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## Legislation

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<sup>(1)</sup> 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.

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

## II

(Non-legislative acts)

## REGULATIONS

## COMMISSION IMPLEMENTING REGULATION (EU) 2018/1128

of 9 August 2018

**amending Implementing Regulation (EU) No 1354/2011 opening annual Union tariff quotas for sheep, goats, sheepmeat and goatmeat**

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 <sup>(1)</sup>, and in particular points (a) and (b) of Article 187 thereof,

Whereas:

- (1) Commission Implementing Regulation (EU) No 1354/2011 <sup>(2)</sup> provides for the opening of annual Union import tariff quotas for sheep, goats, sheepmeat and goatmeat, including those originating in Iceland.
- (2) Article 4 of Implementing Regulation (EU) No 1354/2011 provides that the tariff quotas opened by that Regulation are to be managed in accordance with Articles 49 to 54 of Commission Implementing Regulation (EU) 2015/2447 <sup>(3)</sup>.
- (3) The European Union and Iceland signed an Agreement in the form of an Exchange of Letters (hereafter 'the Agreement') concerning additional trade preferences in agricultural products on 23 March 2017. The signature of the Agreement on behalf of the Union was authorised by Council Decision (EU) 2016/2087 <sup>(4)</sup> and its conclusion by Council Decision (EU) 2017/1913 <sup>(5)</sup>.
- (4) In accordance with Annex V to the Agreement, the Union amended Regulation (EU) No 1354/2011 by Commission Implementing Regulation (EU) 2018/562 <sup>(6)</sup>. The amendment increased the quantities of the pre-existing duty-free quotas for Iceland for sheepmeat and goatmeat, falling within tariff headings 0204 and 0210, and furthermore opened an annual Union duty-free quota for processed sheepmeat falling within subheading 1602 90.
- (5) The quantities of the sheepmeat and goatmeat quotas managed under Implementing Regulation (EU) No 1354/2011 are expressed in carcass-weight equivalent, whereas the Agreement provides for the quantities to be expressed in tonnes of products. It is therefore appropriate to provide for the management of the Union tariff

<sup>(1)</sup> OJ L 347, 20.12.2013, p. 671.

<sup>(2)</sup> Commission Implementing Regulation (EU) No 1354/2011 of 20 December 2011 opening annual Union tariff quotas for sheep, goats, sheepmeat and goatmeat (OJ L 338, 21.12.2011, p. 36).

<sup>(3)</sup> Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code (OJ L 343, 29.12.2015, p. 558).

<sup>(4)</sup> Council Decision (EU) 2016/2087 of 14 November 2016 on the signing, on behalf of the European Union, of the Agreement in the form of an Exchange of Letters between the European Union and Iceland concerning additional trade preferences in agricultural products (OJ L 324, 30.11.2016, p. 1).

<sup>(5)</sup> Council Decision (EU) 2017/1913 of 9 October 2017 on the conclusion of the Agreement in the form of an Exchange of Letters between the European Union and Iceland concerning additional trade preferences in agricultural products (OJ L 274, 24.10.2017, p. 57).

<sup>(6)</sup> Commission Implementing Regulation (EU) 2018/562 of 9 April 2018 amending Implementing Regulation (EU) No 1354/2011 opening annual Union tariff quotas for sheep, goats, sheepmeat and goatmeat (OJ L 94, 12.4.2018, p. 4).

quotas which are set out in the Agreement in a separate Regulation to be adopted, in order to ensure a smooth quota management pursuant to Regulation (EU) No 952/2013 of the European Parliament and of the Council <sup>(1)</sup>. As a consequence, those tariff quotas should be simultaneously removed from Implementing Regulation (EU) No 1354/2011 based on Regulation (EU) No 1308/2013.

- (6) It is therefore necessary to amend Implementing Regulation (EU) No 1354/2011 accordingly.
- (7) The new Regulation opening the import tariff quotas for sheepmeat and goatmeat and processed sheepmeat originating in Iceland adopted pursuant to Regulation (EU) No 952/2013 will apply from 1 September 2018. Therefore, the corresponding amendments to Implementing Regulation (EU) No 1354/2011 should apply from the same date.
- (8) The measures provided for in this Regulation are in accordance with the opinion of the Committee for the Common Organisation of the Agricultural Markets,

HAS ADOPTED THIS REGULATION:

*Article 1*

Implementing Regulation (EU) No 1354/2011 is amended as follows:

- (1) in Article 3(2), point (e) is deleted;
- (2) the Annex is replaced by the text in the Annex to this Regulation.

*Article 2*

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

It shall apply from 1 September 2018.

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

Done at Brussels, 9 August 2018.

*For the Commission,  
On behalf of the President,  
Günther OETTINGER  
Member of the Commission*

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<sup>(1)</sup> Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ L 269, 10.10.2013, p. 1).

## SHEEPMEAT AND GOATMEAT (in tonnes (t) of carcass weight equivalent) UNION TARIFF QUOTAS

CN codes	"Ad valorem" duty (%)	Specific duty EUR/100 kg	Order number under "first-come first-served"				Origin	Annual volume in tonnes of carcass weight equivalent
			Live animals (Coefficient = 0,47)	Boneless lamb <sup>(1)</sup> (Coefficient = 1,67)	Boneless mutton/sheep <sup>(2)</sup> (Coefficient = 1,81)	Bone-in and carcasses (Coefficient = 1,00)		
0204	Zero	Zero	—	09.2101	09.2102	09.2011	Argentina	23 000
			—	09.2105	09.2106	09.2012	Australia	19 186
			—	09.2109	09.2110	09.2013	New Zealand	228 254
			—	09.2111	09.2112	09.2014	Uruguay	5 800
			—	09.2115	09.2116	09.1922	Chile <sup>(3)</sup>	8 000
			—	09.2121	09.2122	09.0781	Norway	300
			—	09.2125	09.2126	09.0693	Greenland	100
			—	09.2129	09.2130	09.0690	Faeroes	20
			—	09.2131	09.2132	09.0227	Turkey	200
			—	09.2171	09.2175	09.2015	Others <sup>(4)</sup>	200
			—	09.2178	09.2179	09.2016	<i>Erga omnes</i> <sup>(5)</sup>	200
0104 10 30 0104 10 80 0104 20 90	10	Zero	09.2181	—	—	09.2019	<i>Erga omnes</i> <sup>(5)</sup>	92

<sup>(1)</sup> And goatmeat of kid.<sup>(2)</sup> And goatmeat other than kid.<sup>(3)</sup> Tariff quota for Chile increases by 200 t per annum.<sup>(4)</sup> "Others" shall refer to all WTO members, excluding Argentina, Australia, New Zealand, Uruguay, Chile, Greenland and Iceland.<sup>(5)</sup> "Erga omnes" shall refer to all origins including the countries mentioned in the current table.

**COMMISSION IMPLEMENTING REGULATION (EU) 2018/1129****of 13 August 2018****approving acetamiprid as an existing active substance for use in biocidal products of product-type 18****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products <sup>(1)</sup>, and in particular the third subparagraph of Article 89(1) thereof,

Whereas:

- (1) Commission Delegated Regulation (EU) No 1062/2014 <sup>(2)</sup> establishes a list of existing active substances to be evaluated for their possible approval for use in biocidal products. That list includes acetamiprid.
- (2) Acetamiprid has been evaluated for use in products of product-type 18, insecticides, acaricides and products to control other arthropods, as described in Annex V to Regulation (EU) No 528/2012.
- (3) Belgium was designated as rapporteur Member State and its evaluating competent authority submitted the assessment report together with its recommendations on 27 July 2015.
- (4) In accordance with Article 7(2) of Delegated Regulation (EU) No 1062/2014, the opinion of the European Chemicals Agency was formulated on 14 December 2017 by the Biocidal Products Committee, having regard to the conclusions of the evaluating competent authority <sup>(3)</sup>.
- (5) According to that opinion, biocidal products of product-type 18 containing acetamiprid may be expected to satisfy the criteria of Article 19(1)(b) of Regulation (EU) No 528/2012, provided that certain specifications and conditions concerning their use are complied with.
- (6) It is therefore appropriate to approve acetamiprid for use in biocidal products of product-type 18, subject to compliance with certain specifications and conditions.
- (7) The opinion of the European Chemicals Agency concludes that acetamiprid meets the criteria for being a very persistent (vP) and toxic (T) substance in accordance with Annex XIII to Regulation (EC) No 1907/2006 of the European Parliament and of the Council <sup>(4)</sup>. Acetamiprid therefore meets the conditions set out in point (d) of Article 10(1) of Regulation (EU) No 528/2012 and should be considered a candidate for substitution.
- (8) Pursuant to Article 10(4) of Regulation (EU) No 528/2012, the approval of an active substance that is considered as a candidate for substitution should be for a period not exceeding seven years.
- (9) Since acetamiprid meets the criteria for being very persistent (vP) in accordance with Annex XIII to Regulation (EC) No 1907/2006, treated articles treated with or incorporating acetamiprid should be appropriately labelled when placed on the market.
- (10) A reasonable period should be allowed to elapse before an active substance is approved, in order to permit interested parties to take the preparatory measures necessary to meet the new requirements.
- (11) The measures provided for in this Regulation are in accordance with the opinion of the Standing Committee on Biocidal Products,

<sup>(1)</sup> OJ L 167, 27.6.2012, p. 1.

<sup>(2)</sup> Commission Delegated Regulation (EU) No 1062/2014 of 4 August 2014 on the work programme for the systematic examination of all existing active substances contained in biocidal products referred to in Regulation (EU) No 528/2012 of the European Parliament and of the Council (OJ L 294, 10.10.2014, p. 1).

<sup>(3)</sup> Biocidal Products Committee (BPC) Opinion on the application for approval of the active substance Acetamiprid, Product type: 18, ECHA/BPC/185/2017, Adopted on 14 December 2017.

<sup>(4)</sup> Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ L 396, 30.12.2006, p. 1).

HAS ADOPTED THIS REGULATION:

*Article 1*

Acetamiprid is approved as an active substance for use in biocidal products of product-type 18, subject to the specifications and conditions set out in the Annex.

*Article 2*

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

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

Done at Brussels, 13 August 2018.

*For the Commission*  
*The President*  
Jean-Claude JUNCKER

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## ANNEX

Common Name	IUPAC Name Identification Numbers	Minimum degree of purity of the active substance <sup>(1)</sup>	Date of approval	Expiry date of approval	Product type	Specific conditions
Acetamiprid	IUPAC Name: (E)-N1-[(6-chloro-3-pyridyl) methyl]-N2-cyano-N1-methy- lacetamide  EC No: None  CAS No: 135410-20-7	99,0 % w/w	1 February 2020	31 January 2027	18	<p>Acetamiprid is considered a candidate for substitution in accordance with point (d) of Article 10(1) of Regulation (EU) No 528/2012.</p> <p>The authorisations of biocidal products are subject to the following conditions:</p> <ol style="list-style-type: none"> <li>The product assessment shall pay particular attention to the exposures, the risks and the efficacy linked to any uses covered by an application for authorisation, but not addressed in the Union level risk assessment of the active substance.</li> <li>In view of the risks identified for the uses assessed, the product assessment shall pay particular attention to: <ol style="list-style-type: none"> <li>professional users;</li> <li>infants and toddlers following secondary exposure when the product is sprayed by professionals;</li> <li>surface water, sediment, soil, groundwater for products applied by spray or brush in stables;</li> <li>surface water, sediment, soil, groundwater for products applied by spray outdoors.</li> </ol> </li> <li>For products that may lead to residues in food or feed, the need to set new or to amend existing maximum residue levels (MRLs) in accordance with Regulation (EC) No 470/2009 of the European Parliament and of the Council <sup>(2)</sup> or Regulation (EC) No 396/2005 of the European Parliament and of the Council <sup>(3)</sup> shall be verified, and any appropriate risk mitigation measures shall be taken to ensure that the applicable MRLs are not exceeded.</li> </ol>



Common Name	IUPAC Name Identification Numbers	Minimum degree of purity of the active substance <sup>(1)</sup>	Date of approval	Expiry date of approval	Product type	Specific conditions
						<p>The placing on the market of treated articles is subject to the following condition:</p> <p>The person responsible for the placing on the market of a treated article treated with or incorporating acetamiprid shall ensure that the label of that treated article provides the information listed in the second subparagraph of Article 58(3) of Regulation (EU) No 528/2012.</p>

- <sup>(1)</sup> The purity indicated in this column was the minimum degree of purity of the active substance evaluated. The active substance in the product placed on the market can be of equal or different purity if it has been proven to be technically equivalent to the evaluated active substance.
- <sup>(2)</sup> Regulation (EC) No 470/2009 of the European Parliament and of the Council of 6 May 2009 laying down Community procedures for the establishment of residue limits of pharmacologically active substances in foodstuffs of animal origin, repealing Council Regulation (EEC) No 2377/90 and amending Directive 2001/82/EC of the European Parliament and of the Council and Regulation (EC) No 726/2004 of the European Parliament and of the Council (OJ L 152, 16.6.2009, p. 11).
- <sup>(3)</sup> Regulation (EC) No 396/2005 of the European Parliament and of the Council of 23 February 2005 on maximum residue levels of pesticides in or on food and feed of plant and animal origin and amending Council Directive 91/414/EEC (OJ L 70, 16.3.2005, p. 1).

**COMMISSION IMPLEMENTING REGULATION (EU) 2018/1130****of 13 August 2018****approving cypermethrin as an existing active substance for use in biocidal products of product-type 18****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products <sup>(1)</sup>, and in particular the third subparagraph of Article 89(1) thereof,

Whereas:

- (1) Commission Delegated Regulation (EU) No 1062/2014 <sup>(2)</sup> establishes a list of existing active substances to be evaluated for their possible approval for use in biocidal products. That list includes cypermethrin.
- (2) Cypermethrin has been evaluated for use in products of product-type 18, insecticides, acaricides and products to control other arthropods, as described in Annex V to Regulation (EU) No 528/2012.
- (3) Belgium was designated as a rapporteur Member State and its evaluating competent authority submitted the assessment report together with its recommendations on 15 April 2015.
- (4) In accordance with Article 7(2) of Delegated Regulation (EU) No 1062/2014, the opinion of the European Chemicals Agency was formulated on 5 May 2017 by the Biocidal Products Committee, having regard to the conclusions of the evaluating competent authority <sup>(3)</sup>.
- (5) According to that opinion, biocidal products of product-type 18 containing cypermethrin may be expected to satisfy the criteria of Article 19(1)(b) of Regulation (EU) No 528/2012, provided that certain specifications and conditions concerning their use are complied with.
- (6) It is therefore appropriate to approve cypermethrin for use in biocidal products of product-type 18, subject to compliance with certain specifications and conditions.
- (7) Furthermore, a need to further investigate the endocrine disrupting potential of cypermethrin has been identified in a screening study carried out in preparation of the impact assessment conducted by the Commission on various options to set criteria to identify endocrine disruptors <sup>(4)</sup>. An assessment of the potential endocrine disrupting properties of cypermethrin will also be conducted in the context of Regulation (EC) No 1107/2009 of the European Parliament and of the Council <sup>(5)</sup>, and the conclusions thereof are expected before the end of 2018. Depending on the outcome of that assessment, the Commission will consider the need to review the approval of cypermethrin as active substance for use in biocidal products in accordance with Article 15 of Regulation (EU) No 528/2012.
- (8) A reasonable period should be allowed to elapse before an active substance is approved in order to permit interested parties to take the preparatory measures necessary to meet the new requirements.
- (9) The measures provided for in this Regulation are in accordance with the opinion of the Standing Committee on Biocidal Products,

<sup>(1)</sup> OJ L 167, 27.6.2012, p. 1.

<sup>(2)</sup> Commission Delegated Regulation (EU) No 1062/2014 of 4 August 2014 on the work programme for the systematic examination of all existing active substances contained in biocidal products referred to in Regulation (EU) No 528/2012 of the European Parliament and of the Council (OJ L 294, 10.10.2014, p. 1).

<sup>(3)</sup> Biocidal Products Committee (BPC) Opinion on the application for approval of the active substance Cypermethrin, Product type: PT 18, ECHA/BPC/153/2017, Adopted on 5 May 2017

<sup>(4)</sup> COM(2016) 350 final.

<sup>(5)</sup> Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC (OJ L 309, 24.11.2009, p. 1).

HAS ADOPTED THIS REGULATION:

*Article 1*

Cypermethrin is approved as an active substance for use in biocidal products of product-type 18, subject to the specifications and conditions set out in the Annex.

*Article 2*

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

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

Done at Brussels, 13 August 2018.

*For the Commission*  
*The President*  
Jean-Claude JUNCKER

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## ANNEX

Common Name	IUPAC Name Identification Numbers	Minimum degree of purity of the active substance (1)	Date of approval	Expiry date of approval	Product type	Specific conditions
Cypermethrin	<p>IUPAC Name: Cypermethrin <i>cis:trans</i> 40:60; (RS)-<math>\alpha</math>-cyano-3 phenoxybenzyl-(1RS)-<i>cis,trans</i>-3-(2,2-dichlorovinyl)-2,2-dimethylcyclopropane carboxylate</p> <p>EC No: 257-842-9 CAS No: 52315-07-8</p>	<p><math>\geq 92</math> % w/w</p> <p>Isomeric ratio: <i>cis:trans</i> 40:60</p>	1 June 2020	31 May 2030	18	<p>The authorisations of biocidal products are subject to the following conditions:</p> <ol style="list-style-type: none"> <li>1. The product assessment shall pay particular attention to the exposures, the risks and the efficacy linked to any uses covered by an application for authorisation, but not addressed in the Union-level risk assessment of the active substance.</li> <li>2. In view of the risks identified for the uses assessed, the product assessment shall pay particular attention to: <ol style="list-style-type: none"> <li>a) professional users;</li> <li>b) secondary exposure of infants and toddlers;</li> <li>c) surface water for: <ol style="list-style-type: none"> <li>i) surface application indoors; and</li> <li>ii) outdoor wall and perimeter applications in urban areas;</li> </ol> </li> <li>d) soil for: <ol style="list-style-type: none"> <li>i) surface application indoors;</li> <li>ii) outdoor wall applications in urban and rural areas; and</li> <li>iii) perimeter applications in rural areas;</li> </ol> </li> <li>e) sediment for: <ol style="list-style-type: none"> <li>i) surface application, chemical barrier and crack and crevice treatment indoors; and</li> <li>ii) outdoor wall and perimeter applications in urban areas;</li> </ol> </li> <li>f) groundwater for outdoor wall and perimeter applications in urban areas.</li> </ol> </li> </ol>

Common Name	IUPAC Name Identification Numbers	Minimum degree of purity of the active substance <sup>(1)</sup>	Date of approval	Expiry date of approval	Product type	Specific conditions
						3. For products that may lead to residues in food or feed, the need to set new or to amend existing maximum residue levels (MRLs) in accordance with Regulation (EC) No 470/2009 of the European Parliament and of the Council <sup>(2)</sup> or Regulation (EC) No 396/2005 of the European Parliament and of the Council <sup>(3)</sup> shall be verified, and any appropriate risk mitigation measures shall be taken to ensure that the applicable MRLs are not exceeded.

<sup>(1)</sup> The purity indicated in this column was the minimum degree of purity of the active substance evaluated. The active substance in the product placed on the market can be of equal or different purity if it has been proven to be technically equivalent to the evaluated active substance.

<sup>(2)</sup> Regulation (EC) No 470/2009 of the European Parliament and of the Council of 6 May 2009 laying down Community procedures for the establishment of residue limits of pharmacologically active substances in foodstuffs of animal origin, repealing Council Regulation (EEC) No 2377/90 and amending Directive 2001/82/EC of the European Parliament and of the Council and Regulation (EC) No 726/2004 of the European Parliament and of the Council (OJ L 152, 16.6.2009, p. 11).

<sup>(3)</sup> Regulation (EC) No 396/2005 of the European Parliament and of the Council of 23 February 2005 on maximum residue levels of pesticides in or on food and feed of plant and animal origin and amending Council Directive 91/414/EEC (OJ L 70, 16.3.2005, p. 1).

**COMMISSION IMPLEMENTING REGULATION (EU) 2018/1131**  
**of 13 August 2018**  
**approving penflufen as an active substance for use in biocidal products of product-type 8**  
**(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products <sup>(1)</sup>, and in particular Article 9(1)(a) thereof,

Whereas:

- (1) The evaluating competent authority of the United Kingdom received on 7 July 2015 an application for the approval of the active substance penflufen for use in biocidal products of product-type 8, wood preservatives, as described in Annex V to Regulation (EU) No 528/2012.
- (2) The evaluating competent authority of the United Kingdom submitted the assessment report together with its recommendations on 28 February 2017 in accordance with Article 8(1) of Regulation (EU) No 528/2012.
- (3) The opinion of the European Chemicals Agency was formulated on 14 December 2017 by the Biocidal Products Committee, having regard to the conclusions of the evaluating competent authority <sup>(2)</sup>.
- (4) According to that opinion, biocidal products of product-type 8 containing penflufen may be expected to satisfy the criteria of Article 19(1)(b) of Regulation (EU) No 528/2012, provided that certain specifications and conditions concerning their use are complied with.
- (5) It is therefore appropriate to approve penflufen for use in biocidal products of product-type 8, subject to compliance with certain specifications and conditions.
- (6) Since the opinion of the European Chemical Agency concludes that penflufen meets the criteria for being very persistent (vP) in accordance with Annex XIII to Regulation (EC) No 1907/2006 of the European Parliament and of the Council <sup>(3)</sup>, treated articles treated with or incorporating penflufen should be labelled appropriately when placed on the market.
- (7) A reasonable period should be allowed to elapse before an active substance is approved in order to permit interested parties to take the preparatory measures necessary to meet the new requirements.
- (8) The measures provided for in this Regulation are in accordance with the opinion of the Standing Committee on Biocidal Products,

HAS ADOPTED THIS REGULATION:

*Article 1*

Penflufen is approved as an active substance for use in biocidal products of product-type 8, subject to the specifications and conditions set out in the Annex.

<sup>(1)</sup> OJ L 167, 27.6.2012, p. 1.

<sup>(2)</sup> Biocidal Products Committee (BPC) Opinion on the application for approval of the active substance Penflufen, Product type: 8, ECHA/BPC/184/2017, Adopted on 14 December 2017.

<sup>(3)</sup> Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ L 396, 30.12.2006, p. 1).

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*Article 2*

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

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

Done at Brussels, 13 August 2018.

*For the Commission*  
*The President*  
Jean-Claude JUNCKER

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## ANNEX

Common Name	IUPAC Name Identification Numbers	Minimum degree of purity of the active substance <sup>(1)</sup>	Date of approval	Expiry date of approval	Product type	Specific conditions
Penflufen	<p>IUPAC Name: 5-fluoro-1,3-dimethyl-N-{2-[(2R,S)-4-methylpentan-2-yl]phenyl}-1H-pyrazole-4-carboxamide</p> <p>EC No: not available</p> <p>CAS No: 494793-67-8</p>	980 g/kg (1:1 ratio (R:S) ratio of enantiomers)	1 February 2019	31 January 2029	8	<p>The authorisations of biocidal products are subject to the following conditions:</p> <ol style="list-style-type: none"> <li>The product assessment shall pay particular attention to the exposures, the risks and the efficacy linked to any uses covered by an application for authorisation, but not addressed in the Union-level risk assessment of the active substance.</li> <li>In view of the risks identified for the uses assessed, the product assessment shall pay particular attention to: <ol style="list-style-type: none"> <li>industrial and professional users;</li> <li>soil and groundwater for wood in service that will be exposed to frequent weathering.</li> </ol> </li> <li>In view of the risks identified for soil, labels, and, where provided, safety data sheets of product authorised shall indicate that industrial application shall be conducted within a contained area or on impermeable hard standing with bunding, that freshly treated timber shall be stored after treatment under shelter or on impermeable hardstanding, or both, to prevent direct losses to soil or water, and that any losses from the application of the product shall be collected for reuse or disposal.</li> </ol> <p>The placing on the market of treated articles is subject to the following condition:</p> <p>The person responsible for the placing on the market of a treated article treated with or incorporating penflufen shall ensure that the label of that treated article provides the information listed in the second subparagraph of Article 58(3) of Regulation (EU) No 528/2012.</p>

<sup>(1)</sup> The purity indicated in this column was the minimum degree of purity of the active substance evaluated. The active substance in the product placed on the market can be of equal or different purity if it has been proven to be technically equivalent to the evaluated active substance.



**COMMISSION IMPLEMENTING REGULATION (EU) 2018/1132****of 13 August 2018****authorising the change of the designation and specific labelling requirement of the novel food synthetic zeaxanthin under Regulation (EU) 2015/2283 of the European Parliament and of the Council and amending Commission Implementing Regulation (EU) 2017/2470****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) 2015/2283 of the European Parliament and of the Council of 25 November 2015 on novel foods, amending Regulation (EU) No 1169/2011 of the European Parliament and of the Council and repealing Regulation (EC) No 258/97 of the European Parliament and of the Council and Commission Regulation (EC) No 1852/2001 <sup>(1)</sup>, and in particular Article 12 thereof,

Whereas:

- (1) Regulation (EU) 2015/2283 provides that only novel foods authorised and included in the Union list may be placed on the market within the Union.
- (2) Pursuant to Article 8 of Regulation (EU) 2015/2283, Commission Implementing Regulation (EU) 2017/2470 <sup>(2)</sup> was adopted, which establishes a Union list of authorised novel foods.
- (3) Pursuant to Article 12 of Regulation (EU) 2015/2283, the Commission is to submit a draft implementing act authorising the placing on the Union market of a novel food and updating the Union list.
- (4) Natural zeaxanthin is a component of the normal human diet as it is found in many fruits and green vegetables as well as in egg yolk. It is also currently used in food supplements as defined in Directive 2002/46/EC of the European Parliament and of the Council <sup>(3)</sup>.
- (5) Commission Implementing Decision 2013/49/EU <sup>(4)</sup> authorised, in accordance with Regulation (EC) No 258/97 of the European Parliament and of the Council <sup>(5)</sup>, the placing on the market of synthetic zeaxanthin as a novel food ingredient in food supplements at the maximum intake of up to 2 mg per day. The designation of synthetic zeaxanthin authorised by Implementing Decision 2013/49/EU on the labelling of the foodstuffs containing it is 'synthetic zeaxanthin'.
- (6) On 23 February 2018, the company DSM Nutritional Products Europe ('the Applicant') made a request to the Commission to authorise the amendment of the designation and of the specific labelling requirements for synthetic zeaxanthin within the meaning of Article 10(1) of Regulation (EU) 2015/2283. The application requests the deletion of the term 'synthetic' from the designation of the novel food as listed in the Union list and from the labelling of foodstuffs containing it.
- (7) The Applicant considers that the change of the designation and the labelling requirements of zeaxanthin is necessary to alleviate any potential negative economic impact that the use of the term 'synthetic' on the labelling of food supplements containing synthetic zeaxanthin may cause due to the negative connotation of the term 'synthetic'. The Applicant also claims that such potential negative economic impact is most probably not experienced by economic operators placing on the market food supplements containing authorised synthetic novel foods which do not carry the term 'synthetic' on their labelling.

<sup>(1)</sup> OJ L 327, 11.12.2015, p. 1.

<sup>(2)</sup> Commission Implementing Regulation (EU) 2017/2470 of 20 December 2017 establishing the Union list of novel foods in accordance with Regulation (EU) 2015/2283 of the European Parliament and of the Council on novel foods (OJ L 351, 30.12.2017, p. 72).

<sup>(3)</sup> Directive 2002/46/EC of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements (OJ L 183, 12.7.2002, p. 51).

<sup>(4)</sup> Commission Implementing Decision 2013/49/EU of 22 January 2013 authorising the placing on the market of synthetic zeaxanthin as a novel food ingredient under Regulation (EC) No 258/97 of the European Parliament and of the Council (OJ L 21, 24.1.2013, p. 32).

<sup>(5)</sup> Regulation (EC) No 258/97 of the European Parliament and of the Council concerning novel food and novel food ingredients (OJ L 43, 14.2.1997, p. 1).

- (8) There are a number of synthetic substances currently authorised and listed in the Union list of novel foods, of which the counterparts from natural origin exist, and both forms are used in food supplements. However those synthetic substances are not designated as synthetic in the Union list and are not labelled as such. The change in the designation and labelling of synthetic zeaxanthin will ensure consistency with the designation and labelling of those synthetic substances.
- (9) There are no changes in the proposed uses and use levels of zeaxanthin when used as an ingredient in food supplements, the safety considerations that supported the authorisation of synthetic zeaxanthin by Implementing Decision 2013/49/EU remain valid and therefore this change does not pose any safety concerns. Taking into account these legitimate factors, the proposed changes comply with Article 12(1) of Regulation (EU) 2015/2283.
- (10) The implementation of the new labelling requirement in accordance with this Implementing Regulation might involve changes for the business operators who currently place synthetic zeaxanthin on the market. Therefore, it is appropriate to provide for a transitional period.
- (11) Directive 2002/46/EC lays down requirements on food supplements. The change of designation and of specific labelling requirement for zeaxanthin should be authorised without prejudice to that Directive.
- (12) The measures provided for in this Regulation are in accordance with the opinion of the Standing Committee on Plants, Animals, Food and Feed,

HAS ADOPTED THIS REGULATION:

*Article 1*

1. The entry in the Union list of authorised novel foods as provided for in Article 8 of Regulation (EU) 2015/2283 referring to the substance zeaxanthin shall be amended as specified in the Annex to this Regulation.
2. The entry in the Union list referred to in the first paragraph shall include conditions of use and the labelling requirements laid down in the Annex to this Regulation.
3. The authorisation provided for in this Article shall be without prejudice to the provisions of Directive 2002/46/EC.

*Article 2*

The Annex to Implementing Regulation (EU) 2017/2470 is amended in accordance with the Annex to this Regulation.

*Article 3*

Food supplements containing synthetic zeaxanthin and complying with Regulation (EU) 2015/2283 as applicable before the entry into force of this Regulation may be placed on the market until 3 September 2019 and may remain on the market until exhaustion of stocks.

*Article 4*

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

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

Done at Brussels, 13 August 2018.

*For the Commission*  
*The President*  
Jean-Claude JUNCKER

## ANNEX

In Table 1 (Authorised novel foods) of the Annex to Implementing Regulation (EU) 2017/2470 the entry for 'Zeaxanthin' is replaced by the following:

Authorised novel food	Conditions under which the novel food may be used		Additional specific labelling requirements
<b>'Zeaxanthin'</b>	<i>Specified food category</i>	<i>Maximum levels</i>	The designation of the novel food on the labelling of the foodstuffs containing it shall be "Zeaxanthin".
	Food Supplements as defined in Directive 2002/46/EC	2 mg/day	

**COMMISSION IMPLEMENTING REGULATION (EU) 2018/1133****of 13 August 2018****authorising the placing on the market of dried aerial parts of *Hoodia parviflora* as a novel food under Regulation (EU) 2015/2283 of the European Parliament and of the Council and amending Commission Implementing Regulation (EU) 2017/2470****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) 2015/2283 of the European Parliament and of the Council of 25 November 2015 on novel foods, amending Regulation (EU) No 1169/2011 of the European Parliament and of the Council and repealing Regulation (EC) No 258/97 of the European Parliament and of the Council and Commission Regulation (EC) No 1852/2001 <sup>(1)</sup>, and in particular Article 12 thereof,

Whereas:

- (1) Regulation (EU) 2015/2283 provides that only novel foods authorised and included in the Union list may be placed on the market within the Union.
- (2) Pursuant to Article 8 of Regulation (EU) 2015/2283, Commission Implementing Regulation (EU) 2017/2470 <sup>(2)</sup> was adopted, which establishes a Union list of authorised novel foods.
- (3) Pursuant to Article 12 of Regulation (EU) 2015/2283, the Commission is to decide on authorisation and on the placing on the Union market of a novel food and on the updating of the Union list.
- (4) On 21 October 2014, the company Desert Labs, Ltd ('the applicant') made a request to the competent authority of Ireland to place dried aerial parts of *Hoodia parviflora* on the Union market as a novel food within the meaning of point (e) of Article 1(2) of Regulation (EC) No 258/97 of the European Parliament and of the Council <sup>(3)</sup>. The application requests for dried aerial parts of *Hoodia parviflora* to be used in foods including beverages, biscuits, confectionary, savoury snacks, soups and broths, tea, coffee and water. It is also intended for use in food supplements.
- (5) Pursuant to Article 35(1) of Regulation (EU) 2015/2283, any request for placing a novel food on the market within the Union submitted to a Member State in accordance with Article 4 of Regulation (EC) No 258/97 and for which the final decision has not been taken before 1 January 2018 shall be treated as an application submitted under Regulation (EU) 2015/2283.
- (6) While the request for placing dried aerial parts of *Hoodia parviflora* on the market as a novel food within the Union was submitted to a Member State in accordance with Article 4 of Regulation (EC) No 258/97, the application also meets the requirements laid down in Regulation (EU) 2015/2283.
- (7) On 24 August 2015, the competent authority of Ireland issued its initial assessment report. In that report, it came to the conclusion that dried aerial parts of *Hoodia parviflora* meets the criteria for novel food set out in Article 3(1) of Regulation (EC) No 258/97.
- (8) On 28 August 2015, the Commission forwarded the initial assessment report to the other Member States. Reasoned objections were raised by some Member States within the 60-day period laid down in the first subparagraph of Article 6(4) of Regulation (EC) No 258/97 with regard to insufficient characterisation of the novel food, limited assessment of allergenicity, insufficient data to exclude the risk for children older than 12 years, insufficient information on the specifications, stability, intake assessment and on toxicological data.

<sup>(1)</sup> OJ L 327, 11.12.2015, p. 1.

<sup>(2)</sup> Commission Implementing Regulation (EU) 2017/2470 of 20 December 2017 establishing the Union list of novel foods in accordance with Regulation (EU) 2015/2283 of the European Parliament and of the Council on novel foods (OJ L 351, 30.12.2017, p. 72).

<sup>(3)</sup> Regulation (EC) No 258/97 of the European Parliament and of the Council concerning novel foods and novel foods ingredients (OJ L 43, 14.2.1997, p. 1).

- (9) In view of the objections raised by some Member States, the Commission consulted the European Food Safety Authority ('the Authority') on 25 January 2016, asking it to carry out an additional assessment for dried aerial parts of *Hoodia parviflora* as novel food in accordance with Regulation (EC) No 258/97.
- (10) On 20 September 2017, the Authority adopted 'Scientific Opinion on the safety of dried aerial parts of *Hoodia parviflora* as a novel food pursuant to Regulation (EC) No 258/97' <sup>(1)</sup>. That opinion, although elaborated and adopted by the Authority under Regulation (EC) No 258/97 is in line with the requirements of Article 11 of Regulation (EU) 2015/2283.
- (11) In its opinion, the Authority did not establish the safety of dried aerial parts of *Hoodia parviflora* in foods at the uses and use levels proposed by the applicant because the intake would exceed the level which is considered as safe (0,134 mg/kg bw). However, the Authority concluded that dried aerial parts of *Hoodia parviflora* are safe for adults when added to food supplements at a maximum daily dose of 9,4 mg which corresponds to the safe level of intake for an adult with a default body weight of 70 kg.
- (12) That opinion gives sufficient grounds to establish that dried aerial parts of *Hoodia parviflora* in the proposed uses and use levels when used as an ingredient in food supplements, comply with Article 12(1) of Regulation (EU) 2015/2283.
- (13) On 24 January 2018, the applicant made a request to the Commission for protection of proprietary data for two studies submitted in support of the application namely, reports of the 14-day dose-finding oral toxicity study of dried aerial parts of *Hoodia parviflora* <sup>(2)</sup>, and of the 90-day oral toxicity study <sup>(3)</sup>, served as basis for the Bench Mark Dose (BMD) analysis and for deriving safe intake levels for human.
- (14) On 18 February 2018, the Authority considered <sup>(4)</sup> that in elaborating its opinion on dried aerial parts of *Hoodia parviflora* as a novel food the data from the report of the 90-day oral toxicity study served as basis for the BMD analysis and for deriving safe intake levels for humans. Therefore, it is considered that the conclusions on the safety of dried aerial parts of *Hoodia parviflora*, could not have been reached without the data from the report of that study.
- (15) Following the receipt of the Authority's opinion, the Commission requested the applicant to further clarify the justification provided with regard to their proprietary claim over the study, and their claim to an exclusive right of reference to that study, as referred to in points (a) and (b) of Article 26(2) of Regulation (EU) 2015/2283.
- (16) The applicant has also declared that, at the time the application was submitted, it held proprietary and exclusive rights of reference to the study under national law and that therefore third parties could not lawfully access or use that study. The Commission assessed all the information provided by the applicant and considered that the applicant has sufficiently substantiated the fulfilment of the requirements laid down in Article 26(2) of Regulation (EU) 2015/2283.
- (17) Accordingly, as provided for under Article 26(2) of Regulation (EU) 2015/2283, the 90-day oral toxicity study contained in the applicant's file should not be used by EFSA for the benefit of a subsequent applicant for a period of five years from the date of entry into force of this Regulation. As a consequence, the placing on the market within the Union of the novel food authorised by this Regulation should be restricted to the applicant for a period of five years.
- (18) However, restricting the authorisation of this novel food and of the reference to the study contained in the applicant's file for the sole use of the applicant does not prevent other applicants from applying for an authorisation to place on the market the same novel food provided that their application is based on legally obtained information supporting the authorisation under this Regulation.
- (19) Directive 2002/46/EC of the European Parliament and of the Council <sup>(5)</sup> lays down requirements on food supplements. The use of dried aerial parts of *Hoodia parviflora* should be authorised without prejudice to that Directive.
- (20) The measures provided for in this Regulation are in accordance with the opinion of the Standing Committee on Plants, Animals, Food and Feed,

<sup>(1)</sup> EFSA Journal 2017;15(10):5002.

<sup>(2)</sup> Desert Labs, 2012a, unpublished.

<sup>(3)</sup> Desert Labs, 2012b, unpublished.

<sup>(4)</sup> EFSA Scientific Panel on Dietetic Products, Nutrition and Allergies, Minutes of the 83rd Plenary held on 7-8 February 2018 and agreed on 18 February 2018 (<https://www.efsa.europa.eu/sites/default/files/event/180207-1-m.pdf>).

<sup>(5)</sup> Directive 2002/46/EC of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements (OJ L 183, 12.7.2002, p. 51).

HAS ADOPTED THIS REGULATION:

*Article 1*

1. Dried aerial parts of *Hoodia parviflora* as specified in the Annex to this Regulation shall be included in the Union list of authorised novel foods established in Implementing Regulation (EU) 2017/2470.

2. For a period of five years from the date of entry into force of this Regulation only the Applicant:

Company: Desert Labs, Ltd

Address: Kibbutz Yotvata, 88820, Israel

is authorised to place on the market within the Union the novel food referred to in paragraph 1, unless a subsequent applicant obtains authorisation for the same novel food without reference to the data protected pursuant to Article 2 of this Regulation or with the agreement of Desert Labs, Ltd.

3. The entry in the Union list referred to in paragraph 1 shall include the conditions of use and labelling requirements laid down in the Annex to this Regulation.

4. The authorisation provided for in this Article shall be without prejudice to the provisions of Directive 2002/46/EC.

*Article 2*

The study contained in the application file on the basis of which the novel food referred to in Article 1 has been assessed by the Authority, claimed by the applicant as fulfilling the requirements laid down in Article 26(2) of Regulation (EU) 2015/2283, shall not be used for the benefit of a subsequent applicant for a period of five years from the date of entry into force of this Regulation without the agreement of Desert Labs, Ltd.

*Article 3*

The Annex to Implementing Regulation (EU) 2017/2470 is amended in accordance with the Annex to this Regulation.

*Article 4*

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

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

Done at Brussels, 13 August 2018.

*For the Commission*  
*The President*  
Jean-Claude JUNCKER

ANNEX

The Annex to Implementing Regulation (EU) 2017/2470 is amended as follows:

(1) The following last column is added in Table 1 (Authorised novel foods):

'Data protection'

(2) The following entry is inserted in Table 1 (Authorised novel foods) in alphabetical order:

Authorised novel food	Conditions under which the novel food may be used		Additional specific labelling requirements	Other requirements	Data protection
	<i>Specified food category</i>	<i>Maximum levels</i>			
<b>Dried aerial parts of <i>Hoodia parviflora</i></b>			The designation of the novel food on the labelling of the foodstuffs containing it shall be “dried aerial parts of <i>Hoodia parviflora</i> ”		<p>Authorised on 3 September 2018. This inclusion is based on proprietary scientific evidence and scientific data protected in accordance with Article 26 of Regulation (EU) 2015/2283.</p> <p>Applicant: Desert Labs, Ltd Kibbutz Yotvata, 88820 Israel.</p> <p>During the period of data protection the novel food dried aerial parts of <i>Hoodia parviflora</i> is authorised for placing on the market within the Union only by Desert Labs, Ltd unless a subsequent applicant obtains authorisation for the novel food without reference to the proprietary scientific evidence or scientific data protected in accordance with Article 26 of Regulation (EU) 2015/2283 or with the agreement of Desert Labs, Ltd.</p> <p>End date of the data protection: 3 September 2023.’</p>
	Food Supplements as defined in Directive 2002/46/EC for adult population	9,4 mg/day			

(3) The following entry is inserted in Table 2 (Specifications) in alphabetical order:

Authorised Novel Food	Specification
<b>Dried aerial parts of <i>Hoodia parviflora</i></b>	<p><b>Description/Definition:</b> It is the whole dried aerial parts of <i>Hoodia parviflora</i> N.E.Br., (family <i>Apocynaceae</i>)</p>

Authorised Novel Food	Specification
	<p><b>Characteristics/Composition</b></p> <p>Plant material: Aerial parts of at least 3-year-old plants</p> <p>Appearance: Light green to tan fine powder</p> <p>Solubility (water): &gt; 25 mg/mL</p> <p>Moisture: &lt; 5,5 %</p> <p>A<sub>w</sub>: &lt; 0,3</p> <p>pH: &lt; 5,0</p> <p>Protein: &lt; 4,5 g/100 g</p> <p>Fat: &lt; 3 g/100 g</p> <p>Carbohydrate (including dietary fibre): &lt; 80 g/100 g</p> <p>Dietary fibre: &lt; 55 g/100 g</p> <p>Total sugars: &lt; 10,5 g/100 g</p> <p>Ash: &lt; 20 %</p> <p><b>Hoodigosides</b></p> <p>P57: 5–50 mg/kg</p> <p>L: 1 000–6 000 mg/kg</p> <p>O: 500–5 000 mg/kg</p> <p>Total: 1 500–11 000 mg/kg</p> <p><b>Heavy metals:</b></p> <p>Arsenic: &lt; 1,00 mg/kg</p> <p>Mercury: &lt; 0,1 mg/kg</p> <p>Cadmium: &lt; 0,1 mg/kg</p> <p>Lead: &lt; 0,5 mg/kg</p> <p><b>Microbiological criteria:</b></p> <p>Aerobic plate count: &lt; 10<sup>5</sup> CFU/g</p> <p><i>Escherichia coli</i>: &lt; 10 CFU/g</p> <p><i>Staphylococcus aureus</i>: &lt; 50 CFU/g</p> <p>Total coliforms: &lt; 10 CFU/g</p> <p>Yeast: ≤ 100 CFU/g</p> <p>Mould: ≤ 100 CFU/g</p> <p><i>Salmonella</i> species: Negative/25 g</p> <p><i>Listeria monocytogenes</i>: Negative/25 g</p> <p>CFU: Colony Forming Units'</p>



# DECISIONS

## COMMISSION IMPLEMENTING DECISION (EU) 2018/1134

of 5 July 2018

**concerning the applicability of Article 34 of Directive 2014/25/EU of the European Parliament and of the Council to contracts awarded for certain activities related to the retail supply of electricity and natural gas in the Czech Republic**

*(notified under document C(2018) 4194)*

**(Only the Czech text is authentic)**

**(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union (TFEU),

Having regard to Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC <sup>(1)</sup>, and in particular Article 35(3) thereof,

Having regard to the request submitted by the Czech Republic,

After consulting the Advisory Committee for Public Contracts,

Whereas:

### 1. FACTS

#### THE REQUEST

- (1) On 2 November 2016, the Czech Republic (hereinafter referred to as 'the Applicant') submitted to the Commission a request pursuant to Article 35(1) of Directive 2014/25/EU (hereinafter referred to as 'the Request').
- (2) The Request concerns the following activities as described in it:
  - (a) retail supply of electricity to large customers with 'automated continual metering' A or 'manual continual metering' B that receive individualised offers from suppliers (hereinafter referred to as the 'retail supply of electricity to large customers');
  - (b) retail supply of electricity to small commercial and household customers with 'non-continual metering' C that receive standardised offers from suppliers (hereinafter referred to as the 'retail supply of electricity to small customers');
  - (c) retail supply of natural gas to large customers with (i) automated continual metering with either remote (A) or monthly (B) reading that have annual consumption of at least 4,2 GWh; or with (ii) non-interval metering with monthly reading that have annual consumption of between 0,63 and 4,2 GWh that generally receive individualised offers from suppliers (hereinafter referred to as the 'retail supply of natural gas to large customers');
  - (d) retail supply of natural gas to small commercial and household customers with non-interval metering with other than monthly reading that have annual consumption of less than 0,63 GWh and generally receive standardised offers from suppliers (hereinafter referred to as the 'retail supply of natural gas to small customers').
- (3) The Request was accompanied by a letter of the National Competition Authority ('NCA') of the Czech Republic dated 30 September 2016 and a supplementary letter from that Authority dated 14 June 2017 (hereinafter referred to as the 'NCA Opinion').

<sup>(1)</sup> OJ L 94, 28.3.2014, p. 243.

- (4) In the letter of 30 September 2016, which the NCA issued in response to the request of the Czech Ministry of Industry and Trade for an opinion concerning the application for exemption of retail sales of electricity and gas in the Czech Republic from the scope of Directive 2014/25/EU, the NCA noted that 'it did not have sufficient time to perform a sector survey in those areas, which would have allowed it to map the situation on those markets in order to respond to' the Ministry's request. The NCA finally took the following view in that letter: 'it can be considered that an exemption on the markets for gas and electricity supplies to end customers in the Czech Republic pursuant to Article 34 should not have a negative effect on economic competition on those markets. This conclusion by the Office <sup>(1)</sup> is based on the documentation supplied by the Ministry of Industry and Trade. In this regard, the Office reserves the right to re-evaluate its opinion in the event that any structural or other fundamental changes occur on the markets in question, or if any data forming the basis of the information provided to the Office are corrected.'
- (5) The supplementary letter of NCA dated 14 June 2017 was based on 'other submissions of the Czech Republic [...] and the data provided by an independent market operator (OTE) and also by some undertakings operating in the relevant markets including the ČEZ group (ČEZ) and Pražská plynárenská'. The supplementary letter referred in particular to a number of concerns raised by the Commission in respect to the market for retail of electricity to small customers, such as the high market concentration, low switching rates and vertical integration of ČEZ group. The supplementary letter concluded that nothing prevents all markets subject to the Request from being exempted from the application of the Directive.
- (6) The Request was also accompanied by a consultant report <sup>(2)</sup> (hereinafter referred to as 'the CRA Report').
- (7) The Commission submitted to the Applicant requests for additional information on 31 January 2017, 24 March 2017, 27 March 2017, 21 April 2017, 1 June 2017, 28 June 2017 and 21 December 2017 to which the Applicant replied on 16 February 2017, 28 March 2017, 31 March 2017, 3 May 2017, 10 May 2017, 9 June 2017, 1 August 2017 and 12 April 2018. Moreover, at the request of the Applicant, the Commission met the representatives of the Applicant on 31 January 2017, 28 February 2017, 29 March 2017, 30 May 2017 and 9 June 2017. The Applicant provided also supplementary information on 27 January 2017.

## 2. LEGAL FRAMEWORK

- (8) Directive 2014/25/EU applies to the award of contracts for the pursuit of activities related to the retail supply of electricity and gas, unless this activity is exempted pursuant to Article 34 of that Directive.
- (9) Under Directive 2014/25/EU, contracts intended to enable the performance of one of the activities to which the Directive applies are not to be subject to the Directive if, in the Member State in which the activity is carried out, it is directly exposed to competition on markets to which access is not restricted. Direct exposure to competition is assessed on the basis of objective criteria, taking account of the specific characteristics of the sector concerned.

## 3. ASSESSMENT

### 3.1. UNRESTRICTED ACCESS TO THE MARKET

- (10) Access to a market is deemed not to be restricted if the Member State concerned has implemented and applied the relevant Union legislation opening a given sector or a part of it. That legislation is listed in Annex III to Directive 2014/25/EU. As regards the electricity sector, it consists of Directive 2009/72/EC of the European Parliament and of the Council <sup>(3)</sup>. As regards the natural gas sector, it consists of Directive 2009/73/EC of the European Parliament and of the Council <sup>(4)</sup>.
- (11) The Czech Republic has transposed Directives 2009/72/EC and 2009/73/EC in its national law through Act No 458/2000 Coll on conditions of business and state administration in energy markets (hereinafter referred to as 'the Energy Act') <sup>(5)</sup>.

<sup>(1)</sup> The term „Office” designates here the NCA.

<sup>(2)</sup> Report by Charles River and Associates of 9 October 2016 called 'An Economic Assessment of the Extent of Competition on the Czech Markets for Retail supply of Electricity and Gas'.

<sup>(3)</sup> Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ L 211, 14.8.2009, p. 55).

<sup>(4)</sup> Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ L 211, 14.8.2009, p. 94).

<sup>(5)</sup> Available at <https://www.zakonyprolidi.cz/cs/2000-458> and [http://aplikace.mvcr.cz/sbirka-zakonu/SearchResult.aspx?q=458/2000&typeLaw=zakon&what=Cislo\\_zakona\\_smlouvy](http://aplikace.mvcr.cz/sbirka-zakonu/SearchResult.aspx?q=458/2000&typeLaw=zakon&what=Cislo_zakona_smlouvy)

- (12) On 7 December 2017, the Commission addressed a letter of formal notice ('LFN') to the Minister of Foreign Affairs of the Czech Republic (Ref infringement procedure No 2017/2152) regarding incorrect transposition of Directives 2009/72/EC and 2009/73/EC into the Czech legal order. Given that the presumption of unrestricted access to the market provided for in the first subparagraph of Article 34(3) of Directive 2014/25/EU should not apply for the matters subject to the infringement procedure, the Commission requested by email of 21 December 2017, the Applicant to provide its observations on this matter and explain whether the access to the market is not restricted *de facto* and *de jure*, in accordance with the second subparagraph of Article 34(3) of Directive 2014/25/EU.
- (13) The Applicant in its reply of 12 April 2018 explained that access to the market is not restricted *de facto* and the main arguments were: the low cost of entry, inexistence of other barriers to entry, the large number of licences granted for trading electricity and gas <sup>(1)</sup> and the large number of retailers currently active on the markets for retail supply of electricity and retail of gas <sup>(2)</sup>. Moreover, the Applicant explained that the way in which the provisions Union law concerned by the LFN were reflected in national law did not result in a *de jure* restriction to access to the markets of retail of electricity and gas. The Applicant also argued in this context that the specific issues, raised in the infringement procedure, either did not concern access to market or were only potentially related to it.
- (14) As regards the question of whether the access to market is free *de facto* the Commission agrees with the arguments brought by the Applicant and in particular with the existence of a large number of retailers active at national level on the markets for retail supply of electricity and the market for retail supply of gas, which indicates that access to the market is, *de facto*, not restricted.
- (15) As regards the question of whether the access to market is not restricted *de jure*, the Commission has taken good note of the Applicant's explanations regarding the way in which the concerns raised in the LFN were addressed in the national law. The Commission analysed those explanations in the light of requirements of Directive 2014/25/EU, i.e. in order to assess whether the provisions of national law and the concerns related to them and raised in the infringement procedure could result in a *de jure* restriction of access to market, within the meaning of Article 34 of Directive 2014/25/EU. Having reviewed the arguments of the Applicant, the Commission agrees with the argument underlying all of the Applicant's explanations that the specific issues raised in the infringement procedure do not directly concern access to the market. The Commission also takes into account the argument of Applicant that it is appropriate to consider the Czech legal system as a whole, in particular as regards the obligation to interpret the relevant provisions of national law in a way which is conform to the requirements of EU law. Therefore, while the concerns identified in the infringement procedure still persist, and without prejudice to that infringement procedure, for the purposes of this Decision and the procedure pursuant to Directive 2014/25/EU, the Commission considers that access to the market is not restricted *de jure* on the territory of the Czech Republic.
- (16) Based on the preceding conclusions the Commission considers that the condition of unrestricted access to market, referred to in Article 34(1) of Directive 2014/25/EU, is fulfilled in the present case.

### 3.2. DIRECT EXPOSURE TO COMPETITION

- (17) Direct exposure to competition should be evaluated on the basis of various indicators, none of which are, *per se*, decisive. In respect of the markets concerned by this Decision, the market share of the main players on a given market constitutes one criterion which should be taken into account. Given the characteristics of the markets concerned, further criteria should also be taken into account.
- (18) This Decision is without prejudice to the application of the rules on competition and other fields of Union law. In particular, the criteria and the methodology used to assess direct exposure to competition under Article 34 of Directive 2014/25/EU are not necessarily identical to those used to perform an assessment under Article 101 or 102 TFEU or Council Regulation (EC) No 139/2004 <sup>(3)</sup>. This point was upheld by the General Court in a recent judgment <sup>(4)</sup>.

<sup>(1)</sup> 388 licences granted for trading electricity and 229 licences to trade gas (see Applicant's reply of 12 April 2018 to Commission's Request for information — RFI of 21 December 2017, p. 1).

<sup>(2)</sup> 71 active suppliers in the retail supply of electricity and 68 active suppliers in the retail supply of gas (see Applicant's reply of 12 April 2018 to Commission's RFI of 21 December 2017, p. 1).

<sup>(3)</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).

<sup>(4)</sup> Judgment of 27 April 2016, *Österreichische Post AG v Commission*, T-463/14, EU:T:2016:243, para. 28.

- (19) It should be kept in mind that the aim of this Decision is to establish whether the activities concerned by the Request are exposed to a level of competition, on markets to which access is not restricted within the meaning of Article 34 of Directive 2014/25/EU, which will ensure that, also in the absence of the discipline brought about by the detailed procurement rules set out in Directive 2014/25/EU, procurement for the pursuit of the activities concerned will be carried out in a transparent, non-discriminatory manner based on criteria allowing purchasers to identify the solution which overall is the economically most advantageous one.
- (20) In this context, it is important to mention that, in the markets concerned, not all market players are subject to the public procurement rules. Therefore, the companies which are not subject to those rules, when acting on those markets, would normally have the possibility to exert competitive pressure on the market players which are subject to the public procurement rules <sup>(1)</sup>.

#### RELEVANT PRODUCT MARKETS

##### **Retail supply of electricity**

- (21) As the Commission has found in the past <sup>(2)</sup>, the retail supply of electricity encompasses the overall sale of electricity to final customers, that is household and small industrial and commercial customers on the one hand (i.e. customers who are not subject to continual metering and connected to the low voltage grid <sup>(3)</sup>) and large industrial and commercial customers on the other hand (i.e. customers who are 'half-hourly metered' and typically connected to high and medium voltage grids <sup>(4)</sup>).
- (22) In its decisional practice, the Czech NCA <sup>(5)</sup> also considered a segmentation of the retail market by different categories of final customers, but ultimately left the definition open.
- (23) The Applicant differentiates between three categories of customers.
- (a) Large commercial customers, identified by (i) 'automated continual metering' customers — essentially load-measured customers that are connected to the high and medium voltage grid; and (ii) 'manual continual metering' customers — essentially customers that are connected to the low voltage grid <sup>(6)</sup>. Large customers typically receive individualised offers from suppliers or buy electricity directly on commodity exchanges. In 2015, they represented around [...] <sup>(7)</sup> of total electricity consumption, namely in volume, [...] TWh out of [...] TWh <sup>(8)</sup>.
- (b) Small commercial customers and households, identified by 'non-continual metering'. These customers receive standardised offers from suppliers and are free to choose their electricity supplier since 2006. In 2015, this category represented around [...] of total electricity consumption, namely in volume, [...] TWh out of [...] TWh <sup>(8)</sup>.
- (c) Other customers. This third category consists of large commercial customers such as operators of the local distribution zones ('LDZs') <sup>(9)</sup> who are at the same time electricity producers and retailers and industrial parks connected to LDZs. These large customers may purchase electricity from other suppliers than the operators of the LDZs, therefore they fall under the category of large customers as defined above. In 2015, this third category accounted for around [...] % of total electricity consumption, namely, in volume, [...] TWh out of [...] TWh.
- (24) In view of the factors listed in recitals 21 to 23, for the purposes of assessing whether the conditions laid down in Article 34 of Directive 2014/25/EU are fulfilled, and without prejudice to the application of other Union law,

<sup>(1)</sup> According to the Applicant, in the markets subject to this Request, only ČEZ Prodej and Pražská plynárenská ('PP') are contracting entities in the sense of Article 4(1) of Directive 2014/25/EU and, hence, subject to the public procurement rules.

<sup>(2)</sup> Case COMP/M.3440 — EDP/ENI/GDP, recital 56.

<sup>(3)</sup> See case COMP/M.6225 — Molaris/Commerz Real/RWE/Amprion, of 23 August 2011; COMP/M.5467 — RWE/Essent, of 23 June 2009.

<sup>(4)</sup> See cases COMP/M.5512 — Electrabel/E.ON, of 16 October 2009; COMP/M.5496 — Vattenfall/Nuon Energy, of 22 June 2009.

<sup>(5)</sup> Czech NCA Decision n. ÚOHS-S0830/2015/KS-45620/2015/840/JMě of 21 December 2015, BOHEMIA ENERGY entity s.r.o./Europe Easy Energy a.s.; Czech NCA Decision n. ÚOHS-S0438/2016/KS-28103/2016/840/LBř of 7 July 2016 in BOHEMIA ENERGY entity s. r. o./RIGHT POWER, a. s..

<sup>(6)</sup> See CRA Report page 17, last para.

<sup>(7)</sup> [...] confidential information.

<sup>(8)</sup> See CRA Report, page 18, Table 3.

<sup>(9)</sup> The Applicant explained that the LDZs started out as a production site of a specific large industrial customer that over time turned the production site into an industrial park that comprises its own production facilities as well as other large industrial customers' production facilities that are hosted by the industrial customer with the historic production site.

the relevant product markets for this Decision, as regards the retail supply of electricity in the Czech Republic, are the following: (a) retail supply of electricity to large customers (continual metering large industrial and commercial consumers including those in the third category mentioned in recital 23(c)); and (b) retail supply of electricity to small customers (non-continual metering households and small commercial customers).

### **Retail supply of natural gas**

- (25) In respect of retail supply of gas, the Commission differentiates between the supply of natural gas to small customers and the supply of natural gas to large customers, which are subdivided into large industrial customers and power stations <sup>(1)</sup>.
- (26) In its Decision M.4238 — E.ON/PP <sup>(2)</sup> concerning the Czech gas retail market, the Commission left the definition open, as the transaction concerned did not lead to competition concerns under any alternative definition.
- (27) In its decisional practice <sup>(3)</sup>, the Czech NCA also considered a segmentation of the gas retail market by the different categories of final customers, but ultimately left the definition open.
- (28) The Applicant also differentiates between large and small gas supply customers. Large gas supply customers <sup>(4)</sup> are commercial customers with (i) automated continual metering with remote (A) or monthly (B) reading that have annual consumption of at least 4,2 GWh; or with (ii) non-interval metering with monthly reading that have annual consumption of between 0,63 and 4,2 GWh. They normally receive individualised offers from suppliers. Small customers are commercial and household customers with non-interval metering with other than monthly reading that have annual consumption of less than 0,63 GWh. They generally receive standardised offers. Each category accounts for around half of the total gas consumption.
- (29) In view of the factors listed in recitals 25 to 28, for the purposes of assessing whether the conditions laid down in Article 34 of Directive 2014/25/EU are fulfilled, and without prejudice to the application of other Union law, the relevant product markets are the following: (a) retail supply of natural gas to large customers; (b) retail supply of natural gas to small customers.

### RELEVANT GEOGRAPHIC MARKETS

#### **Retail supply of electricity**

- (30) The Commission has previously found <sup>(5)</sup> that the retail supply of electricity to large customers was national in scope, whereas narrower, regional markets could be considered for the retail supply of electricity to small customers. In its Decision M.4238 — E.ON/PP <sup>(6)</sup> concerning the Czech retail market, the market investigation confirmed that the market was at least national in case of electricity retail market. However, the exact scope of the geographic market was left open. The Czech NCA found that the retail supply of electricity to small customers is national in scope <sup>(7)</sup>.
- (31) According to the Applicant, there are currently around 65 active suppliers with more than 100 delivery points that can supply large and small commercial customers and households on a national basis. This would point to a national scope of the retail supply markets.
- (32) In the Czech Republic there are three distribution areas, according to the ownership of the distribution companies <sup>(8)</sup>. Due to the high market shares of the three regional distributors in their own respective distribution areas, the Czech Republic is characterised by a strong regional element. ČEZ group, through its

<sup>(1)</sup> M.4180 — *Gaz de France/Suez*, recital 63; M.3868 — *DONG/Elsam/Energi E2*, recital 193 et seq.; M.3440 — *EDP/ENI/GDP* recital 215 et seq.; M.5740 — *Gazprom/A2A/JOE*, recital 17 and seq.

<sup>(2)</sup> M.4238 — *E.ON/PP*, recital 16.

<sup>(3)</sup> Czech NCA Decision n. ÚOHS-S0830/2015/KS-45620/2015/840/JMě of 21 December 2015, BOHEMIA ENERGY entity s.r.o./Europe Easy Energy a.s.; Czech NCA Decision n. ÚOHS-S0438/2016/KS-28103/2016/840/LBř of 7 July 2016 in BOHEMIA ENERGY entity s. r. o./RIGHT POWER, a. s.

<sup>(4)</sup> This market does not include supply to gas-fired power plants, which typically purchase gas directly on Power Exchanges and have gas delivered by purchasing gas pipeline capacity.

<sup>(5)</sup> M.5496 — *Vattenfall/Nuon Energy*, recital 15 and seq., M.7778 — *Vattenfall/Engie/GASAG*, recital 37.

<sup>(6)</sup> M.4238 — *E.ON/PP*, recitals 19 and 20.

<sup>(7)</sup> Merger Decision UOHS-S492/2011/KS of the Czech NCA.

<sup>(8)</sup> ČEZ group, the former Czech electricity incumbent and currently still state-owned, owns five of the eight electricity distribution networks, two distribution networks are owned by E.ON, while the electricity distribution company in the capital area is owned by Prazska energetica a.s. (PRE) — a company owned by EnBW and the City of Prague and controlled by EnBW. See CRA Report, para. 2, p. 1.

subsidiary ČEZ Distribuce, is the largest distributor with five of the eight electricity distribution networks accounting for around [...] of all the electricity consumed in the Czech Republic; in comparison, [...] of electricity consumption stems from E.ON's distribution area and only [...] stems from PRE's distribution area while the rest stems from the local LDZ <sup>(1)</sup>. In total, around [...] % of all delivery points are located in the area of ČEZ Distribuce. Not all of them are served by ČEZ Prodej (the retail supply arm of ČEZ group); however ČEZ Prodej supplies the large majority ([...] %) of the small commercial customers and households in its own distribution area <sup>(2)</sup>.

- (33) At national level, ČEZ Prodej serves [...] million household delivery points, which corresponds to around [...] % market share in terms of delivery points.
- (34) Another element that would point to non-homogeneous competition conditions across the three distribution areas would be the fact that PRE charges around [...] % more for the energy component of the standard tariff in its own area. The Applicant justifies this price difference by the presence of PRE's low-cost subsidiary (Yello Energy) outside its own area but claims that ČEZ Prodej and E.ON charge identical prices for the energy component of the tariff across the three areas <sup>(3)</sup>.
- (35) For the purposes of assessing whether the conditions laid down in Article 34 of Directive 2014/25/EU are fulfilled and without prejudice to the application of other Union law; and based on the fact that there are a large number of retailers operating at national level, the geographic scope of the retail supply of electricity to final customers in the Czech Republic can be considered national for both large and small customers. This does not exclude however that strong regional elements may also be present.

### **Retail supply of natural gas**

- (36) The Commission has previously defined the markets for retail supply of gas, including those for small customers, as national in scope <sup>(4)</sup>.
- (37) In its Decision M.4238 — E.ON/PP <sup>(5)</sup> concerning the Czech retail market, the Commission left the definition open, as the transaction concerned did not lead to competition concerns under any alternative definition.
- (38) From a geographical perspective, the Czech NCA has, in its previous practice <sup>(6)</sup>, considered the relevant product markets in the sector of retail supply of gas as national in scope.
- (39) According to the latest information, there are currently a large number of active suppliers <sup>(7)</sup> in the Czech gas retail market. According to the Applicant these suppliers can supply large and small customers on a national basis.
- (40) As for electricity, gas distribution in the Czech Republic is split into three distribution areas, according to the ownership of the distribution companies <sup>(8)</sup>. With regard to retail supply of gas to households, the Commission notes a similar pattern as for electricity with regard to the incumbent gas distributors' market shares per distribution area. In 2015, these market shares were around [...] % for RWE, [...] % for PP and [...] % for E.ON <sup>(9)</sup>. However, the market shares of these companies are more diluted at national level with regard to the supply of gas to large customers <sup>(10)</sup>.
- (41) The energy component of the gas price is not regulated and is set by the local distribution companies across the three distribution areas. The Applicant's analysis shows that both PP's and RWE's pricing of the energy component of the total gas price is the same across the three distribution areas, while E.ON has identical prices in PP and RWE areas, and slightly lower (less than [...] %) in its own area <sup>(11)</sup>. In the light of this, the Applicant argues that the market for gas retail is national in scope.

<sup>(1)</sup> See CRA Report, Table 1, p. 6.

<sup>(2)</sup> See CRA Report, Table 8, p. 23.

<sup>(3)</sup> See CRA Report, Table 9, p. 23-24.

<sup>(4)</sup> M.3696 — E.ON/MOL (2005), recitals 138 and 140.

<sup>(5)</sup> M.4238 — E.ON/PP, recital 16.

<sup>(6)</sup> Case S830/2015/KS Bohemia Energy entity s.r.o./Europe Easy Energy a.s.; S713/2016/KS Bohemia Energy entity s.r.o/X Energie s.r.o.

<sup>(7)</sup> ERO National Report 2016, indicate that in 2016, 98 active traders were supplying gas to customers in the Czech Republic ([https://www.eru.cz/documents/10540/488714/NR\\_ERU\\_2016/3e05aa8c-0a79-4c3c-9389-6d0c3c313e1e](https://www.eru.cz/documents/10540/488714/NR_ERU_2016/3e05aa8c-0a79-4c3c-9389-6d0c3c313e1e)).

<sup>(8)</sup> See CRA Report, para. 2, p. 1.

<sup>(9)</sup> See CRA Report, page 31, Table 17.

<sup>(10)</sup> That is, [...] % for RWE and [...] % for both PP and E.ON (see CRA Report, page 22, Table 7). However, according to more recent data, in 2016, RWE had [...] %; PP had [...] % and E.ON [...] % of the market for large customers (see Applicant's reply of 12 April 2018 to Commission's RFI of 21 December 2017, p. 16).

<sup>(11)</sup> See CRA Report, Table 18, p. 33.

- (42) For the purposes of assessing whether the conditions laid down in Article 34 of Directive 2014/25/EU are fulfilled and without prejudice to the application of other Union law; and based on the fact that there are a large number of retailers operating at national level, the geographic market for the retail supply of natural gas to final customers in the Czech Republic can be considered national for both large and small customers. This does not exclude however that, like for electricity supply, regional elements may also be present.

### **Market analysis**

- (43) The Commission has adopted other decisions <sup>(1)</sup> concerning the applicability of exemptions from procurement rules to the retail supply of electricity and gas. In those Decisions, the Commission based its assessment on the following criteria in particular: number of market participants in general, combined market share of the biggest players, switching rate of final consumers, liquidity of the wholesale markets and price regulation.

### **Retail supply of electricity**

- (44) It should be first pointed out that, in order for a supplier to be a credible long-term player exerting effective competitive pressure at retail level in the Czech Republic, it is necessary to have access to competitive electricity sources, either via own generation capacity or through access to liquid wholesale markets for all the necessary wholesale products in the Czech Republic or abroad through imports. Otherwise, retailers are dependent on their vertically-integrated competitors for their electricity sourcing which means that they are under the permanent threat of a margin squeeze, which in turn significantly limits the competitive constraint they can exert on vertically-integrated suppliers such as ČEZ.
- (45) In assessing whether the retail supply of electricity is directly exposed to competition, it is therefore also necessary to consider the conditions of competition in the upstream market for generation and wholesale supply of electricity and the position of the operators therein <sup>(2)</sup>.

### **Number of market players, market shares of the biggest players**

- (46) In June 2017, 65 active suppliers were supplying more than 100 delivery points across the three distribution areas of ČEZ group, E.ON and PRE. ČEZ Prodej is the largest supplier for both large and small customers, followed by E.ON and PRE. Other competitors have much smaller market shares for the supply of final customers.
- (47) In previous decisions <sup>(3)</sup>, the Commission considered that, concerning the electricity retail supply market, the combined market share of the largest three undertakings is one of the relevant indicators to assess the market concentration and assess the general competition situation. Given that not all market players are subject to public procurement rules, the analysis focuses mainly on the market position and competitive constraints on the individual market players subject to public procurement rules that is, essentially, ČEZ Prodej and PP. However, whenever relevant to understand the market context in which ČEZ Prodej and PP are operating, other market operators are included in the analysis (see also recital 20). Other measures of concentration may also be considered relevant.

### **Retail supply of electricity to large customers**

- (48) ČEZ Prodej supplies [...] of large customers, namely, in volume, around [...] TWh out of [...] TWh <sup>(4)</sup>. Its market shares for large customers have been rather stable during the period 2012-2015 at [...] % <sup>(5)</sup>, however they dropped to [...] % in 2016 <sup>(6)</sup>. The Commission notes that this drop happened during the same year when ČEZ group experienced several shortfalls at a number of its nuclear reactors affecting around [...] of its nuclear

<sup>(1)</sup> Commission Decision 2007/141/EC of 26 February 2007 establishing that Article 30(1) of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors applies to the supply of electricity and gas in England, Scotland and Wales (OJ L 62, 1.3.2007, p. 23) and Commission Implementing Decision (EU) 2016/1674 of 15 September 2016 exempting retail supply of electricity and gas in Germany from the application of Directive 2014/25/EU of the European Parliament and of the Council (OJ L 253, 17.9.2016, p. 6).

<sup>(2)</sup> The upstream market concerning wholesale of electricity was not investigated in previous Decisions under Article 34 of Directive 2014/25/EU, as the competitive situation in these upstream markets did not raise concerns in the downstream level.

<sup>(3)</sup> Implementing Decision (EU) 2016/1674, recital 37 and the decisions cited.

<sup>(4)</sup> See CRA Report, Table 3, p. 18 and Table 6, p. 21.

<sup>(5)</sup> See Request, p. 32, Table 3.

<sup>(6)</sup> For large industrial customers, if the operators of the LDZ are included, the market share of ČEZ Prodej increases from [...] % to [...] % (see reply of 1 August 2017 to Commission's RFI of 28 June 2017, Table 2, p. 8).

capacity, which confirms that access to competitive electricity sources is a key factor to compete in the retail markets. Furthermore, it cannot be excluded that ČEZ Prodej's [...] % market share would be larger in one or more regions if it was calculated on the basis of a regional, instead of national, geographic market for large customers. However, local market share figures for large customers connected to the network of ČEZ Prodej were not provided, although requested.

- (49) During the period 2014-2016, the market shares for large customers were rather stable also in the case of E.ON with around [...] % and in the case of PRE with around [...] %.
- (50) At national level, the combined market share of the three main market players (ČEZ Prodej, E.ON and PRE) for large customers is around 60 % <sup>(1)</sup> (HHI <sup>(2)</sup> calculated for this market is 1 847 <sup>(3)</sup>). With regard to the other suppliers for large customers, Bohemia Energy, CENTROPOL, RWE, Veolia Komodity, Lumius, EP Energy Trading, Slovenské elektrárne and Amper Market are all below [...] %.

### Retail supply of electricity to small customers

- (51) At national level, ČEZ Prodej supplies [...] % of small customers <sup>(4)</sup> in terms of volume deliveries; however, larger volumes were consumed in ČEZ group's distribution area, namely, [...] TWh out of [...] TWh were consumed by small customers <sup>(5)</sup>. ČEZ Prodej's market shares for such customers have been rather stable during the period 2012-2015 at [...] % <sup>(6)</sup>. The Commission notes however that, according to the NCA opinion, the market shares of ČEZ Prodej have decreased over the last 6 years <sup>(7)</sup>.
- (52) At local level, the incumbents' market shares for small customers are high: in 2014-2015, ČEZ Prodej and E.ON had [...] % market share in their respective distribution areas, while PRE had [...] % market share in the Prague area. The presence of the three main suppliers in each other's respective areas was insignificant ([...] %) <sup>(8)</sup>. This confirms that strong regional elements are present.
- (53) During the period 2014-2016, the market shares for small customers were rather stable also in the case of E.ON with around [...] % and in the case of PRE with around [...] %. At national level, the combined market share of the three main market players (ČEZ Prodej, E.ON and PRE) for small customers is around 74 % <sup>(9)</sup> (the HHI calculated for this market is 2 664) <sup>(10)</sup>. The closest competitor for that category of small customers is Bohemia Energy with [...] %.

### Switching rates of final consumers

- (54) The number of customers switching is also considered a relevant indicator of effective competition. Two types of customer switching could be defined: external switching, which refers to the switching of supplier, and internal switching, which is defined as the switching of tariff or contract with the existing supplier. In a previous decision <sup>(11)</sup>, the Commission analysed mainly the external switching.

<sup>(1)</sup> By comparison, Implementing Decision (EU) 2016/1674 found that the combined market shares of the four largest electricity retailers in Germany was 33 %, in Commission Decision 2010/403/EU of 14 July 2010 exempting the production and wholesale of electricity in Italy's Macro-zone North and the retail of electricity to end customers connected to the medium, high and very high voltage grid in Italy, from the application of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 186, 20.7.2010, p. 44), concerning Italy, the combined market shares of the three largest electricity retailers was found to be 43,89 %. In Commission Decision 2006/422/EC of 19 June 2006 establishing that Article 30(1) of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors applies to the production and sale of electricity in Finland, excluding the Åland Islands (OJ L 168, 21.6.2006, p. 33), concerning Finland, this market share was at 35-40 %.

<sup>(2)</sup> HHI — Herfindahl-Hirschman Index.

<sup>(3)</sup> See Request, page 7.

<sup>(4)</sup> See, for small customers Table 10 of the Applicant's reply of 10 May 2017 to Commission's RFI of 21 April 2017.

<sup>(5)</sup> See CRA Report, Table 3, p. 18 in combination with Table 8, p. 23.

<sup>(6)</sup> See Request, Table 3, p. 32.

<sup>(7)</sup> See NCA Opinion, p. 2.

<sup>(8)</sup> See CRA Report, Table 8, p. 23.

<sup>(9)</sup> By comparison, Implementing Decision (EU) 2016/1674 found that the combined market shares of the four largest electricity retailers in Germany was 36 %. In Decision 2006/422/EC concerning Finland, this market share was at 35-40 %.

<sup>(10)</sup> See CRA presentation to DG COMP of 9 June 2017.

<sup>(11)</sup> Implementing Decision (EU) 2016/1674.



### **Retail supply of electricity to large customers**

- (55) The Applicant claims that external switching rates are relatively high among large consumers. However, the external switching rate among large customers decreased from around 30 % in 2010 to 16 % in 2015; the average external switching rate during those six years was 22 % <sup>(1)</sup>. By way of comparison, on average the external switching rates are higher in the Czech Republic than in Germany (around 11 %) <sup>(2)</sup> and lower than in Italy (around 32 %) <sup>(3)</sup>. According to the Applicant, no costs are incurred for switching electricity supplier; customers directly connected to the high voltage network organise their electricity supply through tenders or they directly purchase electricity on the exchanges, which may explain their tendency to switch suppliers more often than small customers (see recitals 56 to 59) <sup>(4)</sup>.

### **Retail supply of electricity to small customers**

- (56) The Applicant claims that external switching rates are not high for small customers, due to alleged high customer satisfaction levels and/or due to contract renegotiations with the same supplier. The external switching rate of small customers was approximately 4,6 % in 2015 (i.e. the same as in 2010); the average external switching rate during these six years was 5 % <sup>(5)</sup>. According to the Applicant, external switching of the electricity supplier is fairly easy also for small customers. According to a customer survey carried out by the Applicant, small customers across the three distribution areas would switch electricity supplier 'in response to price increases of 5-10 %' <sup>(6)</sup>.
- (57) The NCA Opinion indicated that according to the customer survey ordered by ČEZ Prodej, customers are very sensitive to prices and willing to switch <sup>(7)</sup>. Moreover, the NCA Opinion indicated that 'suppliers started to make pro-competitive retention offers to their customers with significant discounts' and consequently, based on internal data of ČEZ Prodej, 'a substantial part of the customers of ČEZ Prodej that would otherwise switch to another supplier chose switching to a more advantageous price of ČEZ Prodej' <sup>(8)</sup>. Also, the NCA Opinion concluded that by combining external switching rate with the internal switching rate of ČEZ Prodej, the combined level of switching rates for households was of [...] %.
- (58) The Commission notes however that, according to the latest available public information <sup>(9)</sup>, internal switching rates for households appear to be rather low in the Czech Republic. In particular, the three-year average of internal switching rates of electricity for household customers' accounts for 2 % only, while the five-year average of external switching of electricity for household customers is 6 % <sup>(10)</sup>.
- (59) Moreover, the Commission notes that the Czech National Regulator (ERO) points out, in relation to the retail market for electricity, certain unclear contractual conditions in fixed-term contracts with automatic extension, which may make it more difficult for customers to identify the dates and conditions on which contracts can be terminated <sup>(11)</sup>. The same point regarding contracts with fixed term and automatic extension was reiterated in the latest available ERO National Report of 2016 <sup>(12)</sup>.

### **Access to wholesale electricity**

- (60) The liquidity of the wholesale market is a relevant indicator for competition, as sufficient volumes on both the supply and the demand side for the relevant wholesale products (e.g. baseload, peak load, hourly blocs for

<sup>(1)</sup> See Request, Table 12, p. 58. The percentages are calculated in terms of points of delivery.

<sup>(2)</sup> Implementing Decision (EU) 2016/1674, recital 39.

<sup>(3)</sup> Decision 2010/403/EU, recital 18.

<sup>(4)</sup> See CRA Report, p. 43.

<sup>(5)</sup> See Request, Table 13, p. 59. The percentages are calculated in terms of points of delivery.

<sup>(6)</sup> See CRA Report, p. 49.

<sup>(7)</sup> See NCA Opinion, p. 2, last para.

<sup>(8)</sup> See NCA Opinion of 14.6.2017, p. 3, paras. 3 and 4

<sup>(9)</sup> ACER/CEER Annual Report on the Results of Monitoring the Internal Electricity and Gas Markets in 2015 of November 2016, page 66 [https://www.acer.europa.eu/Official\\_documents/Acts\\_of\\_the\\_Agency/Publication/ACER\\_Market\\_Monitoring\\_Report\\_2015.pdf](https://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Publication/ACER_Market_Monitoring_Report_2015.pdf)

<sup>(10)</sup> The five-year average of external switching in the Czech Republic is lower than in Germany, Sweden, Finland, and Great Britain.

<sup>(11)</sup> ERO National Report 2015, p. 21. ([https://www.ero.cz/documents/10540/488714/NR\\_ERU\\_2015.pdf/e6ca9e45-17c6-4f48-9561-8f0ef0d6af29](https://www.ero.cz/documents/10540/488714/NR_ERU_2015.pdf/e6ca9e45-17c6-4f48-9561-8f0ef0d6af29)), ERO National Report 2016, p. 25.

<sup>(12)</sup> ERO National Report 2016, p. 25.

different timeframes) provide sourcing and hedging opportunities to suppliers that do not dispose of own generation, enabling them to enter the retail markets and to compete with vertically integrated suppliers with own generation capacity.

### **ČEZ group remains by far the largest electricity generator**

- (61) At the generation level, ČEZ group produced [...] % of the electricity generated in the Czech Republic in 2016 <sup>(1)</sup>. The second largest generator (Elektrárna Počeradý a.s.) had a [...] % market share and the following three largest generators (Sokolovská Uhelná a.s., Elektrárna Dětmarovice a.s. and Severní Energetická a.s. <sup>(2)</sup>) were all below [...] % each <sup>(3)</sup>. The following six producers were below 3 % and the remaining category (representing around 17 % of the electricity generated) consisted in a multitude of small solar/wind power plants and agricultural undertakings. E.ON, PRE and the other smaller retailers (e.g. Bohemia Energy, CENTROPOL) do not own generation assets in the Czech Republic.
- (62) ČEZ group remains therefore the largest electricity generator of the Czech Republic. Its market share at generation level reflects its privileged access to the cheapest sources of generation in the Czech Republic (nuclear, lignite, coal).
- (63) As regards nuclear generation, it should be noted that in 2016-2017, ČEZ group experienced several shortfalls at a number of its nuclear reactors [...].
- (64) Under the Czech long-term energy strategy plan of the Czech Republic <sup>(4)</sup>, nuclear generation should account for around half of the country's total electricity consumption by 2050 (up from around one third at present). The Czech authorities plan to phase out four units at Dukovany from 2035 onwards and at the same time they plan to build new reactors at the two existing nuclear sites (Dukovany and Temelin) with an option either for the State to acquire ČEZ group's nuclear division or for ČEZ group to finance the new plants. In this scenario, with the full re-start of its reactors and forecast increase of power generation for next year <sup>(5)</sup>, ČEZ group's share of the generation market will likely increase to previous levels.

### **Use of the wholesale market**

- (65) At the wholesale level, electricity is either sold internally within vertically integrated undertakings carrying out both generation and retail supply activities (such as ČEZ group entities) or traded through various channels: under purely bilateral (over-the-counter or 'OTC') or brokered contracts; at the futures markets organised by Power Exchange Central Europe, a.s. ('PXE') or the Czech Moravian Commodity Exchange Kladno ('CMCEK') <sup>(6)</sup>; and at spot markets organised by the Czech electricity and gas market operator, the company OTE a.s. Electricity traders can use any combination of bilateral contracts and energy exchange products, including OTE's platforms and foreign exchanges <sup>(7)</sup>, for buying and selling <sup>(8)</sup>.
- (66) Wholesale prices at the PXE exchange traditionally follow the prices on the EEX exchange. In this regard, the Applicant claims that ČEZ Prodej <sup>(9)</sup> has no competitive advantage compared with other retailers on the market procuring their electricity on the PXE exchange, because [...] <sup>(10)</sup>. However, it should be noted that this price level is based on a purely contractual arrangement between two companies belonging to the same group, and can therefore be changed at any time and has no impact on the total profit of ČEZ group.

<sup>(1)</sup> More precisely, almost [...] TWh out of a gross electricity generation of around [...] TWh (See Applicant's reply of 10 May 2017 to the Commission's RFI of 21 April 2017, page 1, Table 1). ERO reports that in 2016, gross electricity generation totalled 83,3 TWh.

<sup>(2)</sup> It could nonetheless be expected that, after the announced sale of ČEZ group's Pocerady coal-fired power plant (1 000 MW) to Czech Coal, the market share of Severní Energetická (subsidiary of Czech Coal) will slightly grow.

<sup>(3)</sup> See Applicant's reply of 1 August 2017 to Commission's RFI of 28 June 2017.

<sup>(4)</sup> See Platts Power in Europe, Issue 753, 3 July 2017, p. 15.

<sup>(5)</sup> In March 2017, ČEZ group forecast an increase in its power generation in 2018 to 66 TWh from 59 TWh in 2015 — see Platts Power in Europe, issue 722 (28 March 2016), page 15.

<sup>(6)</sup> This commodity exchange focuses more on domestic than international trading.

<sup>(7)</sup> Mainly, the European Energy Exchange in Leipzig (EEX).

<sup>(8)</sup> ERO National Report 2015, p. 17, 18.

<sup>(9)</sup> The NCA, in its Opinion, brings forward the same argument.

<sup>(10)</sup> See Applicant's reply of 28 March 2017 to Commission's RFI of 24 March 2017.

- (67) The volumes traded on the wholesale markets (spot and forward, brokered and exchanges) in the Czech Republic in 2016 ([...] TWh) were around [...] the amount of annual electricity consumption <sup>(1)</sup>. In particular, OTC volumes traded on broker platforms such as Trayport amounted to [...] TWh (out of a total traded volume of [...] TWh) in 2016, increasing slightly since 2008 ([...] TWh) <sup>(2)</sup>. In comparison, the size of the German wholesale market was ten times bigger than the total volumes of electricity withdrawals <sup>(3)</sup>. In the Czech Republic, low futures trading volumes <sup>(4)</sup> were registered in the largest power exchange (PXE <sup>(5)</sup>), while very small volumes (2-3 TWh) were traded in domestic trading venues such as the CMCEK <sup>(6)</sup>. The volumes traded in the day-ahead and intra-day markets (OTE-Spot), which are also required for retailers to be able to rely on wholesale markets, increased since 2008 but the volumes involved remain small <sup>(7)</sup>. Finally, the lack of data about direct (OTC) bilateral sales does not allow the Commission to assess whether they are sufficient for new entrants to compete in the market <sup>(8)</sup>.

### Import opportunities

- (68) With regard to imports, the Applicant has argued that there is 'ample interconnector capacity on the Czech/German border' <sup>(9)</sup>. However, the Czech TSO has reported <sup>(10)</sup> several critical situations in the Czech transmission system due to unplanned transit flows (or 'loop flows') amounting to several GW. In particular, according to the Czech TSO, loop flows are a major problem in grid stability <sup>(11)</sup> and a limiting factor for commercial trade on the Czech borders, in particular on the Czech-German border. Figures submitted by the Applicant <sup>(12)</sup> shows that the import capacity commercially available at the border with Germany has substantially decreased in the period 2014-2016 <sup>(13)</sup>.
- (69) Moreover, the scope for imports from neighbouring countries could be reduced due to the traditionally low wholesale prices in the Czech Republic. This has been the case during the period 2012-2016 when the average day-ahead price differential across the Czech borders was negative, namely – 3,9 EUR/MWh with Poland; – 0,4 EUR/MWh with Austria; – 0,6 EUR/MWh with Slovakia, and only with Germany was it slightly positive (0,4 EUR/MWh) <sup>(14)</sup>.
- (70) Notwithstanding the above, the Applicant has argued that in 2016, around 8,6 TWh of import capacity was allocated to market participants, while 7,9 TWh, representing 'roughly 13 % of total electricity consumption', were imported in response to the sudden outages of ČEZ group's nuclear power plants <sup>(15)</sup>. This exceptional circumstance may explain the volumes of capacity imported and allocated to market participants in 2016. Indeed, ČEZ group has calculated that, in the absence of those shortfalls, it would have produced additional [...] TWh of electricity. However, the situation is recovering and some of the reactors have restarted while others are planned to restart soon. As a result it can be expected that imports will gradually decrease in the future as the ramping up of nuclear generation with low marginal cost will push down electricity prices in the Czech Republic.

<sup>(1)</sup> Figures reported by the Applicant on the basis of figures from OTE.

<sup>(2)</sup> The evolution of brokered volumes on Trayport — OTC during the previous years has been the following: [...] TWh in 2008; [...] TWh in 2009; [...] TWh in 2010; [...] TWh in 2011; [...] TWh in 2012; [...] TWh in 2013; [...] TWh in 2014 and [...] TWh in 2015. See Applicant's reply of 10 May 2017 to the Commission's RFI of 3 May 2017.

<sup>(3)</sup> See Implementing Decision (EU) 2016/1674.

<sup>(4)</sup> [...] TWh in 2016 compared to [...] TWh in 2008 — see Applicant's reply of 10 May 2017 to Commission's RFI of 3 May 2017, Table 5, p. 4.

<sup>(5)</sup> At PXE, only financial products, i.e. without the option of physical supply are traded.

<sup>(6)</sup> Approx. 2,6 TWh according to the 2015 Annual report of Kladno (available online in Czech language at: <https://www.cmkkb.cz/zpravy/vz2015/#6/z>, p. 6).

<sup>(7)</sup> Around [...] TWh. See Table 5, page 4 of the Applicant's reply of 10 May 2017 to the Commission's RFI of 21 April 2017.

<sup>(8)</sup> The Applicant has not submitted the volumes of electricity supplied under cooperation agreements or direct bilateral sales (without a broker) on the argument that they are unknown to them. The above calculations did not include data from OTC platforms.

<sup>(9)</sup> See page 10 (answer to Q. 9) of Applicant's reply of 16 February 2017 to the Commission RFI of 31 January 2017.

<sup>(10)</sup> See several reports and studies published by the Czech TSO Ceps, a.s. ([www.ceps.cz](http://www.ceps.cz)) about loop-flows in the region.

<sup>(11)</sup> See also the ERO Annual Report 2016.

<sup>(12)</sup> See the Applicant's reply of 1 August 2017 and Annexes thereof, to the Commission's RFI of 28 June 2017.

<sup>(13)</sup> Commercial capacity at the Czech-German border (in the direction Germany to Czech Republic) available on the day-ahead market has fallen from [...] MWh in 2014 to [...] MWh in 2016 (figures processed on the basis of Annex 8 of the Applicant's reply of 1 August 2017 to the Commission's RFI of 28 June 2017).

<sup>(14)</sup> See ACER 2016 Electricity and gas markets report ([http://www.acer.europa.eu/Official\\_documents/Acts\\_of\\_the\\_Agency/Publication/ACER%20Market%20Monitoring%20Report%202016%20-%20ELECTRICITY.pdf](http://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Publication/ACER%20Market%20Monitoring%20Report%202016%20-%20ELECTRICITY.pdf)).

<sup>(15)</sup> See p. 10 (answer to Q. 9) of Applicant's reply of 16 February 2017 to the Commission's RFI of 31 January 2017.

**Price competition and price regulation**

- (71) The price of electricity supply to end customers, has two main components <sup>(1)</sup>: the first one, accounting for 45 % of the total final price, includes fixed costs for electricity distribution, auxiliary services, system charges, etc.; the second one, accounting for 37 % of the total final price, is the electricity component, which includes the retail supply margin <sup>(2)</sup>. This second component is not regulated <sup>(3)</sup>.
- (72) With regard to prices of electricity to end consumers, for both large and small customers, the price level including taxes is smaller than the EU-28 average, and also smaller than the EU-28 average if taxes are excluded <sup>(4)</sup>. The Applicant observes that these prices were consistently lower than the corresponding prices in Germany over the period 2007-2015.
- (73) In particular, with regard to large industrial customers <sup>(5)</sup>, the Applicant observes that the Czech energy component decreased by more than 40 % between the second half of 2012 and the second half of 2015, when it was 24 % lower (0,0300-0,0400 EUR per kWh) than the German energy component (0,0400-0,0500 EUR per kWh). With regard to households <sup>(6)</sup>, the Applicant observes that, after the second half of 2009, the Czech energy component was constantly declining and in the second half of 2015 it was almost 0,0400 EUR per kWh, which means that it was 49 % lower than the German energy component (0,0700-0,0800 EUR per kWh) <sup>(7)</sup>.
- (74) The Applicant concludes from these figures, based on Eurostat data, that 'the degree of competition is larger in the Czech market than in the German market that is directly exposed to competition according to the Commission's recent German Retail Exemption Decision' <sup>(8)</sup>. However, this is not corroborated by evidence, in particular with regard to the price comparison between the Czech and German markets. Under certain conditions (e.g. marginal cost levels and elasticities of demand), economic theory suggests that highly concentrated markets could have lower prices than less concentrated markets <sup>(9)</sup>. More importantly, the price comparison depended on the choice of unit. In fact, German prices were above Czech ones in absolute terms in the last years but they were lower in terms of purchasing power standard (PPS); in that respect Czech prices were higher in 2015 <sup>(10)</sup>.
- (75) Moreover, with regard in particular to household prices, the Agency for Cooperation of Energy Regulators (ACER) has observed, on the basis of information received from the national regulators, that 'there may be irregularities in the data for household electricity prices. These results should therefore be interpreted with caution' <sup>(11)</sup>.

## RETAIL SUPPLY OF NATURAL GAS

**Number of market players, market shares of the biggest players**

- (76) Latest figures from the ERO indicate that in 2016, 98 active traders supplying gas to customers operated in the Czech Republic <sup>(12)</sup>. The total cost <sup>(13)</sup> of entry into the market for retail supply of gas is low, and does not seem to constitute a barrier to entry.

<sup>(1)</sup> Taxes account for 18 % of the price.

<sup>(2)</sup> See ERO National Report 2016, Chart 8, p. 20.

<sup>(3)</sup> The only exception to this rule is the price of electricity supplied by the supplier of last resort, which is marginal in the Czech Republic.

<sup>(4)</sup> See <http://ec.europa.eu/eurostat/web/energy/data/database>

<sup>(5)</sup> For the purpose of this price calculation, the Applicant defines large industrial customers as customers with consumption between 2 000 and 20 000 MWh.

<sup>(6)</sup> For the purpose of this price calculation, the Applicant defines household consumers as customers with consumption between 2 500 and 5 000 kWh.

<sup>(7)</sup> See CRA Report, p. 41, and p. 42.

<sup>(8)</sup> Section 5.2 of the Request, p. 37, last para.

<sup>(9)</sup> For instance, in an oligopolistic market with Cournot competition it can be shown that the aggregate Lerner Index of market power (the percentage of price not devoted to cover marginal costs, also known as mark-up) is inversely related to demand elasticity and directly related to the HHI index of concentration (see for example Chapter 4 in Vives, 1999, 'Oligopoly Pricing: Old Ideas and New Tools', MIT Press). This means that, other things equal, markets with higher concentration (higher elasticity) would display higher (lower) mark-ups. It also implies that a highly concentrated market A could show lower prices (and yet a higher mark-up) than another less concentrated market B if, for example, marginal costs in A are small enough compared to B. The same result holds for other alternative combinations of relative marginal costs and demand elasticities between A and B, including combinations that resemble real features of the Czech and German markets. Therefore, these counterexamples suggest that from a simple comparison of observed prices, and without taking into consideration other factors, it might not be possible to unambiguously infer whether one market is more competitive than other.

<sup>(10)</sup> Commission calculation based on Eurostat data (Ref. tables: nrg\_pc\_204 and nrg\_pc\_205).

<sup>(11)</sup> See ACER Market Monitoring report 2015 — Electricity and gas retail markets — p. 44, footnote 107. [https://www.acer.europa.eu/Official\\_documents/Acts\\_of\\_the\\_Agency/Publication/ACER%20Market%20Monitoring%20Report%202015%20-%20ELECTRICITY%20AND%20GAS%20RETAIL%20MARKETS.pdf](https://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Publication/ACER%20Market%20Monitoring%20Report%202015%20-%20ELECTRICITY%20AND%20GAS%20RETAIL%20MARKETS.pdf)

<sup>(12)</sup> See ERO National Report 2016, p. 42.

<sup>(13)</sup> Total costs are composed of the cost associated with the licensing and operational cost (marketing, customers' service costs, etc.).

- (77) In previous decisions <sup>(1)</sup>, the Commission considered that, concerning the gas retail supply market, the combined market share of the largest three undertakings is one of the relevant indicators to assess the market concentration and assess the general competition situation. Given that not all market players are subject to public procurement rules, the analysis focuses mainly on the market position and competitive constraints on the individual market players subject to public procurement rules that is, essentially, ČEZ Prodej and PP. However, whenever relevant to understand the market context in which ČEZ Prodej and PP are operating, other market operators are included in the analysis (see also recital 20). Other measures of concentration may also be considered relevant.
- (78) According to the most recent figures <sup>(2)</sup>, the largest suppliers of gas in terms of quantity supplied to customers are RWE (now, Innogy Energie, s.r.o.) with almost [...] % market share, followed by PP and E.ON with [...] % market share. Also ČEZ Prodej is active in this market with a market share of [...] % <sup>(3)</sup>.

#### **Retail supply of natural gas to large customers**

- (79) According to the 2016 figures supplied by the Applicant, RWE is the largest supplier to large customers with a market share of [...] %, followed by ČEZ Prodej with a market share of [...] % and E.ON with a market share of [...] %. The Commission notes that only PP and ČEZ Prodej are considered contracting entities in the sense of Article 4 of Directive 2014/25/EU, and hence are subject to procurement rules.
- (80) The combined market share of the three largest retailers to large customers on the Czech gas market is 51 %. The HHI calculated for this market is 1 341 <sup>(4)</sup>.

#### **Gas retail supply to small customers**

- (81) According to the 2016 figures supplied by the Applicant, the three largest suppliers to small customers are RWE, with a market share of [...] %, followed by PP with a market share of [...] %, and E.ON with a market share of [...] % <sup>(5)</sup>. Also ČEZ Prodej (fourth largest supplier) is active in this market with a market share of [...] %. The Commission notes that only PP and ČEZ Prodej are considered contracting entities in the sense of Article 4 of Directive 2014/25/EU, and hence are subject to procurement rules.
- (82) The combined market share of the three largest retailers to small customers on the Czech gas market is 69 % <sup>(6)</sup>. The HHI calculated for this market is 2 024 <sup>(7)</sup>.

#### **Switching rates of final consumers**

##### **Retail supply of natural gas to large customers**

- (83) ERO's national report for 2016 contains information regarding supplier switching data separately for four categories of customers <sup>(8)</sup>: 'high demand', 'medium size demand', 'low demand' and 'households'.
- (84) The first two categories ('high demand' and 'medium size demand') can be broadly assigned to the category of 'large customers' as defined for the purposes of this Decision. In 2016, customer switching for high demand customers was 38 % and for medium size demand was 29 %. The levels of switching for those two categories were also high over the last five years.

##### **Retail supply of natural gas to small customers**

- (85) The last two categories ('low demand' and 'households') can be broadly assigned to the category of 'small commercial customers and households' as defined for the purpose of this Decision.

<sup>(1)</sup> Implementing Decision (EU) 2016/1674, recital 37 and the decisions cited.

<sup>(2)</sup> See ERO National Report 2016, p. 43.

<sup>(3)</sup> Market shares in this recital refer to global retail supply of gas (to large customers and small customers).

<sup>(4)</sup> Calculated on the basis of Table 1, page 16 of Applicant's reply of 12 April 2018 to Commission's RFI of 21 December 2017.

<sup>(5)</sup> See Request, p. 70.

<sup>(6)</sup> See Request, p. 68.

<sup>(7)</sup> Calculated on the basis of Table 2, page 16 of Applicant's reply of 12 April 2018 to Commission's RFI of 21 December 2017.

<sup>(8)</sup> See ERO National Report 2016, Table 9, p. 43.

- (86) In 2016, customer switching for 'low demand' was at 14 %, while for 'households' it was at 6,6 %. The levels of switching for 'low demand' customers were above 10 % during the period 2011-2016. The levels of switching for 'households' have been decreasing since 2011 (around when the switching rate was 13 % <sup>(1)</sup>), however in 2016 the switching rate increased.

### ***Access to wholesale gas <sup>(2)</sup>***

- (87) Entities trading at the wholesale gas market can buy gas under long-term contracts, at commodity exchanges, or from other traders. Long-term contracts with Russian and Norwegian gas producers probably still have the most significant influence on the formation of wholesale prices. Long-term contracts are usually entered into for very long terms of up to 30 years. Earlier, certain changes to the gas price formulae were made in these contracts, but long-term contracts themselves have not been abandoned <sup>(3)</sup>. According to Eurostat figures, in total 36 entities imported gas into the Czech Republic in 2016 <sup>(4)</sup>.
- (88) According to the ERO, the holder of the exclusive licence for the activities of the market operator in the Czech Republic, OTE, a.s., has been organising a spot gas market since 2010. An amendment to the Gas Market Rules has abolished the day-ahead gas market organised by the market operator. On the other hand, a platform has been established for the intra-day gas market. According to ERO, this market has maintained its high attraction for gas market participants in 2016 <sup>(5)</sup>.
- (89) The largest share of the wholesale market takes place outside of the exchange platforms and in the form of bilateral over-the-counter ('OTC') trading. OTC trading offers the advantage that it can be carried out flexibly, namely in particular without having to have recourse to a limited set of contracts. A significant role in OTC trading is played by brokerage via broker platforms. OTC trading saw substantial increases as of 2012. In 2016, natural gas trading transactions brokered on broker platforms with the Czech Republic as a supply area totalled 88 TWh (93 TWh including the volumes traded on exchange platforms). The volume of futures contracts rose from 0,7 TWh in 2014 to 3 TWh in 2015.
- (90) In 2016, annual gas consumption in the Czech Republic totalled around 88 TWh. Consumption rose by 8,5 % compared to 2015. The ratio of the wholesale trading volume with the consumption is > 1 <sup>(6)</sup>.
- (91) In view of the factors examined in recitals 87-90, in this case, the Commission considers that the liquidity of the Czech wholesale market is sufficient to allow the retailers to have access under competitive conditions to the wholesale gas either through wholesale markets or through imports. The liquidity of the Czech wholesale market does not prevent the retail supply of gas from being subject to direct exposure to competition.

### ***Price competition and price regulation***

- (92) The price of gas supply to end customers, without taxes, has two main components <sup>(7)</sup>. The first one, accounting for 22 % of the price, contains regulated parts (transmission, distribution, etc.). The second one, which accounts for 78 % of the price, represents the price of the commodity itself which includes the retail supply margin. The second component is not regulated <sup>(8)</sup>.

### ***Retail supply of natural gas to large customers***

- (93) For large customers, the price level including taxes is smaller than the EU-28 average, and also smaller than the EU-28 average if taxes are excluded <sup>(9)</sup>.

### ***Retail supply of natural gas to small customers***

- (94) For small customers, the price level including taxes is smaller than the EU-28 average, and also smaller than the EU-28 average if taxes are excluded <sup>(9)</sup>.

<sup>(1)</sup> See Request p. 73.

<sup>(2)</sup> In addition to wholesale and imports, in 2017, the Czech Republic produced 1 TWh gas.

<sup>(3)</sup> See ERO National Report 2016, p. 39.

<sup>(4)</sup> See [http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Number\\_of\\_entities\\_bringing\\_natural\\_gas\\_into\\_the\\_country-T1.png](http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Number_of_entities_bringing_natural_gas_into_the_country-T1.png)

<sup>(5)</sup> See ERO National Report 2016, p. 39.

<sup>(6)</sup> 88 TWh of gas consumed in 2016 out of 93 TWh volume of gas traded at the wholesale level.

<sup>(7)</sup> See ERO National Report 2016, p. 32.

<sup>(8)</sup> The only exception to this rule is the price of gas supplied by the supplier of last resort, which according to the Request (para. 3, p. 76) has not been used so far in the Czech Republic.

<sup>(9)</sup> Based on <http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do>

#### 4. CONCLUSIONS

##### 4.1. ELECTRICITY

- (95) Competition on the Czech retail electricity markets is structurally limited by the fact that retailers (other than ČEZ Prodej) do not have sufficient own generation capacity nor access to significantly liquid wholesale markets either in the Czech Republic or abroad through imports. As a result these retailers are not in a position to compete on an equal footing with ČEZ Prodej which is vertically integrated with the largest local distribution company and the largest electricity generator.

##### RETAIL SUPPLY OF ELECTRICITY TO LARGE CUSTOMERS

- (96) The combined market shares of the three largest retail supply companies for large customers is rather high (60 %) with the largest market player (ČEZ Prodej) holding a [...] % market share. The second and third largest market players, namely E.ON and PRE, which hold market shares of [...] % and [...] %, respectively, are not subject to Union procurement rules. Despite their non-negligible market shares, they can only exercise limited competitive pressure on ČEZ Prodej. Access to wholesale electricity is not sufficient: ČEZ group is by far the largest electricity generator in the Czech Republic and electricity interconnection capacities are limited and therefore the liquidity of the wholesale electricity market is dependent on the behaviour of ČEZ group. This situation limits their possibility to procure electricity both in baseload and the other products needed under competitive conditions, which in turn structurally limits their ability to compete with ČEZ Prodej. For the same reasons, smaller competitors have a limited ability to compete with the three largest suppliers.
- (97) The market position of ČEZ Prodej, E.ON and PRE is strengthened by the strong regional elements characteristics of this market and non-homogeneous competition conditions across the three distribution areas make it difficult for competitors to challenge those operator's market positions within their own respective distribution areas. Finally, the degree of customer switching although higher than for small customers has declined in recent years.
- (98) In view of the factors examined above the condition of direct exposure to competition laid down in Article 34(1) of Directive 2014/25/EU should be considered not to be met in respect of the retail supply of electricity to large customers on the territory of the Czech Republic.

##### RETAIL SUPPLY OF ELECTRICITY TO SMALL CUSTOMERS

- (99) The combined market share of the three largest retail supply companies for small customers is high (74 %), with the largest market player (ČEZ Prodej) holding a [...] % market share. The second and third largest market players, namely E.ON and PRE, which are the second and third largest market players holding market shares of [...] % and [...] %<sup>(1)</sup>, respectively, are not subject to Union procurement rules. Despite their non-negligible market shares, they can only exercise limited competitive pressure on ČEZ Prodej. Access to wholesale electricity is not sufficient: ČEZ group is by far the largest electricity generator in the Czech Republic and electricity interconnection capacities are limited and therefore the liquidity of the wholesale electricity market is dependent on the behaviour of ČEZ group. This situation limits their possibility to procure electricity both in baseload and the other products needed under competitive conditions, which in turn structurally limits their ability to compete with ČEZ Prodej. For the same reasons, smaller competitors have a limited ability to compete with the three largest suppliers.
- (100) The market position of ČEZ Prodej, E.ON and PRE is strengthened by the strong regional characteristics of this market and non-homogeneous competition conditions across the three distribution areas, which make it difficult for competitors to challenge those operators' market position within their own respective distribution area. Finally, the degree of customer switching is rather low and, for the reasons noted above, low retail prices are not an indicator of direct exposure to competition.
- (101) In view of the factors examined above, the condition of direct exposure to competition laid down in Article 34(1) of Directive 2014/25/EU should be considered not to be met in respect of the retail supply of electricity to small customers on the territory of the Czech Republic.

<sup>(1)</sup> See, for small customers, Table 10 of the Applicant's reply of 10 May 2017 to Commission's RFI of 21 April 2017.

## 4.2. GAS

## RETAIL SUPPLY OF NATURAL GAS TO LARGE CUSTOMERS

- (102) In respect of the retail supply of gas to large customers in the Czech Republic, the situation can be summarised as follows: there is a high number of suppliers active at national level; the combined market shares of the three largest retail supply companies is not very high (51 %); the first and third market players are not subject to Union procurement rules; the degree of switching appears satisfactory, there is no end-user price control and the wholesale market liquidity does not seem to constitute an obstacle to the retail supply of gas being subject to direct exposure to competition.
- (103) In view of the factors examined above, the condition of direct exposure to competition laid down in Article 34(1) of Directive 2014/25/EU should be considered to be met in respect of retail supply of gas to large customers on the territory of the Czech Republic.

## RETAIL SUPPLY OF NATURAL GAS TO SMALL CUSTOMERS

- (104) In respect of the retail supply of gas to small customers in the Czech Republic, the situation can be summarised as follows: there is a high number of suppliers active at national level; the combined market shares of the three largest retail supply companies is rather high (69 %), however the first and the third market players are not subject to procurement rules; the degree of switching appears satisfactory; there is no end-user price control and the wholesale market liquidity does not seem to constitute an obstacle to the retail supply of gas being subject to direct exposure to competition.
- (105) In view of the factors examined above, the condition of direct exposure to competition laid down in Article 34(1) of Directive 2014/25/EU should be considered to be met in respect of retail supply of gas to small customers on the territory of the Czech Republic.

## 4.3. CONCLUSION

- (106) This Decision is based on the legal and factual situation as of November 2016 to April 2018 as it appears from the information submitted by the Applicant, and the ERO National Reports. It may be revised, should the conditions for the applicability of Article 34 of Directive 2014/25/EU be no longer met, following significant changes in the legal or factual situation.
- (107) Since the services related to the retail supply of electricity <sup>(1)</sup> should continue to be subject to Directive 2014/25/EU, it is recalled that procurement contracts covering several activities should be treated in accordance with Article 6 of that Directive. This means that, where a contracting entity is engaged in 'mixed' procurement, that is procurement used to support the performance of both activities exempted from the application of Directive 2014/25/EU and activities not exempted therefrom, regard must be had to the activities for which the contract is principally intended. In the event of such mixed procurement, where the purpose is principally to support activities which are not exempted, the provisions of Directive 2014/25/EU are to be applied. Where it is objectively impossible to determine for which activity the contract is principally intended, the contract is to be awarded in accordance with the rules laid down in Article 6(3) of Directive 2014/25/EU.
- (108) The measures provided for in this Decision are in accordance with the opinion of the Advisory Committee for Public Contracts,

HAS ADOPTED THIS DECISION:

*Article 1*

Directive 2014/25/EU shall not apply to contracts awarded by contracting entities and intended to enable the following activities to be carried out on the territory of the Czech Republic:

- (a) retail supply of natural gas to large customers;
- (b) retail supply of natural gas to small customers.

<sup>(1)</sup> Retail supply of electricity to large customers and to small customers.



*Article 2*

Directive 2014/25/EU shall continue to apply to contracts awarded by contracting entities and intended to enable the following activities to be carried out on the territory of the Czech Republic:

- (a) retail supply of electricity to large customers;
- (b) retail supply of electricity to small customers.

*Article 3*

This Decision is addressed to the Czech Republic.

Done at Brussels, 5 July 2018.

*For the Commission*  
Elżbieta BIENKOWSKA  
*Member of the Commission*

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**COMMISSION IMPLEMENTING DECISION (EU) 2018/1135****of 10 August 2018****establishing the type, format and frequency of information to be made available by the Member States for the purposes of reporting on the implementation of Directive 2010/75/EU of the European Parliament and of the Council on industrial emissions***(notified under document C(2018) 5009)***(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

Having regard to Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) <sup>(1)</sup>, and in particular Article 72(2) thereof,

Whereas:

- (1) Commission Implementing Decision 2012/795/EU <sup>(2)</sup> laid down the obligations for the Member States to report on the implementation of Directive 2010/75/EU for the period 2013-2016. That Decision has exhausted its temporal effects and should be repealed.
- (2) The type, format and frequency of information relating to the years from 2017 which are to be made available by the Member States should be established.
- (3) In accordance with Article 72(1) of Directive 2010/75/EU, Member States are to report information on the implementation of that Directive, on representative data on emissions and other forms of pollution, on emission limit values, and on the application of best available techniques in accordance with Articles 14 and 15 of that Directive, in particular on the granting of exemptions in accordance with its Article 15(4).
- (4) Member States are, in addition, required to include information under Articles 51(4), 55(2) and 59(1), (2) and (3) of Directive 2010/75/EU in the reports submitted under Article 72 of that Directive.
- (5) In accordance with Article 72(1) of Directive 2010/75/EU, Member States are to make the information available in an electronic format using a reporting tool provided by the Commission for this purpose.
- (6) Directive 2010/75/EU requires each installation covered by its Chapter II to have an individual permit in order to operate. Permit conditions must be based on the environmental performance achievable by that installation taking into account its technical characteristics, external factors including local conditions, and its use of best available techniques. Permits set conditions, in particular, on emission limit values, emission monitoring and compliance assessment specific to each individual installation. Permit conditions are to be periodically re-considered, and where necessary updated, particularly where new conclusions on best available techniques ('BAT conclusions') have been published for the main activity of an installation, in accordance with Article 21(3) of Directive 2010/75/EU. The most efficient way to report on the implementation of Directive 2010/75/EU is to provide the relevant information for each individual installation, and thus to extend the approaches taken in Modules 2 and 3 of Implementing Decision 2012/795/EU to all sectors.
- (7) Large combustion plants and waste (co-)incineration plants are covered by specific provisions in Chapters III and IV of Directive 2010/75/EU. For those plants, Member States should, in addition, provide information on the implementation of temporary derogations and emission control safeguards as specified in Articles 32 to 35 and 46(2) of Directive 2010/75/EU. For waste incineration and waste co-incineration plants with a capacity of

<sup>(1)</sup> OJ L 334, 17.12.2010, p. 17.

<sup>(2)</sup> Commission Implementing Decision 2012/795/EU of 12 December 2012 establishing the type, format and frequency of information to be made available by the Member States for the purposes of reporting on the implementation of Directive 2010/75/EU of the European Parliament and of the Council on industrial emissions (OJ L 349, 19.12.2012, p. 57).

less than 2 tonnes per hour, Article 55(3) of that Directive requires Member States to make publicly available a list of installations. Information on the publication of that list should be provided to the Commission in order for it to monitor the implementation of the Directive on those smaller plants.

- (8) In accordance with Article 72(1) of Directive 2010/75/EU, the Member States must also report representative data on emissions and other forms of pollution. In order to reduce unnecessary administrative burdens, Member States should provide information on where emission monitoring data are made available under Article 24(3)(b) of Directive 2010/75/EU and also a link to the emission data reported under Regulation (EC) No 166/2006 of the European Parliament and of the Council<sup>(1)</sup>. Under that Regulation, Member States are required to report annual data on, inter alia, off-site transfers of waste and releases to air, water and land of pollutants in accordance with its Annex II, which covers all pollutants listed in Annex II to Directive 2010/75/EU. At the same time, all 'installations' covered by Directive 2010/75/EU relate to or coincide with a 'facility' covered by that Regulation. The data reported under Regulation (EC) No 166/2006 thus provide 'representative data on emissions and other forms of pollution' in the sense of Article 72(1) of Directive 2010/75/EU.
- (9) The link to the reporting of emissions under Regulation (EC) No 166/2006 should be created by the use of existing spatial data which are managed by the Member States in accordance with Article 4(1) of Directive 2007/2/EC of the European Parliament and of the Council<sup>(2)</sup> and point 8 of Annex III to that Directive. The data model established in Commission Regulation (EU) No 1089/2010<sup>(3)</sup> enables Member States and the Commission to link 'installations', large combustion plants and waste (co-) incineration plants with 'facilities' within the meaning of Article 2(4) of Regulation (EC) No 166/2006. Reporting spatial data on installations, large combustion plants and waste (co-) incineration plants instead of providing detailed reports on emissions from installations is, in this context, thus just another 'type' of reporting within the meaning of Article 72(2) to Directive 2010/75/EU. This includes the adaptation of the INSPIRE model to the specific reporting requirements of Article 72(1) of Directive 2010/75/EU, thereby rendering compulsory certain elements of spatial information that are voidable under Regulation (EU) No 1089/2010.
- (10) For installations and activities using organic solvents which are not covered by Chapter II of Directive 2010/75/EU, and therefore not necessarily subject to an installation specific permit, Member States should report information on the total number of installations and on the number of installations which apply a reduction scheme under Article 59(1)(b) of that Directive, or a derogation under paragraph 2 or 3 of its Article 59. This will inform the Commission whether, and to what extent, the implementation of Directive 2010/75/EU could be affected.
- (11) The measures provided for in this Decision are in accordance with the opinion of the committee established by Article 75(1) of Directive 2010/75/EU,

HAS ADOPTED THIS DECISION:

#### Article 1

For installations covered by Chapters II, III and IV of Directive 2010/75/EU, with the exception of waste incineration plants and waste co-incineration plants with a nominal capacity of less than 2 tonnes per hour, Member States shall make available to the Commission the information set out in Annex I using the format laid down in that Annex, for each installation covered.

For waste incineration plants and waste co-incineration plants with a nominal capacity of less than 2 tonnes per hour and for installations covered by Chapter V of Directive 2010/75/EU, Member States shall make available to the Commission the information set out in Annex II using the format laid down in that Annex.

Member States shall report the information set out in Annexes I and II using the harmonised electronic reporting tool made available by the Commission.

<sup>(1)</sup> Regulation (EC) No 166/2006 of the European Parliament and of the Council of 18 January 2006 concerning the establishment of a European Pollutant Release and Transfer Register and amending Council Directives 91/689/EEC and 96/61/EC (OJ L 33, 4.2.2006, p. 1).

<sup>(2)</sup> Directive 2007/2/EC of the European Parliament and of the Council of 14 March 2007 establishing an Infrastructure for Spatial Information in the European Community (INSPIRE) (OJ L 108, 25.4.2007, p. 1).

<sup>(3)</sup> Commission Regulation (EU) No 1089/2010 of 23 November 2010 implementing Directive 2007/2/EC of the European Parliament and of the Council as regards interoperability of spatial data sets and services (OJ L 323, 8.12.2010, p. 11).

*Article 2*

The information set out in Annex I shall be first submitted for the reporting year 2017 unless otherwise stated in that Annex. For that reporting year, the information shall be submitted by 30 June 2019 at the latest. For subsequent reporting years, the information set out in Annex I shall be submitted every year within 9 months of the end of the reporting year.

The information set out in Annex II shall be first submitted for reporting years 2017 and 2018. For those reporting years, the information shall be submitted by 30 September 2019 at the latest. For subsequent reporting years, the information set out in Annex II shall be submitted every three years within 9 months of the end of the last of those reporting years

This Decision is addressed to the Member States.

Done at Brussels, 10 August 2018.

*For the Commission*  
Karmenu VELLA  
*Member of the Commission*

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## ANNEX I

**Information on installations covered by Chapters II, III and IV of Directive 2010/75/EU [with the exception of waste incineration plants and waste co-incineration plants with a nominal capacity of less than 2 tonnes per hour]**

Note: Member States may indicate information which they consider to be confidential, giving the grounds that are considered to preclude the Commission from making it publicly available.

## 1.1. Contextual information

Type	Format
1.1.1. Country identifier	Identification of the country where the reported installations and installation parts are located.
1.1.2. Reporting year	Calendar year to which the reporting refers.

## 1.2 Information on all installations covered by Chapter II of Directive 2010/75/EU

Type	Format
1.2.1. inspireId	Unique identifier of the installation that follows the requirements of Directive 2007/2/EC.
1.2.2. thematicId <sup>(1)</sup>	Thematic object identifier.
1.2.3. pointGeometry	Latitude and longitude (coordinates for the approximate centre of the installation) expressed with reference to the ETRS89 (2D)-EPSG:4258 coordinate reference system to a precision of 5 decimal places.
1.2.4. Name of the installation	Official denomination, proper name or conventional name of the installation.
1.2.5. Status	The operational status of the installation
1.2.6. Competent authority	For activities covered by Annex I to Directive 2010/75/EU, the name of and contact information for: (a) the competent authority or authorities responsible for granting permits under Chapter II of that Directive; (b) the competent authority or authorities responsible for inspections under Chapter II of that Directive.
1.2.7. Activities carried out	Identification of all activities covered by Annex I to Directive 2010/75/EU carried out within the installation.
1.2.8. BAT conclusions	As from the reporting year 2018, identification of the Commission Implementing Decisions on BAT conclusions that are applicable to any of the activities carried out at the installation.
1.2.9. Other relevant Chapters under Directive 2010/75/EU	Identification of the Chapters of Directive 2010/75/EU that apply to the installation (or part thereof).
1.2.10. Baseline report submitted	An indication of whether a baseline report as referred to in Article 22(2) of Directive 2010/75/EU, has been submitted to the competent authority.

Type	Format
1.2.11. Permit granted	<ul style="list-style-type: none"> <li>(a) An indication of whether a permit to operate the installation has been granted under Article 5 of Directive 2010/75/EU.</li> <li>(b) URL(s) where the permit(s) is/are made available to the public.</li> <li>(c) As from the reporting year 2018, if no permit has been granted under Article 5 of Directive 2010/75/EU, a description of what enforcement action has been taken.</li> </ul>
1.2.12. Reconsideration of permit conditions	<ul style="list-style-type: none"> <li>(a) An indication of whether permit conditions have been reconsidered in accordance with Article 21(3) of that Directive.</li> <li>(b) If applicable, the date on which the permit conditions were updated in accordance with Article 21(3) of Directive 2010/75/EU.</li> </ul>
1.2.13. BAT derogation under Article 15(4) of Directive 2010/75/EU	<p>For installations where the permit conditions have been reconsidered in accordance with Article 21(3) of that Directive, an indication of whether a derogation was granted under its Article 15(4).</p> <p>As from the reporting year 2018, where a derogation has been granted, information about:</p> <ul style="list-style-type: none"> <li>(a) the URL making available to the public the specific reasons for the derogation, in accordance with Article 24(2)(f) of Directive 2010/75/EU;</li> <li>(b) the Commission Implementing Decision on BAT conclusions from which the derogation was granted;</li> <li>(c) the BAT-Associated Emission Level (BAT-AEL) from which the derogation was granted;</li> <li>(d) if applicable, the duration of the derogation.</li> </ul>
1.2.14. Stricter permit conditions	<p>As from the reporting year 2018, for installations where the permit conditions have been reconsidered in accordance with Article 21(3), a specification of whether the permit sets stricter emission limit values than the lower value of the BAT-AEL range, indicating:</p> <ul style="list-style-type: none"> <li>(a) the applicable Commission Implementing Decisions on BAT conclusions;</li> <li>(b) the applicable BAT-AEL;</li> <li>(c) whether those stricter emission limit values were set pursuant to Article 14(4) or Article 18 of Directive 2010/75/EU or both of those Articles.</li> </ul>
1.2.15. Site visits (inspections)	<ul style="list-style-type: none"> <li>(a) The number of site visits to the production installation which were carried out by the competent authority during the reporting year.</li> <li>(b) As from the reporting year 2018, the specific URL of the last site visit report, or a generic URL explaining how individual visit reports can be publicly accessed in accordance with Article 23(6) second subparagraph.</li> </ul>
1.2.16. Emission monitoring data	<p>As from the reporting year 2018, an indication of how the results of emission monitoring have been made available to the public under Article 24(3)(b), including a URL if websites have been created for this purpose.</p>
1.2.17. eSPIRS identifier	<p>As from the reporting year 2018, where the installation is covered by Directive 2012/18/EU the Seveso Plants Information Retrieval System identifier ('eSPIRS identifier') for the establishment in which the installation is located. Optional.</p>

Type	Format
1.2.18. Emissions Trading Scheme identifier	As from the reporting year 2018, where the installation is, fully or partly, covered by Directive 2003/87/EC the identifier used for reporting under that Directive. Optional.
1.2.19. Remarks	Any other relevant information. Optional.
(1) This field has a multiplicity of 0-1 under INSPIRE.	
1.3 Additional information on large combustion plants covered by Chapter III and waste incineration and waste co-incineration plants with a capacity of 2 tonnes or more per hour covered by Chapter IV of Directive 2010/75/EU (1)	
Type	Format
1.3.1 General information	
1.3.1.a. inspireId	Unique identifier that follows the requirements of Directive 2007/2/EC, as further specified in Regulation (EU) No 1089/2010, in particular point 8 of Annex IV to that Regulation, as amended.
1.3.1 b. thematicId (2)	Thematic object identifier.
1.3.1.c. pointGeometry	Latitude and longitude (coordinates for the approximate centre of the plant) expressed with reference to the ETRS89 (2D)-EPSG:4258 coordinate reference system to a precision of 5 decimal places.
1.3.1.d. Name of the plant	Official denomination or proper or conventional name of the plant.
1.3.1.e. Status	The operational status of the plant.
1.3.2. Information on large combustion plants	
1.3.2.a. Total rated thermal input	Total rated thermal input of the large combustion plant.
1.3.2.b. Derogations under Directive 2010/75/EU	Details of any derogations as provided for in Articles 31 to 35 of Directive 2010/75/EU granted in respect of the large combustion plant.
1.3.2.c. Remarks	Any other relevant information. Optional.
1.3.3. Information on waste incineration and waste co-incineration plants with a nominal capacity of 2 tonnes or more per hour	
1.3.3.a. Total nominal capacity	Total nominal capacity of the waste incineration or waste co-incineration plant.
1.3.3.b. Permitted capacity for hazardous waste	Total permitted capacity for hazardous waste incineration and co-incineration.
1.3.3.c. Permitted capacity for non-hazardous waste	Total permitted capacity for non-hazardous waste incineration and co-incineration.

Type	Format
1.3.3.d. Article 46(2) of Directive 2010/75/EU on emission control safeguards	As from the reporting year 2018, an indication of: (a) whether more than 40 % of the heat release resulting from the incineration comes from hazardous waste; (b) whether untreated mixed municipal waste is co-incinerated.
1.3.3.e. Specific conditions	(a) An indication of whether a change of the operating conditions has been authorised under Article 51 of Directive 2010/75/EU. (b) If applicable, further information on the nature of the authorised change to the operating conditions. (c) As from the reporting year 2018, if applicable: (i) a URL for the permit setting out the operating conditions; (ii) the URL of the last site visit report made publicly available pursuant to Article 23(6), or a URL where it is explained how this report can be publicly accessed.
1.3.3.f. Public disclosure	As from the reporting year 2018, an indication of how the information referred to in Article 55(2) of Directive 2010/75/EU has been made available to the public, including a URL if websites have been created for this purpose.
1.3.3.g. Remarks	Any other relevant information. Optional.

(<sup>1</sup>) For the waste incineration and waste co-incineration plants with a capacity between 2 to 3 tonnes/hour the data only has to be submitted as from the reporting year 2018.  
(<sup>2</sup>) This field has a multiplicity of 0-1 under INSPIRE.

#### 1.4 Information where the IED installation is part of or coincides with a Facility (<sup>1</sup>)

Type	Format
1.4.1. inspireId	Unique identifier of the facility that follows the requirements of Directive 2007/2/EC.
1.4.2. thematicId ( <sup>2</sup> )	Thematic object identifier.
1.4.3. riverBasinDistrict	Code identifier and/or name assigned to the basin district of a watercourse.
1.4.4. Geometry	Latitude and longitude (coordinates for the approximate centre of the facility) expressed with reference to the ETRS89 (2D)-EPSG:4258 coordinate reference system to a precision of 5 decimal places.
1.4.5. Function	Activities performed by the facility. Function is described by the activity of the facility expressed as NACE-code.
1.4.6. Name of the facility	Official denomination or proper or conventional name of the facility.
1.4.7. Status	The operational status of the facility.
1.4.8. Remarks	Any other relevant information. Optional.

(<sup>1</sup>) This is a 'Production Facility' as defined in Regulation (EU) No 1089/2010, Annex IV, point 8.2.1 as 'one or more installations on the same site operated by the same natural or legal person, designed, built or installed to serve specific production or industrial purposes, comprehending all infrastructure, equipment and materials' and covered by Regulation (EC) N° 166/2006.

(<sup>2</sup>) This field has a multiplicity of 0-1 under INSPIRE



## ANNEX II

**Information on waste incineration plants and waste co-incineration plants with a nominal capacity of less than 2 tonnes per hour and on installations covered by Chapter V of Directive 2010/75/EU**

2.1. Waste incineration plants or waste co-incineration plants with a nominal capacity of less than 2 tonnes per hour	A reference to the list of such installations made publicly available in accordance with Article 55(3) of Directive 2010/75/EU.
2.2. Installations covered by Chapter V of Directive 2010/75/EU (installations using organic solvents)	<ul style="list-style-type: none"><li data-bbox="715 501 1417 566">(a) Total number of installations covered by Chapter V of Directive 2010/75/EU.</li><li data-bbox="715 568 1417 633">(b) Number of installations complying with Article 59(1)(b) of Directive 2010/75/EU.</li><li data-bbox="715 636 1417 701">(c) Number of installations for which a derogation as provided for in Article 59(2) of Directive 2010/75/EU has been granted.</li><li data-bbox="715 703 1417 763">(d) Number of installations for which a derogation as provided for in Article 59(3) of Directive 2010/75/EU has been granted.</li></ul>

**COMMISSION IMPLEMENTING DECISION (EU) 2018/1136****of 10 August 2018****on risk mitigation and reinforced biosecurity measures and early detection systems in relation to the risks posed by wild birds for the transmission of highly pathogenic avian influenza viruses to poultry***(notified under document C(2018) 5243)***(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

Having regard to Council Directive 2005/94/EC of 20 December 2005 on Community measures for the control of avian influenza and repealing Directive 92/40/EEC <sup>(1)</sup>, and in particular Article 3 and Article 63(3) thereof,

Whereas:

- (1) Avian influenza is an infectious viral disease in birds, including poultry. Infections with avian influenza viruses in domestic poultry cause two main forms of that disease that are distinguished by the virulence of the virus. The low pathogenic form generally only causes mild symptoms, while the highly pathogenic form results in very high mortality rates in most poultry species. That disease may have a severe impact on the health of domestic and wild birds and the profitability of poultry farming.
- (2) Directive 2005/94/EC sets out the minimum control measures to be applied in the event of an outbreak of that disease in poultry or other captive birds and also provides for certain preventive measures relating to the surveillance and the early detection of avian influenza.
- (3) Wild birds, in particular migratory water birds, are known to be the natural host for avian influenza viruses of low pathogenicity which they carry, usually without showing signs of that disease, during their seasonal migratory movements. However, since 2005, highly pathogenic avian influenza (HPAI) viruses of the H5 subtype have shown to be able to infect migratory birds which can then spread these viruses over long distances between continents.
- (4) The presence of avian influenza viruses and in particular HPAI viruses in wild birds poses a continual threat for the direct and indirect introduction of these viruses into holdings where poultry or other captive birds are kept, in particular during the seasonal movements of migratory birds, with the risk of subsequent virus spread from an infected holding to other holdings liable to cause significant economic losses.
- (5) The European Food Safety Authority (EFSA) adopted on 14 September 2017 a comprehensive scientific opinion on avian influenza <sup>(2)</sup>, confirming that the strict implementation of biosecurity measures plays a key role in preventing the spread of HPAI viruses from wild birds to poultry and other captive birds (the 2017 EFSA opinion).
- (6) The 2017 EFSA opinion lists the most relevant biosecurity measures to be applied continuously in different poultry husbandry systems including small size farms. It also states that certain general biosecurity principles universally apply to poultry holdings, while unique features for each holding need to be considered for optimised protection based on expert advice.
- (7) The 2017 EFSA opinion assessed and identified risks for HPAI virus introduction into poultry holdings, such as the keeping together of domestic ducks and geese with other poultry species, and the risks related to certain activities, such as the release of poultry for restocking supplies of game birds, and it proposed measures to mitigate these risks.

<sup>(1)</sup> OJ L 10, 14.1.2006, p. 16.<sup>(2)</sup> EFSA Journal 2017;15(10):4991.

- (8) The 2017 EFSA opinion concluded that the passive surveillance of wild birds is the most effective means for the early detection of the presence of HPAI viruses in wild birds, where the HPAI virus infections are associated with mortality and it recommended the sampling and laboratory testing of wild bird target species. Subsequently, EFSA published a list of wild bird target species in its scientific report on avian influenza approved on 18 December 2017 <sup>(1)</sup>.
- (9) In a scientific report on avian influenza approved on 22 March 2018 <sup>(2)</sup>, EFSA stated that there have not been any reported cases of human infection due to A(H5N8) or the newly emerged A(H5N5) and A(H5N6) viruses representing a reassortment of A(H5) clade 2.3.4.4 viruses with local European viruses donating the N5 or N6 gene. The A(H5N8), A(H5N5) and A(H5N6) viruses are considered to be predominantly adapted to avian species.
- (10) The 2017 EFSA opinion also concluded that in certain epidemiological situations, it may be appropriate that Member States temporarily intensify certain preventive measures around the place where the HPAI virus infection was confirmed in a wild bird or in its faeces, in particular in order to assess, if transmission to poultry holdings has occurred and if biosecurity measures are effectively applied to prevent virus introduction.
- (11) In order to target the bird populations that are most at risk of avian influenza infection and to ensure the effectiveness of the measures laid down in this Decision, certain preventive measures should therefore be targeted at holdings keeping poultry.
- (12) Commission Implementing Decision (EU) 2017/263 <sup>(3)</sup> provided for risk mitigating and reinforced biosecurity measures to reduce the risk of the transmission of HPAI viruses from wild birds to poultry by preventing direct and indirect contacts between these populations, and it required the Member States to identify the areas of their territory that are at particular risk for the introduction of HPAI viruses into holdings where poultry or other captive birds are kept ('high risk areas'), taking into account, amongst other things, the epidemiological situation and specific risk factors. That Implementing Decision applied until 30 June 2018.
- (13) The measures laid down in Implementing Decision (EU) 2017/263 should therefore be reviewed taking into account the current epidemiological situation in poultry, other captive birds and in wild birds in the Union and in risk-relevant third countries, the 2017 EFSA opinion and subsequent scientific reports on avian influenza and the Member States' experience gained in the implementation of the measures laid down in that Implementing Decision.
- (14) Accordingly, in view of the ongoing threat of HPAI virus transmission by infected wild birds, and the risk of outbreaks in holdings where poultry or other captive birds are kept, updated measures, taking into account the results of the review of Implementing Decision (EU) 2017/263, should therefore be laid down in this Decision.
- (15) The experience gained in the implementation of the measures laid down in Implementing Decision (EU) 2017/263 shows that certain derogations from risk mitigation and reinforced biosecurity measures are necessary in order for individual Member States to be able to adapt these measures to the changing epidemiological situation.
- (16) The measures provided for in this Decision are in accordance with the opinion of the Standing Committee on Plants, Animals, Food and Feed,

HAS ADOPTED THIS DECISION:

#### Article 1

#### Subject matter and scope

This Decision lays down risk mitigation measures, certain reinforced biosecurity measures and early detection systems in relation to the risks posed by wild birds for the introduction of highly pathogenic avian influenza (HPAI) viruses into holdings, as well as measures to raise awareness among owners and others involved in the poultry sector of such risks and of the necessity to implement or reinforce biosecurity measures on their holdings.

<sup>(1)</sup> EFSA Journal 2017;15(12):5141.

<sup>(2)</sup> EFSA Journal 2018;16(3):5240.

<sup>(3)</sup> Commission Implementing Decision (EU) 2017/263 of 14 February 2017 on risk mitigating and reinforced biosecurity measures and early detection systems in relation to the risks posed by wild birds for the transmission of highly pathogenic avian influenza viruses to poultry (OJ L 39, 16.2.2017, p. 6).

*Article 2***Definitions**

For the purposes of this Decision, the definitions set out in Article 2 of Directive 2005/94/EC shall apply.

*Article 3***Identification of high risk areas for the introduction and spread of HPAI viruses**

1. Member States shall identify the areas of their territory that are at particular risk for the introduction of HPAI viruses into holdings ('high risk areas'), taking into account:

- (a) the risk factors for the introduction of HPAI viruses into holdings, in particular with respect to:
  - (i) their geographical location in areas in Member States through which migratory birds are travelling or where these birds are resting during their migratory movements after having entered the Union in particular via the north-eastern and eastern migratory routes;
  - (ii) their proximity to wet areas, ponds, swamps, lakes, rivers or the sea where migratory birds, in particular those of the orders *Anseriformes* and *Charadriiformes*, may gather and have their stop-over places;
  - (iii) their geographical location in areas with a high density of migratory birds, particularly water birds;
  - (iv) poultry kept in open-air holdings, where contact between wild birds and poultry cannot be prevented or sufficiently controlled;
  - (v) current and past detections of HPAI viruses in poultry, other captive birds and wild birds;
- (b) the risk factors for the spread of HPAI viruses within holdings and between holdings, in particular, where:
  - (i) the geographical location of the holding is in an area with a high density of holdings, in particular those keeping ducks and geese and any poultry with open-air access;
  - (ii) the intensity of movements of vehicles transporting poultry and of persons within and from holdings, and where other direct and indirect contacts between holdings is high;
- (c) risk assessments and scientific advice in relation to the relevance of the spread of HPAI viruses by wild birds carried out by the European Food Safety Authority (EFSA) and by national and international risk assessment bodies;
- (d) the results of surveillance programmes carried out in accordance with Article 4 of Directive 2005/94/EC.

2. Member States shall ensure that stakeholders active in the poultry sector, including small-size holdings are informed by the most appropriate means about the delineation of the high risk areas identified in accordance with paragraph 1.

3. Member States shall keep the extent of the delineation of the high risk areas under constant review.

*Article 4***Risk mitigation and reinforced biosecurity measures**

1. Member States shall continuously monitor the specific epidemiological situation on their territory, taking also into account the threats posed by the detection of HPAI in poultry, other captive birds and wild birds in other Member States and nearby third countries, as well as the risk assessments referred to in Article 3(1)(c).

2. Member States shall take appropriate and practicable measures in high risk areas to reduce the risk of the transmission of HPAI viruses from wild birds to poultry.

3. The risk mitigation and reinforced biosecurity measures shall be aimed at preventing wild birds, and in particular migratory water birds, from coming into direct or indirect contact with poultry and in particular ducks and geese.

4. Depending on the assessment of the epidemiological situation referred to in paragraph 1, Member States shall prohibit the following activities in high risk areas:
- (a) the keeping together of ducks and geese with other poultry species, unless:
    - (i) the risk of virus introduction is deemed insignificant due to the characteristics of the holding and the risk mitigation measures in place that are considered sufficient by the competent authority; or
    - (ii) poultry species other than ducks and geese are used as sentinels according to the provisions of the competent authority;
  - (b) the keeping of poultry in the open air, unless:
    - (i) the poultry are protected against contact with wild birds with nets, roofs, horizontal fabrics or by other appropriate means to prevent contact; or
    - (ii) the poultry are supplied with feed and water indoors or under a shelter which sufficiently discourages the access of wild birds and thereby prevents contact by wild birds with the feed or water intended for the poultry;
  - (c) the use of outdoor water reservoirs for poultry; unless required for animal welfare reasons for certain poultry and they are sufficiently screened against wild birds;
  - (d) the provision of water to poultry from surface water reservoirs that can be accessed by wild birds; unless the water undergoes treatment that ensures the inactivation of avian influenza viruses;
  - (e) the gathering of poultry and other captive birds at markets, shows, exhibitions and cultural events; unless such events are organised and managed in such a way that the risk of virus spread by possibly infected birds to other birds is reduced to a minimum;
  - (f) the use of decoy birds of the orders *Anseriformes* and *Charadriiformes*; unless they are used in the framework of a surveillance programme for avian influenza carried out in accordance with Article 4 of Directive 2005/94/EC, research projects, ornithological studies or any other activity permitted by the competent authority;
  - (g) the release of poultry for restocking supplies of game birds; unless authorised by the competent authorities under the condition that:
    - (i) these activities are separated from other holdings; and
    - (ii) the poultry for restocking have been tested virologically in accordance with point 4(a) of Chapter IV of the diagnostic manual for avian influenza set out in the Annex to Commission Decision 2006/437/EC<sup>(1)</sup> with negative results for avian influenza on samples taken from each production unit within 48 hours before their release.
5. Member States may, on the basis of the regular review of the measures in accordance with Article 5, extend or limit the scope and the period of application of the risk mitigation and reinforced biosecurity measures referred to in paragraph 4.
6. Member States shall encourage the poultry sector to support training activities on risk mitigation and reinforced biosecurity measures for poultry owners, to develop holding-specific biosecurity plans and to monitor the application of biosecurity measures.

#### Article 5

#### **Maintenance and review of risk mitigation and reinforced biosecurity measures applied in high risk areas**

1. Member States shall maintain the measures applied pursuant to Article 4(4) in the high risk areas for the time period during which the heightened risk for HPAI virus introduction and spread persists on their territory.
2. Member States shall regularly review the measures they have taken pursuant to Article 4(4) in order to adjust and adapt them to the prevailing epidemiological situation, in particular as regards the risks posed by wild birds.

<sup>(1)</sup> Commission Decision 2006/437/EC of 4 August 2006 approving a Diagnostic Manual for avian influenza as provided for in Council Directive 2005/94/EC (OJ L 237, 31.8.2006, p. 1).

3. Member States shall base the review referred to in paragraph 2 on the assessment of the following factors:
  - (a) the development of the disease situation in wild birds, the epidemiological curve, namely, the number of new infections per time unit, the mapping of positive and negative findings and the dynamics of infection;
  - (b) the presence of species of migratory and sedentary wild birds, in particular those identified as target species for avian influenza surveillance;
  - (c) the occurrence of HPAI outbreaks in poultry and other captive birds, in particular as a consequence of primary virus introduction from wild birds;
  - (d) the detection of HPAI in poultry, other captive birds and wild birds during ongoing surveillance;
  - (e) the HPAI virus subtype or subtypes, virus evolution and the potential relevance to human health;
  - (f) the epidemiological situation for HPAI in wild birds, poultry and other captive birds on the territory of nearby Member States and third countries and risk assessments performed by EFSA, national and international risk assessment bodies;
  - (g) the level of implementation and efficiency of the measures laid down in this Decision.

#### *Article 6*

##### **Awareness raising**

Member States shall ensure that the necessary measures are in place to raise awareness among stakeholders active in the poultry sector including small-size holdings of the risks for HPAI virus introduction into holdings and to provide them with the most appropriate information on risk mitigation and reinforced biosecurity measures as provided for in Article 4, in particular the measures to be enforced in high risk areas, by the means best suited to bring such information to their attention.

Member States shall also raise awareness of groups involved in wildlife activities including ornithologists, bird watchers and hunters.

#### *Article 7*

##### **Early detection systems in poultry flocks**

1. Member States shall introduce or reinforce existing early detection systems aimed at rapid reporting by the owners to the competent authority of any sign of HPAI virus presence in flocks of poultry kept on holdings located in high risk areas.
2. The systems referred to in paragraph 1 shall, at least, consider as relevant parameters that indicate the likely presence of disease, a significant drop in feed and water intake and in egg production, the observed mortality rate and any clinical sign or post-mortem lesion suggesting HPAI virus presence taking into account a variation of these parameters in different poultry species and production types.

#### *Article 8*

##### **Increased surveillance in wild birds**

1. Member States shall ensure that increased surveillance of wild bird populations and further monitoring for dead or sick birds is carried out in accordance with the guidelines on the implementation of surveillance programmes for avian influenza in wild birds set out in Annex II to Commission Decision 2010/367/EU <sup>(1)</sup> adopted in accordance with Article 4(2) of Directive 2005/94/EC.
2. Member States may target sampling and laboratory testing of wild birds on species and geographical areas previously unaffected by HPAI.

<sup>(1)</sup> Commission Decision 2010/367/EU of 25 June 2010 on the implementation by Member States of surveillance programmes for avian influenza in poultry and wild birds (OJ L 166, 1.7.2010, p. 22).

*Article 9***Additional temporary measures in the event of confirmation of cases of HPAI in wild birds**

1. Where the presence of the HPAI virus is confirmed in samples taken from one or more wild birds or their faeces and where an increased risk for virus introduction into holdings or a possible risk for public health has been identified, Member States shall take additional temporary measures in the vicinity of that finding, which shall include:

- (a) the implementation of risk mitigation and reinforced biosecurity measures in accordance with Article 4;
- (b) increased surveillance in wild birds in accordance with Article 8;
- (c) if necessary, epidemiological investigations and visits to holdings including as appropriate, sampling and testing for HPAI;
- (d) the introduction and reinforcement of early detection systems in accordance with Article 7.

2. Member States may limit the application of some of the measures referred to in paragraph 1, if the risk of the introduction of the HPAI virus is deemed by the competent authority to be negligible for certain parts of the their territory or certain types of holdings.

*Article 10***Compliance and information obligations**

1. Member States shall arrange for the monitoring of the implementation by owners and the poultry sector of the measures laid down in this Decision.

2. Member States shall inform the Commission and the other Member States in the framework of the Standing Committee on Plants, Animals, Food and Feed about the measures that they take to comply with this Decision.

*Article 11***Addressees**

This Decision is addressed to the Member States.

Done at Brussels, 10 August 2018.

*For the Commission*  
Vytenis ANDRIUKAITIS  
*Member of the Commission*

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**COMMISSION IMPLEMENTING DECISION (EU) 2018/1137****of 10 August 2018****on the supervision, plant health checks and measures to be taken on wood packaging material for the transport of commodities originating in certain third countries***(notified under document C(2018) 5245)*

THE EUROPEAN COMMISSION,

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

Having regard to Council Directive 2000/29/EC of 8 May 2000 on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community <sup>(1)</sup>, and in particular the third and the fourth sentence of Article 16(3) thereof,

Whereas:

- (1) Commission Implementing Decision 2013/92/EU <sup>(2)</sup> provides for plant health checks and measures to be taken on wood packaging material actually in use in the transport of specified commodities originating in China. Articles 1 to 4 of that Decision expire on 31 July 2018.
- (2) Plant health checks conducted by Member States on the basis of that Decision, as well as Article 13a of Directive 2000/29/EC, have shown that wood packaging material used in the transport of certain commodities originating from Belarus and China ('the specified commodities') was non-compliant with Union requirements concerning marking of wood packaging material as set out in point 2 of Section I of Part A of Annex IV to Directive 2000/29/EC, and in some cases also infested by harmful organisms listed in Part A of Annex I to that Directive.
- (3) In order to ensure a better preparation of the authorities carrying out the respective plant health checks, airport authorities, harbour authorities, other authorities responsible for the control of movement of goods or any professional operator involved in the importation of specified commodities accompanied by wood packaging material, should give, as soon as they are aware of the imminent arrival of that wood packaging material, advance notice thereof to the customs office of the point of entry and to the responsible official body of the point of entry.
- (4) The wood packaging material of consignments of the specified commodities should be subject to the plant health checks on a regular basis. Member States should define the rate of the wood packaging material of the specified commodities subject to plant health checks. That rate should be no lower than 1 % of the imported wood packaging material of the specified commodities, to ensure that a representative sample is checked.
- (5) That wood packaging material, as well as the specified commodities, should be subject to the Union rules concerning customs supervision until those plant health checks are completed, in order to ensure that their free movement within the Union territory does not introduce any phytosanitary risks.
- (6) Plant health checks should take place at the point of entry into the Union or at the place of destination approved for that purpose by the responsible official body, in order to ensure that those checks are carried out in the most appropriate facilities.
- (7) Where the plant health checks are carried out in the place of destination, and they show that point 2 of Section I of Part A of Annex IV to Directive 2000/29/EC is not complied with, or that the wood packaging material has been found infested by harmful organisms listed in Part A of Annex I to that Directive, the Member State concerned should properly handle the respective wood packaging material and immediately destroy it, to ensure the phytosanitary protection of the Union territory.
- (8) Member States should notify to the Commission the number and the results of the plant health checks carried out in accordance with this Decision by means of a specific electronic reporting template.

<sup>(1)</sup> OJ L 169, 10.7.2000, p. 1.

<sup>(2)</sup> Commission Implementing Decision 2013/92/EU of 18 February 2013 on the supervision, plant health checks and measures to be taken on wood packaging material actually in use in the transport of specified commodities originating in China (OJ L 47, 20.2.2013, p. 74).



- (9) Experience of the plant health checks carried out so far shows that, in order to provide further detail on the interceptions recorded on wood packaging material to the national plant protection organisations of those third countries, it is necessary that Member States report any information necessary to identify the sources of unreliable or incorrect marking.
- (10) This Decision should apply as from 1 October 2018, in order to allow the responsible official bodies and the professional operators the appropriate time to adapt to the new provisions.
- (11) In order to ensure that no legal vacuum occurs by that date, Articles 1 to 4 of Implementing Decision 2013/92/EU which expire on 31 July 2018 should apply until 30 September 2018.
- (12) For the purpose of legal clarity, Implementing Decision 2013/92/EU should be repealed as of 1 October 2018, which is the date of application of this Decision.
- (13) This Decision should apply until 30 June 2020, in order to allow for the adoption of the necessary measures as appropriate by that time.
- (14) The measures provided for in this Decision are in accordance with the opinion of the Standing Committee on Plants, Animals, Food and Feed,

HAS ADOPTED THIS DECISION:

#### *Article 1*

#### **Definitions**

For the purpose of this decision, the following definitions shall apply:

- (a) 'wood packaging material' means wood or wood products used in supporting, protecting or carrying a commodity, in the form of packing cases, boxes, crates, drums and similar packings, pallets, box pallets and other load boards, pallet collars and dunnage, whether or not actually in use in the transport of objects of all kinds; processed wood produced by glue, heat or pressure or a combination thereof and packaging material entirely composed of wood of 6 mm of thickness or less are excluded;
- (b) 'specified commodities' means commodities originating in Belarus or China imported into the Union supported, protected or carried by wood packaging material, with the Combined Nomenclature (CN) codes or the TARIC codes listed in Annex I to this Decision and meeting the descriptions laid down in Annex I to Council Regulation (EEC) No 2658/87 <sup>(1)</sup>;
- (c) 'consignment' means a quantity of goods being covered by a single document required for customs formalities or for other formalities;
- (d) 'professional operator' means any person, governed by public or private law, involved professionally in, and legally responsible for the introduction in the Union territory of wood packaging material.

#### *Article 2*

#### **Supervision**

The wood packaging material of each consignment of the specified commodities, from the time of entry into the customs territory of the Union shall be subject to customs supervision pursuant to Article 134 of Regulation (EU) No 952/2013 of the European Parliament and of the Council <sup>(2)</sup> and to supervision by the responsible official bodies as referred to in Article 13(1) of Directive 2000/29/EC.

The wood packaging material and the specified commodities may only be placed under one of the customs procedures as specified in point 16(a) and (b) of Article 5 of Regulation (EU) No 952/2013 with the exception of the special procedures referred to in Article 210(a) and (b) of that Regulation, if the plant health checks as specified in Article 4 of this Decision have been completed.

<sup>(1)</sup> Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ L 256, 7.9.1987, p. 1).

<sup>(2)</sup> Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ L 269, 10.10.2013, p. 1).

*Article 3***Advance notice of imported wood packaging material**

Airport authorities, harbour authorities, other authorities responsible for the control of movement of goods or any professional operator involved in the importation of the specified commodities accompanied by wood packaging material, shall give, as soon as they are aware of the imminent arrival of that wood packaging material, advance notice thereof to the customs office at the point of entry or to the responsible official body of the point of entry.

*Article 4***Plant health checks**

The wood packaging material of consignments of the specified commodities shall, on a regular basis, be subject to the plant health checks provided for in Article 13a(1)(b)(iii) of Directive 2000/29/EC, to confirm that the wood packaging material meets the requirements laid down in point 2 of Section I of Part A of Annex IV to Directive 2000/29/EC.

Based on the identified plant health risk, Member States shall define the rate of the wood packaging material of the specified commodities subject to plant health checks. That rate shall be no lower than 1 % of the consignments of the specified commodities. Until the completion of the checks, that wood packaging material and the respective specified commodities shall remain under customs supervision pursuant to Article 134 of Regulation (EU) No 952/2013 and also to supervision by the responsible official body.

Plant health checks shall take place at the point of entry into the Union or at the place of destination approved for that purpose by the responsible official body.

*Article 5***Measures in case of non-compliance**

Where the plant health checks referred to in Article 4 show that point 2 of Section I of Part A of Annex IV to Directive 2000/29/EC is not complied with, or that the wood packaging material has been found infested by harmful organisms listed in Part A of Annex I to that Directive, the Member State concerned shall immediately subject the non-compliant wood packaging material to one of the measures provided for in Article 13c(7) of that Directive.

When such non-compliance or detection of such infestation is concluded in the place of destination, as referred to in Article 4 of this Decision, the Member State concerned shall ensure that the respective wood packaging material is immediately destroyed. Prior to that destruction, the wood packaging material shall be treated to ensure that no phytosanitary risks occur during and after that destruction.

*Article 6***Reporting**

Without prejudice to Commission Directive 94/3/EC <sup>(1)</sup>, Member States shall notify the number and the results of the plant health checks carried out in accordance with this Decision to the Commission, using the electronic reporting template set out in Annex II to this Decision by the following dates:

- (a) by 31 October 2019 for the period from 1 October 2018 to 30 September 2019;
- (b) by 31 March 2020 for the period from 1 October 2019 to 29 February 2020.

*Article 7***Amendment to Implementing Decision 2013/92/EU**

The second paragraph of Article 7 of Implementing Decision 2013/92/EU is replaced by the following:

‘Articles 1 to 4 shall apply until 30 September 2018’.

<sup>(1)</sup> Commission Directive 94/3/EC of 21 January 1994 establishing a procedure for the notification of interception of a consignment or a harmful organism from third countries and presenting an imminent phytosanitary danger (OJ L 32, 5.2.1994, p. 37).

*Article 8***Repeal of Implementing Decision 2013/92/EU**

Implementing Decision 2013/92/EU is repealed as from 1 October 2018.

*Article 9***Application**

Articles 1 to 6 shall apply from 1 October 2018.

This Decision shall apply until 30 June 2020.

*Article 10***Addressees**

This Decision is addressed to the Member States.

Done at Brussels, 10 August 2018.

*For the Commission*  
Vytenis ANDRIUKAITIS  
*Member of the Commission*

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## ANNEX I

## SPECIFIED COMMODITIES

2514 00 00	Slate, whether or not roughly trimmed or merely cut, by sawing or otherwise, into blocks or slabs of rectangular (including square) shape
2515	Marble, travertine, ecaussine and other calcareous monumental or building stone of an apparent specific gravity of 2,5 or more, and alabaster, whether or not roughly trimmed or merely cut, by sawing or otherwise, into blocks or slabs of rectangular (including square) shape
2516	Granite, porphyry, basalt, sandstone and other monumental or building stone, whether or not roughly trimmed or merely cut, by sawing or otherwise, into blocks or slabs of a rectangular (including square) shape
4401	Fuel wood, in logs, billets, twigs, faggots or similar forms; wood in chips or particles; sawdust and wood waste and scrap, whether or not agglomerated in logs, briquettes, pellets or similar forms
4415	Packing cases, boxes, crates, drums and similar packings, of wood; cable-drums of wood; pallets, box pallets and other load boards, of wood; pallet collars of wood (excl. containers specially designed and equipped for one or more modes of transport)
4415 20	Pallets, box pallets and other load boards, of wood; pallet collars of wood (excl. containers specially designed and equipped for one or more modes of transport)
4415 20 90	Box pallets and other load boards, of wood (excl. containers specially designed and equipped for one or more modes of transport; flat pallets and pallet collars)
4415 20 20	Pallets and pallet collars, of wood
4418	Builders' joinery and carpentry, of wood, incl. cellular wood panels, assembled flooring panels, shingles and shakes, of wood (excl. plywood panelling, blocks, strips and friezes for parquet flooring, not assembled, and pre-fabricated buildings)
4421	Other articles of wood, n.e.s.
6501 00	Hat-forms, hat bodies and hoods of felt, neither blocked to shape nor with made brims; plateaux and manchons, incl. slit manchons, of felt
6801 00 00	Setts, curbstones and flagstones, of natural stone (excl. slate)
6802	Worked monumental or building stone (except slate) and articles thereof, other than goods of heading 6801; mosaic cubes and the like, of natural stone (including slate), whether or not on a blocking; artificially coloured granules, chippings and powder, of natural stone (including slate)
6803 00	Worked slate and articles of slate or of agglomerated slate (excl. slate granules, chippings and powder, mosaic cubes and the like, slate pencils, and ready-to-use slates or boards with writing or drawing surfaces)
6810	Articles of cement, concrete or artificial stone, whether or not reinforced
6811 40	Articles of asbestos-cement, cellulose fibre-cement or the like, containing asbestos
6902 00	Refractory bricks, blocks, tiles and similar refractory ceramic constructional goods, other than those of siliceous fossil meals or similar siliceous earths
6904 00	Non-refractory ceramic building bricks, flooring blocks, support or filler tiles and the like

6905 00	Roofing tiles, chimney pots, cowls, chimney liners, architectural ornaments and other ceramic constructional goods
6906 00	Ceramic pipes, conduits, guttering and pipe fittings (excl. of siliceous fossil meals or similar siliceous earths, refractory ceramic goods, chimney liners, pipes specifically manufactured for laboratories, insulating tubing and fittings and other piping for electrotechnical purposes)
6907	Ceramic flags and paving, hearth or wall tiles; ceramic mosaic cubes and the like, whether or not on a backing (excl. of siliceous fossil meals or similar siliceous earths, refractory goods, tiles specially adapted as table mats, ornamental articles and tiles specifically manufactured for stoves)
6912 00 83	Household articles and toilet articles, of stoneware (excl. tableware, kitchenware, baths, bidets, sinks and similar sanitary fixtures, statuettes and other ornamental articles, pots, jars, carboys and similar receptacles for the conveyance or packing of goods)
6912 00 23	Tableware and kitchenware, of stoneware (excl. statuettes and other ornamental articles, pots, jars, carboys and similar receptacles for the conveyance or packing of goods, and coffee grinders and spice mills with receptacles made of ceramics and working parts of metal)
7210	Flat-rolled products of iron or non-alloy steel, of a width $\geq 600$ mm, hot-rolled or cold-rolled 'cold-reduced', clad, plated or coated
7313 00	Barbed wire of iron or steel; twisted hoop or single flat wire, barbed or not, and loosely twisted double wire, of a kind used for fencing, of iron or steel
7317 00	Nails, tacks, drawing pins, corrugated nails, staples and similar articles of iron or steel, whether or not with heads of other material (excl. such articles with heads of copper and staples in strips)
7318	Screws, bolts, nuts, coach screws, screw hooks, rivets, cotters, cotter pins, washers, incl. spring washers, and similar articles, of iron or steel (excl. lag screws, stoppers, plugs and the like, threaded)
7415	Nails, tacks, drawing pins, staples and similar Articles, of copper or with shafts of iron or steel and heads of copper, screws, bolts, nuts, screw hooks, rivets, cotters, cotter pins, washers 'incl. spring washers' and similar articles, of copper (excl. staples in strips, and lag screws, plugs, bungs and the like, threaded)
8101 96	Tungsten wire
8102 96	Molybdenum wire
8205 90 10	Anvils; portable forges; hand- or pedal-operated grinding wheels with frameworks
8465 93	Grinding, sanding or polishing machines for working wood, cork, bone, hard rubber, hard plastics or similar hard materials (excl. machines for working in the hand and machining centres)
4504 90 80	Agglomerated cork, with or without a binding substance, and articles of agglomerated cork (excl. footwear and parts thereof, insoles, whether or not removable; headgear and parts thereof; plugs and dividers for shotgun cartridges; toys, games and sports equipment and parts thereof; blocks, plates, sheets or strips; tiles of any shape; solid cylinders, incl. discs; corks and stoppers)
4823 90 85	Paper, paperboard, cellulose wadding and webs of cellulose fibres, in strips or rolls of a width $\leq 36$ cm, in rectangular or square sheets, of which no side $> 36$ cm in the unfolded state, or cut to shape other than rectangular or square, and articles of paper pulp, paper, cellulose wadding or webs of cellulose fibres, n.e.s.
6912 00 83	Household articles and toilet articles, of stoneware (excl. tableware, kitchenware, baths, bidets, sinks and similar sanitary fixtures, statuettes and other ornamental articles, pots, jars, carboys and similar receptacles for the conveyance or packing of goods)

7108 13 80	Gold, incl. gold plated with platinum, in semi-manufactured forms, for non-monetary purposes (excl. sheets and strips of a thickness, excl. any backing, of > 0,15 mm and plates, bars, rods, wire and sections)
7110 19 80	Platinum in semi-manufactured forms (excl. sheets and strips of a thickness, excl. any backing, of > 0,15 mm and plates, bars, rods, wire and sections)
7304 31 20	Precision tubes, seamless, of circular cross-section, of iron or non-alloy steel, cold-drawn or cold-rolled 'cold-reduced' (excl. line pipe of a kind used for oil or gas pipelines or casing and tubing of a kind used for drilling for oil or gas)
7304 41 00	Tubes, pipes and hollow profiles, seamless, of circular cross-section, of stainless steel, cold-drawn or cold-rolled 'cold-reduced' (excl. line pipe of a kind used for oil or gas pipelines, casing and tubing of a kind used for drilling for oil or gas)
8407 33 20	Spark-ignition reciprocating piston engine, of a kind used for vehicles of chapter 87, of a cylinder capacity > 250 cm <sup>3</sup> but ≤ 500 cm <sup>3</sup>
8407 33 80	Spark-ignition reciprocating piston engine, of a kind used for vehicles of chapter 87, of a cylinder capacity > 500 cm <sup>3</sup> but ≤ 1 000 cm <sup>3</sup>
8424 49 10	Agricultural or horticultural liquid/powder sprayers designed to be mounted on or drawn by a tractor
8424 82 90	Agricultural or horticultural mechanical appliances, whether or not hand-operated, for projecting or dispersing liquids or powders (excl. sprayers and watering appliances)
8424 89 40	Mechanical appliances for projecting, dispersing, or spraying liquids or powders, of a kind used solely or principally for the manufacture of printed circuits or printed circuit assemblies
8424 89 70	Mechanical appliances, whether or not hand-operated, for projecting, dispersing or spraying liquids or powders, n.e.s.
8467 29 51	Angle grinders for working in the hand, with self-contained electric motor, operating with an external source of power
8544 19 00	Winding wire for electrical purposes, of material other than copper, insulated
8544 49 91	Electric wire and cables, for a voltage ≤ 1 000 V, insulated, not fitted with connectors, with individual conductor wires of a diameter > 0,51 mm, n.e.s.
8708 30 10	Brakes and servo-brakes and their parts, for the industrial assembly of: pedestrian-controlled tractors, motor cars and vehicles principally designed for the transport of persons, vehicles for the transport of goods with compression-ignition internal combustion piston engine 'diesel or semi-diesel engine' ≤ 2 500 cm <sup>3</sup> or with spark-ignition internal piston engine ≤ 2 800 cm <sup>3</sup> , special purpose motor vehicles of heading 8705, n.e.s.
8708 40 20	Gear boxes and parts thereof, for the industrial assembly of: pedestrian-controlled tractors, motor cars and vehicles principally designed for the transport of persons, vehicles for the transport of goods with compression-ignition internal combustion piston engine 'diesel or semi-diesel engine' of a cylinder capacity ≤ 2 500 cm <sup>3</sup> or with spark-ignition internal piston engine of a cylinder capacity ≤ 2 800 cm <sup>3</sup> , special purpose motor vehicles of heading 8705, n.e.s.
8708 91 20	Radiators and parts thereof, for the industrial assembly of: pedestrian-controlled tractors, motor cars and vehicles principally designed for the transport of persons, vehicles for the transport of goods with compression-ignition internal combustion piston engine 'diesel or semi-diesel engine' of a cylinder capacity ≤ 2 500 cm <sup>3</sup> or with spark-ignition internal piston engine of a cylinder capacity ≤ 2 800 cm <sup>3</sup> , special purpose motor vehicles of heading 8705, n.e.s.
8708 92 20	Silencers 'mufflers' and exhaust pipes, and parts thereof, for the industrial assembly of: pedestrian-controlled tractors, motor cars and vehicles principally designed for the transport of persons, vehicles for the transport of goods with compression-ignition internal combustion piston engine 'diesel or semi-diesel engine' ≤ 2 500 cm <sup>3</sup> or with spark-ignition internal piston engine ≤ 2 800 cm <sup>3</sup> , special purpose motor vehicles of heading 8705, n.e.s.

## ANNEX II

## REPORTING TEMPLATE REFERRED TO IN ARTICLE 6

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**Report on the phytosanitary import checks of wood packaging material of each consignment of the specified commodities originating in Belarus and China**


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**Reporting period:**

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**Reporting Member State:**

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<b>Points of entry involved:</b>	<b>Places of inspection:</b>	<b>Number of consignments inspected at place of destination:</b> <b>Number of consignments inspected at point of entry:</b>
	<b>Combined Nomenclature code:</b>	
Number of <b>incoming</b> consignments entering the Union via the reporting Member State		
Number of <b>inspected</b> consignments		
<b>Of which</b> Number of consignments with compliant wood packaging material		
<b>Of which</b> Number of consignments intercepted with non-compliant wood packaging material		
— Of which, with a harmful organism and without a compliant ISPM15 mark (please provide breakdown per harmful organism and whether the mark is missing or incorrect)		
— Of which, with a harmful organism and a compliant ISPM15 mark (please provide breakdown per harmful organism) Please provide the country code, producer/treatment provider code and treatment code of the ISPM 15 mark(s)		
— Of which, without a compliant ISPM15 mark only (please provide breakdown between missing mark and incorrect mark)		
% of specified commodities checked (out of the total number of consignments)		











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