ISSN 1725-2555

Official Journal of the European Union

L 143

English edition

Legislation

Volume 51

3 June 2008

Contents

(Continued overleaf)

EN

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

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

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

EN

[1] Text with EEA relevance

I

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

REGULATIONS

COUNCIL REGULATION (EC) No 485/2008

of 26 May 2008

on scrutiny by Member States of transactions forming part of the system of financing by the European Agricultural Guarantee Fund

(Codified version)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 37 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament [1],

Whereas:

(1) Council Regulation (EEC) No 4045/89 of 21 December 1989 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund and repealing Directive 77/435/EEC [2] has been substantially amended several times [3]. In the interests of clarity and rationality the said Regulation should be codified.

(2) Under Article 9 of Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy [4], the Member States are to take the measures necessary to ensure effective protection of the financial interests of the Community, and particularly in order to check the genuineness and compliance of operations financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD), to prevent and pursue irregularities and to recover sums lost as a result of irregularities or negligence.

(3) Scrutiny of the commercial documents of undertakings receiving or making payments can be a very effective means of surveillance of transactions forming part of the system of financing by the EAGF. This scrutiny supplements other checks already carried out by the Member States. Furthermore, national provisions relating to scrutiny which are more extensive than those provided for in this Regulation are not affected by it.

(4) The documents used as a basis for such scrutiny should be determined in such a way as to enable a full scrutiny to be carried out.

(5) The undertakings to be scrutinised should be selected on the basis of the nature of the transactions carried out on their responsibility and the breakdown of the undertakings receiving or making payments according to their financial importance in the system of financing by the EAGF.

(6) Furthermore, it is necessary to provide for a minimum number of inspections of commercial documents. This number should be determined by a method which precludes substantial differences between the Member States by virtue of differences in the structure of their expenditure under the EAGF. This method may be established by referring to the number of undertakings of a certain financial importance in the system of financing by the EAGF.

(7) The powers of the officials responsible for scrutiny and the obligations on undertakings to make commercial documents available to such officials for a specified period and to supply such information as may be requested by them should be defined. It should also be stipulated that commercial documents may be seized in certain cases.

---

[1] Opinion of 19 June 2007 (not yet published in the Official Journal).
[2] OJ L 388, 30.12.1989, p. 18. Regulation as last amended by Regulation (EC) No 2154/2002 (OJ L 328, 5.12.2002, p. 4).
[3] See Annex I.
[4] OJ L 209, 11.8.2005, p. 1. Regulation as last amended by Regulation (EC) No 1437/2007 (OJ L 322, 7.12.2007, p. 1).

(8) It is necessary to organise cooperation among the Member States on account of the international structure of agricultural trade and with a view to the functioning of the internal market. It is also necessary for a centralised documentation system concerning undertakings receiving or making payments established in third countries to be set up at Community level.

(9) While it is the responsibility of the Member States in the first instance to adopt their scrutiny programmes, it is necessary that these programmes be communicated to the Commission so that it can assume its supervisory and coordinating role and to ensure that the programmes are adopted on the basis of appropriate criteria. Scrutiny can thus be concentrated on sectors or undertakings where the risk of fraud is high.

(10) It is essential that each Member State have a special department responsible for monitoring the application of this Regulation and for coordinating the scrutiny carried out in accordance with this Regulation. The officials belonging to that department may make inspections of undertakings in accordance with this Regulation.

(11) The departments carrying out scrutiny pursuant to this Regulation should be organised independently of the departments carrying out scrutiny prior to payment.

(12) Information collected during the scrutiny of commercial documents should be protected by professional secrecy.

(13) Arrangements should be made for an exchange of information at Community level so that the results of the application of this Regulation can be used to greater effect,

HAS ADOPTED THIS REGULATION:

Article 1

1. This Regulation relates to scrutiny of the commercial documents of those entities receiving or making payments relating directly or indirectly to the system of financing by the European Agricultural Guarantee Fund (EAGF), or their representatives, hereinafter 'undertakings', in order to ascertain whether transactions forming part of the system of financing by the EAGF have actually been carried out and have been executed correctly.

2. This Regulation shall not apply to measures covered by the integrated administration and control system falling within Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers [1]. The Commission shall, in accordance with the procedure referred to in Article 41(2) of Regulation (EC) No 1290/2005, establish a list of other measures to which this Regulation does not apply.

3. For the purposes of this Regulation the following definitions shall apply:

(a) 'commercial documents' means all books, registers, vouchers and supporting documents, accounts, production and quality records, and correspondence relating to the undertaking's business activity, as well as commercial data, in whatever form they may take, including electronically stored data, in so far as these documents or data relate directly or indirectly to the transactions referred to in paragraph 1;

(b) 'third party' means any natural or legal person directly or indirectly connected with transactions carried out within the financing system by the EAGF.

Article 2

1. Member States shall carry out systematic scrutiny of the commercial documents of undertakings taking account of the nature of the transactions to be scrutinised. Member States shall ensure that the selection of undertakings for scrutiny gives the best possible assurance of the effectiveness of the measures for preventing and detecting irregularities under the system of financing by the EAGF, *inter alia*, the selection shall take account of the financial importance of the undertakings in that system and other risk factors.

2. The scrutiny referred to in paragraph 1 shall apply, for each period of scrutiny referred to in paragraph 7, to a number of undertakings which may not be less than half the undertakings whose receipts or payments, or the sum thereof, under the system of financing by the EAGF, amounted to more than EUR 150 000 for the EAGF financial year preceding the beginning of the period of scrutiny in question.

[1] OJ L 270, 21.10.2003, p. 1. Regulation as last amended by Commission Regulation (EC) No 293/2008 (OJ L 90, 2.4.2008, p. 5).

3. In relation to each current scrutiny period, Member States shall, without prejudice to their obligations defined in paragraph 1, select the undertakings to be scrutinised on the basis of risk analysis in the export refunds sector, and for all other measures where it is practicable to do so. The Member States shall submit to the Commission their proposals for the use of risk analysis. The proposals shall include all relevant information concerning the approach to be followed, the techniques, the criteria and the method of implementation. They shall be presented not later than 1 December of the year prior to commencement of the scrutiny period for which they are to be applied. The Member States shall take account of the comments of the Commission on the proposals, which shall be given within eight weeks of their receipt.

4. For measures for which a Member State considers the use of risk analysis not to be practicable, it shall be compulsory for undertakings the sum of whose receipts or payments or the sum of those two amounts within the system of financing by the EAGF was more than EUR 350 000 and which were not scrutinised in accordance with this Regulation during either of the two preceding scrutiny periods, to be scrutinised.

5. Undertakings the sum of whose receipts or payments amounted to less than EUR 40 000 shall be scrutinised in accordance with this Regulation only for specific reasons to be indicated by the Member States in their annual programme as referred to in Article 10 or by the Commission in any proposed amendment to that programme.

6. In appropriate cases, the scrutiny provided for in paragraph 1 shall be extended to natural and legal persons with whom undertakings within the meaning of Article 1 are associated and to such other natural or legal persons as may be relevant for the pursuit of the objectives set out in Article 3.

7. The scrutiny period shall run from 1 July to 30 June of the following year.

Scrutiny shall cover a period of at least 12 months ending during the previous scrutiny period; it may be extended for periods, to be determined by the Member State, preceding or following the 12-month period.

8. The scrutiny carried out pursuant to this Regulation shall not prejudice the checks undertaken pursuant to Articles 36 and 37 of Regulation (EC) No 1290/2005.

Article 3

1. The accuracy of primary data under scrutiny shall be verified by a number of cross-checks, including, where necessary, the commercial documents of third parties, appropriate to the degree of risk presented, including, *inter alia*:

(a) comparisons with the commercial documents of suppliers, customers, carriers and other third parties;

(b) physical checks, where appropriate, upon the quantity and nature of stocks;

(c) comparison with the records of financial flows leading to or consequent upon the transactions carried out within the financing system by the EAGF; and

(d) checks, in relation to bookkeeping, or records of financial movements showing, at the time of the scrutiny, that the documents held by the paying agency as justification for the payment of aid to the beneficiary are accurate.

2. In particular, where undertakings are required to keep particular book records of stock in accordance with Community or national provisions, scrutiny of these records shall in appropriate cases include a comparison with the commercial documents and, where appropriate, with the actual quantities in stock.

3. In the selection of transactions to be checked, full account shall be taken of the degree of risk presented.

Article 4

Undertakings shall keep the commercial documents for at least three years, starting from the end of the year in which they were drawn up.

The Member States may prescribe a longer period for the retention of these documents.

Article 5

1. The persons responsible for the undertaking, or a third party, shall ensure that all commercial documents and additional information are supplied to the officials responsible for the scrutiny or to the persons empowered for that purpose. Electronically stored data shall be provided on an appropriate data support medium.

2. The officials responsible for the scrutiny or the persons empowered for that purpose may require that extracts or copies of the documents referred to in paragraph 1 be supplied to them.

3. Where, during scrutiny carried out pursuant to this Regulation, the commercial documents maintained by the undertaking are considered inadequate for scrutiny purposes, the undertaking shall be directed to maintain in future such records as are required by the Member State responsible for the scrutiny, without prejudice to obligations laid down in other Regulations relating to the sector concerned.

Member States shall determine the date as of which such records are to be established.

Where all or part of the commercial documents required to be scrutinised pursuant to this Regulation are located with an undertaking in the same commercial group, partnership or association of undertakings managed on a unified basis as the undertaking scrutinised, whether located inside or outside Community territory, the undertaking shall make available these commercial documents to officials responsible for the scrutiny, at a place and time to be determined by the Member States responsible for carrying out the scrutiny.

Article 6

1. Member States shall ensure that officials responsible for scrutiny are entitled to seize commercial documents, or have them seized. This right shall be exercised with due regard for relevant national provisions and shall not affect the application of rules governing proceedings in criminal matters concerning the seizure of documents.

2. Member States shall adopt appropriate measures to penalise natural or legal persons who fail to fulfil their obligations under this Regulation.

Article 7

1. Member States shall assist each other for the purposes of carrying out the scrutiny provided for in Articles 2 and 3 in the following cases:

(a) where an undertaking or third party is established in a Member State other than that in which payment of the amount in question has or should have been made or received;

(b) where an undertaking or third party is established in a Member State other than that in which the documents and information required for scrutiny are to be found.

The Commission may coordinate joint actions involving mutual assistance between two or more Member States. Provisions for such coordination shall be established in accordance with the procedure referred to in Article 41(2) of Regulation (EC) No 1290/2005.

Where two or more Member States include in the programme sent in under Article 10(2) a proposal for joint action involving extensive mutual assistance, the Commission may, on request, allow a reduction of up to a maximum of 25 % of the minimum number of scrutinise as determined under Article 2(2) to (5) for the Member States concerned.

2. During the first three months following the EAGF financial year of payment, Member States shall send a list of the undertakings referred to in paragraph 1(a) to each Member State in which such an undertaking is established. The list shall contain all the details necessary to enable the Member State of destination to identify the undertakings and to undertake its scrutiny obligations. The Member State of destination shall be responsible for the scrutiny of such undertakings in accordance with Article 2. A copy of each list shall be sent to the Commission.

The Member State receiving or making the payment may ask the Member State in which the undertaking is established to scrutinise some of the undertakings on that list in accordance with Article 2, indicating why it is necessary to make such a request and in particular the risks associated with it.

The Member State receiving the request shall take due account of the risks associated with the undertaking, which shall be communicated by the requesting Member State.

The requested Member State shall inform the requesting Member State of the follow-up accorded to the request. Where scrutiny of an undertaking on the list takes place, the requested Member State that carried out the scrutiny shall inform the requesting Member State of the results of that scrutiny at the latest three months after the end of the scrutiny period.

An overview of such requests shall be sent to the Commission on a quarterly basis, within one month after the end of each quarter. The Commission may demand that a copy of individual requests be provided.

3. During the first three months following the EAGF financial year of payment, Member States shall send the Commission a list of undertakings established in a third country for which payment of the amount in question has or should have been made or received in that Member State.

4. If additional information is required in another Member State as part of the scrutiny of an undertaking in accordance with Article 2, and in particular cross-checks in accordance with Article 3, specific scrutiny requests may be made indicating the reasons for the request. An overview of such specific requests shall be sent to the Commission on a quarterly basis within one month after the end of each quarter. The Commission may demand that a copy of individual requests be provided.

The scrutiny request shall be met not later than six months after its receipt; the results of the scrutiny shall be communicated without delay to the requesting Member State and to the Commission. The communication to the Commission shall be on a quarterly basis within one month after the end of each quarter.

5. In accordance with the procedure referred to in Article 41(2) of Regulation (EC) No 1290/2005, the Commission shall determine minimum requirements regarding the contents of the requests referred to in paragraphs 2 and 4 of this Article.

Article 8

1. Information collected in the course of scrutiny as provided for in this Regulation shall be protected by professional secrecy. It may not be communicated to any persons other than those who, by reason of their duties in the Member States or in the institutions of the Communities, are required to have knowledge thereof for the purposes of performing those duties.

2. This Article shall not prejudice national provisions relating to legal proceedings.

Article 9

1. Before 1 January following the scrutiny period Member States shall send the Commission a detailed report on the application of this Regulation.

The report must set out any difficulties encountered and the measures taken to overcome them and put forward, where appropriate, suggestions for improvements.

2. The Member States and the Commission shall have regular exchanges of views on the application of this Regulation.

3. The Commission shall evaluate annually the progress achieved, in its annual report on the administration of the funds referred to in Article 43 of Regulation (EC) No 1290/2005.

Article 10

1. Member States shall draw up programmes for scrutinies to be carried out pursuant to Article 2 during the subsequent scrutiny period.

2. Each year, before 15 April, the Member States shall send the Commission their programme as referred to in paragraph 1 and shall specify:

(a) the number of undertakings to be scrutinised and their breakdown by sector on the basis of the amounts relating to them;

(b) the criteria adopted for drawing up the programme.

3. The programmes established by the Member States and forwarded to the Commission shall be implemented by the Member States, if, within eight weeks, the Commission has not made known its comments.

4. Amendments made by the Member States to the programmes shall be subject to the same procedure.

5. Exceptionally, at any stage, the Commission may request the inclusion of a particular category of undertaking in the programme of one or more Member States.

Article 11

1. In each Member State a special department shall be responsible for monitoring the application of this Regulation and for:

(a) the performance of the scrutiny provided for herein by officials employed directly by that special department; or

(b) the coordination and general surveillance of the scrutiny carried out by officials belonging to other departments.

Member States may also provide that scrutinies to be carried out pursuant to this Regulation are allocated between the special department and other national departments, provided that the former is responsible for their coordination.

2. The department or departments responsible for the application of this Regulation must be organised in such a way as to be independent of the departments or branches of departments responsible for the payments and the scrutiny carried out prior to payment.

3. In order to ensure that this Regulation is properly applied, the special department referred to in paragraph 1 shall take all the measures necessary.

4. The special department shall be responsible in addition for:

(a) training the national officials responsible for carrying out the scrutiny referred to in this Regulation, in order to enable them to acquire sufficient knowledge for performing their duties;

(b) administering the scrutiny reports and any other documents relating to the scrutinies carried out and provided for under this Regulation;

(c) the preparation and communication of the reports referred to in Article 9(1) and the programmes referred to in Article 10.

5. The special department shall be entrusted by the Member State concerned with all the powers necessary to perform the tasks referred to in paragraphs 3 and 4. It shall consist of a sufficient number of officials who are suitably trained to carry out those tasks.

6. This Article shall not apply when the minimum number of undertakings to control, in accordance with Article 2(2) to (5), is less than 10.

Article 12

The amounts in euro appearing in this Regulation shall be converted, where appropriate, into national currencies by applying the rate of exchange operating on the first working date of the year when the scrutiny period begins and published in the C series of the *Official Journal of the European Union*.

Article 13

Detailed rules for the application of this Regulation shall be adopted where necessary, in accordance with the procedure referred to in Article 41(2) of Regulation (EC) No 1290/2005.

Article 14

Articles 36 and 37 of Regulation (EC) No 1290/2005 shall apply to the scrutiny of specific expenditure financed by the Community under this Regulation.

Article 15

1. In accordance with the relevant national laws, Commission officials shall have access to all documents prepared either with a view to or following the scrutiny organised under this Regulation and to the data held, including those stored in the data-processing systems. Those data shall be provided upon request on an appropriate data support medium.

2. The scrutinies referred to in Article 2 shall be carried out by the officials of the Member States.

Officials of the Commission may participate in these scrutinies. They may not themselves exercise the powers of scrutiny accorded to national officials; however, they shall have access to the same premises and to the same documents as the officials of the Member States.

3. In the case of scrutinies taking place under Article 7, officials of the requesting Member State may be present, with the agreement of the requested Member State, at the scrutiny in the requested Member State and have access to the same premises and the same documents as the officials of that Member State.

Officials of the requesting Member State present at scrutinies in the requested Member State must at all times be able to furnish proof of their official capacity. The scrutinies shall at all times be carried out by officials of the requested Member State.

4. Where national provisions concerning criminal procedure reserve certain acts for officials specifically designated by the national law, neither the officials of the Commission, nor the officials of the Member State referred to in paragraph 3, shall take part in these acts. In any event, they shall not take part in, in particular, visits to the home or the formal interrogation of persons in the context of the criminal law of the Member State. They shall, however, have access to information thus obtained.

Article 16

Regulation (EEC) No 4045/89, as amended by the Regulations listed in Annex I, is repealed.

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

Article 17

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

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

Done at Brussels, 26 May 2008.

For the Council
The President
D. RUPEL

ANNEX I

REPEALED REGULATION WITH ITS SUCCESSIVE AMENDMENTS

Council Regulation (EEC) No 4045/89 (OJ L 388, 30.12.1989, p. 18).	
Council Regulation (EC) No 3094/94 (OJ L 328, 20.12.1994, p. 1).	
Council Regulation (EC) No 3235/94 (OJ L 338, 28.12.1994, p. 16).	Article 1(1) only
Council Regulation (EC) No 2154/2002 (OJ L 328, 5.12.2002, p. 4).	

ANNEX II

CORRELATION TABLE

Regulation (EEC) No 4045/89	This Regulation
Article 1(1)	Article 1(1)
Article 1(2)	Article 1(3), introductory wording, and Article 1(3)(a)
Article 1(3)	Article 1(3)(b)
Article 1(4)	Article 1(2)
Article 1(5)	—
Article 2(1)	Article 2(1)
Article 2(2), first subparagraph	Article 2(2)
Article 2(2), second subparagraph	Article 2(3)
Article 2(2), third subparagraph	—
Article 2(2), fourth subparagraph	Article 2(4)
Article 2(2), fifth subparagraph	Article 2(5)
Article 2(3)	Article 2(6)
Article 2(4)	Article 2(7)
Article 2(5)	Article 2(8)
Article 3(1), introductory wording	Article 3(1), introductory wording
Article 3(1), first indent	Article 3(1)(a)
Article 3(1), second indent	Article 3(1)(b)
Article 3(1), third indent	Article 3(1)(c)
Article 3(1), fourth indent	Article 3(1)(d)
Article 3(2)	Article 3(2)
Article 3(3)	Article 3(3)
Article 4	Article 4
Article 5	Article 5
Article 6	Article 6
Article 7(1), first subparagraph, introductory wording	Article 7(1), first subparagraph, introductory wording
Article 7(1), first subparagraph, first indent	Article 7(1), first subparagraph, (a)
Article 7(1), first subparagraph, second indent	Article 7(1), first subparagraph, (b)
Article 7(1), second subparagraph	Article 7(1), second subparagraph
Article 7(1), third subparagraph	Article 7(1), third subparagraph
Article 7(2), (3), (4) and (5)	Article 7(2) to (5)
Article 8	Article 8
Article 9(1)	Article 9(1), first subparagraph
Article 9(2)	Article 9(1), second subparagraph
Article 9(3)	Article 9(2)

Regulation (EEC) No 4045/89	This Regulation
Article 9(4)	Article 9(3)
Article 9(5)	—
Article 10(1)	Article 10(1)
Article 10(2), introductory wording	Article 10(2), introductory wording
Article 10(2), first indent	Article 10(2)(a)
Article 10(2), second indent	Article 10(2)(b)
Article 10(3), (4) and (5)	Article 10(3), (4) and (5)
Article 11(1), first subparagraph, introductory wording	Article 11(1), first subparagraph, introductory wording
Article 11(1), first subparagraph, first indent	Article 11(1), first subparagraph, (a)
Article 11(1), first subparagraph, second indent	Article 11(1), first subparagraph, (b)
Article 11(1), second subparagraph	Article 11(1), second subparagraph
Article 11(2) and (3)	Article 11(2) and (3)
Article 11(4), introductory wording	Article 11(4), introductory wording
Article 11(4), first indent	Article 11(4)(a)
Article 11(4), second indent	Article 11(4)(b)
Article 11(4), third indent	Article 11(4)(c)
Article 11(5) and (6)	Article 11(5) and (6)
Article 18	Article 12
Article 19	Article 13
Article 20	Article 14
Article 21	Article 15
Article 22	—
—	Article 16
Article 23	Article 17
—	Annex I
—	Annex II

COMMISSION REGULATION (EC) No 486/2008

of 2 June 2008

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

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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

Whereas:

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

(2) In compliance with the above criteria, the standard import values must be fixed at the levels set out in the Annex to this Regulation,

HAS ADOPTED THIS REGULATION:

Article 1

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

Article 2

This Regulation shall enter into force on 3 June 2008.

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

Done at Brussels, 2 June 2008.

For the Commission

Jean-Luc DEMARTY

Director-General for Agriculture and Rural Development

[1] OJ L 350, 31.12.2007, p. 1.

ANNEX

to Commission Regulation of 2 June 2008 establishing the standard import values for determining the entry price of certain fruit and vegetables

(EUR/100 kg)

CN code	Third country code (1)	Standard import value
0702 00 00	MA	51,7
	MK	44,3
	TN	105,3
	TR	60,2
	ZZ	65,4
0707 00 05	MK	30,3
	TR	127,0
	ZZ	78,7
0709 90 70	TR	94,9
	ZZ	94,9
0805 50 10	AR	123,8
	IL	134,6
	TR	149,9
	US	152,9
	UY	61,8
	ZA	143,4
	ZZ	127,7
0808 10 80	AR	103,8
	BR	87,0
	CA	61,8
	CL	91,6
	CN	83,4
	NZ	112,0
	TR	85,9
	US	126,6
	UY	94,7
	ZA	86,9
	ZZ	93,4
0809 20 95	TR	502,4
	US	508,1
	ZZ	505,3

(1) Country nomenclature as fixed by Commission Regulation (EC) No 1833/2006 (OJ L 354, 14.12.2006, p. 19). Code 'ZZ' stands for 'of other origin'.

COMMISSION REGULATION (EC) No 487/2008

of 2 June 2008

registering a name in the Register of protected designations of origin and protected geographical indications (Casatella Trevigiana (PDO))

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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

Whereas:

(1) Pursuant to the first subparagraph of Article 6(2) of Regulation (EC) No 510/2006 and in accordance with Article 17(2) thereof, Italy's application to register the name 'Casatella Trevigiana' was published in the *Official Journal of the European Union* ([2]).

(2) As no objections within the meaning of Article 7 of Regulation (EC) No 510/2006 were received by the Commission, this name should be entered in the Register,

HAS ADOPTED THIS REGULATION:

Article 1

The name given in the Annex to this Regulation shall be entered in the Register.

Article 2

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

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

Done at Brussels, 2 June 2008.

For the Commission
Mariann FISCHER BOEL
Member of the Commission

([1]) OJ L 93, 31.3.2006, p. 12. Regulation as last amended by Commission Regulation (EC) No 417/2008 (OJ L 125, 9.5.2008, p. 27).
([2]) OJ C 204, 1.9.2007, p. 20.

ANNEX

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

Class 1.3. Cheese

ITALY

Casatella Trevigiana (PDO)

COMMISSION REGULATION (EC) No 488/2008

of 2 June 2008

imposing a provisional anti-dumping duty on imports of citric acid originating in the People's Republic of China

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community [1] (the basic Regulation) and in particular Article 7 thereof,

After consulting the Advisory Committee,

Whereas:

A. PROCEDURE

1. Initiation

(1) On 23 July 2007, a complaint concerning imports of citric acid originating in the People's Republic of China was lodged by the European Chemical Industry Council (CEFIC) (the complainant) on behalf of a producer representing a major proportion of the total Community production of citric acid, in this case more than 25 %.

(2) This complaint contained evidence of dumping of the said product and of material injury resulting therefrom, which was considered sufficient to justify the initiation of a proceeding.

(3) On 4 September 2007, the proceeding was initiated by the publication of a notice of initiation in the *Official Journal of the European Union* [2].

2. Parties concerned by the proceeding

(4) The Commission officially advised the exporting producers, importers, users known to be concerned and their associations, consumers associations, the representatives of the exporting country and the Community producers of the initiation of the anti-dumping proceeding. Interested parties were given the opportunity to make their views known in writing and to request a hearing within the time-limit set out in the notice of initiation.

(5) In order to allow exporting producers to submit a claim for market economy treatment (MET) or individual treatment (IT), if they so wished, the Commission sent claim forms to the Chinese exporting producers known to be concerned and to the representatives of the PRC. Eight exporting producers, including groups of related companies, requested MET pursuant to Article 2(7) of the basic Regulation, or alternatively IT – should the investigation establish that they do not meet the conditions for MET.

(6) In view of the apparent large number of exporting producers and importers involved in this investigation, sampling was envisaged in the notice of initiation, in accordance with Article 17 of the basic Regulation.

(7) In order to enable the Commission to decide whether sampling would be necessary and, if so, to select a sample, exporting producers and importers and representatives acting on their behalf were requested to make themselves known and to provide, as specified in the notice of initiation, basic information on their activities related to the product concerned within 15 days of the date of publication of the notice of initiation.

(8) As far as the exporting producers are concerned, in accordance with Article 17 of the basic Regulation, a sample was selected based on the largest representative volume of exports of citric acid to the Community, which could reasonably be investigated within the time available. On the basis of the information received from the exporting producers, a sample of four companies, or groups of related companies (the sampled companies) having the largest volume of exports to the Community was selected. In terms of export volume the four sampled companies represent 79 % of the total exports of citric acid from the PRC to the Community during the investigation period. In accordance with Article 17(2) of the basic Regulation, the parties concerned were consulted and raised no objection.

[1] OJ L 56, 6.3.1996, p. 1. Regulation as last amended by Regulation (EC) No 2117/2005 (OJ L 340, 23.12.2005, p. 17).
[2] OJ C 205, 4.9.2007, p. 14.

(9) All four producers outside the sample have requested an individual margin, in accordance with Article 17(3) of the basic Regulation. Only one company, DSM Citric Acid (Wuxi) Ltd., has submitted the requested information within the timeframe foreseen. Therefore, only one complete request for an individual margin was received. As this request was not considered unduly burdensome and would not have prevent completion of the investigation in good time, the request was accepted.

(10) With regard to unrelated Community importers, in accordance with Article 17 of the basic Regulation, a sample was selected based on the largest representative volume of imports of citric acid to the Community, which could reasonably be investigated within the time available. On the basis of the information received from the unrelated Community importers, a sample of four companies, or groups of related companies (the sampled companies) having the largest volume of imports to the Community was selected. In terms of import volume the four sampled companies represent 36 % of the total imports of citric acid from the PRC to the Community during the investigation period. In accordance with Article 17(2) of the basic Regulation, the parties concerned were consulted and raised no objection. One of the sampled importers was not able to provide the requested information. The three remaining importers represent 29 % of the total imports of citric acid from the PRC to the Community during the investigation period.

(11) The Commission sought and verified all the information deemed necessary for a provisional determination of dumping, resulting injury and Community interest and carried out verification at the premises of the following companies:

(a) producers in the Community:

— Jungbunzlauer Austria AG, Vienna, Austria,

— S.A. Citrique Belge N.V., Tienen, Belgium;

(b) exporting producers in the PRC:

— Anhui BBCA Biochemical Co., Ltd, Bengbu City, Anhui Province,

— RZBC Co., Ltd, Rizhao, Shandong Province,

— TTCA Co., Ltd., Anqiu City, Shandong Province,

— Yixing Union Biochemical Co. Ltd, Yixing City, Jiangsu Province,

— Shanxi Ruicheng, Ruicheng County, Shanxi Province,

— Laiwu Taihe Biochemistry Co. Ltd, Laiwu City, Shandong Province,

— Weifang Ensign Industry Co. Ltd, Changle City, Shandong Province,

— DSM Citric Acid (Wuxi) Ltd, West Wuxi, Jiangsu Province;

(c) related companies in the PRC:

— Anhui BBCA Maanshan Biochemical Ltd, Maanshan, Anhui Province,

— China National Xin Liang Storage Transportation & Trading Corp., Beijing,

— DSM (China) Ltd., Shanghai,

— Shanxi Dimine International Trade, Taiyuan, Shanxi Province;

(d) unrelated importers in the Community:

— Azelis group, St. Augustin, Germany,

— Rewe Food Ingredients, Köln, Germany,

— Brenntag, Mülheim/Ruhr, Germany.

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

(13) In view of the need to establish a normal value for exporting producers to which MET might not be granted, a verification to establish normal value on the basis of data from an analogue country, Canada in this case (see recitals (40) to (44) below), took place at the premises of the following company:

(e) producer in Canada:

— Jungbunzlauer Canada, Port Colborne, Ontario.

3. **Investigation period**

(14) The investigation of dumping and injury covered the period from 1 July 2006 to 30 June 2007 (investigation period or IP). With respect to the trends relevant for the injury assessment, the Commission analysed data covering the period from 1 January 2004 to 30 June 2007 (period considered).

B. **PRODUCT CONCERNED AND LIKE PRODUCT**

1. **Product concerned**

(15) The product concerned is citric acid (including sodium citrate), an acidulant and pH regulator for many applications such as beverages, food, detergents, cosmetics and pharmaceuticals. Its main raw materials are sugar/-molasses, tapioca, corn or glucose (obtained from cereals) and different agents for the submerged microbial fermentation of carbohydrates.

(16) The product concerned includes citric acid monohydrate (CAM), citric acid anhydrous (CAA) and trisodium citrate dihydrate (TSC). These three types form the product concerned as they share similar basic chemical characteristics and have similar usage. The types of product are falling within CN Codes 2918 14 00 (CAM, CAA) and ex 2918 15 00 (TSC). The CN code 2918 15 00 also includes other salts and esters, which are not the product concerned.

(17) The investigation has shown that the different types of the product concerned all share the same basic technical and chemical characteristics and are basically used for the same purposes. They are therefore considered to constitute a single product for the purpose of this proceeding.

2. **Like product**

(18) The citric acid produced and sold in the Community by the Community industry and the citric acid produced and sold in the PRC and in Canada, which served as an analogue country, were found to have essentially the same technical and chemical characteristics and the same basic uses of the citric acid produced in the PRC and sold for export to the Community. They are therefore provisionally considered to be alike within the meaning of Article 1(4) of the basic Regulation.

C. **DUMPING**

1. **General**

(19) As stated in recital (6) above, sampling was envisaged for exporting producers in the PRC in the notice of initiation. In total, eight groups of companies replied to the sampling questionnaire within the time limits and provided the requested information. They represented 96 % of the total imports reported by Eurostat. The level of cooperation is therefore considered to be high. All of exporting producers have requested MET and IT. As mentioned at recital (8) above, four groups of companies were selected in the sample on the basis of their export volume to the Community.

2. **Market Economy Treatment (MET)**

(20) Pursuant to Article 2(7)(b) of the basic Regulation, in anti-dumping investigations concerning imports originating in the PRC, normal value shall be determined in accordance with paragraphs 1 to 6 of the said Article for those producers which were found to meet the criteria laid down in Article 2(7)(c) of the basic Regulation.

(21) Briefly, and for ease of reference only, the MET criteria are set out in summarised form below:

1. business decisions and costs are made in response to market signals and without significant State interference; costs of major inputs substantially reflect market values;

2. firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes;

3. there are no significant distortions carried over from the former non-market economy system;

4. bankruptcy and property laws guarantee legal certainty and stability;

5. exchange rate conversions are carried out at market rates.

(22) All eight companies or groups of companies of Chinese exporting producers cooperating in this proceeding requested MET pursuant to Article 2(7)(b) of the basic Regulation and replied to the MET claim form for exporting producers within the given deadlines. All of these groups included both producers of the product concerned and companies related to the producers and involved in citric acid business. Indeed, it is the Commission's consistent practice to examine whether a group of related companies as a whole fulfils the conditions for MET. The following groups had requested MET:

— Anhui BBCA Biochemical Co., Ltd,

— RZBC Co., Ltd,

— TTCA Co., Ltd,

— Yixing Union Biochemical Co. Ltd,

— Shanxi Ruicheng,

— Laiwu Taihe Biochemistry Co. Ltd,

— Weifang Ensign Industry Co. Ltd,

— DSM Citric Acid (Wuxi) Ltd.

(23) For the above mentioned cooperating exporting producers, the Commission sought all information deemed necessary and verified the information submitted in the MET claim at the premises of the companies in question as deemed necessary.

(24) Two companies or groups of companies (Laiwu Taihe and DSM Wuxi) fulfilled all the criteria as summarised in recital (21) above and could be granted MET.

(25) Three companies or groups of companies (RZBC Co. Ltd, TTCA Co., Ltd. and Yixing Union Biochemical) have mortgaged most of their assets in order to receive loans. Despite having mortgaged most of their assets, they were still in a position to guarantee loans that were granted to other companies. As compensation, RZBC, TTCA Co., Ltd and Yixing Union Biochemical received similar guarantees for their own loans from the same companies for which they had acted as a guarantor. The companies used these guarantees to obtain further loans amounting to 25-50 % of their total assets. These companies argued that such system is also applied in market economy countries and explicitly provided for under Chinese banking legislation. However, the information collected during the investigation showed that the banks' policy should normally be to grant loans only for a fraction of the value of the assets used as a guarantee and not for an amount which exceeds such value. Moreover, the banking system from which the loans were obtained was under substantial State influence. Therefore, it was concluded that the three abovementioned companies did not meet criterion 1 as summarised in recital (21) above. Accordingly, they could not therefore be granted MET.

(26) For two companies (TTCA Co., Ltd and Weifang Ensign), the value of land use right and/or fixed assets increased substantially (500-1 500 %) over a relatively short period of time, between the moment when they were acquired or brought into the company as a capital contribution and a later date (between 1 and 5 years later) when they were evaluated again. This indicates that the respective assets were acquired at a value below market price which would represent a hidden subsidy. Both companies claimed that the increase had actually not been so substantial and was rather in line with the increase normally observed in China for comparable assets. However, no evidence was provided to this effect. Given the advantage that these companies received by obtaining assets for prices substantially below market value, compliance with criterion 3 as summarised in recital (21) above is not satisfied.

(27) One company, Anhui BBCA Biochemical Co., Ltd, received a significant sum of money during the IP (close to 10 % of its total assets or 15 % of it annual turnover). Moreover, certain rents were received free of charge. In view of this and the significant level of the subsidy received, it is considered that criteria 1 and 3 as summarised in recital (21) above are not fulfilled. The company's comments in this respect were not such as to change the nature of the findings.

(28) One company, Shanxi Ruicheng, received private loans worth around 20 % of assets. For all of these loans, no repayment terms had been agreed (so far), and no accrual or payment of interest took place. Therefore, the company's credit costs were subject to considerable distortions. Since the company could not present contracts for these loans, it cannot be excluded that there has been State interference regarding these loans, which means criterion 1 as summarised in recital (21) above is not fulfilled. The company's comments in this respect were not such as to change the nature of the findings.

(29) On the basis of the above, six of the eight Chinese companies or groups of companies that had requested MET could not show that they fulfil all the criteria set out in Article 2(7)(c) of the basic Regulation.

(30) It was therefore considered that MET should be granted to two companies (Laiwu Taihe and DSM Wuxi) and rejected for the remaining six companies/groups of companies. The Advisory Committee was consulted and did not object to these conclusions.

3. **Individual treatment (IT)**

(31) Pursuant to Article 2(7)(a) of the basic Regulation, a country-wide duty, if any, is established for countries falling under that Article, except in those cases where companies are able to demonstrate that they meet all criteria set out in Article 9(5) of the basic Regulation.

(32) All exporting producers who requested MET also claimed IT in the event that they would not be granted MET.

(33) Of the six companies or groups of companies that were not be granted MET, all fulfilled all the criteria set out in Article 9(5) and were granted IT.

4. **Normal value**

(34) Normal value had to be established for all four sampled companies, plus the sole company submitting a complete request for an individual margin, as explained in recital (9) above (the examined companies).

4.1. *Companies or groups of companies which could be granted MET*

(35) As far as the determination of normal value is concerned, the Commission first established, in accordance with Article 2(2) of the basic Regulation, for each of the exporting producers that could be granted MET whether their total domestic sales of the product concerned were representative, i.e. whether the total volume of such sales represented at least 5 % of their total export sales volume of the product concerned to the Community. One (DSM Wuxi) of the five examined companies could be granted MET. For this company which could be granted MET, the domestic sales of the product concerned were found to be representative.

(36) The Commission subsequently examined whether the domestic sales of each type of the product concerned, sold domestically in representative quantities, could be considered as being made in the ordinary course of trade pursuant to Article 2(4) of the basic Regulation. This was done by establishing the proportion of profitable domestic sales to independent customers, of the sole exported product type.

(37) For DSM Wuxi, the investigation showed that sales of the sole product type exported were not made in the ordinary course of trade. Since domestic sales could not be used in order to establish normal value, another method had to be applied. In this regard, normal value was constructed in accordance with Article 2(3) of the basic Regulation on the basis of the company's manufacturing costs of the product concerned. When constructing normal value pursuant to Article 2(3) of the basic Regulation, a reasonable amount for selling, general and administrative (SG&A) expenses and profit was added to the manufacturing costs.

(38) As DSM Wuxi had no domestic sales of the like product in the ordinary course of trade, SG&A and profit could not be established according to the methodology set out in the *chapeau* of Article 2(6) of the basic Regulation. As no sampled exporting producers were granted MET, SG&A and profit could also not be established according to the methodology set out in Article 2(6)(a) of the basic Regulation. In addition, as DSM Wuxi sells almost exclusively citric acid, SG&A and profit could also not be established according to the methodology set out in Article 2(6)(b) of the basic Regulation. It was therefore decided to establish SG&A and profit according to Article 2(6)(c) of the basic Regulation. In this respect, the amounts for SG&A and profit for domestic sales of the like product established for the cooperating company in the analogue country were used.

(39) Where appropriate, the costs of manufacturing and SG&A expenses as verified were used in constructing normal values.

4.2. *Companies or groups of companies which could not be granted MET*

(40) According to Article 2(7)(a) of the basic Regulation, normal value for the exporting producers not granted MET has to be established on the basis of the prices or constructed value in an analogue country.

(41) In the notice of initiation, the Commission indicated that it envisaged using the United States of America as an appropriate analogue country for the purpose of establishing normal value for the PRC. Interested parties were invited to comment on this. Two interested parties objected to this proposal. RZBC Co. proposed Thailand as analogue country.

(42) As regards Thailand, available information suggests that the total production of the two Thai producers is only around 10 000 tonnes, 5 000 tonnes thereof being exports (mainly to Japan). If these domestic sales (averaging 2 500 tonnes per company) are compared with Chinese exports to the Community (more than 50 000 tonnes for the biggest exporters), it is unlikely that any of the Thai producers has representative domestic sales. Moreover, RZBC argues that the cost structure of the Thai companies is more likely to be comparable with the situation in the PRC. The main argument to support this likelihood is, however, that both Thailand and the PRC are Asian countries. It should be noted that labour costs typically account for 5-10 % of turnover, so they are certainly not a main element in the cost structure of any citric acid producer.

(43) It is worth noting that the Thai companies are significantly smaller than the companies in the main producing countries (China, EU, USA, Canada and Brazil). The major Chinese producers are around 10-20 times larger than the Thai producers, while the size of the Canadian producer and the major Chinese producers is comparable.

(44) The USA has been originally selected as analogue country, and two United States companies initially agreed to cooperate. Subsequently, both United States companies mentioned above withdrew their cooperation. The sole producer in Canada and two producers in Brazil were therefore contacted and asked to cooperate with the investigation. However, only the sole Canadian producer cooperated in the investigation. Therefore, the prices in the Canadian market of citric acid sold in the ordinary course of trade were used as a basis for establishing normal value for the comparable product types of the exporting producers not granted MET.

5. **Export price**

(45) The exporting producers made export sales to the Community either directly to independent customers or through related or unrelated trading companies located inside and outside the Community. All companies or groups of companies could be granted either MET or IT.

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

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

6. **Comparison**

(48) The normal value and export prices were compared on an ex-works basis and at the same level of trade. For the purpose of ensuring a fair comparison between the normal value and export prices, due allowance in the form of adjustments was made for differences affecting prices and price comparability in accordance with Article 2(10) of the basic Regulation.

(49) On this basis, allowances for transport and insurance costs, handling, loading and ancillary costs, packing costs, credit costs were made where applicable and justified.

(50) For the sales channelled through related importers based in the Community, an adjustment was applied in accordance with Article 2(10)(i) of the basic Regulation, where these companies have been shown to perform functions similar to that of an independent importer. This adjustment was based on the SG&A of the importers plus a profit, based on data obtained from unrelated importers in the Community.

7. **Dumping margins**

(51) For the sampled exporting producers, individual dumping margins were established on the basis of a comparison of a weighted average normal value with a weighted average export price, in accordance with Article 2(11) and (12) of the basic Regulation. For RZBC, since this group of companies includes two exporting producers, a single dumping margin was established as the average of the dumping margins of the two companies.

(52) For the cooperating companies not included in the sample and not granted individual examination, the dumping margin was calculated as a weighted average of the margins established for all the companies in the sample.

(53) Given the high level of cooperation (96 %), referred to at recital (19) above, a country-wide dumping margin was set at the same level as the highest margin found for a cooperating company.

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

Company	Provisional dumping margin
Anhui BBCA Biochemical Ltd	54,4 %
DSM Citric Acid (Wuxi) Ltd	19,6 %
RZBC Co.	60,1 %
RZBC (Juxian) Co. Ltd	60,1 %
TTCA Co., Ltd	57,3 %
Yixing Union Biochemical	56,8 %
Laiwu Taihe Biochemistry Co. Ltd	57,5 %
Shanxi Ruicheng	57,5 %
Weifang Ensign Industry Co. Ltd	57,5 %
All other companies	60,1 %

D. **INJURY**

1. **Community production and Community industry**

(55) Within the Community, the like product is manufactured by two companies: Jungbunzlauer, Austria and S.A. Citrique Belge in Belgium (part of the DSM group, headquartered in Switzerland). The complainant Jungbunzlauer represents a major proportion of the total known Community production of the like product, i.e. in this case more than 25 %. Both producers fully cooperated in the investigation, but the second European producer took a neutral position to the investigation.

(56) S.A. Citrique Belge N.V. had made some imports from the PRC in the IP. However, the volumes of its imports were insignificant (between 1 % and 6 % of production during the IP – this range is given for confidentiality reasons), thus it was not considered appropriate to exclude this producer from the definition of the Community industry.

(57) As the two cooperating producers mentioned in recital (11) above accounted for 100 % of the total Community production during the IP, they are deemed to constitute the Community industry within the meaning of Article 4(1) and Article 5(4) of the basic Regulation and will hereinafter be referred to as the 'Community industry'.

(58) Given that the Community industry comprises only two producers, data relating to the Community industry had to be indexed or ranges have been used in order to preserve confidentiality pursuant to Article 19 of the basic Regulation.

2. **Community consumption**

(59) Community consumption was established on the basis of the sales volumes of the Community industry's own production on the Community market and Community import volumes data obtained from Eurostat.

(60) Between 2004 and the IP, the Community market for the product concerned and the like product has strongly increased by 15 %, which is due to the increase in citric acid applications.

	2004	2005	2006	IP
Consumption in tonnes	360 000-380 000	360 000-380 000	390 000-410 000	420 000-440 000
Index (2004 = 100)	100	99	106	115

3. **Imports from the country concerned**

(a) *Volume of the imports concerned*

(61) The volume of imports of the product concerned from the PRC into the Community increased significantly throughout the period considered. Imports in the EU increased by 37 % since 2004.

Imports	2004	2005	2006	IP
PRC tonnes	145 025	151 806	171 703	198 288
Index (2004 = 100)	100	105	118	137

(b) *Market share of the imports concerned*

(62) The market share held by imports from the PRC increased steadily by 7 percentage points throughout the period concerned. In detail, it rose by 2 percentage points between 2004 and 2005, by further 2 percentage points between 2005 and 2006 and by 3 percentage points during the IP. In the IP, the market share of Chinese imports was 46 %.

(c) *Prices*

(i) Price evolution

(63) From 2004 to 2005, the average price of imports of the product concerned originating in the PRC increased by 3 % and then fell sharply by 9 percentage points from 2005 to 2006. During the IP, the price remained at the low level of 2006. Overall, prices of imports from the countries concerned decreased by 6 % during the period considered.

Unit price	2004	2005	2006	IP
PRC (EUR/tonne)	588	606	551	553
Index (2004 = 100)	100	103	94	94

(ii) Price undercutting

(64) For the determination of the price undercutting the price data pertaining to the IP were analysed. The relevant sales prices of the Community industry were net prices after deduction of discounts and rebates. Where necessary, these prices were adjusted to an ex-works level, i.e. excluding freight cost in the Community. The import prices of the PRC were also net of discounts and rebates and were adjusted, where necessary, to cif Community frontier with an appropriate adjustment for the customs duties (6,5 %) and post-importation costs. The latter included also an adjustment for special treatment costs incurred by importers in the Community to de-cake certain volumes of the product concerned before further selling. The Community industry's sales prices and the import prices of the PRC were compared at the same level of trade, namely to independent customers within the Community market. During the IP, the weighted average price undercutting margin thus calculated, expressed as a percentage of the Community industry's sales prices, was 17,42 % for the PRC.

4. **Situation of the Community industry**

(65) In accordance with Article 3(5) of the basic Regulation, the examination of the impact of the dumped imports on the Community industry raised an evaluation of all economic factors having a bearing on the state of the Community industry during the period considered. For confidentiality reasons, given that the analysis concerns only two companies, most indicators are presented in indexed form or ranges are given.

(a) *Production, capacity and capacity utilisation*

(66) The Community industry's production increased by 5 % during the period considered and production capacity also increased by 3 % in order to benefit from the increased consumption. During the period considered capacity utilisation slightly increased by 2 %.

	2004	2005	2006	IP
Production in tonnes (ranges)	260 000-280 000	265 000-285 000	270 000-290 000	275 000-295 000
Production (index)	100	99	102	105
Production capacity in tonnes (ranges)	315 000-335 000	315 000-335 000	320 000-340 000	320 000-340 000
Production capacity (index)	100	100	103	103
Capacity utilisation (index)	100	99	99	102

(b) *Sales volume and market shares in the Community*

(67) Given that the Community industry comprises only two producers and that the Community market for citric acid is supplied by only three origins/sources (the Community industry, the PRC, Israel), data relating to the market shares of the Community industry are presented in an indexed format in order to preserve the confidentiality of the data submitted in confidence by the Community industry, pursuant to Article 19 of the basic Regulation.

(68) The table below shows the Community industry's performance in relation to its sales to independent customers in the Community. Sales volumes of the Community industry to independent customers in the Community went up by 5 % from 2004 to the IP. This has to be seen in the light of a 15 % increase in Community consumption. Against this background, the market share of the Community industry has been steadily decreasing from 2004 to the IP and in total it was five percentage points lower in the IP.

Community Industry	2004	2005	2006	IP
Sales volume (index)	100	98	99	105
Market share (index)	100	99	94	91

(69) Unit sales prices developed as follows:

	2004	2005	2006	IP
Unit prices in EUR (ranges)	750-850	750-850	780-880	780-880
Unit prices (index)	100	100	102	103

The table shows that the price increased slightly by 3 % over the period considered. It is noted that the main raw materials for the production of citric acid are sugar/molasses or glucose (obtained from cereals). In addition, energy is also a major cost in producing citric acid. The total weight of energy cost in the production of citric acid subsequently amounts to 16 % and therefore, in normal circumstances, a significant change in the oil and gas prices can be expected to have a direct impact on the citric acid sales price.

(70) It was found that world market prices of the major inputs (sugar/molasses, glucose and energy) increased significantly during the period considered, leading to considerably higher production costs. This evolution was not reflected in the sales prices of the Community industry as those prices increased only by 3 % during the same period. Thus, in order not to lose customers, the Community industry only passed on a small fraction of its higher costs.

(c) *Stocks*

(71) The figures below represent the volumes of stocks at the end of each period. The level of stocks decreased by 28 % to meet the increasing demand on the market.

	2004	2005	2006	IP
Stocks in tonnes (ranges)	20 000-25 000	20 000-25 000	20 000-25 000	15 000-20 000
Stocks (index)	100	98	97	72

(d) *Investments and ability to raise capital*

(72) The Community industry's annual investments in the production of the like product declined sharply over the period considered and were limited in the IP to solely maintenance works.

	2004	2005	2006	IP
Investments (index)	100	81	82	79

(e) *Profitability, return on investment and cashflow*

(73) In view of very high and extraordinary restructuring costs incurred by one Community producer, it was not considered reasonable to establish the profitability on the basis of the pre-tax net profit. Therefore, the profitability of the Community industry was established by expressing the operating profit on the sales of the like product to unrelated customers as a percentage of the turnover of these sales.

	2004	2005	2006	IP
Profitability on EC sales (range)	0 %-10 %	0 %-10 %	(– 10 %)-0 %	(– 10 %)-0 %
Profitability on EC sales (index)	100	141	– 126	– 166
Return on total investments (range)	(– 10 %)-0 %	0 %-10 %	(– 10 %)-0 %	(– 15 %)-(– 5 %)
Return on total investments (index)	– 100	124	– 75	– 175
Cash flow (index)	100	133	70	61

(74) Over the period considered, the profitability of the Community industry deteriorated significantly. The return on total investments was calculated by expressing the operating profit of the like product as a percentage of the net book value of fixed assets allocated to the like product. This indicator developed in line with profitability, decreasing significantly over the period considered. With regard to the cash flow a similar negative trend was found, resulting in a dramatic overall deterioration of the Community industry's financial situation in the IP.

(f) *Employment, productivity and wages*

(75) The number of employees of the Community industry involved with the like product diminished by 9 % between 2004 and the IP. The average labour cost per employee, declined by 11 %.

	2004	2005	2006	IP
Number of employees (index)	100	93	92	91
Average labour cost per employee (index)	100	90	88	89
Productivity (index)	100	106	112	115

(76) Restructuring efforts aiming to decrease production cost, rationalisation and reduction in number of employees resulted in an increased output per worker (15 % increase over the period considered). It can therefore be concluded that, during the period considered, the Community industry made very significant progress in terms of cost efficiency.

(g) *Magnitude of the dumping margin*

(77) As concerns the impact on the Community industry of the magnitude of the actual margins of dumping, given the volume and the prices of the imports from the country concerned, this impact cannot be considered to be negligible.

(h) *Recovery from past dumping*

(78) In the absence of any information on the existence of dumping prior to the situation assessed in the present proceeding, this issue is considered irrelevant.

5. **Conclusion on injury**

(79) During the period considered a number of injury indicators experienced apparent positive developments: the Community industry, in an effort to enhance its effectivity, managed to increase its sales and production volume, production capacity, capacity utilisation and productivity while decreasing its stocks and annual labour.

(80) However, against a background of increased consumption, its market share shrunk by 9 % over the period considered. Moreover, its financial indicators developed negatively: profitability decreased continuously. The return on investment and cash flow situation developed also negatively. The reason for this development is that the significant increase in raw material prices was only partially reflected in the sales prices of the like product. The small increase in sales prices was insufficient for the Community industry to maintain its profit margin.

(81) In the light of the foregoing, it is provisionally concluded that the Community industry has suffered material injury within the meaning of Article 3(5) of the basic Regulation.

E. **CAUSATION**

1. **Introduction**

(82) In accordance with Article 3(6) and (7) of the basic Regulation, the Commission examined whether dumped imports have caused injury to the Community industry to a degree that enables it to be classified as material. Known factors other than the dumped imports, which could at the same time be injuring the Community industry, were also examined to ensure that possible injury caused by these other factors was not attributed to the dumped imports.

2. **Effect of the dumped imports**

(83) The significant increase in the volume of the dumped imports by 37 % between 2004 and the IP and of its corresponding share of the Community market, i.e. by 7 percentage points, as well as the significant undercutting found (between 15 % and 21 % during the IP) coincided with the deterioration of the economic situation of the Community industry, while average prices of all exporting producers in the PRC decreased by 6 %.

(84) Therefore, the effect of this unfair pricing behaviour of the dumped imports from the PRC was that the prices on the Community market were suppressed and that the Community industry lost market share to the dumped imports. The Community industry in order not to lose more market share was unable to pass on its increased input prices to its customers to an extent that would have been necessary to remain profitable.

(85) In view of the clearly established coincidence in time between, on the one hand, the surge of dumped imports at prices significantly undercutting the Community industry's prices and, on the other hand, the Community industry's decrease of profitability and deterioration of the other financial indicators, it is provisionally concluded that the dumped imports played a determining role in the injurious situation of the Community industry.

3. **Effect of other factors**

(a) *Imports originating in third countries other than the PRC*

(86) According to Eurostat, the main third country from which citric acid is imported is Israel. However, the market share held by imports from Israel is limited and declining over the period considered, from 5 % in 2004 to only 3 % during the IP. In addition, average prices of imports from Israel are at the same level or even exceeding Community prices over the period considered.

Average price (EUR)	2004	2005	2006	IP
Israel	807	788	865	839
Index (2004 = 100)	100	98	107	104

(87) Further to the imports from Israel, there are no significant imports from other countries. On the basis of the findings with regard to these imports, it can thus provisionally be concluded that imports other than from the PRC did not contribute to the material injury suffered by the Community industry.

(b) *Rise in the costs of raw materials due to the EU sugar market reform*

(88) Some interested parties claimed that any injury suffered by the Community industry was linked to the rise of sugar price, used as the main raw material for the production of the like product, due to the reform of sugar regime in the EU and the subsequent abolition of the production refund granted to the chemical industry.

(89) In this respect it is noted that one Community producer uses as main raw material mainly molasses, which were never subject to production refunds although formally falling under the common agricultural policy for sugar.

(90) The investigation showed that in respect of their usage of sugar as raw material, the Community industry was indeed entitled to a production refund under the Common market organisation for sugar to help maintain its competitiveness on the world market. The production refunds corresponded to the difference between EU sugar intervention price after deducting sugar world market price plus the standard amount corresponding to the forwarding costs for exporting Community sugar. Thereby the Community industry obtained its supplies of sugar at world market prices.

(91) Since July 2006 this system has been reformed by down-scaling the protection for the sugar sector. According to the new system, as stipulated in Council Regulation (EC) No 318/2006 of 20 February 2006 on the common organisation of the markets in the sugar sector [1], firstly the chemical industry is allowed to freely negotiate quantities and prices of industrial sugar with sugar producers and beet farmers, i.e. the reference price methodology and the quotas have been dropped in this sector. Secondly, the Community industry can also buy certain quantities of industrial sugar on the world market free of duty. Finally, should there be no sugar available at a price corresponding to the world price of sugar, the chemical industry would be entitled to request the grant of a production refund. The provision for those production refunds, although still existing, has since July 2006 not been used. This can be considered as a strong indication that there were sufficient quantities of sugar available at world market prices.

(92) Moreover, the analysis showed that depending on the raw material split of the Community industry used to manufacture the like product, sugar made up from 6 to 21 % (range is given for confidentiality reasons) of its cost of manufacturing from January until June 2006 and this did not increase during the IP further than the increase of the world market prices for sugar.

(93) Thus, the investigation has shown that the reform of the sugar market had no considerable impact on the cost situation of the Community industry.

(94) On the basis of the above, it is provisionally concluded that the sugar market reform did not contribute to the material injury suffered by the Community industry.

(c) *Rising energy prices*

(95) Some interested parties claimed that any injury suffered by the Community industry was linked to the rise in costs of energy.

(96) In this respect it is noted that the production of citric acid is energy intensive where the total weight of energy cost in the production amounts to 16 % (see recital (69) above). The cost of energy has indeed risen relatively moderately throughout the period considered and this was reflected in the cost of production.

(97) In any event, it is not the increase in the cost of energy as such that had a negative impact on the financial situation of the Community industry, but the inability to pass on those increased energy costs to the necessary extent to their customers due to the price depression caused by the significant volumes of dumped imports.

(98) Furthermore, it was alleged that the risen energy prices would also indirectly affect the production of citric acid as the European citric acid industry would compete with the biofuel industry for carbohydrates which is one of the compounds used for the production of citric acid. As the demand for energy is increasing and therefore the demand for biofuels as well, biofuel producers would be in a position to pay more for those carbohydrates (i.e. sugar and its residual molasses, glucose). This would drive the cost for those carbohydrates up for the Community industry. However, as the analysis of the cost of manufacturing of the Community industry has shown, see recitals (69) and (92) above, there has been no increase in the cost of manufacturing for sugar or molasses which was not linked to the general increase of sugar on the world market. Therefore, no indirect impact of the biofuel industry to the producers of citric acid could be established. The argument is therefore dismissed.

[1] OJ L 58, 28.2.2006, p. 1. Regulation as last amended by Regulation (EC) No 1260/2007 (OJ L 283, 27.10.2007, p. 1).

(99) On the basis of the above, it is provisionally concluded that the consequences of the rise in energy costs did not contribute to the material injury suffered from the Community industry.

(d) *Price cartel of Community industry*

(100) Some interested parties claimed that the loss of market share for the European producers was self-inflicted because of the citric acid cartel (1991-1995) in which both the complainant and the other European producer, under its former ownership, participated. They claim that due to the anti-competitive practices, the sales price was artificially high and allowed the Chinese producers to enter the market. An analysis of statistics shows that the big boost in Chinese citric acid imports occurred between 1998 and 1999 (64 %) and even more between 2002 and 2004 (137 %), several years after the cartel had finished.

(101) On the basis of the above, it is provisionally concluded that the consequences of the anti-competitive practices in which the Community industry has taken part did not contribute to the material injury suffered by the Community industry.

(e) *Currency fluctuations*

(102) Some interested parties have claimed that the devaluation of the USD against the euro has favoured imports of citric acid into the European Community.

(103) Between 2004 and the end of the IP, the USD lost 6,01 % of its value against the euro. Neither the price development of the Community industry nor the import volumes from the country concerned or from other third countries reflect the rather low devaluation of the USD against the euro.

(104) Therefore the devaluation of the USD against the euro has to be considered as negligible and cannot be considered as a major cause of the loss of the market share of the Community industry.

(105) Moreover, it is recalled that the investigation has to examine whether the dumped imports (in terms of prices and volumes) have caused material injury to the Community industry or whether such material injury was due to other factors. In this respect, with regard to prices, Article 3(6) of the basic Regulation states that it is necessary to show that the price level of the dumped imports causes injury. It therefore merely refers to a difference between price levels, and there is thus no requirement to analyse the factors affecting the level of those prices.

(106) However, even if the USD/EUR currency fluctuation between 2004 and the IP was taken into account and even assuming that all export sales to the Community were made in USD, there would still be more than 10 % undercutting.

(107) Consequently, it was provisionally concluded that the appreciation of the euro in respect of the USD was not such as to break the causal link between the injury established and the imports concerned to the Community industry and the claim was, therefore, rejected.

4. **Conclusion on causation**

(108) In conclusion, the above analysis has demonstrated that there was a substantial increase in volume and market share of the imports originating in the country concerned during the period considered, together with a considerable decrease in their sales prices and a high level of price undercutting during the IP. This increase in market share of the low-priced imports coincided with a decline in the Community industry's market share and a price depression with a drop in profitability.

(109) On the other hand, the examination of the other factors which could have injured the Community industry revealed that none of them could have had a significant negative impact.

(110) Based on the above analysis which has properly distinguished and separated the effects of all known factors on the situation of the Community industry from the injurious effects of the dumped imports, it is provisionally concluded that the dumped imports originating in the country concerned have caused material injury to the Community industry within the meaning of Article 3(6) of the basic Regulation.

F. **COMMUNITY INTEREST**

(111) The Commission examined whether, despite the conclusions on dumping, injury and causation, compelling reasons existed which would lead to the conclusion that it is not in the Community interest to adopt measures in this particular case. For this purpose, and pursuant to Article 21 of the basic Regulation, the Commission considered the likely impact of measures for all parties concerned.

1. **Interest of the Community industry**

(112) As indicated in recital (11) above, the Community industry is composed of two companies, with production facilities in Austria and Belgium, which employs in the range of 500 to 600 persons directly involved in the production, sales and administration of the like product. If measures are imposed, it is expected that the price depression on the Community market will come to an end and that sales prices of the Community industry will start to recover, as a consequence of which the financial situation of the Community industry should improve.

(113) On the other hand, should no anti-dumping measures be imposed, it is likely that the negative trend in the development of the Community industry's financial indicators, and notably its profitability, will continue. The Community industry will then continue to lose market share as it is not able to follow the artificially low market prices set by imports from the PRC. Therefore, cuts in production and investments, closure of certain production capacities and job reduction in the Community will be a likely result.

(114) In this respect, it is worth mentioning that since 2004 three producers of citric acid in the Community have closed down.

(115) In conclusion, the imposition of anti-dumping measures would allow the Community industry to recover from the effects of injurious dumping found.

2. **Interest of unrelated importers**

(116) As described in recital (10) above, four sampled importers sent questionnaire replies and they accounted for around 36 % of the Community imports of the product concerned during the IP. One of the sampled importers was not able to provide the requested information. Therefore, its submitted questionnaire was disregarded. The three remaining questionnaire replies were verified on the spot.

(117) The overall weight represented by citric acid in the total turnover of these importers' activities was very small. On an average basis, around 1 % of these importers' activities could be linked to imports of citric acid from the PRC, which is nonetheless considered to be important to complete their product range. Certain importers purchase the product under investigation not only from the PRC but also from other sources in and outside the Community, including from the Community industry. The average profit margin attained by the sampled importers, on their trading of citric acid, is around 4,4 %.

(118) Importers in the Community are not in favour of the imposition of measures. The cooperating importers argued that the imposition of measures would seriously harm their operations, as they would not be able to pass on the price increase to users. In this respect, the imposition of an anti-dumping duty on imports from the PRC, will most likely lead to an upwards correction of market prices. The effect of the duties would in all likelihood be diluted in the importers overall result as citric acid only represents a fraction of their total turnover. The significant undercutting still found after adjustment of the cif Community border prices for post-importation costs also suggests that there is room for a price increase. It can thus not be excluded that importers can pass on a part of the duties to their customers in the food and beverages industry. In any event, in view of the limited weight of sales of this product in the importers' activities, and the profit margin currently attained both overall and in view of their sales of citric acid only, it is expected that the duty as provisionally established will not affect the financial situation of these economic operators to a significant extent.

(119) Further, it was claimed that if duties are imposed, this could lead to a duopolistic market situation on the Community market, excluding competition from third countries. Some interested parties raised concerns about the ability of European producers to meet the increasing European demand. The investigation has shown that, even if operating at full capacity, the Community industry would only have been able to meet 75 % of the European demand during the IP. In this respect, it needs to be underlined that anti-dumping duties should not have the effect of stopping all imports, but rather restoring a level playing field. In combination with imports from other third countries such as Israel, it is provisionally concluded that this would ensure a sufficient supply to meet Community demand. However, the level of Chinese imports will be closely examined after the imposition of provisional measures to analyse the supply situation on the EU market.

(120) Although importers/distributors are against the imposition of measures, it can be concluded on the basis of the information available that any advantage they may gain from not having anti-dumping measures imposed is outweighed by the interest of the Community industry in having the effect of unfair and injurious trading practices from the PRC neutralised.

3. **Interest of users**

(121) Ten users filled in a users' questionnaire. All replies were incomplete and they therefore could not be fully included in the analysis, although it clearly appears that citric acid is used in many different applications but only in small quantities. Thus, the impact of any anti-dumping duty would not be significant for their total cost of production. Only one cooperating user indicated that the imposition of any measures would have a major impact on its business without further substantiating this argument.

(122) In the light of the above and given the overall low degree of cooperation, the situation of users in the Community is therefore unlikely to be substantially affected by the proposed measures.

4. **Conclusion on Community interest**

(123) The effects of the imposition of measures can be expected to afford the Community industry the opportunity to regain lost sales and market shares and to improve its profitability. In view of the unfavourable financial situation of the Community industry, there is a real risk that, in absence of measures, the Community industry may close down production facilities and lay off workforce. In general, the users in the Community would also benefit from the imposition of measures, in the sense that the supply of sufficient volumes of citric acid would not be jeopardised whilst the overall increase in purchase price of citric acid would be moderate. In the light of the above, it is provisionally concluded that no compelling reasons exist for not imposing measures in the present case on Community interest grounds.

G. **PROPOSAL FOR PROVISIONAL ANTI-DUMPING MEASURES**

(124) In view of the conclusions reached with regard to dumping, injury, causation and Community interest, provisional measures should be imposed in order to prevent further injury to the Community industry by the dumped imports.

1. **Injury elimination level**

(125) The level of the provisional anti-dumping measures should be sufficient to eliminate the injury to the Community industry caused by the dumped imports, without exceeding the dumping margins found. When calculating the amount of duty necessary to remove the effects of the injurious dumping, it was considered that any measures should allow the Community industry to obtain a profit before tax that could be reasonably achieved under normal conditions of competition, i.e. in the absence of dumped imports. In this respect, a target profit of 9 % has been applied, based on the profit that was achieved before the major increase in Chinese imports of citric acid.

2. **Provisional measures**

(126) In the light of the foregoing and pursuant to Article 7(2) of the basic Regulation, it is considered that a provisional anti-dumping duty should be imposed at the level of the lowest of the dumping and injury margins found, in accordance with the lesser duty rule, which is in all cases the injury margin found.

(127) The level of cooperation was very high, it was therefore considered appropriate to set the duty for the remaining companies, which had not cooperated in the investigation, at the level of the highest duty to be imposed on the companies cooperating in the investigation. Therefore, the residual duty was set at the rate of 49,3 %.

(128) Consequently, the provisional anti-dumping duties should be as follows:

Sampled exporters	Proposed anti-dumping duty
Anhui BBCA Biochemical Ltd Co. Ltd	42,2 %
DSM Citric Acid (Wuxi) Ltd	13,2 %
RZBC Co.	43,2 %
RZBC (Juxian) Co. Ltd	43,2 %
TTCA Co., Ltd	49,3 %
Yixing Union Biochemical	38,8 %
Laiwu Taihe Biochemistry Co. Ltd	43,2 %
Shanxi Ruicheng	43,2 %
Weifang Ensign Industry Co. Ltd	43,2 %
All other companies	49,3 %

(129) The above anti-dumping measures are provisionally established in the form of *ad valorem* duties. In consideration of the fact that the production capacity of the Community Industry may be not sufficient to satisfy the needs of the Community market (see recital 119), the level of imports from the PRC after the imposition of provisional duties will be examined closely. Should it appear that some difficulties arise in the supply of citric acid in the Community market, consideration will be given to apply an alternative form of measures.

3. **Final provision**

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

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

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

HAS ADOPTED THIS REGULATION:

Article 1

1. A provisional anti-dumping duty is hereby imposed on imports of citric acid and of trisodium citrate dihydrate falling within CN codes 2918 14 00 and ex 2918 15 00 (TARIC code 2918 15 00 10) and originating in the People's Republic of China.

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

Company	Anti-Dumping duty (%)	TARIC Additional Code
Anhui BBCA Biochemical Co., Ltd — No 73, Fengyuandadao Road, Bengbu City 233010, Anhui Province, PRC	42,2	A874
DSM Citric Acid (Wuxi) Ltd — West Side of Jincheng Bridge, Wuxi 214024, Jiangsu province, PRC	13,2	A875
RZBC Co., Ltd — No 9 Xinghai West Road, Rizhao, Shandong Province, PRC	43,2	A876
RZBC (Juxian) Co. Ltd, West Wing, Chenyang North Road, Ju County Shandong Province, PRC,	43,2	A877
TTCA Co., Ltd — West, Wenhe Bridge North, Anqiu City, Shandong Province, PRC	49,3	A878
Yixing Union Biochemical Co., Ltd — Industry Zone Yixing City 214203, Jiangsu Province, PRC	38,8	A879
Laiwu Taihe Biochemistry Co. Ltd, PRC	43,2	A880
Shanxi Ruicheng Yellow River Chemicals Co. Ltd., PRC	43,2	A881
Weifang Ensign Industry Co. Ltd, PRC	43,2	A882
All other companies	49,3	A999

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

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

Article 2

Without prejudice to Article 20 of Council Regulation (EC) No 384/96, interested parties may request disclosure of the essential facts and considerations on the basis of which this Regulation was adopted, make their views known in writing and apply to be heard orally by the Commission within one month of the date of entry into force of this Regulation.

Pursuant to Article 21(4) of Regulation (EC) No 384/96, the parties concerned may comment on the application of this Regulation within one month of the date of its entry into force.

Article 3

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

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

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

Done at Brussels, 2 June 2008.

For the Commission
Peter MANDELSON
Member of the Commission

COMMISSION REGULATION (EC) No 489/2008

of 2 June 2008

amending Regulation (EC) No 806/2007 opening and providing for the administration of tariff quotas in the pigmeat sector

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 2759/75 of 29 October 1975 on the common organisation of the market in pigmeat [1], and in particular Article 11(1) thereof,

Whereas:

(1) Commission Regulation (EC) No 806/2007 [2] opened certain tariff quotas for imports of pigmeat products.

(2) In response to questions concerning imports of certain products under the quotas bearing the serial numbers 09.4038 and 09.4074, and to ensure uniform application, the designation of goods falling under these serial numbers needs to be clarified.

(3) Regulation (EC) No 806/2007 should therefore be amended accordingly.

(4) The measures provided for in this Regulation are in accordance with the opinion of the Management Committee for Pigmeat,

HAS ADOPTED THIS REGULATION:

Article 1

The following paragraph is added to Article 1 of Regulation (EC) No 806/2007:

'4. For the purposes of this Regulation, products falling within CN codes ex 0203 19 55 and ex 0203 29 55 within the quotas bearing the serial numbers 09.4038 (group G2) and 09.4074 (group G7) in Annex I include hams and cuts thereof.'

Article 2

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

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

Done at Brussels, 2 June 2008.

For the Commission
Mariann FISCHER BOEL
Member of the Commission

[1] OJ L 282, 1.11.1975, p. 1. Regulation as last amended by Regulation (EC) No 1913/2005 (OJ L 307, 25.11.2005, p. 2). Regulation (EEC) No 2759/75 will be replaced by Regulation (EC) No 1234/2007 (OJ L 299, 16.11.2007, p. 1) from 1 July 2008.

[2] OJ L 181, 11.7.2007, p. 3.

II

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

DECISIONS

COMMISSION

COMMISSION DECISION

of 11 December 2007

on State aid C 51/06 (ex N 748/06) which Poland has implemented for Arcelor Huta Warszawa

(notified under document number C(2007) 6077)

(Only the Polish version is authentic)

(Text with EEA relevance)

(2008/406/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having regard to Protocol No 8 of the Accession Treaty *on the restructuring of the Polish steel industry* [1],

Having called on interested parties to submit their comments [2] pursuant to the provisions cited above and having regard to their comments,

Whereas:

I. PROCEDURE

(1) In 2002 a restructuring plan (also referred to as the individual business plan) was presented to the Polish authorities by Arcelor Huta Warszawa (hereinafter AHW), then still Huta L.W. Sp. z o o (hereinafter HLW). The plan was revised in March 2003 (hereinafter 2003 IBP).

(2) The process of steel restructuring in Poland started in June 1998, when Poland presented a first Restructuring Programme for the Iron and Steel Industry to the Community in order to comply with Article 8(4) of Protocol 2 of the Europe Agreement with Poland (hereinafter referred to as Article 8(4)), which allowed, exceptionally, State aid to be granted for restructuring in the steel product sector during the first five years after the entry into force of the Agreement.

(3) On 5 November 2002, the Council of Ministers of the Republic of Poland approved the Restructuring and Development Programme for the Polish Iron and Steel Industry until 2006 and, on this basis, on 25 March 2003 it adopted its final National Restructuring Programme (hereinafter NRP). This plan essentially allows for State aid of up to PLN 3,387 billion (EUR 846 million) [3] to be awarded to the Polish steel industry for restructuring in the period from 1997 to 2006.

(4) The NRP was submitted to the Commission, which assessed it on 25 March 2003 and, on the basis of its assessment, made a proposal for a Council Decision to extend the grace period (initially due to expire in 1997)

[1] OJ L 236, 23.9.2003, p. 948.
[2] OJ C 35, 17.2.2007, p. 41.

[3] Assuming that EUR 1 = PLN 4.

for the granting of State aid to the Polish steel sector under the Europe Agreement until the end of 2003, subject to the beneficiaries achieving viability by 2006. The proposal was approved by the Council in July 2003 ([4]).

(5) The EU thus allowed Poland, by way of derogation from EU's rules ([5]), to grant restructuring aid to the steel industry. This was finally laid down in Protocol No 8 to the Act of Accession, on the restructuring of the Polish steel industry (hereinafter Protocol No 8) ([6]). It confirms acceptance of State aid of not more than PLN 3,387 billion being granted to the eight companies indicated, including HLW, up to the end of 2003, provided that restructuring is completed no later than 31 December 2006 ([7]). The NRP allocates PLN 322 million of restructuring aid to HLW (see Table 8), which is confirmed in greater detail in the 2003 IBP and which is to be implemented according to point 9(a) and (h) of Protocol No 8.

(6) In order to ensure compliance with its conditions, Protocol No 8 sets out detailed provisions for implementation and monitoring. Inter alia Poland had to provide bi-annual monitoring reports, and independent evaluations were carried out by an independent consultant in 2004, 2005 and 2006. Company reports for HLW/AHW have so far been presented in February 2004, April 2005, May 2006 and June 2007. They were discussed with the Polish authorities and the beneficiaries and accepted by the Commission services and the Polish authorities.

(7) The IBP of HLW was amended in 2005 by AHW (hereinafter 2005 IBP) and the Commission's approval sought according to point 10 of Protocol No 8.

(8) By letter dated 6 December 2006, the Commission informed Poland that it had decided to initiate the procedure laid down in Article 88(2) EC in respect of potential misuse of aid.

([4]) Council Decision of 21 July 2003, OJ L 199, 7.8.2003, p. 17. Cf. Commission Decision in Case C 20/04, OJ L 366, 21.12.2006, p. 1, points 23 et seq.

([5]) Cf. Communication from the Commission on Rescue and Restructuring aid and closure aid for the steel sector OJ C 70, 19.3.2002, p. 21, which prohibits restructuring aid to the steel industry.

([6]) See footnote 1.

([7]) According to the latest monitoring report of June 2007, PLN 2,727 billion of aid has been disbursed. Out of the eight beneficiaries, three companies, namely Technolgie Buczek (cf. Commission Decision of 23 October 2007 in Case C 23/06, not yet published), Huta Andrzej and Huta Batory have in the meantime gone into liquidation, while four companies, namely Polskie Huty Stali S.A. (now Mittal Steel Poland, see Commission Decision in Case N 186/05, Change of IBP of MSP), Huta Bankowa, Huta Labędy and Huta Pokój, have restored viability.

(9) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ([8]). The Commission invited interested parties to submit their comments on the aid.

(10) Poland replied by letter of 2 March 2007. On 19 March 2007 the Commission also received comments from the beneficiary AHW, which it forwarded together with questions to the Polish authorities. After a meeting with the Polish authorities and the beneficiary in March 2007, further questions were sent to Poland on 2 April 2007 and 6 August 2007. On 4 June 2007 and 1 October 2007 Poland replied.

(11) Then, on 18 October 2007 the Commission services informed Poland about its preliminary assessment of the case and, after further exchanges between the Polish authorities and the Commission, on 16 November 2007 the Polish authorities indicated that the company intended to repay the aid, 'without prejudice to the legal situation'.

(12) The Polish authorities confirmed in a letter of 22 November 2007 that on 20 November AHW had paid 2007 EUR 2 089 768 into an account blocked in favour of the Polish Ministry of Finance. Under the conditions of the agreement, no one will have access to the money on the account until this Decision is adopted. On the date of its adoption the Ministry will receive the amount plus interest accrued as of 20 November 2007. If the decision is not issued by the end of February 2008, the money will revert to AHW.

II. DETAILED DESCRIPTION OF THE AID

(13) AHW is a Polish steel producer which produces liquid steel and long products, especially quality and special steels (light and heavy section profiles).

(14) In 1991 the majority of shares in HLW were taken over by the Italian steel producer Lucchini and sold in 2005 to Arcelor, which merged with Mittal Steel in 2006 ([9]).

([8]) See footnote 2.

([9]) See Commission Decision Mittal/Arcelor of 2 June 2006, Case No COMP/M.4137.

1. **The restructuring programme of the 2003 IBP**

(15) The Commission understands that HLW was facing serious financial constraints at the time of the adoption of the business plan. It was not getting any additional moneys from its mother company Lucchini, which was, according to Poland, in a profound financial crisis, and it was unable to sell its own valuable assets due to regulatory problems. Therefore, between 1997 and 2003 the company was very short of cash, which was reflected in the restructuring plan ([10]).

(16) In order to restore viability, HLW's 2003 IBP therefore set several core restructuring tasks (in point 3.2) among which the most important were:

(a) Asset restructuring and financial restructuring in order to obtain funds for the implementation of this programme, ensure financial liquidity and reduce financial costs.

(b) Implementation of investments in order to further improve the quality and mix of the manufactured products and increase competitiveness of the enterprise, cost reduction […].

(c) Further improvement of environmental protection standards.

(a) *Investments*

(17) The 2003 IBP (point 3.3) stated its industrial strategy to be 'to focus on the gradual improvement of its product mix through a significant reduction of the production of merchant bars and billets and the development of production with a focus on speciality and engineering steels'. To this end, HLW expected ' … to pursue a programme of gradual investments in the following areas of the plant: medium rolling mill, forging shop, drawing mill, ingot-casting bay', while the narrow strip mill was to be closed.

(18) In order to pursue the above strategy, the company planned an investment programme of [between PLN 150 million and PLN 220 million] (*), which was indicated in the 2003 IBP as follows:

Table 1

Planned steel production investments (= table 21 of the 2003 IBP)

In PLN 1 000	2002	2003	2004	2005	2006	Total
Steel-shop					[…]	[…]
Hot rolling mills	[…]	[…]	[…]	[…]	[…]	[approx. 95 %]
General	[…]	[…]	[…]	[…]	[…]	[…]
Drawing mill	[…]	[…]	[…]	[…]	[…]	[…]
Total	[…]	[…]	[…]	[…]	[…]	[PLN 150-220 million]

(19) As indicated in point 4.4 of the 2003 IBP, the investments focused on modernisation of the hot rolling mills (see Table 22 of 2003 IBP). This comprised the modernisation of the medium section mill, as well as the replacement of the reheating furnaces of the blooming mill and the heavy section mill. The timing for implementation of the investments was indicated in Table 23 of the 2003 IBP, which indicated that investments were almost all to be commenced in 2002.

(b) *Employment restructuring*

(20) Under the 2003 IBP (point 4.11), the company planned to reduce the number of its employees from 1 249 to 850. The 2005 IBP now states that the workforce will be reduced to 700 employees. The 2003 IBP allocated PLN 4,03 million for the employment restructuring, of which PLN 1,5 million was to be supported by specially earmarked State aid, PLN 1,17 million by the PHARE programme and PLN 1,34 million by the company ([11]).

([10]) Cf. information submission of Poland of 4 June 2007, points 19, 30, 55.

(*) Parts of this text have been hidden so as not to divulge confidential information. These have been indicated with a dotted line in square brackets. The total investment programme amounts to between PLN 150 million and PLN 220 million. In order to make the decision easier to follow, further confidential financial information is given as an approximate percentage of the amount of PLN 150-220 million (taking PLN 150-220 million as 100 %).

([11]) 2003 IBP, p. 66, Table 35.

(c) *Financial restructuring*

(21) The 2003 IBP also provided for financial restructuring and asset restructuring, which, according to the plan (point 3.2), concerned 'repayment of short-term loans and the sale of unnecessary assets not connected with production.'

(22) The 2003 IBP (point 4.7) provided for the restructuring of debt of PLN 513 369 million (according to the balance sheet this was the total of long-term and short-term liabilities). It was intended to finance this from future profits and asset restructuring. Proceeds of PLN 363 million were expected from the latter in 2004 and 2005, PLN 60 million of which was to cover new debts.

(23) In detail, the Commission understands that the 2003 IBP specified the following measures for financial restructuring: firstly, public debt had been waived resulting in aid of PLN 21,5 million (see 4.12.2); secondly, HLW had, since 2000, been conducting some ongoing asset restructuring by selling non-productive assets, and this was supposed to generate funds to finance the investment programme.

(24) The asset restructuring must be seen against the background that HLW's assets had already been the subject of a financial transaction described by HLW as a 'sale and leaseback transaction'. In 2000 the company had obtained a PLN 250 million loan basically collateralised by a pledge on land and buildings belonging to the company. This concerned productive and non-productive assets. Repayment was to take place in two payments a year until 2010. The transaction was necessary because HLW was in need of cash but could not sell off its non-productive assets immediately. This was to be done in the course of the coming years and would result in cash generation and the reduction of financial costs.

(25) According to the 2003 IBP, the asset restructuring was to concern the non-productive assets (points 4.7 and 4.8). Apparently at the end of 2001 a first part (53 hectares) of the 100 hectares was sold. However the sale of other non-productive assets was delayed because AKR (*Agencja Kapitałowo Rozliczeniowa S.A.* — a company whose shareholders are the Industry Development Agency and the State Treasury) had difficulties in regulating the legal status of the part of the land not connected with production.

(26) As funds were not available from the sale of land, a bridging loan guaranteed by the State for PLN 300 million was envisaged. The loan was supposed to be used for investments and to cover short-term liabilities (PLN 219 million in total). In addition, PLN 53 million was allocated to bringing forward investments originally planned for after 2006 (this 219 + 53 million add up, together with 10 % financing costs (i.e. 27 million), to 299 million). Consequently, of the total funds of [PLN 150-220 million] planned for investments, at least PLN […] million (i.e. PLN […] million — PLN 53 million) should be included in the PLN 219 million. The remaining amount of PLN […] million (PLN 219 million — PLN […] million) must therefore have been the costs of short-term financial restructuring.

(d) *Environmental restructuring*

(27) The 2003 IBP (point 4.9) also included a separate environment-related investment programme which consisted of implementation of an environmental management system in accordance with ISO 14001 (PLN 0,5 million), a number of investments under the umbrella of a land reclamation project with costs of PLN 50 million and modernisation of the power engineering department (for which no funds were allocated). The measures were to be commenced in 2002.

(28) The investigation indicated that some but not all of the measures indicated in the 2003 IBP were implemented according to the time schedule. In particular, the construction of a scrap-processing plant was postponed to 2007-08, and was not underway until summer 2007. Moreover the construction of a discard-processing plant was abandoned as the discard processing is run by a subcontractor ([12]), which is a more cost-efficient solution.

(29) However, the investigation also confirmed Poland's claim that the costs for the environmental restructuring were not to be paid under the restructuring plan, but were to be covered from own funds, such as proceeds from the asset restructuring.

(e) *Financing the restructuring*

(30) The 2003 IBP (4.12) identifies a financing gap of PLN 300 million (see also the cash flow statement, point 5.1). As no indication is given to the contrary, it can be assumed that this was the only financing required.

([12]) See ESC report for 2006 of July 2007.

(31) Point 4.12 indicates that the restructuring required financing of PLN 113,6 million in 2002 and PLN 105,3 million in 2003, as well as the PLN 21,9 million financing cost of borrowing these funds. Moreover, an additional PLN 53 million was allocated to bringing forward investments. However, there is no indication of what exactly the financing was needed for.

(32) After 2003 no more financing seemed to be necessary. Indeed in its 2005 IBP AHW, when describing the 2003 IBP confirms 'The […] Restructuring Programme assumed that series of actions of strategic and operational character would be taken, as a result of which significant improvement in the profitability of the activities was expected, and as a result, financial liquidity. The Restructuring Programme accepted that financial liquidity factors would gradually improve, starting from the year 2003.'

(f) *Conclusion as to the restructuring efforts under the 2003 IBP*

(33) The restructuring provided for in the IBP for which extraordinary support was required includes investment (PLN [150-220] million, including the PLN 53 million of investments brought forward), employment restructuring (PLN 4,03 million), some write off of public debt (PLN 21,5 million), some financial restructuring (PLN 81,5 million) and some financing costs for the loan (PLN 27,1 million), all totalling PLN 324,63 million.

(34) The restructuring was to be financed mainly from a State-guaranteed loan, which was intended to close a financing gap resulting from the delay of part of the asset restructuring. Therefore, in order to enable the company to carry out financial restructuring and investments in 2002/03 and possibly also 2004, the company was granted the bridging loan guaranteed by the State Treasury. The restructuring project was therefore clearly connected with a time schedule.

(35) However, the asset restructuring was not indicated in the 2003 IBP as leading to restructuring costs. It was, rather, an ongoing exercise, independent of the State aid-supported restructuring plan and clearly requiring no additional State funding. Also some measures not directly linked to restoring viability, such as the environmental measures, were financed through the asset restructuring and were, as is reiterated by Poland, thus pursued outside of the restructuring.

(36) Indeed, the only reason why the asset restructuring is mentioned is because it was to generate financing through the sale of the non-productive assets. However, the repayment of the sale and leaseback transaction is not mentioned.

2. **State aid**

(37) Out of the PLN 322 million aid (calculated as net grant equivalent) originally accepted in the NRP, AHW obtained the aid shown in the attached table submitted by Poland:

Table 2

State aid approved and received in 2002 and 2003 (*)

	NRP (in PLN 000)	State aid obtained (in PLN 000)	Difference (in PLN 000)
Total 2002-03	321 878 000	203 946 000	117 932 000

(*) Figures correspond to Table 36 of the 2003 IBP. Figures updated in line with the Polish and independent Monitoring Reports of June 2007, taking EUR 1 to be PLN 3,95.

(38) The aid was granted for three different purposes:

(a) PLN 0,33 million for employment restructuring (1,5 million had originally been planned),

(b) PLN 20,56 million for debt write-offs (21,5 million had originally been planned), which was used for general improvement of the company's financial situation.

(c) guarantee of a loan of PLN 183,2 million (EUR 46,3 million; PLN 299 million had originally been planned, and approved by the Commission).

(39) The State guarantee-supported loan was given to HLW by Bank Pekao S.A. on the basis of an agreement between HLW and the bank of 10 December 2003. The loan agreement indicates that the loan has to be repaid five years after the signing of the agreement, i.e. by 10 December 2008.

(40) AHW had applied for the guarantee in August 2003. It was granted by a decision of the Council of Ministers of 31 December 2003 and concerned a nominal value of EUR 46,3 million, plus interest and other associated costs of up to EUR 58,3 million. The Council of Ministers decision recognised that HLW would first need the aid in order to finance investments relating to the hot rolling mill and the property purchase costs under sale and leaseback agreement, and ordered that it should be used for this purpose. In detail:

(a) one part of the loan was intended for an amount of up to EUR 14 600 000 to finance production investments, investment connected with the rolling mill (medium) and rolling machine modernisation (cages). However, between 30.9.2004 and 28.2.2005 only EUR 2 854 355 was utilised in eight instalments. The repayment took place on 16.9.2005.

(b) the other part, for an amount of up to EUR 31 430 000, with which the company wanted to pay off the remaining part of the sale and leaseback agreement, was intended for debt restructuring by way of repurchase of production property (land and buildings). From 24.8.2004, the company utilised EUR 31 245 684, and repaid it 16.9.2005. According to the Polish authorities and the beneficiary, the loan was used to pay off the sale and leaseback agreement of 2000.

(41) Altogether, the company indicated that it had paid interest amounting to EUR 1 132 788,35, which it paid in tranches. To this end it was considered that the first interest tranche, paid on 30 December 2004, should be allocated to the respective loan portions drawn, whereas from that point onwards, the interest amounts could be distributed between the respective totals. The Polish authorities submitted that this led to the following split of the interest payments:

Table 3

Interest paid

Date, interest paid	Total interest	Interest on the part of the loan used for repayment of the sale and leaseback agreement	Interest on the part of the loan used for investment
30.12.2004	EUR 371 931	EUR 363 880	EUR 8 051
30.6.2005	EUR 536 522	EUR 491 612	EUR 44 910
16.9.2005	EUR 224 336	EUR 205 557	EUR 18 778
	EUR 1 132 788	EUR 1 061 050	EUR 71 738

(42) AHW also had the following items of expenditure connected with the guaranteed loan:

(a) a preparation fee of EUR 270 000,

(b) a State Treasury fee for granting the loan guarantee of EUR 583 300, paid on 30.4.2004 (1 % of the guarantee total amount of EUR 58 330 000, independent of the size of the loan actually granted),

(c) costs sustained by the bank for the loan contract and passed on to AHW: EU 55 947.

(43) HLW's 2003 loan application also indicates that the reduction of the loan (in relation to the amount approved under the 2003 IBP) was based on HLW's own initiative because it had already negotiated the loan. However, HLW reserved the right to apply for the remaining aid under the PLN 75 million ceiling, but never did so.

3. **Implementation of the 2003 IBP**

(44) It is not disputed that the 2003 IBP was only partly implemented. Between 2002 and 2004 HLW spent only PLN 58,7 million on the restructuring. Only PLN [approximately 25 % of the total investment amount shown in Table 1] million was spent out of the PLN […] million for investment in modernisation of the hot rolling mill envisaged for 2002 to 2004. Investments concerned only the modernisation of the medium section mill, while no investments were made in the reheating furnaces of the blooming mill or the heavy section mill. Moreover, less than half a million out of PLN […] million was invested in the steel plant and PLN […] million in other general investments (for details see columns for 2002, 2003 and 2004 in Table 4 below).

(45) The Commission has not been provided with any information as to whether financial restructuring was performed. However, from the 2005 IBP the Commission sees that the indebtedness of HLW on 30.6.2005 was about the same as that of HLW at the end of 2001 (see point 1.8 of the 2005 IBP). Moreover, HLW was able to achieve a positive operating result already in 2004. Hence, the Commission assumes that the company has achieved its planned short-term financial restructuring.

(46) The reports of the independent consultant in charge of the monitoring confirm that HLW was not viable in 2004, at the end of 2004 or the end of 2005. However, AHW was viable at the end of the restructuring period (end 2006).

(47) It is undisputed that the viability at the end of 2006 is due to a number of factors, which derive, apart from the partial modernisation of the rolling mill, above all from the boom in the steel sector, which had a very positive impact on the company's turnover. Moreover, with the takeover of HLW by Arcelor, a strong investor, all of HLW's liquidity problems had vanished. However, the company was not able to substantiate its general statement that the actual use of the guarantee for refinancing purposes was a cause of the company's achieving viability.

4. **Changes in the 2003 IBP**

(48) In 2005, the entry of a new owner resulted in a considerable change in the investment strategy. Instead of modernising the existing hot rolling mills, AHW now plans to build a new rolling mill with capacity to produce long products for construction applications. Apparently the mill will use square 160 mm CC billets as feedstock and its production range will be carbon steel reinforcing bars, round and flat bars, light sections and square and cross sections. Poland explains that this adaptation is a response to the development of the construction market, for which substantial growth is predicted for many years in the Warsaw area, which may give AHW a first-mover advantage due to its location in Warsaw.

(49) The new mill will be fully operational by mid-2008 and will replace the existing hot rolling mills, in which PLN [approximately 25 % of the total investment amount shown in Table 1] million has already been invested in modernisation. The total cost of the investment programme is summarised in the following table:

Table 4

Costs for the new investment programme in the 2005 IBP

In PLN 000	2002 (*)	2003 (*)	2004 (*)	2005	2006	Total
Steel-shop	[…]	[…]	[…]	[…]	[…]	[…]
Hot rolling mills	[…]	[…]	[…]	[…]	[…]	[approximately 120 % of the total investment amount shown in Table 1]
General	[…]	[…]	[…]	[…]	[…]	[…]
Total	[…]	[…]	[…]	[…]	[…]	[approximately 140 % of the total investment amount shown in Table 1]

(*) Investments already implemented under the 2003 IBP.

(50) Thus total investment costs will now be PLN [approximately 140 % of the total investment amount shown in Table 1] million, of which it is planned to allocate PLN [approximately 120 % of the total investment amount shown in Table 1] to the hot rolling mill, thus PLN […] million more than originally earmarked for investment. However, these costs include the PLN […] million for the medium section mill already completed. If these were subtracted from the PLN […] million, the cost of the new rolling mill would amount to PLN [less than 200] million.

5. **Capacity development**

(51) The development of AHW's capacity is illustrated in the following table:

Table 5

Maximum production capacity per year in thousand tonnes

Production	2002	2003	2004	2005	2006	2007	2008	Remarks
Liquid steel	[…]	[…]	[…]	[…]	[…]	[approx. 100 % of total mill capacity]	[idem]	No changes
Flat products	20	20	20	20	0	0	0	Stipulated by Protocol No 8
Rolling mill — wire rod	180	180	180	180	180	0	0	Stipulated by Protocol No 8
Rolling mill merchant bars light-sections profiles	[…]	[…]	[…]	[…]	[…]	[approx. 40 %]	0	New strategy (*)
Rolling mill long heavy-sections profiles	[…]	[…]	[…]	[…]	[…]	[approx. 60 %]	0	New strategy (*)
Rolling mill forged profiles	[…]	[…]	[…]	[…]	[…]	[…]	0	New strategy (*)
Cold-rolled strip	30	0	0	0	0	0	0	Stipulated by Protocol No 8
New rolling mill	0	0	0	0	0	[…]	[Approx. 70 %]	New strategy (not provided for in Protocol No 8)

(*) Protocol No 8 does not provide for this capacity reduction.

(52) After the new rolling mill is fully operational in 2008, the old rolling mill will be closed. At no point before 2007 did the company's total production exceed the maximum capacity of […] tonnes. Thus the modification of the investment program will result in an additional reduction of the company's capacity by […] tonnes.

III. **REASONS FOR INITIATING THE PROCEDURE**

(53) In its letter of 6 December 2006, the Commission indicated that AHW's restructuring plan had not been implemented and stated that it intended to investigate whether this constituted a misuse of the restructuring aid granted. In particular the Commission indicated that a large amount of the aid had not been properly used.

(54) Further, the Commission doubted whether it could accept the updated business plan under point 10 of Protocol No 8, as it concerns a new investment which might be useful but not necessary for the restructuring of the company.

IV. **COMMENTS FROM POLAND**

(55) The Polish authorities insist that AHW used the State guarantee in accordance with the terms and conditions under which it was granted and explains that:

(a) Firstly, the repayment of the sale and leaseback transaction related to the investments, which were described only as a very general measure, without any investments being specified in detail.

(b) Secondly, it was part of the financial restructuring as the amount of restructuring costs was PLN 857 million, since they also consider losses and liabilities to be restructuring costs. Poland indicates that these consist of losses of PLN 150 million for the years 2002 and 2003, indicated in the forecasted balance sheet (p. 79, 2003 IBP). Moreover the company also had long-term and short-term debt of PLN 513,4 million. The additional costs come from the restructuring of employment and investments (PLN 190,5 million).

(c) Thirdly, the transaction was part of the asset restructuring which was provided for in the restructuring plan. The company therefore decided 'to replace the leaseback agreement with a less costly financial loan' in order to reduce its 'negative cash flow effects from existing financial debt'. Poland indicated that this was urgent as HLW was at the 'point of exhaustion of its financial resources'.

(56) The Polish authorities further claim that the sale and leaseback transaction also contributed to the viability of the company but do not substantiate this.

(57) The Polish authorities confirm that the timing of the aid was crucial. In fact they state that 'there was a need for State aid only in 2003/04' when there was essentially a financing gap ([13]).

(58) The Polish authorities reiterate that AHW has paid back the aid. The State guarantee was supposed to be only supplementary to the other collaterals for the loan. In fact a collateral in the form of a pledge on land and on all fixed assets was given to the bank, as well as seven bills of exchange. Moreover, Poland submitted details on various other financing instruments that HLW was also using at the time and consequently argues that HLW could have obtained financing on the market without the guarantee.

(59) The Polish authorities recall that Arcelor would not have bought the company unless it was certain that HLW was 'entitled to the State aid it had received for the restructuring process'.

(60) The Polish authorities underline that the modification of the plan will result in a broader investment programme than the one envisaged in the original plan and that all the investment was irrecoverably committed by the end of 2006 (i.e. by the end of restructuring period). The Polish authorities are thus of the opinion that the aid should not be considered misused and the proposed modification of the plan should be considered compatible with Community rules.

([13]) Letter of 4 June 2007, point 20.

(61) The Polish authorities indicate that the investment envisaged in the 2005 IBP, i.e. the replacement of the medium mill, was discussed as early as 1997. However from 1997 to 2003 the company had insufficient cash flow to finance this investment. Only when Arcelor took over the company were sufficient funds available for the financing ([14]). Furthermore Poland argues that the product range was only broadly defined in the 2003 IBP and what was defined was not optimal to meet the changed demand structure in the Polish market, which required adaptation of the product range.

(62) The Polish authorities argue that the amendments in the 2005 IBP have no negative impact on Protocol No 8. The new plan is necessary to achieve 'lasting viability'. The current viability at the end of the restructuring period was only due to the positive market and price/revenue/cost situation. In this sense it is claimed that the blooming technology would not guarantee the company being competitive in the long term, and needed to be replaced by a state-of-the-art continuous casting process.

(63) The Polish authorities suggest that even if the aid obtained was considered to be additional operating aid, it should be deemed to be balanced by the compensatory measures, i.e. the company's additional capacity reduction after the strategy was modified. The Polish authorities also confirm that HLW did not carry out all its investments because its asset restructuring was delayed.

(64) Poland also informed the Commission of the interest rate charged for the loan as indicated above in point (41) and the other costs charged in relation to the loan and guaranty as indicated in point (42).

V. COMMENTS FROM INTERESTED PARTIES

(65) The beneficiary submitted comments on the initiation of the procedure and has subsequently been kept informed about the information exchange between the Commission and the Polish authorities.

(66) AHW argues that a large part of the aid was used to buy back some leased assets in order to reduce financial costs. Moreover, as the investments concerned the leased property, its buy-back could be seen as part of the restructuring.

([14]) The Polish authorities confirm that the capital expenditure required for the adaptation relating to continuous casting and extending the product range is higher, but argue that it is compensated for by two factors: firstly, switching investment to the construction of a replacement mill should result in considerable cost savings of up to EUR 85 million and, secondly, there should be energy and operating cost savings later.

(67) The beneficiary also argues that the guarantee was granted before Poland's accession to the European Union (the resolution of the Council of Ministers was adopted in December 2003), and it was therefore up to the Polish government to determine the purpose of the aid. Moreover, the company indicates that it has used the aid in exact accordance with the decision granting the guarantee.

(68) AHW reiterates that the new plan is to serve the objective of the old plan and the change of strategy is necessary for the long-term viability of the company.

VI. ASSESSMENT

1. Applicable law

(69) Point 1 of Protocol No 8 provides that 'notwithstanding Articles 87 and 88 of the EC Treaty, State aid granted by Poland for restructuring purposes to specified parts of the Polish steel industry shall be deemed to be compatible with the common market' if, inter alia, the conditions set out in the Protocol are met.

(70) The grace period for granting restructuring aid to the Polish steel industry under the Europe Agreement was extended by the Council until the accession of Poland to the European Union. This arrangement was recognised in Protocol No 8 as part of Poland's accession to the European Union. In order to achieve this objective, the Protocol covers a time frame extending before and after accession. More precisely, it authorises a limited amount of restructuring aid for the years from 1997 to 2003 and forbids any further State aid to the Polish steel industry for restructuring purposes between 1997 and 2006. In this respect it clearly differs from other provisions of the Accession Treaty such as the interim mechanism set out in Annex IV (the existing aid procedure), which only concerns State aid granted before accession insofar as it is 'still applicable after' the date of accession. Protocol No 8 can therefore be regarded as *lex specialis* which, for the matters that it covers, supersedes any other provision of the Act of Accession ([15]).

(71) Consequently, while Articles 87 and 88 ECT would normally not apply to aid granted before accession and not applicable after accession, the provisions of Protocol No 8 extend State aid monitoring under the EC Treaty to any aid granted for the restructuring of the Polish steel industry between 1997 and 2006.

([15]) See Decision of 5.7.2005 in Case C 20/04 Huta Czestochowa (OJ L 366, 21.12.2006, p. 1).

(72) The decision may be taken under Article 88(2) EC after Poland's accession because, in the absence of specific provisions in Protocol No 8, the normal rules and principles should apply. Consequently Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 (hereinafter the Procedural Regulation) ([16]) will also apply.

2. **Misuse of aid**

(73) Point 18(a) of Protocol No 8 gives the Commission the power to take 'appropriate steps requiring any company concerned to reimburse any aid granted in breach of the conditions laid down in this Protocol […] if monitoring of the restructuring shows that the commitments for the transitional arrangements contained in this Protocol have not been fulfilled'.

(74) Following the formal investigation, the Commission has concluded that Poland has not been able to allay its doubts concerning misuse of the restructuring aid. The Commission concludes that the company has not properly implemented its restructuring plan as explicitly stipulated in points 9(a) and (h) of Protocol No 8. The Commission observes that, of the financial resources made available (around EUR 34 million), only an insignificant part was used for financing investments in line with 2003 IBP, while the rest, i.e. EUR 31,2 million, was used for purposes not indicated in the plan.

(75) To arrive at its conclusion, the Commission first assessed what kind of measures were planned in the original IBP, then whether the measures which were pursued by the company were in any way incompatible with the common market, and then the effect of the incompatibility of the misused aid in view of the overall plan, before considering the aid amount. The question of whether the new plan may change this conclusion is discussed in the following chapter (3).

(a) *Scope of restructuring established in the original investment plan*

(76) The Commission first clarifies the scope of the 2003 IBP and whether the pay-off of the productive assets sale and leaseback agreement, for which the restructuring aid was mainly used, was covered by the 2003 IBP.

(77) As stated above in point (34), the main task of the restructuring plan was to guarantee the execution of certain measures necessary for HLW to restore viability in a timely fashion. This mainly concerned investments and financial restructuring. The emphasis of the plan was on enabling the company to restructure in 2002 and 2003.

(78) Firstly, under the 2003 IBP HLW was to invest PLN [150-220] million. However, both the beneficiary and the Polish authorities seem to infer that acquisition of the productive assets could be seen as part of the investment programme. Poland argues that the investments were described as a very general measure, without specifying any of the investments in detail. Moreover the beneficiary argues that the purchase was necessary to the restructuring process 'since the plant could not have been operated during the restructuring without these facilities'.

(79) The Commission cannot accept these arguments. It is evident that the 2003 IBP earmarked the investments under point 4.4 in terms of costs (Table 21 of 2003 IBP, shown as Table 1 in point (18) above), object (Table 22 of 2003 IBP) and time (Table 23 of 2003 IBP). There was no room for any paying off of the productive assets sale and lease agreement. In fact, this attempt rather illustrates that neither the Polish authorities nor the beneficiary saw any plausible justification for paying off the sale and lease agreement. Otherwise this would have been included in the plan.

(80) Secondly, the 2003 IBP envisages limited financial restructuring. In their later submissions the Polish authorities claimed that the amount of the repurchase of the productive assets should be included in the financial restructuring ([17]). They argue that the financial restructuring also covered existing losses of PLN 150 million and debt rescheduling of PLN 513 million and thus arrive at total restructuring costs of around PLN 858 million.

(81) However, the Commission cannot accept that the existing losses of PLN 150 million and the debt rescheduling of PLN 513 million are restructuring costs. As indicated in point (22), the Commission does not dispute that point 4.7 of the 2003 IBP mentions that 'the company intends to restructure the liability of PLN 513 million'. However, it is not indicated that this is necessarily part of the restructuring tasks. Indeed, point 3.2 singled out only the 'repayment of short-term loans and the sale of unnecessary assets not connected with production' as a restructuring task.

([16]) OJ L 83, 27.3.1999, p. 1.

([17]) Letter 4 June 2007, point 24.

(82) Moreover, it is also not usual to consider all kind of losses simply as restructuring costs as Poland claims. Balance sheet liabilities are not necessarily equivalent to restructuring costs, as liabilities as such form part of normal business operations. It is true that excessive liabilities may give raise to difficulties but then restructuring must identify specific measures such as capital injections or loans or rescheduling agreements to deal with the liabilities. The plan does not include any of these measures for the financial restructuring (point 4.7, fifth paragraph).

(83) Indeed, the 2003 IBP indicates in point 4.7 that only PLN 363 million was required to finance the restructuring. This is less then the total existing debt of PLN 513 million. Moreover, the PLN 60 million mentioned in point 4.7 seems to relate to future working capital. Thus, PLN 300 million at most was to go towards the restructuring (see above point (30)).

(84) However, the use of the PLN 300 million is clarified in point 4.12.1 of the 2003 IBP concerning the costs and sources of the programme. This point explains that total financial coverage of PLN 219 million was required for 2002-03. Given that this was also to cover investments, as indicated above in point (26), the funds left for financial restructuring were only PLN […] million.

(85) The PLN 81,5 million would not even cover the amount to pay off the sale and leaseback agreement. Point 3.2 indicated clearly that financial restructuring would only concern the short-term debt. Therefore, the financial restructuring included in the plan was limited to PLN 81,5 million, which did not, however, concern the paying off of the sale and lease agreement, which, as it was to have been repaid over the years up to 2010, was clearly a long-term liability. Hence paying off the sale and leaseback agreement can also not be viewed as part of the financial restructuring to be supplemented by aid.

(86) Finally, the Polish authorities seem to accept that paying off the sale and leaseback transaction was not part of the asset restructuring, as they do not argue that this is the case. However, they indirectly refer to the asset restructuring when citing a passage from the part on asset restructuring, 'the above sale will enable Huta L.W. to repay part of its loans and maintain financial liquidity' (point 64 of letter of 4 June).

(87) However, the Polish authorities fail to accept that it is nowhere stated that the entire debt from the sale and leaseback is to be rescheduled, while the plan indicates at several points that the rescheduling concerns only the non-productive assets. This is reiterated twice in the same chapter from which the above quote of the Polish authorities was taken. In fact, it is clearly set out there that certain debts under the sale and leaseback agreement, namely those concerning non-productive assets (see point 4.12.1 of the 2003 IBP), are to be subject to asset restructuring. These concern the 100-hectare and 88-hectare projects. The purpose of this asset restructuring was to free up cash in order to make the investments. This would simultaneously reduce the financial cost of the debt. However, no indication is given that the entire sale and leaseback agreement should be paid off ahead of schedule in order to reduce financial costs. Rather the asset restructuring aims only to 'reduce' financial costs, not eliminate them.

(88) Finally, given HLW's financial constraints, the Commission does not see any reason why HLW had to aim to purchase its productive assets when the repayment was only due at a later stage. Indeed, it was in no way indicated that the lease contract would be an obstacle to the restructuring. In particular, point 4.12 of the 2003 IBP does not support this, since it only indicates that by selling off some assets, which were previously identified as the unproductive ones, HLW would be able to reduce the costs of serving the leasing contract. This is only logical, given that assets were to be sold in order to (partly) repay the loan and thus relieve HLW from paying interest on the loan. However, it in no way relates to the re-purchase of the productive assets, which could not generate any cash as these assets would be kept by the firm.

(89) Buying back the productive assets was not therefore provided for in the 2003 IBP. Hence, HLW used the aid for a purpose which was not covered by the restructuring plan which was the basis for authorisation of the aid. This means that the aid was used in contravention of the NRP and the authorisation decision, i.e. Protocol 8. Under Article 1(g) of the Procedural Regulation, this may be considered misuse, since this is defined as using the aid in contravention of the State aid approval decision ([18]).

(b) *Incompatibility of the misused aid*

(90) After it has been established that the State aid obtained was not used in accordance with the plan, it needs to be demonstrated that this misused aid is also incompatible with the common market.

([18]) Misuse does not, however, call into question whether a beneficiary was originally entitled to receive aid, but only concludes that the aid has been used in contravention of the decision granting it.

(91) In formal terms, this can already be concluded from the fact that, firstly, the company did not use the aid in accordance with the plan, which, under Protocol No 8, it is obliged to implement properly and, secondly, that any other State aid outside the IBP, NRP and Protocol No 8 is incompatible with the common market under point 18 of Protocol No 8.

(92) In addition, the Commission notes that it would not have been able to find the actual use compatible with the common market, despite the fact that AHW restored its viability. In this context the Commission would like to clarify that, although the beneficiary doubts that the beneficiary's current viability is sufficient, it must be considered that its understanding of viability departs from the way viability was predefined in Annex 3 of Protocol No 8. This understanding was agreed under Protocol No 8, was monitored by both contracting parties and cannot be altered retroactively by a beneficiary.

(93) However, the Commission reiterates firstly that compatibility does not simply follow from the fact that HLW did restore viability in 2006. In fact, the restoration of viability is not alone sufficient to render a restructuring project compatible with the common market. Moreover, it must be ensured that the restoration of viability is achieved with the minimum amount of State aid necessary for the restructuring and that compensatory measures are implemented. The Commission recalls that these conditions are stated in Article 8(4) of the Europe Agreement, to which reference is made in point 1 of Protocol No 8. In particular the concept of State aid being the minimum necessary implies that the aid should not be used to finance an investment or measure that is not essential for the restructuring ([19]).

(94) Secondly, the Commission recalls that the plan, i.e. the restructuring tasks and the measures to finance them, must, from an *ex ante* point of view, ensure that viability will be achieved. In fact, the 2003 IBP put special emphasis on investments and on bringing forward investments in its use of State aid. The plan indicated that investments were to be brought forward to 2003 thanks to the bridging loan. Moreover, it is indicated that the asset restructuring was expected to take place in 2004 and 2005, which was obviously too late for implementation of the investment programme. Therefore the loan was provided to bridge the financing gap. Indeed, the introduction to the plan reiterates that 'implementation of the restructuring programme in accordance with the adopted schedule and continuation of the enterprise will require the necessary bridging loan'. In conclusion, the bridging loan was considered necessary in order to bring investments forward according to a specific schedule.

(95) The fact that HLW did opt to pay off the productive assets sale and lease agreement and not to make the investments in time therefore indicates that, from an *ex ante* point of view, HLW's action endangered its chances of restoring viability. In fact, the Polish authorities have not communicated any reason why in August 2003, when HLW applied for the guarantee, the situation should have changed, given that it was only five months after the last update of the plan in March 2003. Such use of the aid was therefore not an implementation of the plan but rather, given the fact that the investments were tied to a time schedule, obstruction of proper implementation of the plan. Thus, from the *ex ante* point of view, the company clearly endangered viability, despite the fact that it later restored it.

(96) It is true that financial resources are fungible, and the fact that the State aid was not used in accordance with the plan might imply that the restructuring plan could be financed by other means, which it was originally planned to use for other purposes, for which the aid is now being used. However, such argumentation is not acceptable in the case of a restructuring project, where the financial means of the company should be used for the firm's reorientation and, owing to the company's difficulties, no spare funds should be available for projects outside the plan. Therefore, the use of the funds from the State-guaranteed loan to pay off the loan for the productive assets is a causal factor in the reduction of restructuring activities elsewhere, in particular timely implementation of the above investments.

(97) Furthermore, the Commission does not see the relevance of the argument put forward by the Polish authorities and the beneficiary to the effect that in 2003 the company was in such financial distress that it was unable to undertake any investments. This is because the Commission fails to see why a company in such a situation would have opted for repayment of a long-term debt rather than for other measures which were identified as being necessary to restore viability.

([19]) This common principle has already been reiterated. It is laid down in point 45 of the rescue and restructuring guidelines and confirmed in Commission Decision in Case C 31/2001 Schmitz-Gotha, OJ L 77, 24.3.2003, p. 41, where the Commission rejected the acquisition of a subcontractor, which was seen as useful, but not as strictly necessary for the restructuring. This was upheld in Case T-17/03 Schmitz-Gotha [2006] ECR II-1139.

(98) Finally, it is also not relevant that the company is now offering to catch up with the investments forgone in 2004, because the implementation was bound to a particular time schedule, which was considered the only way to restore viability by the end of 2006. This infringement is definite and can also not be altered by a change in the IBP. This is so even despite the fact that the 2005 IBP provides for additional investments, as these cannot put right the misuse.

(99) Thirdly, even if HLW assumed in August 2003 that the investments were no longer necessary to restore viability, this would imply that HLW had indicated excessively high restructuring costs in the 2003 IBP and that the aid received was not necessary for the restructuring. However, the Commission finds it unlikely that the company changed its mind just five months after the 2003 IBP had been concluded (in March 2003) when, in August 2003, it applied for the guarantee and indicated that the main part was wanted to pay off the loan on the productive assets. In order to substantiate such a finding, the company should then in any event have indicated this fact to the Commission in due time, which it did not.

(100) Nevertheless, even if the investments had not been necessary, the redirecting of the funds to pay off the sale and leaseback of the productive assets would not seem to be justifiable as restructuring costs. In fact, the financing to pay off the productive assets sale and leaseback agreement was arranged, and could have been paid off after the end of the restructuring period. It may be true that it resulted in financial burdens, but these were apparently taken into account in the financial projections of the 2003 IBP. As the assets could not be sold off, the only effect of the repayment would thus be relief from the financial costs, which would have given HLW additional liquidity. This means that HLW obtained additional cash, which can be considered operating aid, which could have even resulted in measures involving excessive distortion of the market. Thus the Commission does not see how such measures could have been authorised if notified to the Commission. Thus also, if the investments were really not necessary, the actual use of the aid would also be considered incompatible with the common market.

(101) Finally, the Commission does not dispute the beneficiary's argument that the guarantee was used in accordance with the government decision and that the government was competent to determine the purpose of the aid. However, the Commission notes that this is without effect on the compatibility of the guarantee, which has to be determined in accordance with Protocol No 8 and the 2003 IBP, which do not include aid for the purpose approved by the government in the granting decision.

(102) In view of the foregoing, the Commission must conclude that the aid has been used in a manner incompatible with points 9 and 18 of Protocol No 8. It is therefore incompatible with the common market.

(c) *Effect of the incompatibility of the misused aid on the entire restructuring plan*

(103) Finally, the effect of the incompatibility of the misuse must be determined.

(104) To this end, the Commission would first like to point out that the present investigation did not find that some restructuring costs had become obsolete, but that parts of the State funds had been misused. It might be true that some investments could have been cancelled — ideally after obtaining Commission approval. This would mean that the actual restructuring costs were lower and the relevant proportion of the aid would have to be recovered; an approach which the Commission has accepted in previous steel restructuring cases ([20]). However, in the present case it is not only that some restructuring costs have become redundant but, as discussed above, the problem is that the entire financing of a part of the restructuring (i.e. the EUR 31,2 million) has lost its object, given that from the *ex ante* point of view the bridging loan was used almost entirely in a way that was not in line with the IBP and endangered the restoration of viability or, from the point of view of the time when the change occurred, it equipped the company with surplus cash, which must be returned. Moreover, such misuse can not be rectified retroactively, by the company implementing investment later, because the funds were given in order to enable financing of investments and financial restructuring at a certain point in time. This incentive for the aid was already outdated in 2005. In fact, if the restructuring had been arranged at a later stage, no aid, in particular not the bridging loan guaranteed by the State, would have been necessary. Hence the misuse concerns all the funds provided under the bridging loan which were used for the sale and lease-back of the productive assets.

(105) The Commission is further aware that an excess of resources at the end of the restructuring period is not unusual and that a company should not be punished for achieving better results than expected *ex ante*. However, this should lead to better business results, allowing the company some more margins for bringing forward the debt repayment, for example. This does not mean that the company may redirect almost all the aid to purposes not indicated in the business plan.

([20]) Commission Decision of 13.9.2006 in Case N 350a/2006 MSO, OJ C 280, 18.11.2006, p. 4, point 48.

(106) Secondly, it must be recalled that the company also received several other State aid measures, such as the debt write-off and a part of the guaranteed loan used to finance investments. These measures were implemented according to the plan and helped to achieve viability for the company.

(107) Nevertheless, it could be assumed that the entire restructuring must be deemed to have failed, because the plan was only partly implemented and, from an *ex ante* point of view, only full implementation of the restructuring plan would ensure that viability was restored. However, in this context it might be of relevance that the company did restore viability ([21]). This is the case at least so long as the company did not obtain any excess aid which was not necessary to restore viability. In other words if this advantage were recovered it would restore the *ex ante* situation, i.e. make good the receipt of excessive aid. In this case the remaining measures, which were implemented in accordance with the plan, may indeed have contributed to restoring viability. They could therefore, provided that the excess aid received was recovered, be considered compatible.

(108) Therefore, as the remaining measures did ensure that viability was restored with the minimum aid necessary, the Commission can conclude that only the redirected amount of the guaranteed loan, and not the entire amount of the restructuring aid, was misused, and that the other measures under the 2003 IBP remained compatible.

(d) *Aid element of the misused part of the guaranteed loan*

(109) Finally, the aid element of the State-guaranteed loan of EUR 31 245 684 must be determined. In principle the aid intensity of a guarantee can be up to 100 % ([22]).

(110) The Commission acknowledges however that the guarantee as a form of aid had in this case a limited distortive effect given that the loan for which HLW obtained a guarantee was repaid after one year by Arcelor. Therefore, the Commission considers that in order to recover all the advantage received by the company it is necessary to recover only the interest subsidy given by the guarantee for the period when the borrowed money was at the company's disposal. Moreover, the Commission notes that the company still had some chances of getting finance and was able to provide decent security. This is confirmed in the guarantee contract, which required security.

(111) According to constant Commission practice, the interest subsidy would be equivalent to the difference between the interest that would have had to be paid on market terms and the interest actually paid by the company. The market interest in this case would be calculated on the basis of the reference rate at the time when the money was made available (August 2004) plus 400 basis points, given that HLW was not viable in 2004 (see above point (46)), but was a company in difficulty ([23]). Established Commission practice does not allow going below 400 basis points ([24]). However no further increase is necessary as the company provided security and the steel sector was performing well in 2004.

(112) As the loan was provided not in PLN but in euro, the Commission is applying the reference rate for the Eurozone, i.e. 4,43 %. In this context it should be recalled that the benefit actually achieved must be assessed by comparing the conditions obtained by the company and the conditions that would have been achieved under market conditions (without the State guarantee). It is normal market practice to determine credit interest on the basis of the reference rate (usually the relevant interbank reference rate) for the currency of the principal, because the fluctuation of the value of money is related to the economy in which a particular currency is used. Therefore, in the case of a loan denominated in euro the reference rate applied by a market economy creditor should also be the one used for credit denominated in euro, even though the loan was granted in Poland.

([21]) See Commission Decision of 23 October 2007 in Case C 23/06 Technologie Buczek, not yet published, where this was not the case.

([22]) Commission Notice on the method for setting the reference and discount rates (OJ C 273, 9.9.1997, p. 3). See also Commission Decision of 12.9.2007 to open proceedings in case NN 45/2007 (C 38/2007), *Arbel Fauvet Rail*, OJ C 249, 24.10.2007, p. 17, point 15.

([23]) The Commission determines that a firm is in difficulty in accordance with the Community Guidelines on State aid for rescuing and restructuring firms in difficulty, OJ C 244, 1.10.2004, p. 2. Furthermore a firm is also regarded as being in difficulty when it is in its restructuring period and is following a restructuring plan, which is the case here. For the 400 basis points cf. Commission Decision of 2.3.2005 in Case C 43/2001, Chemische Werke Piesteritz, OJ L 296, 12.11.2005, p. 19, points 107-108; and Commission Decision of 24.1.2007 in Case C 38/2005, Biria, OJ L 183, 13.7.2007, p. 27, points 83 et seq.

([24]) Commission Notice on the method for setting the reference and discount rates, OJ C 273, 9.9.1997, p. 3.

(113) Thus, the interest should have been at 8,43 % p.a., i.e. it should have amounted to EUR 2 807 206. This needs to be compared with the expenses the company actually incurred. These consist of the interest of EUR 1 061 050 plus some premiums for the guarantee (as indicated in points (42)(a) and (b)), which, according to Commission practice, have to be considered when calculating the aid amount of a guarantee ([25]).

(114) The cost of the guarantee should be spread over the total amount of the guarantee and related to the misused aid plus the interest covered by the guarantee. This is because the limited use of the guaranteed part of the loan for investments was a business decision that had not yet been taken when the guaranteed loan was arranged as a loan of EUR 46 million plus interest for five years. Otherwise the guaranteed loan would have been arranged differently. Hence a pro rata division should be made by calculating the proportion of the fee relating to the actual amount guaranteed and misused. Moreover, for the same reasons the fee should be calculated pro rata of the time actually used in relation to the guarantee for the total period of five years, as the guarantee was theoretically amortised in that period. If it is terminated earlier, this is a revision of a business decision which is independent of the former arrangement.

(115) This means that the Commission accepts deduction of the costs for the State Treasury fee and the preparation fee as indicated above in point (42), but on the basis of a pro rata calculation, based on (a) the ratio of the amount actually guaranteed (32,3 (=31,24 + 1,06 (principal plus interest actually paid)) to the total amount of the guarantee (EUR 58 330 000)) and (b) the ratio of actual use to the intended use for five years (i.e. 388 days out of a potential 1 826 days).

(116) However, as regards fees for the loan indicated above in point (42)(c), the Commission does not consider these as costs deductible from the advantage, given that any loan on market terms must also involve similar costs, which could possibly even have been higher.

(117) This leads to the following calculation, taking into account compound interest on the benefit from 24 August 2004 until repayment, at a recovery rate of 7,62 % p.a.:

(EUR)

Total amount financed	31 245 684,00
Appropriate interest required from 24.8.2004 to 16.9.2005	2 807 206
Interest actually paid by HLW on guaranteed loan	1 061 050
Preparation fee for guarantee, pro rata over total guarantee and loan duration	31 792
State Treasury Fee, pro rata over total guarantee and loan duration	68 683
Total costs for guaranteed loan actually incurred	1 161 525
Interest differential (= benefit)	1 645 682
Plus compound interest at recovery rate from 24.8.2004 to 20.11.2007	444 086
Payable on 20.11.2007	2 089 768

(e) *Conclusion*

(118) To summarise: the Commission concludes that the paying off of the sale and leaseback agreement for the productive assets was not envisaged in the 2003 IBP and put the restoration of viability at risk, at least at the time when the aid was required. However, as the company nevertheless restored viability, the misuse of the aid does not affect the compatibility of the remaining aid. Moreover as the guarantee has been terminated and the loan has already been repaid, only the interest subsidy from which HLW benefited in the period when the money was available (i.e. from the transfer of money to the repayment) need now be recovered. This interest subsidy amounts to EUR 1 645 682.

3. **Change of plan**

(119) Poland has asked the Commission to accept an updated IBP under point 10 of Protocol No 8.

(120) The Commission has dealt with similar cases in the past and has clarified that, '*An agreement by the Commission to a change of an IBP must be based on the consideration that there is no problem of compatibility of the change with the objectives of Protocol No 8. This is the case where the main figures*

([25]) Cf. Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, OJ C 71, 11.3.2000, p. 14, point 3.2.

indicated in the Protocol concerning State aid, capacity and timing remain unchanged and the proportionality of the State aids as stipulated in the Protocol remains in place without questioning the objective of viability ([26]).'

(121) The Commission clarified in the opening decision that in this case the changes concerned neither an increase of the total amount of State aid nor an increase of production capacity ([27]) within the restructuring period, but that the revised IBP mainly implied a significant change in the company's investment strategy, that the State aid provided seemed to have been abused as operating aid and no more State aid was necessary to complete the investments (see points (54) and (56)). Essentially, the investigation confirmed that these doubts were not allayed, as the aid was indeed misused, as concluded above, and is incompatible with the common market.

(122) The 2005 IBP does not rectify this defect, i.e. the excess of State aid, and can thus not be approved in that form. In particular, the fact that AHW has in the meantime revived the investment programme does not suffice to rectify the defect. As discussed above, this would have been so even if the company had carried out only the investments indicated in the restructuring plan. It is clear that the new investment programme will be implemented at a much later stage than originally envisaged in the plan. It is further clear that the original aid was provided to ensure adherence to the schedule of the restructuring programme. Thus the aid was related to the purpose of inciting HLW to make these investments in a scheduled, timely fashion in 2003 and 2004. In fact, if the restructuring schedule had been delayed *ex ante* to 2004 and 2005, no bridging loan and thus no aid would have been necessary.

(123) Notwithstanding the misuse, the Commission notes that if the misused aid is recovered, it can accept the residual new plan. In the decision initiating the procedure the Commission noted its readiness to accept the new business strategy from an industrial point of view, accepting that the new investment would be beneficial for the company's future economic performance and could have other positive effects as regards environmental protection and cost reduction.

([26]) Commission Decision in Case N 186/05, Change of IBP of MSP, point 41 and Commission Decision No N 600/04 Change of IBP of VPFM.

([27]) The Commission noted that the new investment would result in a reduction of capacity from 930 kt to 700 kt.

(124) In any event the Commission notes that the amendment of the plan does not require any additional aid but is entirely financed from the investor's funds. Therefore, the Commission sees no reason to object to the updated programme, even if there is a change in strategy ([28]).

VII. **CONCLUSION**

(125) In short, the Commission concludes that, pursuant to points (9) and (18) of Protocol No 8, the guarantee for loan of EUR 31,2 million was misused and was used in an incompatible manner by HLW. Taking into account that the State guarantee has been terminated and the loan has been repaid, meaning that there was an advantage for HLW equivalent to an interest subsidy of EUR 1 645 682, this advantage should be reimbursed. Given that on 20 November 2007 AHW voluntarily repaid into the blocked account EUR 2 089 768, corresponding to the amount to be recovered plus compound interest, to be received by the Polish authorities as of the day of issuance of this decision, no further recovery is necessary.

(126) Moreover, provided that this aid is reimbursed, the Commission can, under point (10) of Protocol No 8, approve the change of plan as indicated in the 2005 IBP, as it does not involve additional aid and reinforces the viability of the firm,

HAS ADOPTED THIS DECISION:

Article 1

State aid of EUR 1 645 682 granted to HLW/AHW by Poland in breach of point (18) of Protocol No 8 has been misused by HLW/AHW and is incompatible with the common market.

Article 2

In view of the repayment of the misused aid referred to in Article 1, the Commission has no objections to AHW's amendment of its business plan.

([28]) In the interests of completeness, the Commission would also like to note that it maintains its view that the replacement was not already included in the 2003 IBP. The IBP states clearly that HLW wanted 'to focus on the gradual improvement of its product mix' by 'the development of production with a focus on speciality and engineering steels'. The 2005 IBP clearly indicates that 'in order to meet market demand, it has become necessary to refine the strategy and to enrich the portfolio of the steel works by a new range of new products'. This implies that AHW wanted to meet the demand for construction steel by erecting a new mill capable of producing construction steel and using the existing liquid steel more efficiently for this purpose. However, it is evident that the company did not have the funds make do these investments before 2003, but could only do so with the help of Arcelor.

Article 3

This Decision is addressed to Poland.

Done at Brussels, 11 December 2007.

For the Commission
Neelie KROES
Member of the Commission

COMMISSION DECISION

of 2 June 2008

amending Decision 2004/432/EC on the approval of residue monitoring plans submitted by third countries in accordance with Council Directive 96/23/EC

(notified under document number C(2008) 2297)

(Text with EEA relevance)

(2008/407/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Directive 96/23/EC of 29 April 1996 on measures to monitor certain substances and residues thereof in live animals and animal products and repealing Directives 85/358/EEC and 86/469/EEC and Decisions 89/187/EEC and 91/664/EEC [1], and in particular the fourth subparagraph of Article 29(1) and Article 29(2) thereof,

Whereas:

(1) Directive 96/23/EC lays down measures to monitor the substances and groups of residues listed in Annex I thereto. Pursuant to Directive 96/23/EC, the inclusion and retention on the lists of third countries from which Member States are authorised to import animals and primary products of animal origin covered by that Directive, are subject to the submission by the third countries concerned of a plan setting out the guarantees which they offer as regards the monitoring of the groups of residues and substances referred to in that Directive.

(2) Commission Decision 2004/432/EC of 29 April 2004 on the approval of residue monitoring plans submitted by third countries in accordance with Council Directive 96/23/EC [2] lists those third countries which have submitted a residue monitoring plan, setting out the guarantees offered by them in compliance with the requirements of that Directive.

(3) New Caledonia and Tanzania have submitted residue monitoring plans to the Commission for animals and products of animal origin not currently listed in the Annex to Decision 2004/432/EC. The evaluation of those plans and the additional information obtained by the Commission provide sufficient guarantees on the residue monitoring in those third countries for the animals and products concerned. The relevant animals and products of animal origin should therefore be included in the list for those third countries in the Annex to that Decision.

(4) Costa Rica, which is currently not listed in the Annex to Decision 2004/432/EC, has submitted a residue monitoring plan to the Commission concerning aquaculture products. The evaluation of that plan and the additional information obtained by the Commission provide sufficient guarantees on the residue monitoring for aquaculture products in that third country. Aquaculture products should therefore be included in the list for Costa Rica in the Annex to that Decision.

(5) South Africa was deleted with regards to several animals and products of animal origin from the Annex of Decision 2004/432/EC, as amended by Commission Decision 2008/105/EC [3]. However, after providing substantial guarantees, South Africa maintained its entries concerning wild and farmed game, including ostriches. Whereas that third country has demonstrated that the residue monitoring plan 2007/08 is being implemented for ostriches, it has again failed to provide evidence of the implementation of the plan for wild and farmed game, other than ostriches. The entries for the relevant animals and products of animal origin should therefore be deleted from the list for South Africa in the Annex to that Decision.

(6) A Food and Veterinary Office inspection to the Republic of Moldova has revealed serious deficiencies concerning the implementation of the residue monitoring plan for honey. The relevant entry for the Republic of Moldova should therefore be deleted from the list in the annex to that Decision. The authorities of that third country have been informed accordingly.

(7) A transitional period should be laid down to cover consignments of animals and products of animal origin originating in South Africa and the Republic of Moldova which were dispatched from those third countries for the Community before the date of application of this Decision, to cover the time needed for their arrival in the Community and avoid any disruption to trade.

(8) Decision 2004/432/EC should therefore be amended accordingly.

[1] OJ L 125, 23.5.1996, p. 10. Directive as last amended by Directive 2006/104/EC (OJ L 363, 20.12.2006, p. 352).

[2] OJ L 154, 30.4.2004, p. 44, as corrected by OJ L 189, 27.5.2004, p. 33. Decision as last amended by Decision 2008/222/EC (OJ L 70, 14.3.2008, p. 17).

[3] OJ L 38, 13.2.2008, p. 9.

(9) The measures provided for in this Decision are in accordance with the opinion of the Standing Committee on the Food Chain and Animal Health,

HAS ADOPTED THIS DECISION:

Article 1

The Annex to Decision 2004/432/EC is replaced by the text in the Annex to this Decision.

Article 2

The amendments to the list in the Annex to Decision 2004/432/EC by the present Decision shall not apply to consignments of animals and products of animal origin from South Africa and the Republic of Moldova where the importer of such animals and products can demonstrate that they had been dispatched respectively from South Africa and the Republic of Moldova and were en route to the Community before the date of application of the present Decision.

Article 3

This Decision shall apply from 1 June 2008.

Article 4

This Decision is addressed to the Member States.

Done at Brussels, 2 June 2008.

For the Commission
Androulla VASSILIOU
Member of the Commission

ANNEX

'ANNEX

Code ISO2	Country	Bovine	Ovine/caprine	Swine	Equine	Poultry	Aquaculture	Milk	Eggs	Rabbit	Wild game	Farmed game	Honey
AD	Andorra ([1])	X	X		X								
AE	United Arab Emirates						X						
AL	Albania		X				X		X				
AN	Netherlands Antilles							X ([2])					
AR	Argentina	X	X		X	X	X	X	X	X	X	X	X
AU	Australia	X	X		X		X	X			X	X	X
BA	Bosnia and Herzegovina						X						
BD	Bangladesh						X						
BR	Brazil	X			X	X	X						X
BW	Botswana	X										X	
BY	Belarus				X ([3])		X	X	X				
BZ	Belize						X						
CA	Canada	X	X	X	X	X	X	X	X	X	X	X	X
CH	Switzerland	X	X	X	X	X	X	X	X	X	X	X	X
CL	Chile	X	X ([4])	X		X	X	X			X		X
CN	China					X	X			X			X
CO	Colombia						X						
CR	Costa Rica						X						
CU	Cuba						X						X
EC	Ecuador						X						
ET	Ethiopia												X
FK	Falklands Islands	X	X										
FO	Faeroe Islands						X						

Code ISO2	Country	Bovine	Ovine/caprine	Swine	Equine	Poultry	Aquaculture	Milk	Eggs	Rabbit	Wild game	Farmed game	Honey
GL	Greenland		X								X	X	
GM	Gambia						X						
GT	Guatemala						X						X
HK	Hong Kong					X (5)	X (5)						
HN	Honduras						X						
HR	Croatia	X	X	X	X (6)	X	X	X	X	X	X	X	X
ID	Indonesia						X						
IL	Israel					X	X	X	X				X
IN	India						X	X	X				X
IS	Iceland	X	X	X	X		X	X				X (2)	
IR	Iran, Islamic Republic of						X						
JM	Jamaica						X						X
JP	Japan						X						
KG	Kyrgyzstan												X
KR	Korea, Republic of						X						
LK	Sri Lanka						X						
MA	Morocco						X						
ME	Montenegro (5)	X	X	X	X (3)								X
MG	Madagascar						X						
MK	The former Yugoslav Republic of Macedonia (6)	X	X		X (3)			X					
MU	Mauritius					X (2)	X						
MX	Mexico				X		X		X				X
MY	Malaysia					X (7)	X						
MZ	Mozambique						X						
NA	Namibia	X	X								X	X	

Code ISO2	Country	Bovine	Ovine/caprine	Swine	Equine	Poultry	Aquaculture	Milk	Eggs	Rabbit	Wild game	Farmed game	Honey
NC	New Caledonia	X					X				X	X	X
NI	Nicaragua						X						X
NZ	New Zealand	X	X		X		X	X			X	X	X
PA	Panama						X						
PE	Peru					X	X						
PH	Philippines						X						
PN	Pitcairn												X
PY	Paraguay	X											
RS	Serbia ([8])	X	X	X	X ([3])	X	X	X	X		X		X
RU	The Russian Federation	X	X	X	X ([3])	X		X	X			X ([9])	X
SA	Saudi Arabia						X						
SC	Seychelles						X						
SG	Singapore	X ([2])	X ([2])	X ([2])		X ([2])	X ([2])	X ([2])					
SM	San Marino ([10])	X		X									X
SR	Suriname						X						
SV	El Salvador												X
SZ	Swaziland	X											
TH	Thailand					X	X						X
TN	Tunisia					X	X				X		
TR	Turkey					X	X	X					X
TW	Taiwan						X						X
TZ	Tanzania, United Republic of						X						X
UA	Ukraine							X	X				X
UG	Uganda												X
US	United States	X	X	X	X	X	X	X	X	X	X	X	X
UY	Uruguay	X	X		X		X	X		X	X	X	X

Code ISO2	Country	Bovine	Ovine/caprine	Swine	Equine	Poultry	Aquaculture	Milk	Eggs	Rabbit	Wild game	Farmed game	Honey
VE	Venezuela						X						
VN	Vietnam						X						
YT	Mayotte						X						
ZA	South Africa										X ([11])	X ([11])	
ZM	Zambia												X
ZW	Zimbabwe						X					X	

([1]) Initial residue monitoring plan approved by veterinary sub-group EC-Andorra (in accordance with Decision No 2/1999 of EC-Andorra Joint Committee of 22 December 1999 (OJ L 31, 5.2.2000, p. 84)).
([2]) Third countries using only raw material from other approved third countries for food production.
([3]) Export of live equidae for slaughter (food producing animals only).
([4]) Only ovine animals.
([5]) Provisional situation pending further information on residues.
([6]) The former Yugoslav Republic of Macedonia; provisional code which does not prejudge in any way the definitive nomenclature for this country, which is currently under discussion at the United Nations.
([7]) Peninsular (western) Malaysia only.
([8]) Not including Kosovo as defined by the United Nations Security Council Resolution 1244 of 10 June 1999.
([9]) Only for reindeer from the Murmansk and Yamalo-Nenets regions.
([10]) Monitoring plan approved in accordance with Decision No 1/94 of the EC-San Marino Cooperation Committee of 28 June 1994 (OJ L 238, 13.9.1994, p. 25).
([11]) Only ostriches.'

CORRIGENDA

Corrigendum to Council Regulation (EC) No 440/2008 of 30 May 2008 laying down test methods pursuant to Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)

(Official Journal of the European Union L 142 of 31 May 2008)

In the contents on page 1 of the cover and in the title on page 1:

for: 'Council Regulation (EC) No 440/2008 of 30 May 2008 laying down test methods pursuant to Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)',

read: 'Commission Regulation (EC) No 440/2008 of 30 May 2008 laying down test methods pursuant to Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)'.

Corrigendum to Commission Regulation (EC) No 458/2008 of 26 May 2008 amending Council Regulation (EC) No 2368/2002 implementing the Kimberley Process certification scheme for the international trade in rough diamonds

(Official Journal of the European Union L 137 of 27 May 2008)

On page 11, Annex II, under BULGARIA:

for: 'E-mail: feedbach@minfin.bg',

read: 'E-mail: feedback@minfin.bg'.