;

(d) exporting producers in India:

— Godrej Industries Limited, Mumbai and Taluka Valia,

— VVF Limited, Mumbai;

(e) exporting producers in Indonesia:

— P.T. Ecogreen Oleochemicals and its related companies, Batam, Singapore, Dessau,

— P.T. Musim Mas and its related companies, Medan, Singapore, Hamburg;

(f) exporting producers in Malaysia:

— Fatty Chemical Malaysia Sdn. Bhd. and its related companies, Prai, Emmerich,

— KL-Kepong Oleomas Sdn. Bhd. and its related company, Petaling Jaya, Hamburg,

— Emery Oleochemicals Sdn. Bhd., Telok Panglima Garang.

1.3. **Investigation period**

(9) The investigation of dumping and injury covered the period from 1 July 2009 to 30 June 2010 ('the investigation period' or 'IP'). The examination of trends relevant for the assessment of injury covered the period from 1 January 2007 to the end of the investigation period (period considered).

2. **PRODUCT CONCERNED AND LIKE PRODUCT**

2.1. **Product concerned**

(10) The product concerned is saturated fatty alcohols with a carbon chain length of C8, C10, C12, C14, C16 or C18 (not including branched isomers) including single saturated fatty alcohols (also referred to as 'single cuts') and blends predominantly containing a combination of carbon chain lengths C6-C8, C6-C10, C8-C10, C10-C12 (commonly categorised as C8-C10), blends predominantly containing a combination of carbon chain lengths C12-C14, C12-C16, C12-C18, C14-C16 (commonly categorised as C12-C14) and blends predominantly containing a combination of carbon chain lengths C16-C18, originating in India, Indonesia, and Malaysia (the product concerned), currently falling within CN codes ex 2905 16 85, 2905 17 00, ex 2905 19 00 and ex 3823 70 00.

(11) The product investigated is an intermediary product produced from natural (oleo-chemical) or synthetic (petrochemical) sources, such as natural fats and oils, crude oil, natural gas, natural gas liquids and coal. It is mainly used as an input material for the production of fatty alcohol sulphates, fatty alcohol ethoxylates and fatty alcohol ether sulphates (so-called surfactants). Surfactants are used to produce detergents, household, cleaning and personal care products.

2.2. **Like product**

(12) The product exported to the Union from India, Indonesia and Malaysia, and the product produced and sold domestically in these countries and also the one manufactured and sold in the Union by the Union producers were found to have the same basic physical and technical characteristics as well as the same uses. They are therefore provisionally considered as alike within the meaning of Article 1(4) of the basic Regulation.

(13) During the course of the investigation, certain parties claimed that one of the complainants produced, in one of its production sites, a product which includes branched isomer molecules, not covered by the product scope definition, and that therefore such production should not be considered as falling within the like product. It is provisionally determined that this claim is warranted, and therefore the data pertaining to this producer have not been used in the injury analysis. It should be noted that two other companies, one of them cooperating in the investigation, were excluded from the definition of the Union industry for the same reason.

3. DUMPING

3.1. India

3.1.1. *Normal Value*

(14) For the determination of normal value, it was first established for each exporting producer whether its total volume of domestic sales of the like product to independent customers was representative in comparison with its total volume of export sales to the Union. In accordance with Article 2(2) of the basic Regulation domestic sales are considered to be representative when the total domestic sales volume is at least 5 % of the total volume of sales of the product concerned to the Union. It was found that the overall sales by each exporting producer of the like product on the domestic market were representative.

(15) For each product type sold by an exporting producer on its domestic market and found to be directly comparable with the product type sold for export to the Union, it was established whether domestic sales were sufficiently representative for the purposes of Article 2(2) of the basic Regulation. Domestic sales of a particular product type were considered sufficiently representative when the total volume of that product type sold by the exporting producer concerned on the domestic market to independent customers during the IP represented at least 5 % of its total sales volume of the comparable product type exported to the Union.

(16) It was also examined whether the domestic sales of each product type could be regarded as being made in the ordinary course of trade pursuant to Article 2(4) of the basic Regulation. This was done by establishing the proportion of domestic sales to independent customers on the domestic market which were profitable for each exported type of the product concerned during the IP.

(17) For those product types where more than 80 % by volume of sales on the domestic market of the product type were above cost and the weighted average sales price of that type was equal to or above the unit cost of production, normal value, by product type, was calculated as the weighted average of the actual domestic prices of all sales of the type in question, irrespective of whether those sales were profitable or not.

(18) Where the volume of profitable sales of a product type represented 80 % or less of the total sales volume of that type, or where the weighted average price of that type was below the unit cost of production, normal value was based on the actual domestic price, which was calculated as a weighted average price of only the profitable domestic sales of that type made during the IP.

3.1.2. *Export price*

(19) Both exporting producers in India exported the product concerned directly to independent customers in the Union. Export prices were therefore established on the basis of the prices actually paid or payable by these independent customers for the product concerned, in accordance with Article 2(8) of the basic Regulation.

3.1.3. *Comparison*

(20) The normal value and the export price of the exporting producers were compared on an ex-works basis.

(21) For the purpose of ensuring a fair comparison between the normal value and export price, due allowance in the form of adjustments was made for differences affecting prices and price comparability in accordance with Article 2(10) of the basic Regulation. On this basis, adjustments for differences in indirect taxes, transport, insurance, handling, loading and ancillary costs, packing costs, credit costs, and commissions have been made where applicable and justified.

(22) Both exporting producers claimed that their sales made to one of the complainants in the Union during the IP should be ignored when calculating the dumping margin since these sales were made in significant quantities and at strongly negotiated prices. However, there is no legal reason why such exports of the product concerned should be ignored when calculating dumping. The claims by both exporting producers are therefore rejected.

(23) Both exporting producers claimed an adjustment for currency conversion arguing that there was a sustained appreciation of the Indian Rupee (INR) against the Euro (EUR) as from November 2009 which would have a distorting effect on the dumping calculations. The claim related to sales made in EUR from January 2010 onwards and consisted of a request that, for the purposes of converting the value of those sales into INR, the exchange rate of the month in which the sales were made be substituted by the exchange rate of 2 months earlier. Article 2(10)(j) indeed provides for an adjustment for currency conversions under certain circumstances. However, it is noted that the appreciation of the INR only occurred during the second half of the IP. Furthermore, it is noted that both Indian companies frequently increased their prices to their main customers in the Union during that period following a fairly regular pattern, and that the prices made in the Union by the complainants were also steadily increasing during the second half of the IP. There is therefore no clear evidence that the appreciation of the INR was not timely reflected in the prices charged by the Indian exporting producers to their customers in the EU or had an undue penalising effect in the dumping calculations. The claims by both companies were therefore rejected.

3.1.4. *Dumping margin*

(24) In accordance with Article 2(11) and (12) of the basic Regulation, the dumping margins for the cooperating Indian exporting producers were established on the basis of a comparison of the weighted average normal value with the weighted average export price.

(25) Based on information available from the complaint and the cooperating Indian exporting producers, and considering the statistical information available, there are no other producers of the product concerned in India. Therefore, the country-wide dumping margin to be established for India was set at the same level as the highest margin found for a cooperating exporting producer.

(26) On this basis, the provisional dumping margins expressed as a percentage of the CIF Union frontier price, duty unpaid, are as follows:

Company	Provisional dumping margin
Godrej Industries Limited	9,3 %
VVF Limited	4,8 %
All other companies	9,3 %

3.2. **Indonesia**

3.2.1. *Normal value*

(27) For the determination of normal value, it was first established for each exporting producer whether its total volume of domestic sales of the like product to independent customers was representative in comparison with its total volume of export sales to the Union. In accordance with Article 2(2) of the basic Regulation domestic sales are considered to be representative when the total domestic sales volume is at least 5 % of the total volume of sales of the product concerned to the Union. It was found that the overall sales by each exporting producer of the like product on the domestic market were representative.

(28) For each product type sold by an exporting producer on its domestic market and found to be directly comparable with the product type sold for export to the Union, it was established whether domestic sales were sufficiently representative for the purposes of Article 2(2) of the basic Regulation. Domestic sales of a particular product type were considered sufficiently representative when the total volume of that product type sold by the exporting producer concerned on the domestic market to independent customers during the IP represented at least 5 % of its total sales volume of the comparable product type exported to the Union.

(29) It was also examined whether the domestic sales of each product type could be regarded as being made in the ordinary course of trade pursuant to Article 2(4) of the basic Regulation. This was done by establishing the proportion of domestic sales to independent customers on the domestic market which were profitable for each exported type of the product concerned during the IP.

(30) For those product types where more than 80 % by volume of sales on the domestic market of the product type were above cost and the weighted average sales price of that type was equal to or above the unit cost of production, normal value, by product type, was calculated as the weighted average of the actual domestic prices of all sales of the type in question, irrespective of whether those sales were profitable or not.

(31) Where the volume of profitable sales of a product type represented 80 % or less of the total sales volume of that type, or where the weighted average price of that type was below the unit cost of production, normal value was based on the actual domestic price, which was calculated as a weighted average price of only the profitable domestic sales of that type made during the IP.

(32) Wherever there were no domestic sales of a particular product type by an exporting producer, the normal value was constructed in accordance with Article 2(3) of the basic Regulation.

(33) When constructing normal value pursuant to Article 2(3) of the basic Regulation, the amounts for selling, general and administrative costs and for profits have been based, pursuant to Article 2(6) *chapeau* of the basic Regulation, on the actual data pertaining to the production and sales, in the ordinary course of trade, of the like product, by the exporting producer.

3.2.2. *Export price*

(34) The exporting producers made export sales to the Union either directly to independent customers or through related trading companies located in Singapore and in the Union.

(35) Where export sales to the Union were made either directly to independent customers in the Union or through related trading companies located in Singapore, export prices were established on the basis of the prices actually paid or payable for the product concerned in accordance with Article 2(8) of the basic Regulation.

(36) Where export sales to the Union were made through related trading companies located in the Union, export prices were established on the basis of the first resale prices of these related traders to independent customers in the Union, pursuant to Article 2(9) of the basic Regulation.

3.2.3. *Comparison*

(37) The normal value and the export price of the exporting producers were compared on an ex-works basis.

(38) For the purpose of ensuring a fair comparison between the normal value and export price, due allowance in the form of adjustments was made for differences affecting prices and price comparability in accordance with Article 2(10) of the basic Regulation. On this basis, adjustments for differences in indirect taxes, transport, insurance, handling, loading and ancillary costs, packing costs, credit costs, and commissions have been made where applicable and justified.

(39) One company claimed an adjustment for differences in physical characteristics on the basis that it exports the product investigated in both liquid and solid form to the EU whilst it only sells it in solid form on the domestic market and that the prices for the liquid form are lower than those for the solid form of the product investigated. However, the company did not provide a quantification of such adjustment. A simple comparison of export prices of solid and liquid forms of the product investigated cannot constitute a basis for granting an adjustment for differences in physical characteristics. Moreover, the accounting system of the company does not allow for a proper segregation of the cost differences between the solid and liquid product. Therefore, there was no reliable way to calculate a potential adjustment and the claim had to be rejected.

(40) The complainants submitted a claim that the cost of energy in Indonesia is distorted due to very cheap and subsidised energy prices. However, they have not submitted any substantiated information on how such distortion of the cost of energy used for domestic and export production would affect the dumping calculations. The claim was therefore rejected.

3.2.4. *Dumping margin*

(41) In accordance with Article 2(11) and (12) of the basic Regulation, the dumping margins for the cooperating Indonesian exporting producers were established on the basis of a comparison of the weighted average normal value with the weighted average export price.

(42) Based on information available from the complaint and the cooperating Indonesian exporting producers, and considering the statistical information available, there are no other producers of the product concerned in Indonesia. Therefore, the country-wide dumping margin to be established for Indonesia was set at the same level as the highest margin found for a cooperating exporting producer.

(43) On this basis, the provisional dumping margins expressed as a percentage of the CIF Union frontier price, duty unpaid, are:

Company	Provisional dumping margin
P.T. Ecogreen Oleochemicals	6,3 %
P.T. Musim Mas	7,6 %
All other companies	7,6 %

3.3. **Malaysia**

3.3.1. *Normal value*

(44) For the determination of normal value, it was first established for each exporting producer whether its total volume of domestic sales of the like product to independent customers was representative in comparison with its total volume of export sales to the Union. In accordance with Article 2(2) of the basic Regulation domestic sales are considered to be representative when the total domestic sales volume is at least 5 % of the total volume of sales of the product concerned to the Union. For two of the cooperating exporting producers it was found that the overall sales by the exporting producers of the like product on the domestic market were representative. For the remaining cooperating exporting producer no independent domestic sales were found in the IP.

(45) For each product type sold by an exporting producer on its domestic market and found to be directly comparable with the product type sold for export to the Union, it was established whether domestic sales were sufficiently representative for the purposes of Article 2(2) of the basic Regulation. Domestic sales of a particular product type were considered sufficiently representative when the total volume of that product type sold by the exporting producer concerned on the domestic market to independent customers during the IP represented at least 5 % of its total sales volume of the comparable product type exported to the Union.

(46) It was also examined whether the domestic sales of each product type could be regarded as being made in the ordinary course of trade pursuant to Article 2(4) of the basic Regulation. This was done by establishing the proportion of domestic sales to independent customers on the domestic market which were profitable for each exported type of the product concerned during the IP.

(47) For those product types where more than 80 % by volume of sales on the domestic market of the product type were above cost and the weighted average sales price of that type was equal to or above the unit cost of production, normal value, by product type, was calculated as the weighted average of the actual domestic prices of all sales of the type in question, irrespective of whether those sales were profitable or not.

(48) Where the volume of profitable sales of a product type represented 80 % or less of the total sales volume of that type, or where the weighted average price of that type was below the unit cost of production, normal value was based on the actual domestic price, which was calculated as a weighted average price of only the profitable domestic sales of that type made during the IP.

(49) Wherever there were no domestic sales of a particular product type by an exporting producer, the normal value was constructed in accordance with Article 2(3) of the basic Regulation.

(50) When constructing normal value pursuant to Article 2(3) of the basic Regulation, the amounts for selling, general and administrative costs and for profits have been based, pursuant to Article 2(6) *chapeau* of the basic Regulation, on the actual data pertaining to the production and sales, in the ordinary course of trade, of the like product, by the exporting producer.

(51) For the exporting producer with no domestic sales in the IP, the amounts for selling, general and administrative costs and for profits have been based, pursuant to Article 2(6)(a) of the basic Regulation, on the weighted average of the actual amounts determined for the two other exporting producers subject to investigation in respect of production and sales of the like product in the Malaysian market.

3.3.2. *Export price*

(52) The exporting producers made export sales to the Union either directly to independent customers or through related companies located in the Union.

(53) Where export sales to the Union were made directly to independent customers in the Union, export prices were established on the basis of the prices actually paid or payable for the product concerned in accordance with Article 2(8) of the basic Regulation.

(54) Where export sales to the Union were made through related companies located in the Union, export prices were established on the basis of the first resale prices of these related companies to independent customers in the Union, pursuant to Article 2(9) of the basic Regulation.

3.3.3. *Comparison*

(55) The normal value and the export price of the exporting producers were compared on an ex-works basis.

(56) For the purpose of ensuring a fair comparison between the normal value and export price, due allowance in the form of adjustments was made for differences affecting prices and price comparability in accordance with Article 2(10) of the basic Regulation. On this basis, adjustments for, transport, insurance, handling, loading and ancillary costs, packing costs, and credit costs have been made where applicable and justified.

(57) One Malaysian exporting producer claimed that its related company in the Union is, in fact, the export department of the manufacturer. On this basis, the company claimed that there would be excessive deductions in establishing the ex-works price if full adjustments for selling, general and administration costs and profits, pursuant to Article 2(9) of the basic Regulation, were made. In this regard, it was found that invoices were issued by the related company to customers in the Union and that payments were received by the related company from customers in the Union. Furthermore, it is to be noted that the sales made by the related company included a mark-up. Also, the financial accounts of the trader showed that it bore normal selling, general and administrative costs incurred between importation and resale. It would therefore appear that the related company indeed performs the typical functions of an importer. On this basis, the company's claim was rejected.

(58) The complainants submitted in respect of Malaysia the same claim concerning energy costs mentioned at recital (40) for Indonesia. This claim also was rejected for the same reasons.

3.3.4. *Dumping margin*

(59) In accordance with Article 2(11) and (12) of the basic Regulation, the dumping margins for the cooperating Malaysian exporting producers were established on the basis of a comparison of the weighted average normal value with the weighted average export price.

(60) Based on information available from the complaint and the cooperating Malaysian exporting producers, and considering the statistical information available, there are no other producers of the product concerned in Malaysia. Therefore, the country-wide dumping margin to be established for Malaysia was set at the same level as the highest margin found for a cooperating exporting producer.

(61) On this basis, the provisional dumping margins expressed as a percentage of the CIF Union frontier price, duty unpaid, are:

Company	Provisional dumping margin
Fatty Chemical Malaysia Sdn. Bhd	13,8 %
KL-Kepong Oleomas Sdn. Bhd.	5,0 %
Emery Oleochemicals Sdn. Bhd	5,3 %
All other companies	13,8 %

4. INJURY

4.1. Definition of the Union industry and Union production

(62) During the IP, the like product was manufactured by two known and some other very small producers in the Union. All available information concerning Union producers, including information provided in the complaint and data collected from Union producers before and after the initiation of the investigation, was used in order to establish the total Union production. On this basis, the total Union production was estimated to be between 400 000 and 500 000 tonnes during the IP. The Union producers accounting for the total Union production constitute the Union industry within the meaning of Article 4(1) of the basic Regulation.

(63) Some interested parties claimed that one of the complainants should not be considered part of the Union industry, because this company imported the product concerned during the IP. It was however verified that the percentage of product imported by this company from the countries concerned during the IP was relatively low, and thus not substantial in comparison with its production of the like product. Furthermore, these imports were mainly of a temporary nature. It can therefore be confirmed that the core activity of this company is production and sales of the product investigated in the EU and its main interest is that of a Union producer. In consequence, it is provisionally determined that this claim is not warranted.

4.2. Union consumption

(64) Consumption was established on the basis of the total sales on the Union market of the Union industry, the captive use, and the total imports (derived from Eurostat). Since the Eurostat data include also some products other than the product concerned, appropriate adjustments were made. The information is given in index numbers (2007 = 100) to preserve confidentiality.

Union consumption	2007	2008	2009	IP
tonnes	100	102	97	102
Annual Δ%		2,2 %	– 4,8 %	4,6 %

Source: Eurostat, complaint data and questionnaire replies.

(65) During the period considered, Union consumption increased slightly by 2 %. First, from 2007 to 2008, consumption increased by 2,2 %, followed by a decrease from 2008 to 2009 by 4,8 %. From 2009 to the end of the IP, consumption recovered by 4,6 %.

(66) The economic downturn has contributed to the decrease in consumption from 2008, during which users of the product concerned experienced a drop in demand for their products. At the start of the IP, the market situation started to improve slightly, resulting in an increase in demand for the product concerned compared to the first half of 2009.

4.3. Imports into the Union from the countries concerned

4.3.1. *Cumulation*

(67) The Commission considered whether the effects of dumped imports from the countries concerned should be assessed cumulatively, on the basis of the criteria set out in Article 3(4) of the basic Regulation. This Article provides that the effects of imports from two or more countries simultaneously subject to anti-dumping investigations shall be assessed cumulatively only if it is determined that (a) the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in Article 9(3) of the basic Regulation and that the volume of imports of each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in the light of the conditions of competition between imported products and the conditions of competition between the imported products and the like Community product.

(68) The margins of dumping established in relation to the imports from each country concerned are more than *de minimis* as defined in Article 9(3) of the basic Regulation, i.e. 2 % of the export prices, and the volume of imports from each country concerned is above the threshold of 1 % market share set by Article 5(7) of the basic Regulation.

(69) The investigation further showed that the conditions of competition both between the dumped imports and between the dumped imports and the like product were similar. It was found that average import prices from all countries concerned dropped over the period considered, and followed the same trend. Furthermore, the product investigated imported from the countries concerned was alike in all respects, it is interchangeable and is marketed in the Union through comparable sales channels and under similar commercial conditions, thus competing with each other and with the product investigated produced in the Union.

(70) On this basis, it is provisionally concluded that all conditions of cumulation are met and that accordingly the effects of the dumped imports originating in the countries concerned should be assessed jointly for the purpose of the injury analysis.

4.3.2. *Volume, price and market share of dumped imports from the countries concerned*

Imports from the countries concerned	2007	2008	2009	IP
tonnes	112 523	177 286	165 386	176 279
Index: 2007 = 100	100	158	147	157
Annual Δ%		57,6 %	– 6,7 %	6,6 %
Market share	2007	2008	2009	IP
Index: 2007 = 100	100	154	151	154
Annual Δ%		54,2 %	– 2,0 %	1,9 %
Average price in EUR/tonnes	942	1 017	837	882
Index: 2007 = 100	100	108	89	94
Annual Δ%		8 %	– 18 %	5 %

Source: Eurostat and Questionnaire replies.

(71) The volume of imports from the countries concerned increased significantly by 57 % during the period considered. The biggest increase took place between 2007 and 2008 when imports increased by 58 %. Imports then decreased slightly in 2009 to increase again to the 2008 level during the IP.

(72) Average prices of imports from the countries concerned fluctuated heavily during the period considered, reflecting an overall 6 % decrease. Throughout the period considered, average prices of the imports from the countries concerned were always lower than those set by the rest of the world and by the Union Industry, thus resulting in an increase in the market share of the countries concerned.

(73) The market share of the countries concerned increased significantly, by 54 %, during the period considered. The biggest increase took place between 2007 and 2008. There was a slight decrease of imports during the economic crisis, which reduced the market share of the countries concerned by 2 %, between 2008 and 2009, but then they recovered again this market share by the end of the period considered.

4.3.2.1. Price undercutting

(74) For the purposes of analysing price undercutting, the weighted average sales prices per product type of the Union industry to unrelated customers on the Union market, adjusted to an ex-works level, were compared to the corresponding weighted average prices of the imports from the countries concerned to the first independent customer on the Union market, established on a CIF basis, with appropriate adjustments for the existing customs duties and post-importation costs. This price comparison was made for transactions at the same level of trade, duly adjusted where necessary, and after deduction of rebates and discounts. The results of the comparison, when expressed as a percentage of the Union industry's sales prices during the investigation period, showed significant price undercutting margins (up to 16 %). These price undercutting margins indicate price pressure exerted by the imports from the countries concerned on the Union market.

(75) Per country concerned the undercutting margins were as follows:

Country	Undercutting margin
India	from – 0,5 to 16 %
Indonesia	from – 12,1 to – 3,2 %
Malaysia	from – 10,4 to 15,1 %

4.4. **Economic situation of the Union industry** [1]

4.4.1. *Preliminary remarks*

(76) In accordance with Article 3(5) of the basic Regulation, the examination of the impact of the dumped imports on the Union industry included an evaluation of all economic indicators for an assessment of the state of the Union industry from 2007 to the end of the IP.

[1] The information is based on the verified data submitted by the Union industry in its questionnaire replies and is given in index numbers (2007 = 100) or in a range whenever it is necessary to preserve confidentiality.

4.4.2. *Production, production capacity and capacity utilisation*

Production Union industry	2007	2008	2009	IP
Index: 2007 = 100	100	90	77	83
Capacity Union industry	2007	2008	2009	IP
Index: 2007 = 100	100	109	103	98
Capacity Utilisation	2007	2008	2009	IP
Index: 2007 = 100	100	83	75	85

Source: Questionnaire replies.

(77) From 2007 to 2009, Union production decreased significantly by 23 % to improve slightly between 2009 and the end of the IP, resulting in an overall decrease of 17 % over the period considered. It should be noted that although Union consumption reduced by around 5 % between 2008 and 2009, the production of the Union industry fell much more, by 15 %, and that it failed to benefit from the recovery of the Union consumption experienced in the IP.

(78) The production capacity of the Union industry decreased by around 2 % over the period considered. After increasing around 9 % in 2008, capacity was downsized in the following years, to result in an overall 2 % reduction over the period considered.

(79) However, in line with the decreasing production volumes, the utilisation of the available capacity decreased by 15 % over the period considered. The main decrease occurred in 2009, during the general economic crisis, and improved slightly during the IP.

4.4.3. *Sales and market share*

(80) The sales figures in the table below relate to the sales volume and value to the first unrelated customer on the Union market.

Sales volume to unrelated in EU	2007	2008	2009	IP
Index: 2007 = 100	100	85	79	82
Annual Δ%		– 15,4 %	– 6,5 %	4,3 %
Sales in value to unrelated in the EU, (EUR)	2007	2008	2009	IP
Index: 2007 = 100	100	102	85	88
Annual Δ%		1,6 %	– 16,6 %	3,9 %
Market share Union industry	2007	2008	2009	IP
Index: 2007 = 100	100	88	87	88

Source: Eurostat and Questionnaire replies.

(81) Sales volumes and market share declined between 2007 and the IP, by 18 % and 12 % respectively. At the beginning of the period considered, from 2007 to 2008, despite an increase in Union consumption, the sales volume of the Union industry decreased by 15 % and they lost 12 % of market share. In 2009, Union consumption contracted, resulting in a further loss in sales volume of 6,5 % for the Union industry. In the IP, in line with the increased Union consumption, Union sales increased slightly. Market share however, remained stable from 2008 to the end of the IP.

4.4.4. *Average unit prices of the Union industry*

Unit price, sales in EU to unrelated	2007	2008	2009	IP
Index: 2007 = 100	100	120	107	107
Annual Δ%		20,1 %	– 10,8 %	– 0,4 %

Source: Questionnaire replies.

(82) Prices increased significantly from 2007 to 2008, by 20 %. It has to be noted that the exporting producers also raised their prices during this period, although by much less than the Union industry.

(83) In 2009 the Union industry had to reduce prices, in order to respond to the pressure of the increased imports from the countries concerned. In 2008 imports from these countries had grown by 57 % and their prices were significantly lower than the Union industry's. However, the Union industry was not able to reduce its prices to the same level as the exporting producers.

(84) During the IP, the Union industry kept the 2009 price level, resulting in an overall price increase during the period considered of 7 %.

4.4.5. *Stocks*

(85) Stock levels of the Union industry decreased by 33 % during the period considered. In particular between 2008 and the IP stock levels decreased significantly by 51 %.

Closing stocks Union industry	2007	2008	2009	IP
Index: 2007 = 100	100	128	86	67
Annual Δ%		27,7 %	– 33,0 %	– 21,1 %
Stock in relation to production	5,0 %	7,1 %	5,6 %	4,1 %

Source: Questionnaire replies.

4.4.6. *Employment, wages and productivity*

Employment Union industry	2007	2008	2009	IP
Total employees product concerned (with silent producers) Index: 2007 = 100	100	97	91	87
Avg. Wages per employee (EUR) Index: 2007 = 100	100	102	101	106
Productivity (unit/employee) Index: 2007 = 100	100	93	85	96

Source: Questionnaire replies.

(86) Due to the downsizing activities of the Union industry, the number of employees was reduced accordingly during the period considered, by 13 %. Labour costs per employee increased slightly over the period considered, by 6 %. This is considered a natural increase and is less than the inflation rate over the period considered.

4.4.7. *Profitability, cash flow, investments, return on investment and ability to raise capital*

Profitability EU sales to unrelated	2007	2008	2009	IP
% net loss/turnover Index: 2007 = 100	100	76	408	236
Negative Cash flow Union industry (EUR) Index: 2007 = 100	100	– 249	1 178	439
Cash Flow in % of EU Sales to unrelated	– 1,3 %	3,7 %	– 24,5 %	– 7,9 %
Index: 2007 = 100	100	– 285	1 899	609
Investments Union industry (EUR) Index: 2007 = 100	100	56	68	65
Annual Δ%		– 43,8 %	20,6 %	– 4,2 %
Negative Return on investment Union industry Index: 2007 = 100	100	136	510	320

Source: Questionnaire replies

(87) Profitability of the Union industry was established by expressing the pre-tax net profit (in this case loss) of the sales of the like product as a percentage of the turnover of these sales. It was established that the profitability of the Union industry has been negative since the beginning of the period concerned in 2007 and during the period considered the losses increased significantly. After a reduction in losses in 2008, they increased again significantly in 2009, at the time of the general economic crisis. The economic recovery felt during the IP, however, allowed the Union industry to reduce its losses with respect to turnover, but it remained still far away from returning to positive profit levels.

(88) The trend shown by the cash flow, which is the ability of the industry to self-finance its activities, reflects to a large extent the trend of profitability. The cash flow was negative in 2007 and shows a substantial decrease during the period considered. The same comments can be made about the return on investments, which showed a similar negative development in line with the negative results achieved by the Union industry over the period considered.

(89) Following the above, the ability of the Union industry to invest became limited as the cash flow significantly deteriorated during the period considered. As a consequence, the investments dropped by about 35 % during the period considered.

4.4.8. *Growth*

(90) The Union consumption remained fairly stable during the period considered. Sales volume and market share of the Union industry however, decreased during this period with 18 % and 12 % respectively.

4.4.9. *Magnitude of the actual dumping margin*

(91) Given the volume, market share and prices of the dumped imports from the countries concerned, the impact on the Union industry of the actual dumping margins cannot be considered negligible.

4.5. **Conclusion on injury**

(92) The investigation has shown that most of the injury indicators such as production (– 17 %), capacity utilisation (– 13 %), sales volume (– 18 %), market share (– 12 %) and employment (– 14 %) deteriorated during the period considered. In addition, the injury indicators related to the financial performance of the Union industry such as cash flow and profitability were seriously affected. This means that the ability of the Union industry to raise capital was undermined, in particular during the IP.

(93) In the light of the foregoing, it was concluded that the Union industry suffered material injury within the meaning of Article 3(5) of the basic Regulation.

5. **CAUSALITY**

5.1. **Introduction**

(94) In accordance with Articles 3(6) and 3(7) of the basic Regulation, it was examined whether the dumped imports of the product concerned originating in the countries concerned caused injury to the Union industry to a degree that enables it to be classified as material. Known factors other than the dumped imports, which could at the same time be injuring the Union industry, were also examined to ensure that possible injury caused by these other factors was not attributed to the dumped imports.

5.2. **Effect of the dumped imports**

(95) The investigation showed that the Union consumption remained fairly stable during the period considered, whereas the dumped imports from the countries concerned significantly increased in volume, i.e. by 57 %.

(96) The dumped imports from the countries concerned exerted pressure on the Union industry, particularly in the year 2008, when these imports grew by 58 %. In this year, prices from countries concerned, as derived from Eurostat, were much lower than the Union industry's. This resulted in a loss of market share of the Union industry of around 12 %, whilst the countries concerned increased their market share by 54 %.

(97) In order to respond to this pressure, the Union industry reduced its prices in 2009. Although volume imports from the countries concerned decreased in volume (– 6,7 %), in line with the economic downturn and the contraction in the EU market, the import price decreased more than the Union industry's price, and this prevented the Union industry from regaining its lost market share.

(98) During the IP, the Union industry had to further reduce its prices whereby undercutting from the countries concerned, based on verified exporting figures, was still 3 %. Union industry's sales in volume (+ 4,3 %) and value (+ 3,9 %) recovered slightly, but, even though the price difference with respect to the import price of the countries concerned reduced, the Union industry was unable to benefit from the recovery of consumption, and its market share remained unchanged. In the meantime, imports from the countries concerned experienced a further increase in volume (6,6 %) and market share (2 %) during the IP.

5.3. **Effect of other factors**

(99) The other factors which were examined in the context of causality are the imports from other countries, export performance of the Union industry and the effect of the economic crisis.

5.3.1. *Imports from other countries (Rest of the World – RW)*

Volume of imports RW (Eurostat)	2007	2008	2009	IP
tonnes	32 874	31 446	38 295	30 495
Index: 2007 = 100	100	96	116	93
Annual Δ%		– 4,3 %	21,8 %	– 20,4 %
Market share RW	2007	2008	2009	IP
Index: 2007 = 100	100	94	120	91
Annual Δ%		– 6,4 %	27,9 %	– 23,9 %
Average price in EUR/tonnes RW (Eurostat)	1 217	1 358	1 129	1 122
Index: 2007 = 100	100	112	93	92
Annual Δ%		12 %	– 17 %	– 1 %

Source: Eurostat.

(100) Based on Eurostat data, the volume of imports into the Union of the product investigated originating in third countries not concerned by this investigation decreased by 7 % over the period considered. The corresponding market share of these countries decreased also by 9 %.

(101) The average prices of these imports were above those of the exporting producers in the countries concerned and above those of the Union industry.

(102) On the basis of the above, it was provisionally concluded that the imports from these third countries did not contribute to the material injury suffered by the Union industry.

5.3.2. *Export performance of the Union industry*

Sales volume to unrelated export	2007	2008	2009	IP
Index: 2007 = 100	100	38	52	45
Annual Δ%		– 62,4 %	38,0 %	– 14,0 %
Sales in value to unrelated export	2007	2008	2009	IP
Index: 2007 = 100	100	78	74	76
Annual Δ%		– 21,6 %	– 5,9 %	3,5 %
Unit price, export sales to unrelated	2007	2008	2009	IP
Index: 2007 = 100	100	208	142	171
Annual Δ%		108,4 %	– 31,9 %	20,3 %

(103) During the period considered, the volume of export sales of the Union industry decreased by 55 %. The impact of this decrease was however partly compensated by the fact that the average unit selling price increased by 71 % over the same period, limiting the decrease in export sales value to 24 %. This in combination with the fact that the export sales accounted for only 5 % of its total sales during the IP have lead to the provisional conclusion that the export performance is not a factor that breaks the causal link between the injury suffered by the Union Industry and the imports from the countries concerned.

5.3.3. *The impact of the economic crisis*

(104) The Economic crisis contributed to the contraction in consumption in the Union and to the price pressure. The reduced level of demand for the product investigated resulted in the decrease in production by the Union industry and contributed to part of the depression of sales prices.

(105) Under normal economic conditions and in the absence of strong price pressure and increased import levels from the dumped imports, the Union industry might have had some difficulty in coping with the decrease in consumption and the increase in fixed costs per unit due to decreased capacity utilisation it experienced between 2007 and the IP. The dumped imports however have intensified the effect of the economic downturn and have made it impossible to sell above cost price.

(106) Based on the above, it appears that the decrease in Union demand linked to the economic crisis contributed to the injury suffered by the Union industry. It is considered however that this does not break the causal link established in relation to the low-priced dumped imports from the countries concerned.

5.4. **Conclusion on causation**

(107) The above analysis demonstrated that there was a substantial increase in the volume and market share of the low-priced dumped imports originating in the countries concerned over the period considered. In addition, it was found that these imports were made at dumped prices, which were below the prices charged by the Union industry on the Union market for similar product types.

(108) This increase in volume and market share of the low-priced dumped imports from the countries concerned coincided with an overall and continuous decrease of consumption in the Union, during the period considered, but also with the negative development in the market share of the Union industry during the same period. Furthermore, starting from 2008, with the overall economic slowdown and Union consumption decrease, the exporters from the countries concerned managed to maintain their market share, by reducing prices, still undercutting Union price. At the same time, a further negative development in the market share of the Union industry and in the main indicators of its economic situation was observed. Indeed, over the period considered the surge in the low-priced dumped imports from India, Indonesia and Malaysia, which were constantly undercutting the prices of the Union industry, led to a drop in the Union industry's profitability, resulting in heavy losses in the IP.

(109) The examination of the other known factors which could have caused injury to the Union industry revealed that these factors do not appear to be such as to break the causal link established between the dumped imports from the countries concerned and the injury suffered by the Union industry.

(110) Based on the above analysis, which has properly distinguished and separated the effects of all known factors on the situation of the Union industry from the injurious effects of the dumped imports, it was provisionally concluded that the dumped imports from India, Indonesia and Malaysia have caused material injury to the Union industry within the meaning of Article 3(6) of the basic Regulation.

6. UNION INTEREST

6.1. Preliminary remark

(111) In accordance with Article 21 of the basic Regulation, it was examined whether, despite the provisional conclusion on injurious dumping, compelling reasons existed for concluding that it was not in the Union interest to adopt provisional anti-dumping measures in this particular case. The analysis of the Union interest was based on an appreciation of all the various interests involved, including those of the Union industry, importers and users of the product concerned.

6.2. Union industry

(112) The Union industry has suffered material injury caused by the dumped imports from India, Indonesia and Malaysia. It is recalled that the majority of the injury indicators showed a negative trend during the period considered. In particular, injury indicators related to the financial performance of the Union industry, such as cash flow, return on investments and profitability were seriously affected. In the absence of measures, a further deterioration in the Union industry's economic situation appears very likely.

(113) It is expected that the imposition of provisional anti-dumping duties will restore effective trade conditions on the Union market, allowing the Union industry to align the prices of the product investigated to reflect the costs of the various components and the market conditions. It can be expected that the imposition of provisional measures would enable the Union industry to regain at least part of the market share lost during the period considered, with a further positive impact on its financial situation and profitability.

(114) It was therefore concluded that the imposition of provisional anti-dumping measures on imports of the product investigated originating in India, Indonesia and Malaysia would be in the interest of the Union industry.

6.3. Importers

(115) Questionnaires were sent to 21 importers in the Union. Only two importers cooperated in the investigation, both located in the United Kingdom, representing, together, 0,3 % of the total imports from the countries concerned, during the IP. Only the bigger of the two importers was visited. On spot, however, this importer refused to give access to his accounts and relevant information couldn't, therefore, be verified. However, it was clear that, although imposition of anti-dumping measures would mean higher costs for this company, it wouldn't mean for it very serious problems for its activity, even with the same customers or, if necessary, in changing its area of business.

(116) Based on the information available, it was concluded that although the imposition of provisional anti-dumping measures would negatively impact the above-mentioned importer, this should be in a position to pass at least part of the cost increase to its customers and/or shift to other sources of supply. Therefore, the imposition of provisional measures should not have a significant negative impact on the importers.

6.4. Users

(117) Users of the product investigated have shown a strong interest in this case. Out of the 97 users contacted, 21 cooperated in the investigation. These cooperating users represented around 25 % of the imports in the Union of the product concerned, during the IP. These companies are located throughout the Union and are present in sectors regarding personal care, home and industrial detergent products.

(118) Of the 21 companies, 5 were visited, representing 18 % of total EU imports of the product investigated from the countries concerned for the investigation period. On the basis of the verified information, it appears that the share of the product investigated in these companies' cost of production structures is significant, ranging between 10 % and 20 %, depending on the final product.

(119) For three of the five visited companies, about 15 % of total employees work in sectors using the product concerned, in one company the percentage is around 70 %, while for the other it was not possible to have this piece of information, because of the complex company structure and variety of products.

(120) For the investigation period, the average share of business using the product investigated of total business, for the companies visited was 22 %, while the average profit margin in this business was about 6 %. On this basis and given the relatively low level of proposed measures, it was estimated that the impact of provisional anti-dumping duties on imports from the countries concerned is overall quite limited. Some users have argued that the imposition of anti-dumping measures would create problems of availability of the product investigated in the Union, considering that there are only two big Union producers and that demand for the product investigated is increasing more and more. However, it should be noted that the relatively low level of proposed measures should not preclude the possibility to import the product investigated from the countries concerned. Furthermore, the two Union producers did not produce at full capacity during the period considered. In addition, imports are also always possible from other third countries, which are not subject to measures. Therefore, this claim was rejected.

(121) Taken the above into consideration, even if most of the users are likely to be negatively impacted by the measures on imports from the countries concerned, the overall impact appears to be limited. Therefore, it was provisionally concluded that, on the basis of the information available, the effect of the anti-dumping measures against imports of the product investigated from the countries concerned will not have a significant negative impact on the users of the product concerned.

6.5. **Conclusion on Union interest**

(122) In view of the above, it was provisionally concluded that overall, based on the information available concerning the Union interest, there are no compelling reasons against the imposition of provisional measures on imports of the product investigated from the countries concerned.

7. **PROVISIONAL ANTI-DUMPING MEASURES**

(123) In view of the conclusions reached with regard to dumping, injury, causation and Union interest, provisional anti-dumping measures should be imposed in order to prevent further injury being caused to the Union industry by the dumped imports.

7.1. **Injury elimination level**

(124) For the purpose of determining the level of these measures, account was taken of the dumping margins found and the amount of duty necessary to eliminate the injury sustained by the Union industry.

(125) When calculating the amount of duty necessary to remove the effects of the injurious dumping, it was considered that any measures should allow the Union industry to cover its costs of production and to obtain a profit before tax that could be reasonably achieved by an industry of this type in the sector under normal conditions of competition, i.e. in the absence of dumped imports, on sales of the like product in the Union.

(126) Therefore, the injury elimination level was calculated on the basis of a comparison of the average price of the dumped imports and the target price of the Union industry. The target price was established by calculating the break even sales price of the Union industry, (since they made losses during the IP) and adding to this sales price a target profit margin. The Union industry claimed that 15 % would be appropriate as target profit margin, but it was unable to substantiate it. Therefore, the target profit margin was provisionally set at 7,7 %, which corresponds to the last profit margin realised by one of the complainants in the last profitable year before the period considered.

(127) The average underselling margin was set at 24,2 % for India, 9,1 % for Indonesia, and 25,7 % for Malaysia.

7.2. **Provisional measures**

(128) In the light of the foregoing and pursuant to Article 7(2) of the basic Regulation, it is considered that a provisional anti-dumping duty should be imposed on imports of the product concerned originating in India, Indonesia, and Malaysia at the level of the lowest of the dumping and injury elimination level found, in accordance with the lesser duty rule. In all but one case the provisional anti-dumping duty rates are based on the dumping margin.

(129) On the basis of the above, the proposed anti-dumping duty rates, expressed on the CIF Union border price, customs duty unpaid, are provisionally as follows:

Country	Company	Provisional AD duty %
India	VVF Limited	4,8
	All other companies	9,3
Indonesia	P.T. Ecogreen Oleochemicals	6,3
	P.T. Musim Mas	4,3
	All other companies	7,6
Malaysia	KL-Kepong Oleomas (KLK)	5,0
	Emery	5,3
	All other companies	13,8

(130) The individual company anti-dumping duty rates specified in this Regulation were established on the basis of the findings of the present investigation. Therefore, they reflect the situation found during that investigation with respect to these companies. These duty rates (as opposed to the countrywide duty applicable to 'all other companies') are thus exclusively applicable to imports of products originating in the countries concerned and produced by the companies and thus by the specific legal entities mentioned. Imported products produced by any other company not specifically mentioned in the operative part of this Regulation with its name and address, including entities related to those specifically mentioned, cannot benefit from these rates and shall be subject to the duty rate applicable to 'all other companies'.

(131) Any claim requesting the application of these individual company anti-dumping duty rates (e.g. following a change in the name of the entity or following the setting-up of new production or sales entities) should be addressed to the Commission [1] forthwith with all relevant information, in particular any modification in the company's activities linked to production, domestic and export sales associated with, for example, that name change or that change in the production and sales entities. If appropriate, the Regulation will accordingly be amended by updating the list of companies benefiting from individual duty rates.

(132) In order to ensure the proper enforcement of the anti-dumping duty, the residual duty level should not only apply to the non-cooperating exporting producers but also to those producers which did not have any exports to the Union during the IP.

(133) In the interest of sound administration, a period should be fixed within which the interested parties which made themselves known within the time limit specified in the Notice of initiation may make their views known in writing and request a hearing. Furthermore, it should be stated that the findings concerning the imposition of duties made for the purposes of this Regulation are provisional and may have to be reconsidered for the purpose of any definitive measures,

HAS ADOPTED THIS REGULATION:

Article 1

1. A provisional anti-dumping duty is hereby imposed on imports of saturated fatty alcohols with a carbon chain length of C8, C10, C12, C14, C16 or C18 (not including branched isomers) including single saturated fatty alcohols (also referred to as 'single cuts') and blends predominantly containing a combination of carbon chain lengths C6-C8, C6-C10, C8-C10, C10-C12 (commonly categorised as C8-C10), blends predominantly containing a combination of carbon chain lengths C12-C14, C12-C16, C12-C18, C14-C16 (commonly categorised as C12-C14) and blends predominantly containing a combination of carbon chain lengths C16-C18, currently falling within CN codes ex 2905 16 85, 2905 17 00, ex 2905 19 00 and ex 3823 70 00 (TARIC codes 2905 16 85 10, 2905 19 00 60, 3823 70 00 11 and 3823 70 00 91), and originating in India, Indonesia, and Malaysia.

2. The rate of the provisional anti-dumping duty applicable to the net, free-at-Union-frontier price, before duty, of the products described in paragraph 1 and manufactured by the companies listed below shall be as follows:

Country	Company	Provisional AD duty %	TARIC Additional Code
India	VVF Limited, Sion (East), Mumbai	4,8	B110
	All other companies	9,3	B999
Indonesia	PT. Ecogreen Oleochemicals, Kabil, Batam	6,3	B111
	P.T. Musim Mas, Tanjung Mulia, Medan, Sumatera Utara	4,3	B112
	All other companies	7,6	B999
Malaysia	KL-Kepong Oleomas Sdn Bhd, Petaling Jaya, Selangor Darul Ehsan	5,0	B113
	Emery Oleochemicals (M) Sdn. Bhd., Kuala Langat, Selangor	5,3	B114
	All other companies	13,8	B999

3. The release for free circulation in the Union of the product referred to in paragraph 1 shall be subject to the provision of a security equivalent to the amount of the provisional duty.

4. Unless otherwise specified, the provisions in force concerning customs duties shall apply.

Article 2

Without prejudice to Article 20 of Council Regulation (EC) No 1225/2009, interested parties may request disclosure of the essential facts and considerations on the basis of which this Regulation was adopted, make their views known in writing and apply to be heard orally by the Commission within 1 month of the date of entry into force of this Regulation.

Pursuant to Article 21(4) of Council Regulation (EC) No 1225/2009, the parties concerned may comment on the application of this Regulation within 1 month of the date of its entry into force.

Article 3

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

Article 1 of this Regulation shall apply for a period of 6 months.

[1] European Commission, Directorate-General for Trade, Directorate H, Office Nerv-105, 1049 Bruxelles, BELGIQUE.

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

Done at Brussels, 10 May 2011.

For the Commission
The President
José Manuel BARROSO

COMMISSION IMPLEMENTING REGULATION (EU) No 447/2011

of 6 May 2011

concerning the classification of certain goods in the Combined Nomenclature

THE EUROPEAN COMMISSION,

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

Having regard to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff [1], and in particular Article 9(1)(a) thereof,

Whereas:

(1) In order to ensure uniform application of the Combined Nomenclature annexed to Regulation (EEC) No 2658/87, it is necessary to adopt measures concerning the classification of the goods referred to in the Annex to this Regulation.

(2) Regulation (EEC) No 2658/87 has laid down the general rules for the interpretation of the Combined Nomenclature. Those rules apply also to any other nomenclature which is wholly or partly based on it or which adds any additional subdivision to it and which is established by specific provisions of the Union, with a view to the application of tariff and other measures relating to trade in goods.

(3) Pursuant to those general rules, the goods described in column (1) of the table set out in the Annex should be classified under the CN code indicated in column (2), by virtue of the reasons set out in column (3) of that table.

(4) It is appropriate to provide that binding tariff information which has been issued by the customs authorities of Member States in respect of the classification of goods in the Combined Nomenclature but which is not in accordance with this Regulation can, for a period of 3 months, continue to be invoked by the holder, pursuant to Article 12(6) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code [2].

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

HAS ADOPTED THIS REGULATION:

Article 1

The goods described in column (1) of the table set out in the Annex shall be classified within the Combined Nomenclature under the CN code indicated in column (2) of that table.

Article 2

Binding tariff information issued by the customs authorities of Member States, which is not in accordance with this Regulation, can continue to be invoked for a period of 3 months pursuant to Article 12(6) of Regulation (EEC) No 2913/92.

Article 3

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

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

Done at Brussels, 6 May 2011.

For the Commission,
On behalf of the President,
Algirdas ŠEMETA
Member of the Commission

[1] OJ L 256, 7.9.1987, p. 1.

[2] OJ L 302, 19.10.1992, p. 1.

ANNEX

Description of the goods	Classification (CN-code)	Reasons
(1)	(2)	(3)
Tinned stuffed vine leaves ready for consumption. The product is made of a mixture of rice, onion, soya oil, salt, citric acid, black pepper, mint and dill, wrapped in vine leaves. The composition (percentage by weight): — Rice: around 50, — Vine leaves: around 15, — Onion: around 9, — Other ingredients: oil, salt, spices and water.	1904 90 10	Classification is determined by General Rules 1, 3(b) and 6 for the interpretation of the Combined Nomenclature and the wording of CN codes 1904, 1904 90 and 1904 90 10. The essential character of this product is conferred by the rice component. Given its characteristics the product should therefore be classified in accordance with General Rule 3(b) under heading 1904.

COMMISSION IMPLEMENTING REGULATION (EU) No 448/2011

of 6 May 2011

entering a name in the register of protected designations of origin and protected geographical indications (Σταφίδα Ηλείας (Stafida Ilias) (PGI))

THE EUROPEAN COMMISSION,

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

Having regard to Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs [1], and in particular the first subparagraph of Article 7(4) thereof,

Whereas:

(1) Pursuant to the first subparagraph of Article 6(2) of Regulation (EC) No 510/2006, Greece's application to register the name 'Σταφίδα Ηλείας (Stafida Ilias)' was published in the *Official Journal of the European Union* [2].

(2) As no statement of objection under Article 7 of Regulation (EC) No 510/2006 has been received by the Commission, that name should therefore be entered in the register,

HAS ADOPTED THIS REGULATION:

Article 1

The name contained in the Annex to this Regulation is hereby entered in the register.

Article 2

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

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

Done at Brussels, 6 May 2011.

For the Commission,
On behalf of the President,
Dacian CIOLOŞ
Member of the Commission

[1] OJ L 93, 31.3.2006, p. 12.
[2] OJ C 233, 28.8.2010, p. 20.

ANNEX

Agricultural products intended for human consumption listed in Annex I to the Treaty:

Class 1.6. Fruit, vegetables and cereals, fresh or processed

GREECE

Σταφίδα Ηλείας (Stafida Ilias) (PGI)

COMMISSION IMPLEMENTING REGULATION (EU) No 449/2011

of 6 May 2011

entering certain names in the register of protected designations of origin and protected geographical indications (陕西苹果 (Shaanxi ping guo) (PDO), 龙井茶 (Longjing Cha) (PDO), 琯溪蜜柚 (Guanxi Mi You) (PDO), 蠡县麻山药 (Lixian Ma Shan Yao) (PGI))

THE EUROPEAN COMMISSION,

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

Having regard to Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs ([1]), and in particular the first subparagraph of Article 7(4) thereof,

Whereas:

(1) Pursuant to the first subparagraph of Article 6(2) of Regulation (EC) No 510/2006, the applications of the People's Republic of China to register the names '陕西苹果 (Shaanxi ping guo)', '龙井茶 (Longjing Cha)', '琯溪蜜柚 (Guanxi Mi You)' and '蠡县麻山药 (Lixian Ma Shan Yao)' were published in the *Official Journal of the European Union* ([2]).

(2) As no statement of objection under Article 7 of Regulation (EC) No 510/2006 has been received by the Commission, these names should therefore be entered in the register,

HAS ADOPTED THIS REGULATION:

Article 1

The names contained in the Annex to this Regulation are hereby entered in the register.

Article 2

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

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

Done at Brussels, 6 May 2011.

For the Commission,
On behalf of the President,
Dacian CIOLOȘ
Member of the Commission

([1]) OJ L 93, 31.3.2006, p. 12.
([2]) OJ C 252, 18.9.2010, p. 16; OJ C 254, 22.9.2010, p. 6; OJ C 257, 24.9.2010, p. 3; OJ C 257, 24.9.2010, p. 7.

ANNEX

Agricultural products intended for human consumption listed in Annex I to the Treaty:

Class 1.6. Fruit, vegetables and cereals, fresh or processed

PEOPLE'S REPUBLIC OF CHINA

琯溪蜜柚 (Guanxi Mi You) (PDO)

蠡县麻山药 (Lixian Ma Shan Yao) (PGI)

陕西苹果 (Shaanxi ping guo) (PDO)

Class 1.8. Other products of Annex I to the Treaty (spices, etc.)

PEOPLE'S REPUBLIC OF CHINA

龙井茶 (Longjing Cha) (PDO)

COMMISSION IMPLEMENTING REGULATION (EU) No 450/2011

of 10 May 2011

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 11 May 2011.

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

Done at Brussels, 10 May 2011.

For the Commission,
On behalf of the President,
José Manuel SILVA RODRÍGUEZ
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	JO	78,3
	MA	46,2
	TN	107,9
	TR	82,0
	ZZ	78,6
0707 00 05	TR	76,8
	ZZ	76,8
0709 90 70	MA	86,8
	TR	123,0
	ZZ	104,9
0709 90 80	EC	27,0
	ZZ	27,0
0805 10 20	EG	51,1
	IL	59,9
	MA	47,9
	TN	54,9
	TR	72,0
	ZZ	57,2
0805 50 10	TR	49,8
	ZZ	49,8
0808 10 80	AR	68,7
	BR	72,9
	CA	107,1
	CL	82,9
	CN	102,2
	NZ	116,8
	US	143,8
	UY	71,0
	ZA	76,2
	ZZ	93,5

(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'.

DIRECTIVES

COMMISSION DIRECTIVE 2011/58/EU

of 10 May 2011

amending Council Directive 91/414/EEC to renew the inclusion of carbendazim as active substance

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market [1], and in particular Article 6(1) thereof,

Whereas:

(1) The inclusion of carbendazim in Annex I to Directive 91/414/EEC expires on 13 June 2011.

(2) On request the inclusion of an active substance may be renewed for a period not exceeding ten years. On 6 August 2007 the Commission received such a request from the applicant regarding the renewal of the inclusion for this substance.

(3) On 10 January 2008, the applicant submitted to the rapporteur Member State Germany data in support of its request for renewal of the inclusion of carbendazim.

(4) The rapporteur Member State prepared a draft re-assessment report which was commented by the applicant on 13 May 2009 and after its finalisation was submitted to the applicant and the Commission on 24 July 2009. In addition to the assessment of the substance, that report includes a list of the studies the rapporteur Member State relied on for its assessment.

(5) The Commission communicated the draft re-assessment report to the European Food Safety Authority (hereinafter: 'the Authority') and to the Member States on 28 July 2009 for comments.

(6) At the request of the Commission, the draft re-assessment report was peer reviewed by the Member States and the Authority and commented by the applicant on 14 December 2009. The Authority presented its conclusion on the peer review of the risk assessment of carbendazim [2] to the Commission on 30 April 2010. After the applicant had been given the possibility to comment and taking into account its comments delivered on 31 May 2010, the draft re-assessment report and the conclusion from the Authority were reviewed by the Member States and the Commission within the Standing Committee on the Food Chain and Animal Health and finalised on 23 November 2010 in the format of the Commission review report for carbendazim.

(7) It has appeared from the various examinations made that plant protection products containing carbendazim may be expected to continue to satisfy the requirements laid down in Article 5(1)(a) and (b) of Directive 91/414/EEC, as regards the uses which were examined and detailed in the Commission review report. It is therefore appropriate to renew the inclusion of carbendazim in Annex I to Directive 91/414/EEC, in order to ensure that plant protection products containing this active substance may continue to be authorised where they comply with that Directive. In addition to the uses supported for the first inclusion, the applicant supports in its renewal dossier the use on fodder beet. Taking into consideration the additional data submitted by the applicant, the use on fodder beet should be added to the list of uses that may be authorised.

(8) Article 5(4) of Directive 91/414/EEC provides that inclusion of a substance in Annex I may be subject to restrictions. In order to correctly reflect the high level of protection of human and animal health and the environment sought in the Union, it is necessary to limit the uses of carbendazim to those that have actually been assessed and which are considered to comply with the conditions of Article 5(1) of Directive 91/414/EEC. This implies that uses which are not part of the list of uses set out in Annex I to that Directive may not be authorised unless they are first added to that list. It is appropriate to set maximum limits for the presence of two relevant impurities 2-amino-3-hydroxyphenazine (AHP) and 2,3-diaminophenazine (DAP) in commercially manufactured carbendazim.

[1] OJ L 230, 19.8.1991, p. 1.

[2] European Food Safety Authority; Conclusion on the peer review of the pesticide risk assessment of the active substance carbendazim EFSA Journal 2010; 8(5):1598.

(9) Without prejudice to the conclusion set out in recital 8, it is appropriate to obtain further information on certain specific points. Article 6(1) of Directive 91/414/EC provides that inclusion of a substance in Annex I may be subject to conditions. Therefore, it is appropriate to require that the applicant submits further information as regards, the aerobic degradation in soil, the long-term risk to birds and the relevance of a third impurity, for confidentiality reasons referred to as AEF037197. In addition, the applicant should be requested to examine the studies included in the list in the draft re-assessment report of 16 July 2009 (Volume 1, Level 4 'Further information', pp. 155-157).

(10) Several Member States have expressed concerns as regards the hazard profile of this substance. Similar concerns were expressed at the time of the first inclusion. The renewal dossier is, in part, based on toxicity data used during the assessment of the dossier submitted for the initial inclusion of this substance. The original inclusion was limited to a period of three years [1]. Account should also be taken of the progressive understanding of the need to ensure a high level of protection of human and animal health and the sustainable environment. Therefore, it is appropriate to limit the renewal period of the inclusion to three and half years.

(11) As with all substances included in Annex I to Directive 91/414/EEC, the status of carbendazim could be reviewed under Article 5(5) of that Directive in the light of any new data becoming available, such as its currently ongoing evaluation in the framework of Directive 98/8/EC of the European Parliament and the Council of 16 February 1998 concerning the placing of biocidal substances on the market [2] and from the review of relevant scientific literature.

(12) A reasonable period should be allowed to elapse before the inclusion of an active substance in Annex I to Directive 91/414/EEC is renewed in order to permit Member States and the interested parties to prepare themselves to meet the new requirements resulting from the renewal.

(13) Without prejudice to the obligations defined by Directive 91/414/EEC as a consequence of renewing the inclusion of an active substance in Annex I thereto, Member States should be allowed a period of six months after renewal to review authorisations of plant protection products containing carbendazim to make sure that the requirements laid down in Directive 91/414/EEC, in particular in its Article 13, and the relevant conditions set out in Annex I to that Directive, continue to be satisfied. As appropriate, Member States should renew, where appropriate with modifications, or refuse to renew authorisations. By way of derogation from that deadline, a longer period should be provided for the submission and assessment of the update of the complete Annex III dossier of each plant protection product for each intended use in accordance with the uniform principles laid down in Directive 91/414/EEC.

(14) It is therefore appropriate to amend Directive 91/414/EEC accordingly.

(15) The Standing Committee on the Food Chain and Animal Health did not deliver an opinion within the time limit laid down by its Chair and the Commission therefore submitted to the Council a proposal relating to these measures. Since, on the expiry of the period laid down in the second subparagraph of Article 19(2) of Directive 91/414/EEC, the Council had neither adopted the proposed measures nor indicated its opposition to them, these measures are to be adopted by the Commission,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Annex I to Directive 91/414/EEC is amended in accordance with the Annex to this Directive.

Article 2

Member States shall adopt and publish by 30 November 2011 at the latest the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

They shall apply those provisions from 1 December 2011.

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

Article 3

1. Member States shall in accordance with Directive 91/414/EEC, where necessary, amend or withdraw existing authorisations for plant protection products containing carbendazim as an active substance by 1 December 2011.

[1] Commission Directive 2006/135/EC of 11 December 2006 amending Council Directive 91/414/EEC to include carbendazim as active substance (OJ L 349, 12.12.2006, p. 37).

[2] OJ L 123, 24.4.1998, p. 1.

By that date they shall in particular verify that the conditions in Annex I to that Directive relating to carbendazim are met, with the exception of those identified in part B of the entry concerning that active substance, and that the holder of the authorisation has, or has access to, a dossier satisfying the requirements of Annex II to that Directive in accordance with the conditions of Article 13 of that Directive.

2. By way of derogation from paragraph 1, for each authorised plant protection product containing carbendazim as either the only active substance or as one of several active substances, all of which were listed in Annex I to Directive 91/414/EEC by 1 June 2011 at the latest, Member States shall, where necessary, re-evaluate the products, to take into account developments occurred in the scientific and technical knowledge and in accordance with the uniform principles provided for in Annex VI to Directive 91/414/EEC, on the basis of a dossier satisfying the requirements of Annex III to that Directive and taking into account part B of the entry in Annex I to that Directive concerning carbendazim. On the basis of that evaluation, they shall determine whether the product still satisfies the conditions set out in Article 4(1)(b), (c), (d) and (e) of Directive 91/414/EEC. Following that determination Member States shall, where necessary, amend or withdraw the authorisation by 1 December 2013.

Article 4

This Directive shall enter into force on 1 June 2011.

Article 5

This Directive is addressed to the Member States.

Done at Brussels, 10 May 2011.

For the Commission
The President
José Manuel BARROSO

ANNEX

In Annex I to Directive 91/414/EEC, row No 149 is replaced by the following:

No	Common name, identification numbers	IUPAC name	Purity [1]	Entry into force	Expiration of inclusion	Specific provisions
'149	Carbendazim CAS No 10605-21-7 CIPAC No 263	Methyl benzimidazol-2-ylcarbamate	≥ 980 g/kg Relevant impurities 2-amino-3-hydroxyphenazine (AHP): not more than 0,0005 g/kg 2,3-diaminophenazine (DAP): not more than 0,003 g/kg	1 June 2011	30 November 2014	PART A Only uses as fungicide on the following crops may be authorised: — cereals, — rape seed, — sugar and fodder beet, — maize, at rates not exceeding: — 0,25 kg active substance per hectare per application for cereals and rape seed, — 0,075 kg active substance per hectare per application for sugar and fodder beet, — 0,1 kg active substance per hectare per application for maize. The following uses must not be authorised: — air application, — knapsack and handheld applications neither by amateur nor by professional users, — home gardening. Member States shall ensure that all appropriate risk mitigation measures are applied. Particular attention must be paid to the protection of: — aquatic organisms. Appropriate drift mitigation measures must be applied to minimise the exposure of surface water bodies. This should include keeping a distance between treated areas and surface water bodies alone or in combination with the use of drift-reducing techniques or devices,

No	Common name, identification numbers	IUPAC name	Purity (1)	Entry into force	Expiration of inclusion	Specific provisions
						— earthworms and other soil macro-organisms. Conditions of authorisation shall include risk mitigation measures, such as the selection of the most appropriate combination of numbers and timing of application, and, if necessary, the degree of concentration of the active substance, — birds (long-term risk). Depending on the results of the risk assessment for specific uses, targeted mitigation measures to minimise the exposure may become necessary, — operators, who must wear suitable protective clothing, in particular gloves, coveralls, rubber boots and face protection or safety glasses during mixing, loading, application and cleaning of the equipment, unless the exposure to the substance is adequately precluded by the design and construction of the equipment itself or by the mounting of specific protective components on such equipment. PART B For the implementation of the uniform principles of Annex VI, the conclusions of the review report on carbendazim, and in particular Appendices I and II thereof, shall be taken into account. The Member States concerned shall request that the applicant provides the following to the Commission: — by 1 December 2011 at the latest, information as regards the toxicological and ecotoxicological relevance of the impurity AEF037197, — by 1 June 2012 at the latest, the examination of the studies included in the list in the draft re-assessment report of 16 July 2009 (Volume 1, Level 4 “Further information”, pp. 155-157), — by 1 June 2013 at the latest, information on the fate and behaviour (route of aerobic degradation in soil) and the long-term risk to birds.’

(1) Further details on identity and specification of active substance are provided in the review report.

DECISIONS

COMMISSION DECISION

of 26 May 2010

concerning State aid in the form of a tax settlement agreement implemented by Belgium in favour of Umicore SA (formerly Union Minière SA) (State aid C 76/03 (ex NN 69/03))

(notified under document C(2010) 2538)

(Only the French and Dutch texts are authentic)

(Text with EEA relevance)

(2011/276/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(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 [1] pursuant to the provisions cited above and having regard to their comments,

Whereas:

I. PROCEDURE

(1) By letter dated 11 February 2002 the Commission informed the Belgian authorities of the information it had in its possession concerning an agreement between the Belgian Special Tax Inspectorate and the company Umicore SA ('Umicore'), formerly known as Union Minière SA, on a reduction of a value added tax (VAT) debt. In its letter, the Commission asked the Belgian authorities to furnish it with all the information that might enable it to assess the agreement in the light of Articles 107 and 108 of the Treaty (*).

(2) The Belgian Government replied to the Commission by letter dated 7 May 2002.

(3) By letter dated 9 August 2002 the Commission requested further information to complete its assessment of the measure. This information was communicated by the Belgian Government by letter dated 18 September 2002.

(4) By letter dated 21 October 2003 the Commission asked the Belgian authorities to provide additional documentation clarifying the position of the Belgian tax authorities on the agreement with Umicore.

(5) By letter dated 31 October 2003 the Belgian authorities informed the Commission that Umicore's tax file and all the documents pertaining to the agreement in question had been seized by the investigating judge in Brussels, Mr Lugentz, who was conducting a criminal investigation against a person or persons unknown regarding the circumstances in which the agreement had been concluded between the Special Tax Inspectorate and Umicore.

(6) By letter dated 10 December 2003 the Commission informed Belgium that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of this aid.

(7) The Commission's decision to initiate the procedure was published in the *Official Journal of the European Union* [2] on 7 September 2004. The Commission called on interested parties to submit their comments on the aid in question.

(8) As a result of an error in the text published on 7 September 2004, the decision was published again in the *Official Journal of the European Union* on 17 November 2004 [3].

(9) The Commission received comments from Umicore, by letters dated 7 October and 13 December 2004, and from an anonymous third party by letter dated 4 October 2004.

(10) Following the new publication of the decision, Belgium sent its comments by letter dated 15 December 2004.

---

[1] OJ C 280, 17.11.2004, p. 10.

(*) From 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the Treaty on the Functioning of the European Union (TFEU). The provisions laid down in the respective articles are identical in both cases. For the purposes of this Decision, references to Articles 107 and 108 TFEU should be understood as references to Articles 87 and 88 of the EC Treaty where appropriate. Various terminological changes have also been introduced by the TFEU, such as the change from 'Community' to 'Union' and from 'common market' to 'internal market'.

[2] OJ C 223, 7.9.2004, p. 2.

[3] See footnote 1.

(11) The Commission forwarded to Belgium the comments from third parties on 13 May 2005. Belgium submitted its comments on 13 June 2005.

(12) By letter dated 12 December 2005 the Commission informed Belgium of its decision to suspend its examination of the measure until the Belgian judicial authorities had taken a decision in the pending case.

(13) In its reply dated 19 January 2006 Belgium pointed out that searches had been carried out on the tax authorities' premises and the complete tax file had been seized; Belgium promised to inform the Commission of decisions communicated to the authorities concerned by the judicial authorities.

(14) By letter dated 31 March 2008 the Commission requested information about the progress made in the legal proceedings and the possible recovery of the seized documents.

(15) In its reply to the Commission dated 16 June 2008 Belgium explained that the legal proceedings had been closed on 13 November 2007.

(16) On 28 July 2008 a meeting took place between representatives of the Special Tax Inspectorate and the Commission. After the meeting a list of questions containing the points raised by the Commission at the meeting was sent by e-mail to the Belgian authorities. The Belgian authorities replied by letter dated 9 September 2008.

(17) By letter dated 17 October 2008 the Commission reminded Belgium of its duty to take all necessary steps, including the recovery of the seized documents, to answer the Commission's questions. In the letter the Commission also stated that it could issue a formal order requiring Belgium to provide the information requested given that the information should already have been sent to the Commission following its previous requests.

(18) By e-mail dated 21 January 2009 the Commission asked the Belgian authorities to keep it informed of the action taken in response to its letter dated 17 October 2008. By letter dated 29 January 2009 the Belgian authorities replied that the Special Tax Directorate was taking steps to answer the Commission's questions.

(19) By letter dated 7 May 2009 Belgium informed the Commission that the seized documents had finally been returned to the Special Tax Inspectorate and were being examined with a view to answering the Commission's questions.

(20) By letter dated 6 August 2009 Belgium sent the Commission its answers to the questions raised by the Commission in its letter dated 17 October 2008.

(21) At the Commission's request, Belgium sent additional information on certain applicable administrative provisions by e-mail dated 22 September 2009.

II. DETAILED DESCRIPTION OF THE AID

II.1. General context of the agreement of 21 December 2000 between the Special Tax Inspectorate and Umicore

(22) As part of investigations by tax authorities in several Member States into transactions involving precious metals, the Brussels Regional Directorate of the Special Tax Inspectorate carried out checks on Umicore SA covering the period 1995 to 1999. Following these checks the Special Tax Inspectorate addressed to Umicore, on 30 November 1998 and 30 April 1999 respectively, two adjustment notices concerning the irregular application of VAT exemptions to sales of silver granules to undertakings established in Italy, Switzerland and Spain.

(23) In particular, the two adjustment notices concerned the provisional establishment of the VAT owed by Umicore, as a result of the irregular application of exemptions, and the amount of the tax fine, as well as the interest automatically payable from the date on which the VAT debt was incurred. The two notices invited Umicore to send in writing within 20 days to the Special Tax Inspectorate its approval of the amounts established or its duly justified objections.

(24) Following the second option, Umicore sent two letters to the Special Tax Inspectorate in June 1999, in which it stated its objections to the Special Tax Inspectorate's findings and claimed that the VAT exemptions applied were in order. The Special Tax Inspectorate responded to the two letters from Umicore on 23 December 1999 by reaffirming the validity of the findings in the two adjustment notices. The Special Tax Inspectorate invited Umicore either to agree to the tax established or to provide new information that would lead to the reduction or cancellation of the amount and, if appropriate, to forgo the part of the limitation period already elapsed so as to allow suspension of limitation for the recovery of the tax, the interest and the tax fines. On 30 March 2000 Umicore put forward further arguments and again rejected the Special Tax Inspectorate's conclusions.

(25) On 21 December 2000 the Special Tax Inspectorate accepted a proposal for an agreement from Umicore ('the settlement agreement') concerning the two adjustment notices, covering the application of VAT for the entire period examined by the Special Tax Inspectorate. The agreement provided for the payment by Umicore of a much lower amount than the amounts included in the adjustment notices.

II.2. Tax arrangements applicable to intra-Community supplies and exports of goods

(26) The VAT rules applicable to intra-Community supplies and exports of the goods covered by the settlement agreement from 1995 to 1998 originate in the

transposition of Council Directive 91/680/EEC [4] into the Belgian VAT Code. The Directive provides for transitional VAT arrangements with a view to the abolition of fiscal frontiers and amends the Sixth VAT Directive [5].

1. Taxation of supplies of goods

(27) The first subparagraph of Article 2 of the Belgian VAT Code states: 'supplies of goods and services carried out for consideration by a taxable person acting as such are subject to tax when they take place in Belgium.'

(28) Article 10 of the VAT Code states:

'The supply of goods shall mean the transfer of the right to dispose of property as owner. In particular, this involves making goods available to a person acquiring them pursuant to a contract transferring or dividing up ownership.'

(29) Article 15 of the VAT Code states:

'(1) Goods are supplied in Belgium when the place where the supply is deemed to take place in accordance with paragraphs 2 to 6 is in Belgium.

(2) The place of supply of goods is deemed to be the place where the goods are made available to the person acquiring them.

However, the place of supply is deemed to be:

1. where the dispatch or transport to the person to whom they are supplied begins when the goods are dispatched or transported by the supplier, by the person acquiring them or by a third party;

…

(7) Unless proven otherwise, movable goods are deemed to have been supplied in Belgium when, at the time of supply, one of the parties to the transaction has established his business or has a fixed establishment there or, in the absence of such a place of business or fixed establishment, has his permanent address or is habitually resident there.'

(30) The supply of goods (the transport of which begins in Belgium) is therefore in principle taxable in Belgium. The law has introduced a legal presumption that the supply is deemed to have taken place in Belgium when one of the parties to the transaction is established in Belgium.

2. VAT liability

(31) In accordance with Article 51(1) of the VAT Code tax is payable by the taxable person carrying out the supply of taxable goods or services that takes place in Belgium.

3. Exports

(32) Article 39(1) of the VAT Code lays down VAT exemptions for exports of goods; it states: 'The following are exempt from tax: 1. the supply of goods dispatched or transported to a destination outside the Community by or on behalf of the vendor; 2. the supply of goods dispatched or transported to a destination outside the Community by or on behalf of the purchaser, who is not established in Belgium …'

(33) In accordance with Article 39(3) of the VAT Code, Royal Decree No 18 of 29 December 1992 lays down the conditions in Belgian law for exempting exports of goods from Belgium to destinations outside the Community [6].

[4] OJ L 376, 31.12.1991, p. 1.

[5] Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ L 145, 13.6.1977, p. 1).

[6] Article 5(2) of Royal Decree No 18 provides that 'a buyer not established in Belgium who takes possession of goods in Belgium must, on taking possession of the goods, provide an acknowledgment of receipt to the vendor established in Belgium. This acknowledgment of receipt must contain the date of the transfer of the goods, a description of the goods and details of the country of destination. The same document must be supplied to the vendor when a third person takes possession of the goods in Belgium on behalf of a buyer who is not established in Belgium. In this case, the document must be provided by the third person, who must declare that he is acting on behalf of the buyer'. Article 6 of Royal Decree No 18 specifies that 'Proof of export must be provided by the vendor … irrespective of the document required under Article 5(2)'. Article 3 of Royal Decree No 18 states that 'The vendor must at all times be in possession of all documents proving that the goods have been exported and must produce these documents whenever so requested by officials carrying out checks. These documents include, inter alia, order forms, transport documents, payment documents and the export declaration mentioned in Article 2', which states: 'A copy of the sales invoice or, failing that, of the dispatch note containing all the details required on a sales invoice must be handed over to the customs office to which, in line with the customs rules on exports, an export declaration must be submitted'.

4. Intra-Community supplies

(34) Article 39 *bis* of the VAT Code provides from 1 January 1993: 'The following are exempt from tax: 1. supplies of goods dispatched or transported to destinations outside Belgium, but within the Community, by or on behalf of the vendor … or the person acquiring the goods for another taxable person or non-taxable natural person acting as such in another Member State who is liable for tax on his intra-Community acquisitions of goods …'

(35) Belgian tax law lays down several conditions regarding the proof that has to be furnished to ensure correct application of the exemption provided for in Article 39 *bis* of the VAT Code. Article 1 of Royal Decree No 52 of 29 December 1992 states: 'The tax exemptions provided for in Article 39 *bis* of the Code are subject to proof that the goods were dispatched or transported outside Belgium but within the Community'. Article 2 of Royal Decree No 52 specifies that the exemption is 'also subject to proof that the supply is carried out for a taxable person … registered for VAT in another Member State.' In addition, the first subparagraph of Article 3 of Royal Decree No 52 provides: 'The vendor must at all times be in possession of all documents proving that the dispatch or transport of the goods has actually taken place …' In this connection, the extract from a press release published in *Moniteur belge* No 36 of 20 February 1993 informs taxpayers that 'transport must be carried out by or on behalf of the vendor or the person acquiring the goods. Consequently, if transport is carried out by or on behalf of a subsequent customer (e.g. in chain transactions where the transport is carried out by the final customer), supplies before the supply to the final customer may not be exempted'.

(36) In order to qualify for an exemption for intra-Community supply, the taxable person must therefore prove, inter alia, that the transport was carried out by or on behalf of either the vendor or the person acquiring the goods ([7]).

([7]) An extract from the Belgian Minister for Finance's response to Parliamentary question No 248 of 23 January 1996 (Bull. Q.R., Ch. Repr. S.O. 1995-96, No 26, 18.3.1996) states that 'An intra-Community supply from Belgium constitutes a transaction that in principle is liable to VAT in Belgium when it is carried out by a taxable person acting as such. The right to benefit from the exemption must of course be proved by the supplier claiming it. The burden of proving that the conditions for applying the exemption are fulfilled is therefore borne by the supplier'.

(37) If the conditions for the application of the exemptions laid down in Articles 39 and 39 *bis* of the VAT Code are not fulfilled, the supply of the goods becomes taxable in Belgium and the debt is incurred as a result of the mere existence of the transaction ([8]). In the interests of fairness towards the taxable person, the Belgian tax authorities nevertheless agree to grant an exemption under these articles to a taxable person who is not able to provide all the proof necessary to show that the conditions for exemption have been met if they themselves are in possession of such proof, for example within the framework of mutual assistance from other Member States or third countries.

5. Taxation based on actual facts

(38) According to the established case law of the Belgian Court of Cassation, tax (including VAT) must be established on the basis of the actual facts ([9]). In applying this principle, the authorities are therefore required to impose tax, not on the basis of the apparent existence of an act as presented by the taxpayer, but on the basis of the actual existence of an act (resulting from the actual intention of one of the parties concerned).

6. Procedure

(39) In cases where the authorities contest VAT exemptions applied to supplies of goods, they address an adjustment notice ([10]) to the taxable person, normally together with a fine.

7. Settlement with the taxable person

(40) The second subparagraph of Article 84 of the VAT Code states that the Minister for Finance may conclude settlements with taxpayers provided that these do not

([8]) Article 16 stipulates that supply takes place at the moment the goods are made available to the person acquiring them and Article 17 specifies that the event giving rise to the tax occurs and the tax becomes payable at the moment the supply of the goods takes place.

([9]) See judgment of the Court of Cassation of 21.5.1982, Pas. I, 1982, p. 1.106.

([10]) Although this procedure is not explicitly provided for by the VAT Code, it is normal practice for the authorities to follow it in order to respect several fundamental principles, including the rights of defence and the principle of sound administration.

involve an exemption from or a reduction of the tax. Such settlements, therefore, must concern only points of fact and not points of law. They are generally possible only when both parties make concessions ([11]) (not on the amount of the tax that may arise from the established facts, but on points of fact, the setting of fines, etc.).

(41) The Minister for Finance delegates his powers in this area to the Regional Directorates of the VAT authorities and to the Special Tax Inspectorate.

8. Imposition of administrative fines

(42) As regards the imposition of fines when the right to an exemption is not proved, Article 70(1) of the VAT Code lays down a fine in proportion to the infringement of the obligation to pay VAT, equivalent to twice the amount of the unpaid tax. Nevertheless, Royal Decree No 41 of 30 January 1987 provides for a scale reducing the proportional tax fines. Article 1(1) of Royal Decree No 41 states that the fine is reduced by 10 % of the amount of the tax due (table G of the Annex) in the case of infringements against Article 39 *bis* of the VAT Code (wrongly applied exemption or lack of proof of the right to an exemption). The same proportional fine is imposed for similar infringements of Article 39 of the VAT Code.

(43) Article 70(2) of the VAT Code lays down a fine of twice the amount of the tax due on the transaction if the invoice is not supplied or contains inaccurate information, inter alia, as regards identification, the name or the address of the parties to the transaction. In accordance with the second subparagraph of Article 70(2) of the VAT Code this fine is, however, not imposed when the irregularities can be deemed to be purely accidental ([12]) or when the supplier had no reason to doubt that the other party ([13]) was a non-taxable person.

(44) Royal Decree No 41 ([14]) increases the fine to 100 % of the tax due on the transactions in the case of inaccuracies in the invoices. Article 3 of the same Royal Decree provides for full cancellation of the fine if a taxpayer rectifies the situation immediately before the intervention of the tax authorities.

9. Proportionality of fines

(45) In a judgment of 24 February 1999 ([15]) the Belgian Court of Arbitration ([16]) decided that a judge must be able to verify whether 'a decision of a punitive nature is justified by fact and by law and respects all legislative provisions and general principles incumbent on the authorities, including the principle of proportionality.' In the same judgment, the Court of Arbitration also found that administrative fines in the field of VAT are punitive in nature.

(46) In addition, recent case law from the Belgian Court of Cassation ([17]) confirmed that both the competent tax authority and the judge are obliged to apply the principle of proportionality to the calculation of administrative fines, even if this means derogating from fixed scales.

10. Possible reduction or cancellation of fines by the authorities

(47) Following the entry into force of the Law of 15 March 1999 on tax disputes, the provisions of the VAT Code ([18]) that enabled the Minister for Finance to cancel fines have been repealed. Nevertheless, on the basis of Article 9 of the Regent's Decree of 18 March 1831 ([19]) the Minister for Finance, or the official delegated by him for this purpose, retains the power to reduce or cancel fines. The Minister has delegated this power to the Director-General and the Regional Directors ([20]) of the VAT authorities ([21]).

(48) In principle this provision allows the authorities, when imposing a VAT fine, to deviate from the scales laid down in Article 70(2) of the VAT Code and in Royal Decree No 41, especially when strict application of the scales would not be in line with the principle of proportionality.

(49) If a reduction in the fine is possible, it is therefore normal, in the case of an amicable settlement between the tax authorities and the taxpayer, for the agreement also to cover the fine and for negotiations to be held on this matter.

([11]) Administrative comment No 84/91 on the VAT Code.
([12]) Especially with regard to the number and size of the transactions for which the documents are not in order compared with the number and size of transactions for which the documents are in order.
([13]) Administrative comment No 70/67 stipulates that this provision applies when the taxable person sells without an invoice to a customer who presents himself as a private individual provided that the taxable person has no serious reason to doubt that the other parties are not taxable.
([14]) See Table C.
([15]) Judgment of the Court of Arbitration of 24 February 1999 in Case No 22/99.
([16]) Now the Constitutional Court.
([17]) Cassation, 12 February 2009, RG C.07.0507.N, not reported; Cassation, 13 February 2009, RG F.06.0107.N, not reported and Cassation, 12 February 2009, RG F.06.0108.N.
([18]) See former Article 84 of the VAT Code.
([19]) Article 9 of the Regent's Decree states that the Minister for Finance shall rule on claims for the remission of fines and increases in duties in the form of fines not settled in court.
([20]) Regional Directors of the Special Tax Inspectorate have the same powers by virtue of Article 95 of the Law of 15 March 1999 replacing Article 87 of the Law of 8 August 1980.
([21]) See VAT comment No 84/59.

11. Default interest

(50) Article 91(1) of the VAT Code states that default interest is to be calculated at a rate of 0,8 % of the tax due for each month of default. Article 84 *bis* of the VAT Code provides that, in special cases, the competent Director-General may, under the conditions stipulated by himself, grant an exemption for all or part of the interest payable under Article 91 of the VAT Code.

(51) However, it is clear from administrative comments on VAT ([22]) that a partial or total remission of default interest may be granted only if the taxable person is in a difficult financial situation for reasons beyond his control. This view was confirmed by Belgium in its letter dated 13 June 2005 in response to the comments from third parties, where it stated: 'the Special Tax Inspectorate's Regional Directors have never granted a total or partial remission of default interest in any tax case. Moreover, such a remission is granted only to taxpayers in a difficult financial situation …'

12. Refund

(52) Article 77(1), number 7, of the VAT Code provides that the tax charged on the supply of goods (or services) shall be refunded in the appropriate amount in the event of the loss of a claim for payment of all or part of the purchase price.

(53) Circular No 78 on VAT refunds ([23]) specifies that a refund applies not only when the claim for payment of the purchase price is lost due to bankruptcy or composition, but also in all cases where the supplier establishes that the invoice has either not been paid at all or has only been partially paid and that he has exhausted all remedies. The point at which the loss can be deemed to be certain depends on the factual circumstances of each case ([24]).

(54) When only part of the invoice has been paid, for example if the person acquiring the goods pays the amount on the invoice excluding VAT but an amount corresponding to the VAT remains unpaid, only the part of VAT relating proportionally to the unpaid amount ([25]) can be refunded ([26]).

13. Possibility of deducting VAT from corporate tax

(55) Article 53 of the Income Tax Code provides that certain taxes are not deductible when calculating the tax base subject to income tax (including corporate tax). However, this does not include VAT.

(56) The administrative instructions on income tax ([27]) also state that the VAT paid or owed by a taxpayer to the tax authorities that is not covered by VAT charged to the customer constitutes a business expense.

14. Possibility of deducting VAT fines from corporate tax

(57) In accordance with the case law of the Court of Cassation, as confirmed in administrative comments ([28]), proportional VAT fines are deductible from corporate tax.

15. Powers of the Special Tax Inspectorate

(58) According to Article 87 of the Law of 8 August 1980, the Special Tax Inspectorate and its Regional Directors enjoy the same powers as the VAT authorities.

II.3. **The beneficiary**

(59) Umicore SA is a Belgian limited company operating in the EU and international markets that manufactures and sells special materials and precious metals; this includes the manufacture and sale of silver granules. In particular, Umicore is reputed to be one of the world's biggest silver refiners.

(60) The silver manufactured by Umicore is extracted from other materials, in most cases from industrial waste, supplied to it under tolling agreements on the recovery of precious and non-precious metals (silver, gold, platinum, palladium, rhodium, iridium, cobalt, copper, lead, etc.). Umicore specialises in the manufacture of silver granules, which are generally sold to jewellery wholesalers or to industry.

([22]) See VAT comment No 84 *bis*/4 *et seq*.
([23]) VAT Circular No 78 of 15 December 1970, point 9.
([24]) See the VAT handbook published by the VAT authorities, p. 1116, point 530.
([25]) If a taxable person initially invoices an amount of 100 plus VAT of 21, giving a total of 121, and the person acquiring the goods pays only 100, the possible refund will not cover an amount of 21, but 21 × (21/121) = 3,64.
([26]) There are no precise instructions on how to calculate the refund in the case of partial loss on the purchase price. However, there is nothing to stop a refund being applied in cases where the VAT is invoiced subsequently by the taxable person (even several years after the event giving rise to the tax).
([27]) See income tax comment No 53/88.
([28]) See income tax comments Nos 53/97 and 53/97.1.

(61) As part of its marketing activities in silver granules, Umicore carries out deliveries in particular to other Member States. According to the information provided by Umicore to the Belgian tax authorities, at the material time global consumption of silver was approximately 26 000 tonnes a year and Italy was the biggest market in Europe and one of the main geographic markets, with consumption of approximately 2 000 tonnes a year.

II.4. **Checks made and adjustment notices sent by the Special Tax Inspectorate**

(62) Following checks carried out by the Special Tax Inspectorate concerning the precious metals marketing activities carried on by Umicore from 1995 to 1999 inclusive, the Special Tax Inspectorate's Brussels Regional Directorate addressed on Umicore, on 30 November 1998 and 30 April 1999 respectively, two adjustment notices concerning the irregular application of the exemption under Article 39 *bis* of the VAT Code (and in certain cases under Article 39 of the Code concerning the exemption for the export of goods outside the European Union) with respect to various deliveries of silver granules to Italy on behalf of Italian, Spanish and Swiss customers. In particular, the investigations carried out by the relevant authorities of the Member States concerned had made it possible to establish that some of Umicore's foreign customers were fictitious and linked to 'carrousel fraud' type mechanisms implemented to evade payment of VAT.

(63) The irregularities found by the Special Tax Inspectorate concerned, in particular, infringements of Articles 39 and 39 *bis* of the VAT Code and Articles 1 to 3 of Royal Decree No 52 relating to exemptions applied by Umicore to certain intra-Community supplies and exports. In particular, the tax authorities considered that the company was not in a position to prove that the conditions for application of the exemption under Articles 39 and 39 *bis* of the VAT Code had been fulfilled for the supplies. The Special Tax Inspectorate was therefore of the opinion, on a preliminary basis, that Umicore had wrongfully applied the VAT exemption to certain intra-Community supplies or certain exports.

(64) With respect to certain sales to various Italian and Spanish companies in particular (in the 1995-96 period), the Special Tax Inspectorate considered (on a preliminary basis) that the goods had been transported, not by either Umicore or the purchasers indicated on the invoices, or on their behalf, but by subsequent customers, further down the supply chain in Italy. According to the Special Tax Inspectorate, the supplies concerned did not therefore fulfil the conditions laid down in Article 39 *bis* of the VAT Code concerning exemptions on intra-Community supplies of goods.

(65) With respect to certain sales to companies established in Switzerland, the Special Tax Inspectorate was also of the opinion that the exemption provided for in Article 39 of the VAT Code for the export of goods outside the European Union was not applicable either, given that the goods had been delivered to Italy and had not therefore left the territory of the European Union.

(66) Consequently, the Special Tax Inspectorate provisionally concluded, in its adjustment notice of 30 November 1998, that, for the years 1995 and 1996, Umicore owed the Belgian Government the following amounts:

— BEF 708 211 924 (approximately EUR 17 556 115) in VAT,

— BEF 70 820 000 (approximately EUR 1 755 582) by way of a reduced tax fine (table G annexed to Royal Decree No 41),

— 0,8 % per month of interest on arrears beginning from 21 January 1997 to be calculated on the amount of VAT owed.

(67) In addition, in its adjustment notice of 30 April 1999, the Special Tax Inspectorate concluded provisionally that, for the years 1997 and 1998, Umicore owed the Belgian Government the following amounts:

— BEF 274 966 597 (approximately EUR 6 816 243) in VAT,

— BEF 27 496 000 (approximately EUR 681 608) by way of a reduced tax fine (table G annexed to Royal Decree No 41),

— 0,8 % per month of interest on arrears beginning from 21 January 1999 to be calculated on the amount of VAT owed.

(68) In all, the amount of VAT sought from Umicore following the adjustment notices totalled EUR 24 372 358 and the tax fine calculated in the adjustment notices was EUR 2 437 235.

(69) By letters of 11 and 18 June 1999 and 31 March 2000, Umicore indicated its disagreement with the two adjustment notices. In particular, it argued that the irregularities committed by its customers were beyond its control and defended itself by pointing out that, as a wholesaler in the silver granules market, it was not supposed to know who the customers of its purchasers were, given that sales of silver were made ex works to avoid uncertainties with shipments. In addition, Umicore contended that all of its customers were registered for VAT purposes in other Member States over the period when the transactions were made, that all of the deliveries in question had been included in Umicore's quarterly intra-Community deliveries statements in accordance with Belgium's VAT Code, that the names of the companies receiving delivery had been included in the invoices identifying them for VAT purposes, in line with the agreements made on taking the orders, that the shipments had actually been made by specialised transport companies and that the goods had effectively left Belgian territory and actually been delivered in Italy. Umicore was therefore of the opinion that it had rightfully applied the VAT exemption laid down in Article 39 *bis* of the VAT Code to the transactions in question.

(70) Umicore also emphasised that some States merely required proof that goods had been shipped to a Member State other than that from which they originated, whereas Belgium demanded proof that transport had been carried out by or on behalf of the vendor or the purchaser of the goods in question, which, it held, was contrary to EU law and resulted in serious distortions of competition to the disadvantage of Umicore and other Belgian companies engaged in this type of intra-Community supply. Umicore thus held that it had acted in good faith in not applying VAT to the transactions at issue.

II.5. **Basis of the settlement agreement of 21 December 2000**

(71) On 21 December 2000 the Special Tax Inspectorate accepted a proposal for an agreement submitted by Umicore regarding its VAT liabilities for the years 1995 to 1998. In the proposed agreement it was indicated that Umicore disputed the validity of the adjustments claimed by the Special Tax Inspectorate but accepted the settlement put forward in the interests of conciliation.

(72) The agreement provides for the payment by Umicore of BEF 423 000 000, i.e. around EUR 10 485 896, in 'full and final settlement of Umicore's VAT liabilities for the years 1995 to 1999 inclusive'. The agreement further stipulates that this amount will not be deductible from corporate tax.

(73) As was indicated by Belgium during the preliminary investigation before proceedings were opened, its tax authorities are of the view that the settlement amount corresponds to a fine established pursuant to Article 70(2) of the VAT Code, reduced in application of Article 84 of the same Code. In particular, Article 70(2) stipulates that errors in invoices drafted by a taxable person 'concerning the VAT identification numbers, the names or addresses of the parties to the transaction, the nature or quantity of goods supplied or services provided, the prices or incidental expenses' result in the application of a fine equal to double the tax due on the transaction. However, the fine is reduced to 100 % of the tax due in accordance with Article 1(3) of Royal Decree No 41 (Table C annexed to Royal Decree No 41).

(74) Belgium further claims that the settlement amount agreed by Umicore and the Special Tax Inspectorate was entirely legitimate and justified under Belgian law. It derives from the following calculation:

— tax due in principle (theoretical calculation) on the transactions at issue: BEF 708 million,

— statutory fine: BEF 708 million × 200 % = BEF 1 416 million (application of Article 70(2) of the VAT Code),

— reduction to 100 % in accordance with Royal Decree No 41 (Table C) setting the level of fines regarding VAT when the breaches were not committed with the intention of evading or allowing for the evasion of VAT: BEF 708 million,

— consideration of the non-deductibility of the fine under business expenses (708 – 40,17 % of 708): BEF 423 million (approximately EUR 10 485 896).

(75) According to Belgium, such a settlement was justified because the adjustment statements in question constitute merely the first stage of a complicated administrative process aimed at establishing the tax owed by a company liable for VAT. An in-depth examination of the information and arguments presented by Umicore, which has always denied having committed fraud, allegedly convinced the Special Tax Inspectorate that no tax should be demanded in the present case. The Special Tax Inspectorate takes the view that the facts as a whole, in particular the documents provided by Umicore and the Italian authorities, led to the conclusion that the conditions for VAT exemption had been met in spite of what had been noted in the adjustment statements. Since no amount of tax due had been established, no reduction of VAT owing was granted.

III. **GROUNDS FOR OPENING THE PROCEDURE**

(76) In its decision to open the procedure, the Commission found that doubts existed as to the application of the VAT exemption to the supplies of goods covered by the adjustment statements drawn up by the Special Tax Inspectorate. It was of the opinion that a wrongfully applied VAT exemption would result in an increase in profit margins for the supplier on the sales in question.

(77) The Commission noted that an intra-Community supply of goods, taxable in theory in Belgium, could benefit from an exemption if the following two conditions were met:

— the goods were dispatched or transported by the vendor or the purchaser or on their behalf beyond the territory of a Member State but within the Union, and

— the supply of the goods was carried out for another taxable person acting as such in a Member State other than that from which the goods were dispatched or transported.

(78) According to the information at the Commission's disposal, during the checks made by the Special Tax Inspectorate, Umicore did not appear to be in a position to prove that the conditions for exemption were fulfilled. Consequently, and in line with the rules on the application of VAT to supplies of goods in Belgium, a tax liability arose out of the fact that these taxable transactions had taken place.

(79) The Commission therefore considered that the agreement in question appeared to grant an advantage to Umicore consisting of a reduction in the tax burden it would normally have borne.

(80) The Commission also noted that it would be contradictory and unjustified to inflict a fine in proportion to the VAT evaded without recovering the VAT itself.

(81) According to the Commission, Umicore's alleged lack of fraudulent intent did not warrant the imposition of a proportional fine instead of the payment of the tax itself.

(82) The Commission further noted that the amount of VAT used in the basis for calculating the proportional fine (BEF 708 million) amounted to merely a part of the liability initially established in the Special Tax Inspectorate's notices (BEF 983 million). The information provided by Belgium on the calculation concerning the settlement made did not appear to take Umicore's VAT liability for the 1997-98 period into account under the adjustment notice of 30 April 1999.

(83) The Commission, moreover, expressed doubts as to the lawfulness of a subsequent reduction of the amount in question, applied under the non-deductibility of the fine as a business cost for the purposes of corporate tax.

(84) In addition, the Commission expressed doubts as to the way in which the agreement was reached. In particular, the fact that the agreement did not specify its legal basis and its formal justification from a legal point of view constituted a departure from the normal procedure for determining and settling a VAT liability generally applicable in Belgium. In principle, in instances in which the authorities challenge the right of a taxable person to an exemption, they send him an adjustment statement, generally accompanied by a fine. In the event that the taxable person objects to the tax claimed by the authorities and his objections are incapable of convincing the department concerned, the authorities should, in principle, send him a constraining order along with a 50 % increase in the fine.

(85) As for the selective nature of the measure, the Commission noted that discretionary practices by tax authorities are likely to give rise to advantages falling within the scope of Article 107(1) of the Treaty ([29]).

(86) The Commission therefore held that an amicable settlement such as the one from which Umicore had benefited, involving a reduction in a VAT liability, fines and interest, was not generally available to all taxpayers, even assuming that they were to dispute the merits of the infringements attributed to them, and that the criterion of selectivity was thus fulfilled.

(87) According to the Commission, the aid in question did not appear to benefit from any of the exemptions laid down in Article 107 of TFEU.

([29]) See judgment of the Court of Justice in Case C-241/94 *France* v *Commission* [1996] ECR I-4551; judgment of the Court of First Instance in Joined Cases T-127/99 *Diputación Foral de Álava*, T-128/99 *Comunidad Autónoma del País Vasco* and *Gasteizko Industria Lurra* and T-148/99 *Daewoo Electronics Manufacturing España* [2002] ECR II-1275, paragraphs 151 and 154.

IV. **BELGIUM'S COMMENTS**

Concerning the procedure followed

(88) Belgium emphasises that the VAT Code does not lay down any precise formal procedure for imposing adjustments on persons liable for VAT. A standard practice has, nevertheless, become established in this respect, aimed firstly at informing the taxpayer of the adjustment planned by the authorities and asking him to submit information which might prevent such taxation. This practice is consonant with the application of the principles of sound administration and the rights of the defence. In this context, the adjustment notice merely constitutes a proposal from the authorities designed as a basis for discussion with the taxable person, without giving rise to any legal effect on the taxable person or establishing a claim for the authorities. The adjustment notice essentially therefore enables the taxpayer to challenge the initial stance of the tax authorities and provide information in support of his position.

(89) According to Belgium, after examining the arguments presented by the taxpayer in response to the adjustment notice, it can happen that the adjustment planned has to be modified or even that the taxation has to be completely abandoned.

(90) Belgium also explains that the adjustment notice does not have the effect of creating a tax liability. Only the constraining order, rendered enforceable, constitutes the legal act by which the State establishes a tax liability for VAT ([30]). As no constraining order was ever issued to Umicore in the context of the case in question, the expression 'reduction of a VAT debt' is, in Belgium's view, inaccurate.

(91) In order to show that the procedure followed in the Umicore case is also adopted with respect to other taxpayers, Belgium submits a copy of an agreement made with a taxable person in 2000 for an amount of BEF 6 million, whereas the notice issued in 1995 to the same taxable person for the same transactions indicated that they were liable for a total of BEF 14 million.

(92) With regard to the procedure followed with that taxable person, Belgium adds that tax agreements are basic instruments in VAT matters, widely acknowledged by scholarly works and case law, and explicitly provided for by Article 84 of the VAT code. Settlements are thus an intrinsic part of the procedure in itself and are available to all taxpayers without exception.

(93) As for the fact that the agreement does not specify its legal basis, Belgium explains that Article 84 of the VAT Code does not lay down any binding form or content for tax agreements on VAT. There was consequently no obligation to mention any legal basis or formal justification in the agreement.

([30]) Article 85, VAT Code.

The rules of proof

(94) Belgium notes that the Commission questioned it in 1999 about the severity shown by the Belgian authorities in their appraisal of the evidence provided by taxpayers to prove the reality of the intra-Community supplies they had carried out. It refers, in this respect, to correspondence between the Commission and the Belgian Ministry of Finance regarding the standard of proof required to obtain an exemption in the event of an intra-Community supply ([31]).

(95) Belgium also notes that there is no precise method formally provided for in European Union legislation or in Belgian law by which taxpayers could and should, in all circumstances, prove their right to an exemption. On the contrary, it is for the tax authorities initially and, where necessary, for the courts subsequently, to assess on a case-by-case basis whether or not the information aimed at establishing that the conditions for an exemption have been fulfilled is sufficiently persuasive. In this context, Belgium also submits copies of a number of judgments deciding such issues in favour of the tax authorities.

Change in the authorities' appraisal

(96) With regard to the first adjustment notice concerning the years 1995 and 1996, Belgium explains that the following factors were taken into account in deciding not to levy the taxation initially considered:

— the non-involvement of Umicore in the fraudulent system,

— the goods were paid for before being transported by professional hauliers appointed by the purchasers,

— proof of the goods being transported to Italy was provided, even though this was essentially furnished by the Italian authorities rather than Umicore ([32]).

(97) Belgium indicates, however, that having recorded Umicore's shortcomings in terms of identifying the real customers, the Special Tax Inspectorate was of the opinion that a significant fine should be imposed on it. Against this backdrop, the authorities only compromised on the amount of the fine, as can be shown by the fact that the taxpayer's payment was recorded as a proportional fine in the Government accounts.

([31]) In its letter (SG(99) 3364) of 10 May 1999, the Commission indicated that, although the Belgian provisions appear reasonable and proportionate, the Commission had received a number of complaints from which it was apparent, in particular, that if the purchaser transports the goods acquired itself, the authorities require documents that the vendor cannot provide, inter alia, the freight papers.

([32]) In this respect, Belgium refers to Belgian case law according to which taxation must be based on the facts of the case and the principle of sound administration. On the basis of these principles, the tax authorities believe that they must take account of evidence furnished by the authorities of other countries in granting any exemption from VAT for intra-Community supplies.

(98) As for the second adjustment notice concerning the years 1997 and 1998, Belgium notes that proposal not to levy VAT is warranted as the conditions for the exemption were proven to have effectively been met. The goods were indeed sent to another Member State (Italy) and the deliveries were made to a company registered for VAT purposes in another Member State (the United Kingdom) ([33]).

(99) Belgium also indicated that the change in appraisal flowed from the fact that not all the relevant documents had become available in 1998 and 1999. When they were obtained, however, it was up to the authorities to assess, on the basis of all the information at its disposal, whether they could refuse the exemption and whether they would have a reasonable chance of success in defending such a decision before the courts. Belgium adds that, on the basis of a risk analysis similar to that of any private creditor, the Special Tax Inspectorate preferred an immediate, tangible and undisputed result rather than engaging in long and costly litigation the outcome of which was less than certain.

Imposition of a fine

(100) Belgium notes that when the adjustment notices were drawn up, the staff responsible automatically applied the legal provisions relating to the taxation concerned. In the event of an exemption wrongfully claimed or applied without fraudulent intent, Article 70(1) of the VAT Code and Table G (point VII.2.A) of Royal Decree No 41 provide for a fine of 10 % of the tax due. Belgium emphasises that in doing so the Special Tax Inspectorate's staff had necessarily considered that it was not possible to establish any fraudulent intent on Umicore's part.

(101) According to Belgium, the motive for the fine accepted in the agreement of 21 December 2000 was radically different from that underpinning the fine considered in the adjustment notices. With the reality of the intra-Community supplies having been established to the requisite legal standard, Belgium emphasises that it would have been completely contradictory to impose a fine based on Article 70(1) of the VAT Code on the ground that the exemption under Article 39 *bis* of that Code had been wrongfully claimed.

(102) Belgium further highlights that, although the reality of the intra-Community supplies had been established, the invoices produced by Umicore nonetheless showed gross negligence with respect to identifying the real Italian customers for the silver supplied. The fact that Umicore is a major player in economic terms, active essentially and continually at the international and, thus, European level, was taken into account when assessing the seriousness of this negligence. It was

([33]) In this instance, the Swiss company which purchased the goods had appointed a representative in the United Kingdom, who was registered for VAT and discharged his tax obligations in the United Kingdom.

therefore assumed that the company's managers must have known that the invoices bore shortcomings in the identification of customers and did not thus entirely comply with Belgian regulations. In view of the lack of other elements, however, this assumption was insufficient to establish fraudulent intent on the part of Umicore.

(103) Belgium refers to the way in which the amount of the settlement was calculated and explains that the imposition of a proportional fine when no VAT is due does not run counter to the legislation in force. When a transaction is taxable in principle ([34]), the VAT Code grants a subsequent exemption, which is entirely ex post, from tax in Belgium for certain transactions such as intra-Community supplies. It follows from this that a proportional fine can be imposed on the amount of tax due in principle on the transactions concerned, even if those transactions are subsequently exempted ([35]).

(104) Belgium concludes that the fine referred to in Article 70(2) of the VAT Code is a punishment for the inexactitude of the indications on invoices, irrespective of the VAT scheme to be applied to the transactions concerned. It is therefore, in its view, not true that such a fine cannot be imposed in the event of a transaction which is not taxable pursuant to Article 2 of the VAT Code. The fine provided for under Article 70(2) of the VAT Code is not, moreover, a punishment for failing to pay the tax, which is punished under Article 70(1) of the Code, but for making it possible to evade tax due at subsequent stages of the marketing of the goods concerned. By disguising the true identity of the purchaser of the goods, the authorities would lose track of them and would not be able to secure payment of either VAT or even the direct taxes due as result of the subsequent transactions involving the goods supplied. The administrative guidelines for the VAT Code are very clear in this respect ([36]).

(105) Regarding the calculation of the proportional fine, Belgium explains that a reduction from 200 %, as laid down in Article 70(2) of the VAT Code, to 100 % is entirely legal, since such a reduction is in line with the levels of fines stipulated in Table C of Royal Decree No 41 when there is no fraudulent intent.

(106) Belgium also emphasises that, according to the settled case law of the Belgian Court of Cassation, proportional fines for VAT are deductible from the tax base for corporate tax ([37]). Given the fact that Umicore wished to bring this deduction forward, so to speak, in order to put an end to its dispute with the Special Tax Inspectorate before the end of the 2000 financial year, the authorities reportedly accepted to included the effect of bringing the deduction forward in the settlement of 21 December 2000. Belgium further emphasises that accepting this request fell entirely within the Ministry's powers to reduce or waive fines. It also stresses that Umicore actually paid the amount of BEF 423 million before 31 December 2000 as it had undertaken to do.

The existence of State aid

(107) Belgium disputes ever having granted aid to Umicore. It also emphasises that the settlement under consideration did not bear any special feature or advantage for Umicore and it did not strengthen the position of the company in relation to competitors in trade between Member States in any way. It is of the opinion that Umicore did not benefit from any special treatment whatsoever, but was merely the subject of the material application to a particular case of a basic instrument which is very widely used.

(108) According to Belgium, such settlement agreements are commonplace not only in Belgium but, for obvious reasons (that is, to avoid long and costly litigation the outcome of which is uncertain) with the authorities of numerous other Member States. In this respect, Belgium notes that the Commission itself had recourse to a settlement agreement with Philip Morris International in a case involving the loss of customs duties and VAT which should have been paid for legal imports ([38]).

(109) Belgium adds that if VAT had been charged on the transactions at issue, that VAT would have had to be reimbursed to Umicore's customers by the tax authorities, since those customers could use their right to the deduction of VAT as undertakings registered for VAT. It would therefore have had no financial impact on Belgium's public accounts, with no transfer of state resources.

(110) As for the criterion of specificity, Belgium indicates that, contrary to what the Commission argued in its decision to open the procedure, the mere fact that the settlement agreement related only to Umicore is not enough to claim that the criterion of specificity has been fulfilled ([39]). In order to determine if there was a specific advantage, the measure would have to be assessed in the light of the treatment given to undertakings in similar factual and legal circumstances as the allegedly favoured undertaking ([40]).

([34]) Article 2 of the VAT Code stipulates that the supply of goods or services effected for consideration is subject to VAT if it takes place within Belgium. And Article 53(2) of the VAT Code makes it compulsory to issue an invoice for the supply of any goods or services, irrespective of whether or not it is actually taxed in Belgium.

([35]) Article 70(2) of the VAT Code would thus apply when invoices which are required to be issued under Articles 53, 53 *octies* and 54 of the Code, have not been drawn up or have not been drawn up correctly.

([36]) See VAT comment No 70/60 to 70/62.

([37]) See income tax comments Nos 53/97 and 53/97.1.

([38]) See press release of 9 July 2004, IP/04/882.

([39]) See paragraph 55 of the opening decision.

([40]) See the Opinion of the Advocate-General in Case C-353/95 *Schmid* [1997] ECR I-7007, paragraph 30.

(111) According to Belgium, if, as in this case, any person subject to VAT has the possibility to contest an adjustment notice, to present his arguments before the authorities and to conclude an agreement with the authorities relating to his specific case, which does not imply any derogation from the law and is confined, as indicated by the evidence submitted, to accepting the merits of the facts as established by the taxable person, the measure would be general and would not constitute aid within the meaning of Article 107 of the Treaty. According to Belgium, the procedure applicable to Umicore is open to other undertakings and applies in a similar manner to all disputes.

(112) In this respect, Belgium emphasizes that in this case the authorities did not have and did not use any discretionary or arbitrary powers in applying VAT law.

(113) According to Belgium, the measure under investigation is justified also by the nature and structure of the Belgian tax system. Under any administrative procedure, it is logical to expect a correct solution as soon as possible, which contributes to legal certainty while ensuring strict procedural compliance and effective recovery of the tax. The agreements concluded with taxpayers such as Umicore ultimately serve the purpose of avoiding protracted and indecisive legal disputes.

(114) The Belgian authorities point out that, to the best of their knowledge, the European competitors of Umicore supplied fine silver to the same Italian customers as Umicore and under the same terms, and that the VAT situation of those producers has not been the object of any adjustment applied by their national authorities on the ground that the fraud occurred in Italy and not at the producers. Because it accepted to pay a significant fine, while its competitors paid neither VAT nor any administrative fines, Umicore was certainly not an aid recipient, but the object of a measure that affected its competitive position in the relevant market. If there was any distortion of trade, it was to its disadvantage.

(115) Belgium considers therefore that the measure does not meet any of the conditions required in order to establish the existence of State aid under the Treaty. The case does not involve any transfer of resources, advantage, selectivity or distortion of competition or trade between Member States.

General comment on the application of Article 107 of the Treaty to tax agreements

(116) Belgium concludes that if the Commission intends henceforth to attack the very mechanism of tax settlements, even though it is widely used and essential for the proper functioning of tax collection by any tax authorities, in order to assess the substantive application of law it will have, in each case, to substitute itself for the national court acting as 'appeal court' for decisions by national authorities.

V. COMMENTS FROM INTERESTED PARTIES

V.1. Umicore

Outline of the general background

(117) Umicore begins by pointing out that, under the current practice developed in the area of international trade in precious metals, deliveries take place at the plant ('ex works'), the transportation of the goods being taken care of by the buyer. This type of sale appears to be very risky under the new VAT system for intra-Community supplies. The seller has to prove the reality of the transport operation, but in this case the documents proving the transport operation are in the possession of the buyer (given that, since 1993, the ultimate proof of transport, namely the customs stamp on the export document, no longer applies to intra-Community supplies).

(118) As regards the proof of transport of the goods, more particularly, Umicore emphasizes that it submitted to the Special Tax Inspectorate very detailed documentation justifying the transport.

(119) Umicore also mentions that it acted in good faith in connection with the disputed transactions, as witness the 10 % fine indicated in the adjustment notices, which applies only to taxable persons who act in good faith. In this context, Umicore also points out that it cooperated spontaneously with the Italian legal authorities, which, convinced of its good faith, did not proceed against it.

(120) Umicore also underscores that, in its opinion, the Italian authorities are liable to the extent that they did not cancel the VAT numbers of the fictitious Italian companies as soon as serious irregularities were found by the Italian tax authorities.

(121) Umicore also maintains that other competing silver producers, established in other Member States, carried out deliveries to the same Swiss and Italian intermediaries under the same circumstances and terms as those of the deliveries carried out by itself but their deliveries have not been questioned by their tax authorities. It is therefore unacceptable for Umicore, after having paid BEF 423 million (EUR 10 485 896), to be considered a State aid recipient when those other competing companies escape any prosecution.

(122) Finally, Umicore agrees with the comments submitted by Belgium, according to which an adjustment notice, contrary to a constraining order, does not in any way create a VAT debt under Belgian law.

Procedure followed by the Special Tax Inspectorate

(123) Umicore's arguments are similar to those made by Belgium in respect of the legality and validity of VAT agreements concluded between the authorities and taxable persons. The interested party recalls that such agreements may apply only to factual questions such as the proof of transport for intra-Community supplies (and the resulting tax base). In this context, Umicore states that the practice of concluding such agreements is widespread, including at the level of the Special Tax Inspectorate services ([41]).

(124) The interested party also mentions that the validity and legality of reductions in administrative fines, in exchange for an agreement with the taxpayer in respect of the amount, are confirmed by case law ([42]).

(125) Finally, as regards the factoring-in of the tax deductibility of the payable amount, Umicore emphasizes the following:

— the Special Tax Inspectorate does not have only VAT competences, but also competences relating to income tax,

— instead of requesting that Umicore pay a gross amount before income tax, which would have been tax deductible, the Special Tax Inspectorate accepted the payment of a net amount, after tax, provided that, of course, as specified in the agreement, the net amount was not itself tax deductible. In return, Umicore accepted to pay the (net) amount within a very short period (a week), which did not violate any applicable legal provision.

(126) Umicore considers that the amount of BEF 423 million represents VAT owed for the period 1995-96 and that the Special Tax Inspectorate exempted Umicore from paying late interest pursuant to Article 84a of the VAT Code and a proportional fine (of 10 %) pursuant to Article 9 of the Regent's Decree.

(127) As regards the reduction of the VAT owed from BEF 708 million to BEF 423 million, Umicore stresses that it is justified by the fact that the VAT claim established when Umicore invoiced the VAT to Italian and Swiss buyers remains unpaid and is therefore tax deductible.

(128) In connection with the years 1997-98, Umicore states that the adjustment notice of 30 April 1999 has not been acted upon, since the taxable person provided appropriate evidence that the sales in question could be exempted from VAT pursuant to Article 39a of the VAT Code.

Existence of an advantage

(129) Umicore considers that a tax agreement such as the agreement at issue does not constitute an advantage within the meaning of the TFEU and therefore it is not State aid. In particular, Umicore disputes the Commission's allegation that the tax agreement at issue placed the company in a more favourable position than other taxpayers.

(130) First, Umicore states that in reality the Special Tax Inspectorate itself assessed the tax agreement as more advantageous for the Treasury than the launching of a procedure whose final outcome risked being less favourable.

(131) Second, the possibility of concluding a tax agreement and reaching a compromise does not constitute in itself an advantage specific to Umicore. Such agreements are available to all taxable persons and are a current and normal practice in the field of VAT.

(132) Third, a settlement agreement, by its very nature, does not grant any advantage capable of being caught by the State aid rules. By definition, any decision to compromise involves assessing the risks for each of the parties in question by comparing a certain and immediate payment with the supposed or possible outcome of a legal dispute.

(133) Umicore considers, therefore, that it is an error to describe the terms of a settlement as an 'advantage', except in exceptional situations where one party derives from that settlement an outcome that is obviously superior to what it could expect from a legal dispute.

(134) According to Umicore, the Commission presupposes that if the tax dispute had had to be brought before the Belgian courts, by way of an appeal against the administrative decision, the court seized would necessarily have sentenced Umicore to pay a larger amount than that based on the agreement concluded between the

([41]) Umicore mentions statistical data from the Special Tax Inspectorate according to which 22 % of the additional VAT charged for increases in turnover in the period 2000-02 was determined pursuant to an agreement concluded with the taxable person.

([42]) In its judgment of 10 January 1991, in case FJ.F 91/204, the Namur General Court stated that 'tax authorities and the taxpayer may validly compromise on the VAT taxable base. Under the applicable legal and regulatory provisions, by accepting the transaction concerning the taxable base, the taxpayer also requests the benefit of a reduction in fines. The operation thus corresponds, by its very nature, to the definition of a transaction whose main feature is the existence of mutual concessions between the parties. In the case in question, the concession made by the taxpayer is the acceptance of the taxable base resulting from the adjustment notice following the check. The concession made by the tax authorities is the reduction in the legal fines linked to the agreement on the taxable base.'

Special Tax Inspectorate and Umicore. To reach such a conclusion, the Commission would have to substitute its own assessment for that of the national authorities or even that of the national courts, as applicable.

(135) Fourth, Umicore refers to the case *Déménagements-Manutention Transport SA (DMT)* ([43]), where the Court of Justice concluded that by granting payment facilities to the company in question the ONSS ([44]) acted as a public creditor which, like a private creditor, sought to obtain the amounts owed to it by a debtor in financial difficulty. The Court then decided that it was for the national courts to determine whether the payment facilities were clearly more significant than those that the company could obtain from a private creditor.

(136) Following the reasoning of the Court, Umicore estimates that in the present case the Special Tax Inspectorate, acting as a public creditor which seeks to obtain the amounts owed to it just like a private creditor, opted for the immediate payment of a net amount instead of a gross amount, which made the recovery of the amount certain and very fast. This behaviour is therefore rational and cautious from an economic standpoint, and comparable with the behaviour of a hypothetical private creditor in the same situation.

Selectivity

(137) Umicore considers that the selectivity criterion has clearly not been met in this case, since the tax agreement at issue is only one specific application of a general scheme available to all taxpayers in the same situation and the Special Tax Inspectorate does not exercise any discretionary powers when compromising.

(138) Even if the measure at issue were considered selective, it would still be justified by the nature and structure of the system. According to Umicore, even if it is selective, a tax measure should be considered as not conferring an advantage as long as it has been demonstrated that it contributes to the effectiveness of tax recovery ([45]). In the present case, Umicore considers that the measure is justified by the nature and structure of the system to the extent that the agreement concluded contributed to the effective recovery of tax ([46]).

Exceeding of powers

(139) Umicore states that interpreting the concept of State aid as including a tax agreement such as the one concluded with the Special Tax Inspectorate would inevitably lead the Commission to exceed its powers by assuming a competence in respect of the recovery of indirect taxes which it does not have, and to encroach upon the prerogatives of the national courts, which are alone competent to decide on tax disputes.

Absence of effect on competition or trade

(140) Umicore points out that it paid a considerable amount to the Special Tax Inspectorate while other competing silver producers established in other Member States did not pay any VAT, fine or interest on deliveries carried out under identical circumstances and terms.

(141) In this context, Umicore considers that the measure at issue clearly could not strengthen its competitive position in the relevant market, i.e. the market for silver granules. Consequently, Umicore takes the view that the agreement concluded with the Special Tax Inspectorate does not affect competition or trade between Member States and therefore Article 107(1) of the Treaty does not apply to the present case.

V.2. **Anonymous third party**

(142) An anonymous third party sent the Commission a copy of a letter addressed to the Belgian Finance Minister, dated 15 February 2002, containing a legal analysis of the agreement concluded with Umicore and of the transactions in question.

(143) In that letter, the anonymous third party points out that (a) the effect of the agreement concluded between the Special Tax Inspectorate and Umicore was to transform an amount of VAT due into a fine, in breach of Articles 10 and 172 of the Belgian Constitution and Article 84 of the VAT Code; (b) it is illegal to take into account the impact of corporate tax when calculating the amount of VAT due or the fine; and (c) it is illogical to apply a fine proportional to the amount of VAT without demanding payment of the VAT itself.

([43]) Case C-256/97 *DM Transport* [1999] ECR I-3913. DM Transport was liable to pay BEF 18,1 million to the Belgian National Office for Social Security (NOSS) as amounts withheld from salaries and as employer's contributions. Under Belgian law, an employer that does not pay the contributions in time is subject, among other things, to surcharges and criminal penalties. It is recognised, however, that the NOSS may grant grace periods. Considering that the payment facilities enabled the insolvent company to survive in an artificial manner, the Brussels Commercial Court made a referral for a preliminary ruling to the Court with a view to establishing whether such payment facilities could constitute State aid.

([44]) National Office for Social Security in Belgium.

([45]) Judgment in Case T-127/99 *Diputación Foral de Álava and Others* v *Commission of the European Communities* [2002] ECR II-1275, paragraphs 164-166.

([46]) In this respect, Umicore refers to paragraph 26 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3), according to which the purpose of a tax system is 'to collect revenue to finance State expenditure'.

VI. BELGIUM'S REACTION TO THE COMMENTS OF THE INTERESTED PARTIES

(144) Belgium considers that the position of Umicore generally confirms the position of Belgium on the procedure in question, in particular as regards the non-existence of a formal VAT rectification procedure, the lack of legal force of an adjustment notice not signed by the taxable person, the legality of tax agreements and their availability to all taxpayers, and more generally the lack of elements constituting State aid.

(145) In connection with the anonymous letter of 1 October 2004, Belgium considers that it does not contain any specific observation relating to the State aid procedure and is therefore irrelevant.

VII. ADDITIONAL INFORMATION PROVIDED BY BELGIUM

(146) After returning the documents seized by the legal authorities, Belgium sent the Commission information and documents concerning the transactions covered by this procedure.

(147) As regards sales to customers established in Italy, Belgium has sent the documents on the basis of which it was decided to grant the exemption provided for in Article 39 *bis* of the VAT Code. More specifically, the documents in question include invoices issued by Umicore, transport invoices and other transport documents.

(148) As regards deliveries to customers established in Switzerland, Belgium has sent a number of documents intended to demonstrate that the goods were transported directly to Italy. According to Belgium, the role played by the Swiss companies was limited to a financial intervention in the purchasing and transport operations.

(149) In connection with the deliveries carried out in 1997 and 1998, Belgium has pointed out that initially the adjustment for 1995-96 was also applied in the following years. Belgium adds that the inspectors of the Special Tax Inspectorate themselves abandoned the adjustment for this period very quickly. To this end, Belgium has submitted also copies of internal memoranda showing that the inspectors in question effectively abandoned the envisaged taxation.

VIII. ASSESSMENT OF THE AID

(150) Pursuant to Article 107(1) of the Treaty, 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.

(151) The classification of a measure as State aid requires the following cumulative conditions to be met: (1) the measure in question confers an advantage through state resources; (2) the advantage is selective; and (3) the measure distorts or threatens to distort competition and is capable of affecting trade between Member States.

(152) It should also be recalled that, according to established case law, the concept of aid includes not only positive actions such as subsidies, but also interventions, such as exemptions and tax relief, which act in various ways to provide relief from charges normally borne by company budgets ([47]).

VIII.1. Preliminary remarks

(153) It should first be noted that settlement agreements concluded with taxpayers are a normal practice of the Belgian tax authorities and in the field of VAT they are explicitly provided for in Article 84 of the VAT Code. Moreover, this Decision does not question the utility of such agreements, which serve to avoid numerous legal disputes.

(154) It should be recalled that the applicable Belgian administrative rules state that concluding a settlement with the taxpayer generally involves concessions on both sides. Nevertheless, in accordance with Article 84 of the VAT Code, such settlements are possible only to the extent that they do not involve a tax exemption or reduction. Pursuant to this principle, a settlement cannot refer to the amount of tax arising from the established facts, but rather to points of fact.

(155) In this context, the Commission considers that a settlement agreement between a person subject to VAT and the Belgian tax authorities can lead to an economic advantage only under the following conditions:

— when the concessions made by the authorities are clearly out of proportion to the concessions made by the taxable person, given the circumstances, and there are indications that the authorities clearly do not apply the same favourable treatment to other taxpayers in similar situations,

— when the legality of the agreement must be questioned, for example when the amount of tax due is reduced in violation of Article 84 of the VAT Code (tax exemption or reduction concerning a point of law).

(156) It is necessary, therefore, to examine whether the settlement concluded between the Special Tax Inspectorate and Umicore meets the conditions mentioned above.

([47]) See, for instance, judgment of the Court of Justice in Case C-387/92 *Banco de Crédito Industrial, now Banco Exterior de España SA* v *Ayuntamiento de Valencia* [1994] ECR I-877, paragraph 13; judgment in Case C-143/99 *Adria Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH* v *Finanzlandesdirektion für Kärnten* [2001] ECR I-8365, paragraph 38; judgment in Case C-53/00 *Ferring SA* v *Agence centrale des organismes de sécurité sociale (ACOSS)* [2001] ECR I-9067, paragraph 15; judgment in Case C-172/03 *Wolfgang Heiser* v *Finanzamt Innsbruck* [2005] ECR I-1627, paragraph 36; judgment in Joined Cases C-182/03 and C-217/03 *Kingdom of Belgium and Forum 187 ASBL* v *Commission of the European Communities* [2003] ECR I-6887, paragraph 86.

VIII.2. **Existence of an advantage**

(157) It is necessary, first of all, to check whether the measure grants the beneficiary any advantage that provides relief from charges normally borne by its budget ([48]). In the case under consideration, this involves determining whether the disputed settlement was concluded illegally or on the basis of disproportionate concessions made by the tax authorities.

VIII.2.1. *Regularity of the procedure*

(158) In its opening decision, the Commission stated that the procedure followed by the tax authorities could constitute a deviation from the normal course of the procedure for determining and settling VAT debt in so far as the agreement does not mention the legal basis and the tax authorities, in the absence of an agreement with the taxpayer, could issue a constraining order accompanied by a 50 % increase in the fine.

(159) As already indicated in recital 39, issuing an adjustment notice is a normal practice of the Belgian tax authorities in the field of VAT, aimed at ensuring compliance with fundamental principles such as the right to defence. Consequently, the two adjustment notices issued by the Special Tax Inspectorate and addressed to Umicore have to be considered preliminary notices issued by the tax authorities and not as giving rise to a VAT exemption.

(160) Moreover, the possibility of concluding settlement agreements with taxable persons is explicitly provided for in the Belgian VAT Code and has to be considered a normal practice of the Belgian tax authorities. However, the authorities must comply with the principle that such settlements can involve neither an exemption from nor a reduction in the amount of tax due. Therefore, such settlements can occur, in principle, only in situations where the tax authorities wish to avoid a legal dispute with the taxable person concerning facts that have not been clearly established.

(161) Furthermore, it should be noted that the tax authorities are under no obligation to issue a constraining order in cases where the authorities have not been able to reach an agreement with the taxable person on the taxation proposed in the adjustment notice. On the contrary, where there are doubts concerning the facts at issue, the competent authorities may still attempt to conclude an agreement with the taxable person.

(162) Finally, the analysis of the legal texts shows that there is no provision that establishes an obligation for the Belgian tax authorities to indicate an explicit legal basis in the agreements in question.

(163) Therefore, the Commission has to conclude, on the basis of the legal context described in this Decision, that the procedure applied by the tax authorities in relation to Umicore was carried out in compliance with the rules and practices in force and did not constitute a deviation from the normal course of the procedure.

(164) It is then necessary to analyse the settlements in question by taking into account the preliminary remarks made, with a view to determining the possible existence of an advantage. The reasoning presented below rests on the analysis of two distinct periods, one that includes the years 1995 and 1996 which were covered by the adjustment carried out by the tax authorities and one that includes the years 1997 and 1998 for which taxation was completely abandoned.

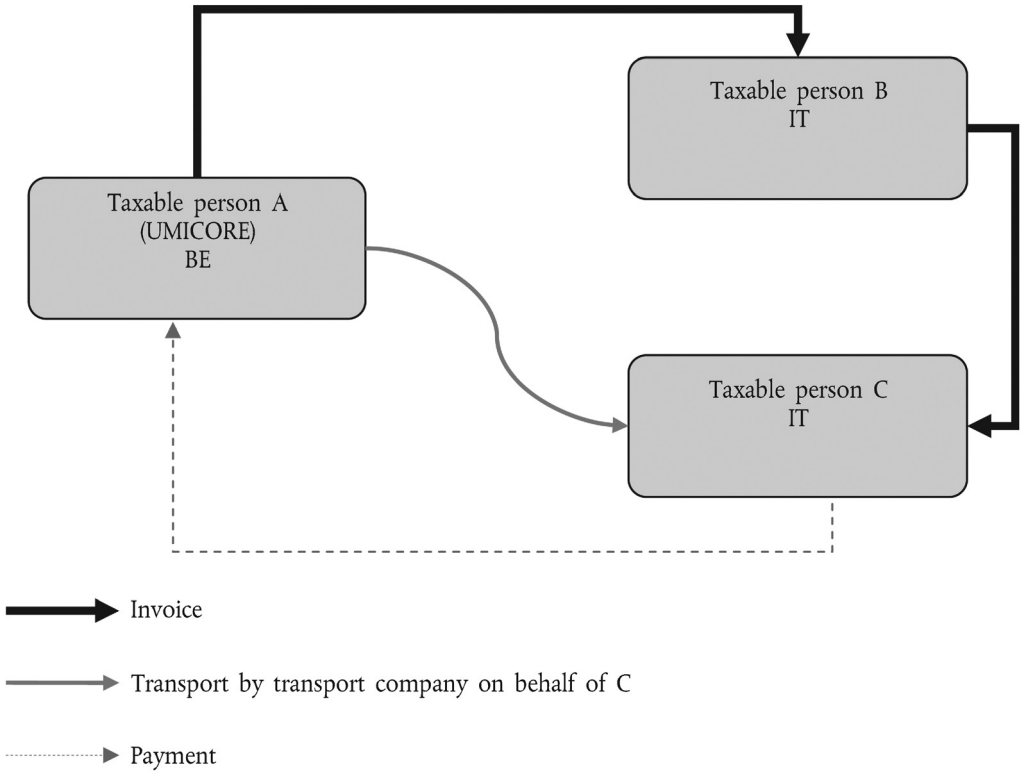
VIII.2.2. *Years 1995-96*

(165) As regards the period 1995-96, it is necessary to analyse three different types of transaction covered by the draft rectification notified to Umicore on 30 November 1998, in order to determine the possible existence of an advantage. For each type of transaction, the analysis seeks to identify the minimum amounts of VAT, fines and late interest that should have been imposed by the Belgian tax authorities on the basis of a reasonable interpretation of the facts, without excessive concessions or irregular application of the VAT rules.

1. Deliveries of goods to customers established in Italy

(166) The first case refers to transactions relating to 'ex-works' deliveries of pure silver carried out between February 1995 and February 1996, as follows:

([48]) See paragraph 9 of the 1998 notice cited in footnote 46.



(167) Umicore invoiced the goods to company B ([49]), established in Italy and holding a VAT registration number issued in that Member State. The latter company re-invoiced the goods to customer C, another taxable person subject to VAT established in Italy. The goods were transported, on behalf of C, directly from the place of production in Belgium to Italy. Most of the invoices issued by Umicore for its customer B were paid for by taxable person C.

(168) Umicore issued the invoices addressed to B under the exemption provided for in Article 39 *bis* of the VAT Code. The examination of the pro forma invoices, obtained through administrative cooperation with the Italian tax authorities, suggests that taxable person C was the consignee of the goods.

(169) In its adjustment notice of 30 November 1998, the Special Tax Inspectorate considered initially that the transport criterion for the exemption of intra-Community supplies had not been met in so far as the transport had been carried out on behalf of a subsequent customer (and not by or on behalf of the seller or the buyer, as provided for in Article 39 *bis* of the VAT Code). On this basis, the authorities took the view that the transaction concluded between Umicore and customer B constituted a delivery of goods that did not include transport and therefore could not benefit from the exemption in Article 39 *bis* of the VAT Code.

([49]) 'Company B' is actually a reference to two separate Italian companies.

(170) The information communicated by Belgium and Umicore to the Commission appears to indicate, nonetheless, that the reality of the transaction between Umicore and company B could reasonably be called into question by the Belgian tax authorities. For instance:

— the information communicated by the Italian tax authorities appeared to indicate that company B could be regarded as a 'missing trader', the role of which was confined to producing invoices charging VAT and then disappearing without fulfilling its tax obligations, including the payment of the VAT to the Italian tax authorities,

— the information communicated by the Italian tax authorities also indicated that the sole director of company B was not recorded on the police register,

— two requests for information sent by the Belgian tax authorities to their Italian counterparts on 26 August 1998 and 1 April 1999 also indicate that the Belgian tax authorities had serious doubts as to the actual existence of company B prior to the conclusion of the agreement,

— the goods had been transported to Italy on behalf of company C, a taxable person,

— the goods had been directly transported from the production site in Belgium to a warehouse in Italy where they had been made available to C,

— the vast majority of the invoices which Umicore sent to company B had been paid by company C,

— based on statements made by the Umicore managers and set out in a report, an extract from which was included in the adjustment notice, it seems that there was no contract between Umicore and company B,

— however, it seems that the actual existence of company C was never questioned by the Italian tax authorities, who had obtained full access to its accounts during an inspection.

(171) Look at separately, neither one of these observations is probably sufficient to demonstrate the fictitious nature of the sale between Umicore and company B. However, when looked at together, these observations can instil definite doubt about the reality of the sale between Umicore and company B. The Belgian tax authorities, who had been informed of suspicions about the actual existence of the activities of company B before the conclusion of the transaction with Umicore on 21 December 2000, thus enjoyed a wide discretion in assessing the reality of the transactions and, where appropriate, in reclassifying them.

(172) It must be remembered, in this respect, that in line with the settled case law of the Court of Cassation in Belgium, tax must be based on actual facts ([50]). The Belgian tax authorities are therefore required in principle to base their taxation, not on apparent transactions presented by a taxable person to justify a potential exemption, but on actual transactions based on the real intentions of the parties.

(173) If it emerged from the information available to the Belgian tax authorities that the sale between A and B was fictitious and that the real sale (involving transfer of the power to dispose of the goods) had in fact occurred between A and C, these authorities were therefore entitled to reclassify delivery of the goods between A and B as delivery of the goods between A and C, and to apply the VAT rules to this reclassified transaction.

(174) The fact that fraud had occurred in Italy through the intermediary of a missing trader does not mean that the right to exemption which Umicore could avail itself of should be called into question, since the good faith of the latter had not been disputed by the Belgian authorities.

([50]) See Section II.2.

(175) In the light of the above, the Belgian tax authorities could legitimately reclassify the transactions in question as intra-Community supplies between Umicore and company C, without this reclassification constituting a disproportionate concession or irregular application of VAT rules. They could also exempt the reclassified transactions from VAT since all the conditions for exemption had been met (including transport by or on behalf of the purchaser).

(176) It must therefore be examined (i) whether the Belgian tax authorities were entitled to impose a fine based on Article 70(2) of the VAT Code because of the inaccurate information on the invoices and, if so, (ii) what should have been the amount of this fine, and (iii) whether Umicore benefited from disproportionate concessions or irregular application of the law by the tax authorities.

(177) First, it must be pointed out that, in the case of inaccurate information featured on an invoice relating to intra-Community supplies, Royal Decree No 41 provides for a fine amounting to 100 % of the tax owed on the transactions in question. Nevertheless, as stated in recitals 45 and 46, administrative fines are subject to the principle of proportionality and the authorities have the power, pursuant to Article 9 of the Regent's Decree of 18 March 1831, to depart from the scales for fines set out in Royal Decree No 41.

(178) In the present case, it cannot be ruled out that a fine of 100 % would have been disproportionate given the good faith of the taxable person, which had not been disputed by the tax authorities. It may also be true that, in the context of the legal proceedings with Umicore, the Belgian tax authorities had attempted to maximise its revenue in the same way that a creditor tries to optimise the recovery of the amount owed to him. It must be remembered that this practice is unlikely to come within the scope of Article 107 of the Treaty in so far as it does not give rise to disproportionate or illegal concessions by the authorities.

(179) Given the discretion available to the authorities in this context, it can reasonably be considered that, in a settlement agreement, the amount of the fine should have been set by the authorities at between 10 % and 50 %. A 10 % rate can be regarded as acceptable with reference to the 10 % rate provided for in table G of the annex to Royal Decree No 41 for infringements covered by Article 70(1) of the VAT Code and with reference to the 10 % fine referred to in the adjustment notice of 30 November 1998. In addition, the 50 % rate could be regarded as the maximum rate applicable in line with the principle of proportionality and the context of a settlement agreement. The application of a 50 %

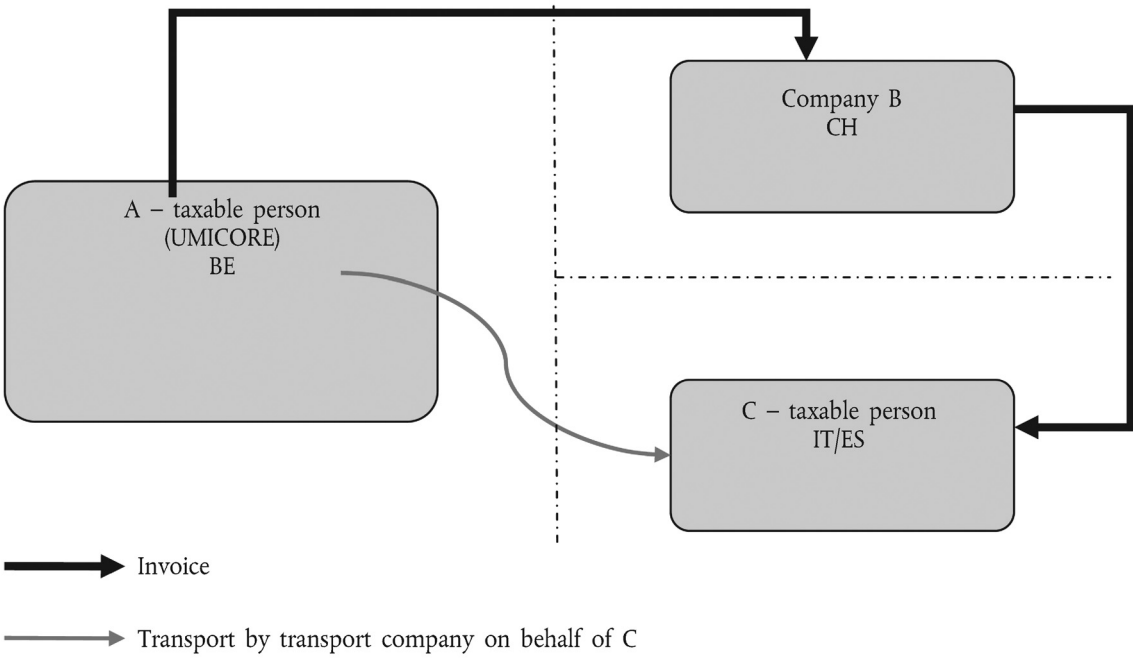
rate also appears to be supported by recent case law of the Belgian Court of Cassation ([51]). Given the fact that this last judgment concerns a criminal case, it can therefore be considered, in the present case, in which the absence of fraudulent intent on the part of Umicore has been established, that a 50 % rate is the maximum rate.

(180) It can therefore be concluded, given the circumstances of the present case, that the fine could reasonably be set at between BEF 33 238 698 (10 % of BEF 332 386 976) and BEF 166 193 488 (50 % of BEF 332 386 976).

(181) Since a selective advantage could only have resulted from disproportionate concessions by the tax authorities, only the lowest amount – BEF 33 238 698 – must be taken into account when determining the potential advantage. This amount is in principle deductible from the tax base for corporate tax ([52]).

2. Deliveries of goods to customers established in Switzerland

(182) In the second example, the sequence of disputed transactions with Swiss customers was as follows:



(183) Between February and October 1996, Umicore invoiced the goods to a company B ([53]), established in Switzerland, with no VAT registration number in any Member State. The Swiss company then re-invoiced the goods to customer C, liable for VAT, who was established in Italy. The goods were transported directly from the place of production in Belgium to Italy. On the basis of documents communicated by Belgium, it appears that the transportation was commissioned by company C. It also appears that, in some cases, company C paid the price of the goods directly to Umicore, while in others the payment was made by company B. Company C in fact refers to companies deemed fictitious by the Spanish and Italian tax authorities ([54]).

(184) The invoices which Umicore sent to Swiss company B between February and October 1996 concern sales of pure silver 'ex works (Hoboken)', with the following indications: 'Export – Exempt from VAT pursuant to Article 39 of the Code'.

(185) Although the goods in question were indeed delivered by Umicore and were exempt from VAT under Article 39 of the VAT Code, the information obtained by the Special Tax Inspectorate from the taxable person and from Belgian Customs and Excise indicated that the goods had been transported to Italy but that export had not taken place.

([51]) Cassation, judgments of 12.9.2009, cited above. The Court confirmed that a fine of 200 % was disproportionate given the circumstances and that the Court of Appeal had quite rightly reduced it to 50 %.

([52]) See Section II.2.

([53]) 'Company B' actually refers to two companies established in Switzerland.

([54]) 'C' in fact refers to the same companies as 'B' in the third example described in the next recital.

(186) Because the goods had not been exported and hence there was no entitlement to exemption under Article 39 of the VAT Code, the question once again is whether the Belgian tax authorities could have been led to conclude that the transactions between Umicore and the Swiss company were fictitious, that the real transactions had occurred between Umicore and C, and that these transactions might be exempt in line with Article 39 *bis* of the VAT Code.

(187) In its adjustment notice of 30 November 1998, the Special Tax Inspectorate had considered that the criteria for exemption in line with Article 39 of the VAT Code (exports) had not been met since no document providing evidence of actual export, and in particular no export declaration, had been produced.

(188) In view of this, the authorities had concluded that the transactions between Umicore and the Swiss companies could not be exempted from VAT in line with Article 39 of the VAT Code and were deemed to have taken place in Belgium, in accordance with Article 15(7) of the VAT Code. They were therefore subject to Belgian VAT under Article 2 of the VAT Code. The authorities thus considered that Umicore was liable for VAT amounting to BEF 312 608 393 ([55]) (EUR 7 749 359) and for a fine of 10 % of this amount.

(189) In a further reply of 30 March 2000 concerning the adjustment statements, Umicore stated that it had been established that the mechanism used was fictitious, something which Umicore's commercial department could not have known. The goods were never imported into Switzerland and it was therefore essential to point out that, in these cases as in the others, the reality of the deliveries to Italy was not disputed.

(190) It appears, moreover, that the name of the Italian taxable person, the consignee, is explicitly indicated on the pro forma invoices which Umicore sent to its Swiss customers, and that the identity of this consignee is confirmed in the waybills drawn up by the carrier.

(191) The transactions concerned cannot be reclassified as intra-Community supplies between Umicore and company C for the following reasons:

— at the time when the agreement was concluded, the Belgian authorities had already been informed that company C in fact referred to entities regarded as fictitious by the Italian and Spanish tax authorities,

— the actual existence of the Swiss companies had never been questioned by either the Belgian or the Italian tax authorities, or by Umicore,

— Umicore could not have known that it was not entitled to apply the exemption in Article 39 of the VAT Code (VAT exemption for exports) because the goods had not been exported.

(192) Consequently, the transactions in question were not eligible for a VAT exemption on the basis of Article 39 of the VAT Code (because the goods had not been exported) or for a VAT exemption under Article 39 *bis* of the VAT Code. They must, in this case, be looked upon as deliveries of goods without transport which are not eligible for a VAT exemption. Therefore, in accordance with Articles 2 and 15(2) and (7) of the VAT Code, Umicore owed VAT amounting to BEF 312 608 393 (EUR 7 749 359). Moreover, a 10 % fine, amounting to BEF 31 260 839, was also chargeable on this amount under Article 70(1) of the VAT Code and Article 1(1) of Royal Decree No 41. There is nothing in the file to lead the Commission to consider that this 10 % rate would pose a problem in terms of the principle of proportionality ([56]).

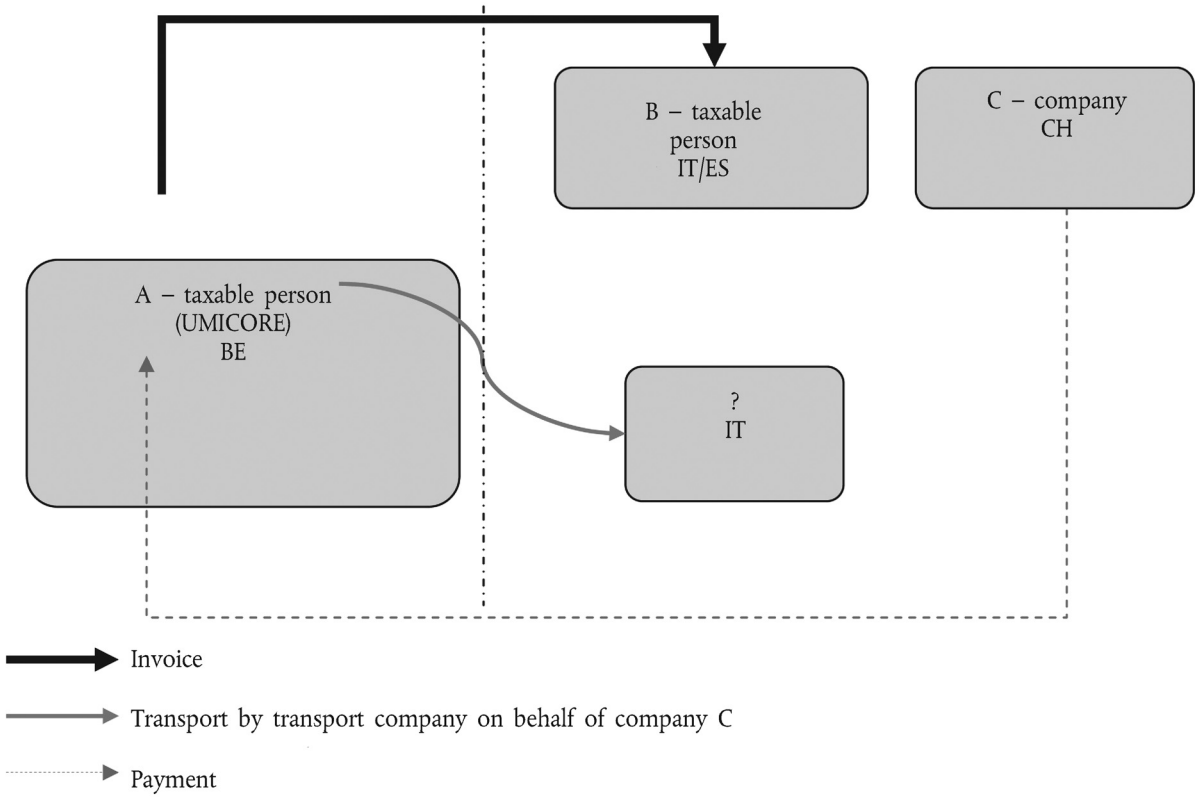
(193) In line with the tax rules applicable, the additional VAT owed by the taxable person and not invoiced to the customer must be regarded as a deductible expense when determining the taxable base for corporate tax. The amount of the administrative fine can also be deducted from corporate tax.

3. Deliveries of goods to customers established in Italy and Spain

(194) Between October and December 1996, the sequence of disputed transactions with these customers was as follows:

([55]) 21 % of BEF 1 488 611 396 = BEF 312 608 393.

([56]) In the cases to which Article 70(1) applies, the 10 % rate is the minimum applied by the tax authorities.



(195) Umicore invoiced the goods to companies 'B' established in Italy and Spain and registered for VAT there. The invoices concerned sales of pure silver ex works and were drawn up on the basis of the exemption in either Article 39 (exports) or Article 39 *bis* (intra-Community supplies) of the VAT Code. The goods were transported directly from the place of production in Belgium to Italy. In most cases, the invoices were paid by Swiss company C ([57]), which also seemed to be the company which actually commissioned the transport ([58]).

(196) Lastly, the information sent by the Italian and Spanish tax authorities to the Belgian authorities prior to the conclusion of the settlement agreement would seem to indicate that companies B were fictitious.

(197) In their adjustment notice of 30 November 1998, the Belgian tax authorities considered that the owners indicated on the invoices were incorrect and that the real owners of the goods were Swiss companies C. The Belgian authorities stated in their adjustment notice that, where goods were not exported outside the territory of the EU, the exemption provided for in Article 39 of the VAT Code did not apply and the sales in question had to be reclassified as deliveries of goods subject to Belgian VAT under Article 15(2) and (7), and Article 2 of the VAT Code. The authorities thus considered that Umicore was liable for VAT amounting to BEF 63 216 555 ([59]) (EUR 1 567 097,46) and for a fine of 10 % of this amount.

(198) In the context of an exchange of correspondence with the Special Tax Inspectorate, Umicore stated that the Swiss companies had been mandated by companies B to organise the transport of the goods and were in addition acting as the financial agent for these companies.

(199) It must be pointed out here that there is no evidence in the file to suggest that the Swiss companies had acted as transport agents for the Italian and Spanish companies. On the contrary, all the documents communicated to the Commission would seem to indicate that the goods had been transported on behalf of the Swiss companies and that they were the recipients and actual owners of these goods.

([57]) Company C in fact refers to the same Swiss companies as were involved in the second example.

([58]) On the pro forma invoices drawn up by Umicore, company C is given as the 'owner' in the description of the goods. The waybills were initially addressed to Swiss company C and generally state that the goods were being transported to Italy on behalf of Swiss company C.

([59]) 21 % of the amounts invoiced: (29 595 944 + 34 744 972 + 32 355 113 + 73 803 950 + 130 531 237) × 21 % = BEF 63 216 555.

(200) The Commission therefore considers that the Belgian tax authorities had been quite right to reclassify the disputed transactions in their adjustment notice as deliveries of goods to the Swiss companies. These deliveries must therefore be subject to Belgian VAT pursuant to Article 15(2) and (7), and Article 2 of the VAT Code; they are not eligible for an exemption on the basis of Article 39 or 39 *bis* of this Code.

(201) Even if the tax authorities had been able to legitimately recognise the existence of the transactions with the Italian and Spanish companies, exemption on the basis of Article 39 *bis* of the VAT Code would have had to be refused on the ground that the goods had not been transported by or on behalf of the seller (Umicore) or purchaser (B).

(202) It must therefore be concluded that Umicore was liable to pay VAT amounting to BEF 63 216 555 (EUR 1 567 097,46) plus an administrative fine of BEF 6 321 655 (10 % of the VAT owed) pursuant to Article 70(1) of the VAT Code and of Article 1(1) of Royal Decree No 41.

(203) This amount of BEF 63 216 555 and the administrative fine can in principle be deducted from corporate tax.

4. Consideration of the non-deductibility of the amount of the transaction

(204) The practice of considering an administrative fine, which is in principle deductible (from the tax base) for corporate tax, as non-deductible and of then reducing the amount of this fine to take account of its non-deductibility (compensation or netting) is not in keeping with administrative rules or practice in this area ([60]). As a result, the advantage and disadvantage resulting from this practice must be looked at compared with a situation in which such compensation has not been applied by the authorities.

(205) The same reasoning can be applied to the amounts of VAT which are in principle deductible from corporate tax and which would have benefited from this compensation.

(206) Of the amounts established in the previous recitals, the following must be regarded as deductible:

BEF 33 238 698 + 312 608 393 + 31 260 839 + 63 216 555 + 6 321 655 = BEF 446 646 140.

(207) The negative impact for Umicore of not being able to deduct these amounts can, in principle, be estimated at:

BEF 446 646 140 × 40,17 % ([61]) = BEF 179 417 754.

(208) However, given that Umicore showed a tax loss in terms of taxable income for 2000, the non-deductibility of the amounts concerned actually only had a negative impact the following tax year (2001 earnings) when Umicore in fact credited the entire tax loss that could be carried over against its earnings. The compensation mechanism as applied by the Belgian authorities therefore had the effect of deferring payment of the tax and fine until the following tax year.

(209) In addition, since Belgian corporate tax is in general collected by means of advance payments made by the taxpayer during the tax year in order to avoid increases in the amount of tax to be paid ([62]), it is reasonable to consider that without compensation, Umicore would have had to make the payments in question in mid-2001, which means that in practice Umicore's obligation to pay BEF 179 417 754 was postponed for 6 months.

(210) The positive impact for Umicore of non-deductibility can therefore be estimated as follows:

BEF 179 417 754 × 0,8 % ([63]) × 6 months = BEF 8 612 052.

5. Interest on late payments

(211) The interest on late payments owed on the VAT amounts calculated above must be calculated at a monthly rate of 0,8 % from 21 January 1997 ([64]) up until the payment was actually made at the end of December 2000:

37,6 % ([65]) × (312 608 393 + 63 216 555) = BEF 141 310 180.

6. List of amounts owed for the period 1995-96

(212) The minimum amounts owed by Umicore for the period 1995-96 are listed in the table below:

(BEF)

DESCRIPTION	AMOUNTS OWED
1) First type of transaction	
Administrative fine	33 238 698
2) Second type of transaction	

([60]) See Section II.2.

([61]) Rate of corporate tax applicable when the agreement was concluded.

([62]) See Article 218 CIR92 in conjunction with Articles 157 to 168 CIR92.

([63]) Rate applied by the Belgian tax authorities to calculate interest on late payments.

([64]) Date set down in the adjustment notice in accordance with the tax authorities' usual practice.

([65]) (3 × 12 months) + 11 months = 47 months × 0,8 % = 37,6 %.

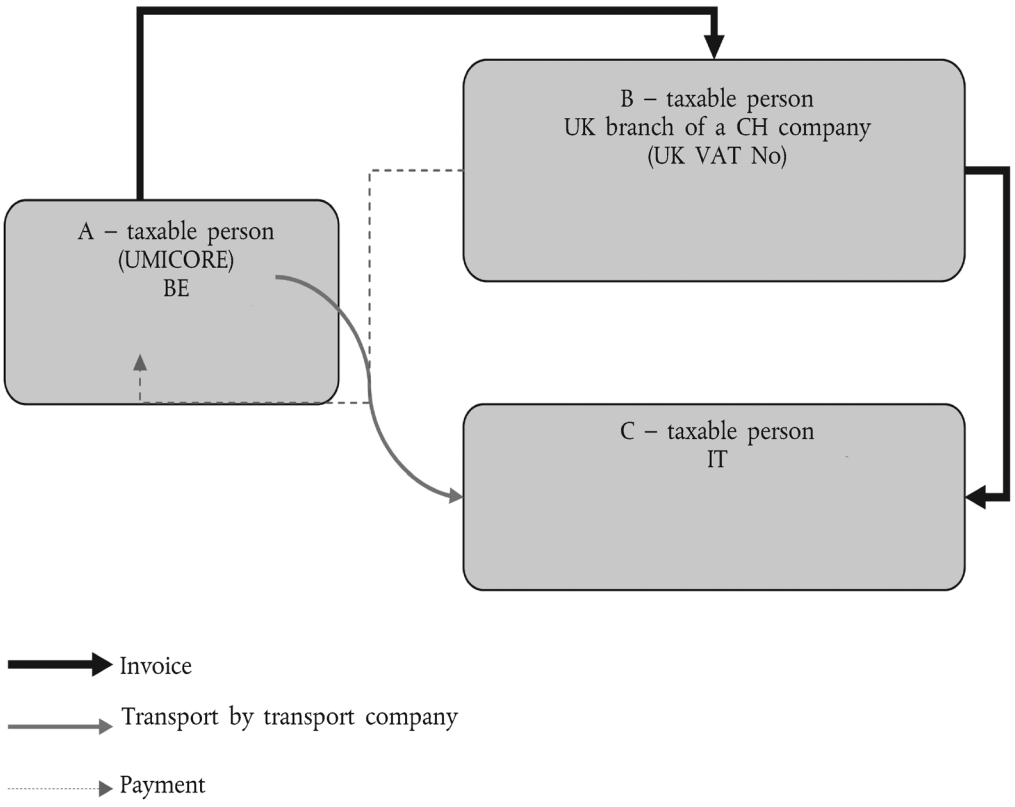
(BEF)

DESCRIPTION	AMOUNTS OWED
VAT owed	312 608 393
Administrative fine (10 %)	31 260 839
3) Third type of transaction	
VAT owed	63 216 555
Administrative fine (10 %)	6 321 655
Sub-total	**BEF 446 646 140**
4) Interest on late payments	141 310 180
Total owed in principle (VAT + interest)	**BEF 587 956 320**
5) Impact of non-deductibility:	
– negative impact of non-deductibility	– 179 417 754
+ positive impact of deferred payment	+ 8 612 052
TOTAL	**BEF 417 150 618**

(213) On the basis of the above calculation, it must be considered that the minimum amount for which Umicore was liable for 1995 and 1996 in the context of a settlement agreement with the tax authorities was BEF 587 956 320 (EUR 14 575 056,46). However, before comparing this amount with the amount in the agreement, the impact of non-deductibility must be taken into account, which reduces the amount to BEF 417 150 618 (EUR 10 340 893,71).

VIII.2.3. *Years 1997-98*

(214) For 1997 and 1998, the transactions questioned in the adjustment notice of 30 April 1999 were as follows:



(215) In this last scenario, Umicore's customer is a subsidiary (B), established in the United Kingdom, of a Swiss company registered for VAT in the UK. The subsequent customer is taxable person C, established in Italy. The goods were transported directly from the place of production in Belgium to Italy. Finally, the invoices drawn up by Umicore were paid by taxable person B.

(216) In their adjustment notice of 30 April 1999, the tax authorities considered that taxable person B was not entitled to claim the VAT exemption provided for in Article 39 *bis* of the VAT Code because it did not have a valid VAT number in Italy. In the alternative, it considered that, even if it was accepted that taxable person B had a real economic activity granting it status as an entity liable for VAT, the sales in question should be looked upon as triangular intra-Community transactions. In this case, the first sale between Umicore and taxable person B should be regarded as a national sale without transport subject to Belgian VAT without any possibility of exemption since the transport had seemingly been carried out on behalf of Italian customers.

(217) It must be noted first of all that, contrary to the period 1995-96, the Special Tax Inspectorate inspectors themselves considered subsequently that there was insufficient evidence to refuse exemption. This is clear from internal memos sent by the inspectors to their director before and after the conclusion of the agreement.

(218) Second, it emerges from the documents which Belgium sent to the Commission with its letter of 6 August 2009 that the transport had indeed been carried out on behalf of taxable person B (and not on behalf of a possible subsequent customer). Moreover, it appears to be possible to confirm this on the basis of copies of documents sent by Umicore to the Special Tax Inspectorate with its letter of 11 June 1999 which indicate that, for each sale, a fax was sent by taxable person B to Umicore to inform it of the identification of the transporter, the driver's name and the lorry's registration number.

(219) The fact that taxable person B did not have a valid VAT number in Italy, as stated by the Belgian authorities in their adjustment notice of 30 April 1999, does not appear to be relevant since taxable persons need not be registered for VAT in the Member State to which the goods are being sent. It must also be noted that the British tax authorities, which had communicated information to the Belgian authorities at their request, did not at any time dispute the reality of taxable person B's activities in the UK.

(220) Lastly, the Belgian tax authorities did not dispute the fact that the goods had indeed left Belgian territory and had been transported to another Member State.

(221) These considerations would seem to indicate clearly that the Special Tax Inspectorate did not have sufficient information to allow it to refuse the VAT exemption applied by Umicore. It must therefore be concluded that Umicore was not liable for any additional VAT payments, fines or interest for the period 1997-98.

VIII.2.4. *Conclusions concerning the existence of an economic advantage*

(222) On the strength of the above, it must be considered that the minimum amount for which Umicore was liable for 1995 to 1998 under a settlement agreement with the tax authorities was BEF 417 150 618 (EUR 10 340 893,71).

(223) In as much as this amount is lower than the amount paid by Umicore under the agreement of 21 December 2000, it cannot be concluded that the Belgian tax authorities made disproportionate concessions. The only aspect of the agreement which departs from administrative practice and rules concerns the compensation mechanism by which the amount due was reduced to take account of the non-deductibility from corporate tax. However, the economic impact of this practice was duly taken into account in the evaluation concerned.

(224) The Commission therefore considers that the Belgian tax authorities did not grant an economic or financial advantage to Umicore in the settlement agreement of 21 December 2000.

IX. **CONCLUSION**

(225) The Commission finds that the settlement agreement concluded on 21 December 2000 between the Belgian tax authorities and Umicore did not involve an advantage for the latter and does not therefore constitute State aid within the meaning of Article 107(1) of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The settlement agreement concluded on 21 December 2000 between the Belgian Government and Umicore SA (formerly Union Minière SA) concerning an amount of BEF 423 million does not constitute aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 2

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 26 May 2010.

For the Commission
Joaquín ALMUNIA
Vice-President

COMMISSION IMPLEMENTING DECISION

of 10 May 2011

amending Annex II to Decision 93/52/EEC as regards the recognition of certain regions in Italy as officially free of brucellosis (*B. melitensis*) and amending the Annexes to Decision 2003/467/EC as regards the declaration that certain regions of Italy, Poland and the United Kingdom are officially free of bovine tuberculosis, bovine brucellosis and enzootic bovine leukosis

(notified under document C(2011) 3066)

(Text with EEA relevance)

(2011/277/EU)

THE EUROPEAN COMMISSION,

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

Having regard to Council Directive 64/432/EEC of 26 June 1964 on animal health problems affecting intra-Community trade in bovine animals and swine [1], and in particular Annex A(I)(4), Annex A(II)(7) and Annex D(I)(E) thereto,

Having regard to Council Directive 91/68/EEC of 28 January 1991 on animal health conditions governing intra-Community trade in ovine and caprine animals [2], and in particular Section II of Chapter 1 of Annex A thereto,

Whereas:

(1) Directive 91/68/EEC defines the animal health conditions governing trade in the Union in ovine and caprine animals. It lays down the conditions whereby Member States or regions thereof may be recognised as being officially brucellosis-free.

(2) Commission Decision 93/52/EEC of 21 December 1992 recording the compliance by certain Member States or regions with the requirements relating to brucellosis (*B. melitensis*) and according them the status of a Member State or region officially free of the disease [3] lists, in Annex II thereto, the regions of the Member States which are recognised as officially free of brucellosis (*B. melitensis*) in accordance with Directive 91/68/EEC.

(3) Italy has submitted to the Commission documentation demonstrating for the regions of Emilia-Romagna and Valle d'Aosta compliance with the conditions laid down in Directive 91/68/EEC in order for those regions in Italy to be recognised as officially free of brucellosis (*B. melitensis*).

(4) Following evaluation of the documentation submitted by Italy, the regions of Emilia-Romagna and Valle d'Aosta should be recognised as being officially free of that disease. The entry for Italy in Annex II to Decision 93/52/EEC should therefore be amended accordingly.

(5) Directive 64/432/EEC applies to trade within the Union in bovine animals and swine. It lays down the conditions whereby a Member State or region of a Member State may be declared officially tuberculosis-free, brucellosis-free and enzootic-bovine-leukosis-free as regards bovine herds.

(6) Even though the Isle of Man, as an internally self-governing dependency of the British Crown, is not part of the Union, it has a special, limited relationship with the Union. As a result, Regulation (EEC) No 706/73 of the Council of 12 March 1973 concerning the Community arrangements applicable to the Channel Islands and the Isle of Man for trade in agricultural products [4] provides that for the purpose of applying rules concerning, amongst others, animal health legislation, the United Kingdom and the Isle of Man are to be treated as a single Member State.

(7) The Annexes to Commission Decision 2003/467/EC of 23 June 2003 establishing the official tuberculosis, brucellosis and enzootic-bovine-leukosis-free status of certain Member States and regions of Member States as regards bovine herds [5] list the Member States and regions thereof which are declared respectively officially tuberculosis-free, officially brucellosis-free and officially enzootic-bovine-leukosis-free.

(8) Italy has submitted to the Commission documentation demonstrating compliance with the conditions for the officially tuberculosis-free status laid down in Directive 64/432/EEC for the provinces of Rieti and Viterbo in the region of Lazio.

(9) Following evaluation of the documentation submitted by Italy, the provinces of Rieti and Viterbo in the region of Lazio should be declared as officially tuberculosis-free regions of Italy.

(10) Italy and the United Kingdom has also submitted to the Commission documentation demonstrating compliance with the conditions for the officially brucellosis-free status laid down in Directive 64/432/EEC for the provinces of Frosinone, Latina and Viterbo in the region of Lazio in Italy and the Isle of Man in the United Kingdom.

[1] OJ 121, 29.7.1964, p. 1977/64.
[2] OJ L 46, 19.2.1991, p. 19.
[3] OJ L 13, 21.1.1993, p. 14.
[4] OJ L 68, 15.3.1973, p. 1.
[5] OJ L 156, 25.6.2003, p. 74.

(11) Following evaluation of the documentation submitted by Italy and the United Kingdom, the provinces of Frosinone, Latina and Viterbo in the region of Lazio in Italy and the Isle of Man in the United Kingdom should be declared as officially brucellosis-free regions of Italy and the United Kingdom respectively.

(12) Italy, Poland and the United Kingdom respectively have submitted to the Commission documentation demonstrating compliance with the appropriate conditions provided for in Directive 64/432/EEC as regards the province of Viterbo in the region of Lazio in Italy, 44 administrative regions (powiaty) within the superior administrative units (voivodships) of Lubuskie, Kujawsko-Pomorskie, Mazowieckie, Podlaskie, Warmińsko-Mazurskie and Wielkopolskie in Poland and the Isle of Man in the United Kingdom so that those regions may be considered officially enzootic-bovine-leukosis-free regions of Italy, Poland and the United Kingdom.

(13) Following evaluation of the documentation submitted by Italy, Poland and the United Kingdom, the regions concerned should be declared as officially enzootic-bovine-leukosis-free regions of Italy, Poland and the United Kingdom respectively.

(14) The Annexes to Decision 2003/467/EC should therefore be amended accordingly.

(15) The measures provided for in this Decision are in accordance with the opinion of the Standing Committee on the Food Chain and Animal Health,

HAS ADOPTED THIS DECISION:

Article 1

Annex II to Decision 93/52/EEC is amended in accordance with Annex I to this Decision.

Article 2

The Annexes to Decision 2003/467/EC are amended in accordance with Annex II to this Decision.

Article 3

This Decision is addressed to the Member States.

Done at Brussels, 10 May 2011.

For the Commission

John DALLI

Member of the Commission

ANNEX I

In Annex II to Decision 93/52/EEC, the entry for Italy is replaced by the following:

'In Italy:

— Region Abruzzo: Province of Pescara,

— Province of Bolzano,

— Region Emilia-Romagna,

— Region Friuli-Venezia Giulia,

— Region Lazio: Provinces of Latina, Rieti, Roma, Viterbo,

— Region Liguria: Province of Savona,

— Region Lombardia,

— Region Marche,

— Region Molise,

— Region Piemonte,

— Region Sardegna,

— Region Toscana,

— Province of Trento,

— Region Umbria,

— Region Valle d'Aosta,

— Region of Veneto.'

ANNEX II

Annexes I, II and III to Decision 2003/467/EC are amended as follows:

(1) in Annex I, Chapter 2, the entry for Italy is replaced by the following:

'In Italy:

— Region Abruzzo: Province of Pescara,

— Province of Bolzano,

— Region Emilia-Romagna,

— Region Friuli-Venezia Giulia,

— Region Lazio: Provinces of Rieti, Viterbo,

— Region Lombardia,

— Region Marche: Province of Ascoli Piceno,

— Region Piemonte: Provinces of Novara, Verbania, Vercelli,

— Region Sardegna: Province of Cagliari, Medio-Campidano, Ogliastra, Olbia-Tempio, Oristano,

— Region Toscana,

— Province of Trento,

— Region Veneto.';

(2) in Annex II, Chapter 2:

(a) the entry for Italy is replaced by the following:

'In Italy:

— Region Abruzzo: Province of Pescara,

— Province of Bolzano,

— Region Emilia-Romagna,

— Region Friuli-Venezia Giulia,

— Region Lazio: Province of Frosinone, Latina, Rieti, Viterbo,

— Region Liguria: Provinces of Imperia, Savona,

— Region Lombardia,

— Region Marche,

— Region Molise: Province of Campobasso,

— Region Piemonte,

— Region Puglia: Province of Brindisi,

— Region Sardegna,

— Region Toscana,

— Province of Trento,

— Region Umbria,

— Region Veneto.';

(b) the entry for the United Kingdom is replaced by the following:

'In the United Kingdom:

— Great Britain: England, Scotland, Wales,

— Isle of Man.';

(3) in Annex III, Chapter 2 is amended as follows:

(a) the entry for Italy is replaced by the following:

'In Italy:

— Region Abruzzo: Province of Pescara,

— Province of Bolzano,

— Region Campania: Province of Napoli,

— Region Emilia-Romagna,

— Region Friuli-Venezia Giulia,

— Region Lazio: Provinces of Frosinone, Rieti, Viterbo,

— Region Liguria: Provinces of Imperia, Savona,

— Region Lombardia,

— Region Marche,

— Region Molise,

— Region Piemonte,

— Region of Puglia: province of Brindisi,

— Region Sardegna,

— Region Sicilia: Provinces of Agrigento, Caltanissetta, Siracusa, Trapani,

— Region Toscana,

— Province of Trento,

— Region Umbria,

— Region Valle d'Aosta,

— Region Veneto.';

(b) the entry for Poland is replaced by the following:

'In Poland:

— Voivodship dolnośląskie

Powiaty:	bolesławiecki, dzierżoniowski, głogowski, górowski, jaworski, jeleniogórski, Jelenia Góra, kamiennogórski, kłodzki, legnicki, Legnica, lubański, lubiński, lwówecki, milicki, oleśnicki, oławski, polkowicki, strzeliński, średzki, świdnicki, trzebnicki, wałbrzyski, Wałbrzych, wołowski, wrocławski, Wrocław, ząbkowicki, zgorzelecki, złotoryjski.

— Voivodship lubelskie

Powiaty:	bialski, Biała Podlaska, biłgorajski, chełmski, Chełm, hrubieszowski, janowski, krasnostawski, kraśnicki, lubartowski, lubelski, Lublin, łęczyński, łukowski, opolski, parczewski, puławski, radzyński, rycki, świdnicki, tomaszowski, włodawski, zamojski, Zamość.

— Voivodship lubuskie

Powiaty:	gorzowski, Gorzów Wielkopolski, krośnieńsko-odrzański, międzyrzecki, nowosolski, słubicki, strzelecko–drezdenecki, sulęciński, świebodziński, Zielona Góra, zielonogórski, żagański, żarski, wschowski.

— Voivodship kujawsko-pomorskie

Powiaty:	aleksandrowski, brodnicki, bydgoski, Bydgoszcz, chełmiński, golubsko-dobrzyński, grudziądzki, inowrocławski, lipnowski, Grudziądz, radziejowski, rypiński, sępoleński, świecki, toruński, Toruń, tucholski, wąbrzeski, Włocławek, włocławski.

— Voivodship łódzkie

Powiaty:	bełchatowski, brzeziński, kutnowski, łaski, łęczycki, łowicki, łódzki, Łódź, opoczyński, pabianicki, pajęczański, piotrkowski, Piotrków Trybunalski, poddębicki, radomszczański, rawski, sieradzki, skierniewicki, Skierniewice, tomaszowski, wieluński, wieruszowski, zduńskowolski, zgierski.

— Voivodship małopolskie

Powiaty:	brzeski, bocheński, chrzanowski, dąbrowski, gorlicki, krakowski, Kraków, limanowski, miechowski, myślenicki, nowosądecki, nowotarski, Nowy Sącz, oświęcimski, olkuski, proszowicki, suski, tarnowski, Tarnów, tatrzański, wadowicki, wielicki.

— Voivodship mazowieckie

Powiaty:	białobrzeski, ciechanowski, garwoliński, grójecki, gostyniński, grodziski, kozienicki, legionowski, lipski, łosicki, makowski, miński, mławski, nowodworski, ostrołęcki, Ostrołęka, ostrowski, otwocki, piaseczyński, Płock, płocki, płoński, pruszkowski, przasnyski, przysuski, pułtuski, Radom, radomski, Siedlce, siedlecki, sierpecki, sochaczewski, sokołowski, szydłowiecki, Warszawa, warszawski zachodni, węgrowski, wołomiński, wyszkowski, zwoleński, żuromiński, żyrardowski.

— Voivodship opolskie

Powiaty:	brzeski, głubczycki, kędzierzyńsko-kozielski, kluczborski, krapkowicki, namysłowski, nyski, oleski, opolski, Opole, prudnicki, strzelecki.

— Voivodship podkarpackie

Powiaty:	bieszczadzki, brzozowski, dębicki, jarosławski, jasielski, kolbuszowski, krośnieński, Krosno, leski, leżajski, lubaczowski, łańcucki, mielecki, niżański, przemyski, Przemyśl, przeworski, ropczycko-sędziszowski, rzeszowski, Rzeszów, sanocki, stalowowolski, strzyżowski, Tarnobrzeg, tarnobrzeski.

— Voivodship podlaskie

Powiaty:	augustowski, białostocki, Białystok, bielski, grajewski, hajnowski, kolneński, łomżyński, Łomża, moniecki, sejneński, siemiatycki, sokólski, suwalski, Suwałki, wysokomazowiecki, zambrowski.

— Voivodship pomorskie

Powiaty:	Gdańsk, gdański, Gdynia, lęborski, Sopot, wejherowski.

— Voivodship śląskie

Powiaty:	będziński, bielski, Bielsko-Biała, bieruńsko-lędziński, Bytom, Chorzów, cieszyński, częstochowski, Częstochowa, Dąbrowa Górnicza, gliwicki, Gliwice, Jastrzębie Zdrój, Jaworzno, Katowice, kłobucki, lubliniecki, mikołowski, Mysłowice, myszkowski, Piekary Śląskie, pszczyński, raciborski, Ruda Śląska, rybnicki, Rybnik, Siemianowice Śląskie, Sosnowiec, Świętochłowice, tarnogórski, Tychy, wodzisławski, Zabrze, zawierciański, Żory, żywiecki.

— Voivodship świętokrzyskie

Powiaty:	buski, jędrzejowski, kazimierski, kielecki, Kielce, konecki, opatowski, ostrowiecki, pińczowski, sandomierski, skarżyski, starachowicki, staszowski, włoszczowski.

— Voivodship warmińsko-mazurskie

Powiaty:	Elbląg, elbląski, ełcki, giżycki, gołdapski, kętrzyński, lidzbarski, olecki, piski, szczycieński, węgorzewski.

— Voivodship wielkopolskie

Powiaty:	jarociński, kaliski, Kalisz, kępiński, kolski, koniński, Konin, krotoszyński, międzychodzki, nowotomyski, ostrowski, ostrzeszowski, pleszewski, słupecki, średzki, śremski, turecki, wolsztyński, wrzesiński.';

(c) the following entry for the United Kingdom is added:

'In the United Kingdom:

— The Isle of Man.'.

2011 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 DVD	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 DVD (cumulative)	22 official EU languages	EUR 400 per year
Supplement to the Official Journal (S series), tendering procedures for public contracts, DVD, one edition 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 DVD.

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*.

Sales and subscriptions

Subscriptions to various priced periodicals, such as the subscription to the *Official Journal of the European Union*, are available from our sales agents. The list of sales agents 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