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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.

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[1] Text with EEA relevance

II

(Non-legislative acts)

REGULATIONS

COUNCIL IMPLEMENTING REGULATION (EU) No 398/2012

of 7 May 2012

amending Implementing Regulation (EU) No 492/2010 imposing a definitive anti-dumping duty on imports of sodium cyclamate originating in, inter alia, the People's Republic of China

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community [1] ('the basic Regulation'), and in particular Articles 9(4), 11(3), 11(5) and 11(6) thereof,

Having regard to the proposal from the European Commission ('the Commission') after consulting the Advisory Committee,

Whereas:

1. PROCEDURE

1.1. Measures in force

(1) By Regulation (EC) No 435/2004 [2], the Council imposed, following an anti-dumping investigation, a definitive anti-dumping duty on imports of sodium cyclamate originating in the People's Republic of China ('the PRC' or 'the country concerned') and Indonesia ('the original investigation'). Following an expiry review, the Council, by Implementing Regulation (EU) No 492/2010 [3] imposed a definitive anti-dumping duty for a further period of five years. The measures were set at the level of dumping and consist of specific anti-dumping duties. The rate of the duty for the PRC ranges between 0 and 0,11 EUR/kilo for individually named Chinese producers with a residual duty rate of 0,26 EUR/kilo imposed on imports from other producers ('current duties').

1.2. Request for a review

(2) A request for a partial interim review ('the current review') pursuant to Article 11(3) of the basic Regulation was lodged by Productos Aditivos S.A., the sole Union producer of sodium cyclamate and the complainant in the original investigation ('the complainant'). The request was limited in scope to dumping and to Golden Time Enterprise (Shenzhen) Co., Ltd ('GT Enterprise' or 'the company concerned'), member of the Rainbow Rich group ('the group of companies concerned', 'Rainbow group', or 'Rainbow'), which was also one of the individually named Chinese producers in the original investigation. The anti-dumping duty applicable to imports of products produced by GT Enterprise is 0,11 EUR/kilo and the duty applicable to imports from the other production companies within the group of companies concerned is 0,26 EUR/kilo (i.e. the residual duty rate).

(3) The complainant provided prima facie evidence that the existing measures are no longer sufficient to counteract the dumping which is causing injury.

1.3. Initiation of a partial interim review

(4) Having determined, after consulting the Advisory Committee, that the request contained sufficient prima facie evidence to justify the initiation of the partial interim review, the Commission announced, by a notice of initiation published in the *Official Journal of the European Union* [4] on 17 February 2011, the initiation of a partial interim review pursuant to Article 11(3) of the basic Regulation limited to the examination of dumping as far as GT Enterprise is concerned.

[1] OJ L 343, 22.12.2009, p. 51.
[2] OJ L 72, 11.3.2004, p. 1.
[3] OJ L 140, 8.6.2010, p. 2.
[4] OJ C 50, 17.2.2011, p. 6.

1.4. **Product concerned and like product**

(5) The product under review is sodium cyclamate, originating in the People's Republic of China, currently falling within CN code ex 2929 90 00 ('the product concerned').

(6) As in previous investigations, this investigation has shown that the product concerned produced in the PRC and sold to the Union is identical in terms of physical and chemical characteristics and uses to the product produced and sold on the domestic market in Indonesia which served as an analogue country in the current review. It is therefore concluded that products sold on the domestic market in Indonesia and sold by the group of companies concerned on the Union market are like products within the meaning of Article 1(4) of the basic Regulation.

1.5. **Parties concerned**

(7) The Commission officially informed the complainant, the company concerned and the representatives of the country concerned about the initiation of the current review. The Commission also advised producers in Indonesia of the initiation of the proceedings, as Indonesia was envisaged as a possible analogue country.

(8) Interested parties were given the opportunity to make their views known in writing and to request a hearing within the time limit set in the notice of initiation. All interested parties, who so requested and showed that there were particular reasons why they should be heard, were granted a hearing.

(9) In order to obtain the information deemed necessary for its investigation, the Commission sent a questionnaire to the company concerned and received replies from five companies in the Rainbow group within the deadline set for that purpose. (As the Rainbow group now consists of two production companies (one being GT Enterprise), one raw material supplier, one company previously involved with the product concerned, but now dormant, and a trader in Hong Kong, the review encompassed the activities of the full group). The Commission also sent questionnaires to producers in Indonesia. One Indonesian producer showed willingness to provide information in the current review and provided a partial reply to the questionnaire.

(10) The Commission sought and verified all information deemed necessary for the analysis of market economy treatment and individual treatment and the determination of dumping. The Commission carried out verification visits at the premises of the following members of the group of the companies concerned:

— Golden Time Enterprises (Shenzhen) Co. Ltd, Shenzhen, PRC, (GT Enterprise),

— Jintian Industrial (Nanjing) Co. Ltd, Nanjing, PRC,

— Golden Time Chemical (Jiangsu) Co. Ltd, Jiangsu, PRC,

— Nanjing Jinzhang Industrial Co. Ltd, Nanjing, PRC,

— Rainbow Rich Ltd, Hong Kong.

1.6. **Review investigation period**

(11) The investigation of dumping covered the period from 1 January 2010 to 31 December 2010 ('the review investigation period' or 'RIP').

2. **RESULTS OF THE INVESTIGATION**

2.1. **Market economy treatment (MET)**

(12) In anti-dumping investigations concerning imports originating in the PRC, normal value shall be determined in accordance with paragraphs 1 to 6 of Article 2 of the basic Regulation for those producers which were found to meet the criteria laid down in Article 2(7)(c) thereof. Briefly, and for ease of reference only, the criteria in Article 2(7)(c) of the basic Regulation, fulfilment of which the applicant companies have to demonstrate, are set out in summarised form below:

— business decisions and costs are made in response to market conditions, and without significant State interference and costs of major inputs substantially reflect market values,

— accounting records are independently audited in line with international accounting standards and applied for all purposes,

— there are no significant distortions carried over from the former non-market economy system,

— legal certainty and stability are provided by bankruptcy and property laws,

— currency exchanges are carried out at the market rate.

(13) The group of companies concerned requested MET pursuant to Article 2(7)(b) of the basic Regulation and submitted claim forms for four producers located in the People's Republic of China. The Commission sought and verified at the premises of the companies all information submitted in the companies' requests and deemed necessary.

(14) The current review revealed that the situation of the company concerned changed since the original investigation. It was found that GT Enterprise no longer meets all MET criteria. Furthermore, compared to the original investigation the Rainbow group had been enlarged and

restructured. The other companies within the group that submitted claim forms could not demonstrate either that they meet all MET criteria.

(15) With regard to criterion 1 concerning business decisions and State interference, it was found that the local government has the authority to interfere in the hiring and dismissal of personnel in one company within the group. Furthermore, the local government is a major shareholder of the company producing raw materials. Indications of significant State interference were identified in the supply of raw materials to the company (electricity and water) and by the company to its related companies, in labour costs and in the operations and decision-making of this company. As a way of example the State shareholder outsourced personnel to the raw material producer at terms that the company could not specify. Furthermore, the company has been continuously loss-making due to selling raw material at abnormally low prices to its related companies and without any further compensation e.g. in the form of profit distribution. Through the accumulation of these losses, the State-owned raw material producer influenced the decisions of the related companies with regard to purchase of raw materials for the production of sodium cyclamate. Finally, interference and influence could be detected in the financing and investment decisions of another company within the group by a local government agency.

(16) With regard to criterion 2 concerning accounting, the investigation showed that accounting records of all members of the group of companies concerned were not in line with international accounting standards as a number of material accounting shortcomings and errors were found which were not reported by the auditors.

(17) With regard to criterion 3, it was found that distortions were carried over from the non-market economy system through the provision of infrastructure investments to one company of the group for free. The same company benefited from favourable rental conditions for the land it uses. The other companies within the group could not demonstrate that they acquired their land use rights in return for a consideration and/or that the consideration would have reflected a market value. Finally one company was not able to demonstrate that certain assets transferred to it were made for monetary consideration or otherwise at prices reflecting market values.

(18) Finally, with regard to criteria 4 and 5, it was found that the companies met the criteria as the companies were subject to bankruptcy and property laws which guaranteed stability and legal certainty. Currency conversions were carried out at or following the official rate published by the Bank of China.

(19) The group of companies concerned and the complainant were given an opportunity to comment on the above findings. The complainant had no comments but the group of companies concerned objected on several grounds. Some of these comments were reiterated after final disclosure of the facts and considerations on the basis of which it was proposed to impose definitive measures. The most important comments received are described in the recitals below.

(20) The Rainbow group firstly stated that the Commission illegally imposed an obligation to re-qualify for MET as the group was given MET in the original investigation and the expiry review and thus the legal obligation to apply the same methodology in reviews as in the original investigation was breached. It argued that the Commission has not shown that circumstances of this company had changed in a way that would justify a different method to that applied in the original investigation. According to the claimant several of the issues identified by the Commission had already existed at the time of the original investigation and thus the Commission's new findings do not relate to new circumstances but are merely a different interpretation of the same circumstances.

(21) It should be noted that, contrary to the claimant's statement, the same methodology was applied both in the original investigation and in the current review whereas due account was taken of the fact that certain circumstances have changed since the original investigation. Even if the claimant's argumentation would be correct in relation to certain facts that were indeed the same during both the original and current investigations, namely in relation to GT Enterprise's land use right agreement, the following can be noted. The current review established additional other facts that — even though they had already existed during the original investigation — were not disclosed at that time by GT Enterprise, such as the local government's authority to approve the hiring and dismissal of its personnel. Finally, the circumstances of the company have also changed since the original investigation in respect of criterion 2. That is because it was established in the current review that during the RIP GT Enterprise had not had a clear set of accounting records that were independently audited in line with international accounting standards and applied for all purposes.

(22) The claimant later explained that it considers that it had disclosed the local government's authority to approve the hiring and dismissal of its personnel by providing in the original investigation the same Articles of Association as in the current review. However, the translation of this document provided by the claimant both during the

original and current investigation was incomplete as it did not disclose the powers given by the Articles of Association to the local government.

(23) The Rainbow group further argued that the MET regime was introduced for countries with an economy in transition, i.e. from the former non-market economy system towards a market economy. It would therefore be illogical to require a company that previously qualified for MET to once again submit sufficient evidence in an interim review that it still qualifies for MET. In this respect it should be noted that there is nothing in the basic Regulation which would support such an interpretation and which would prevent the application of Article 2(7)(c) of the basic Regulation in reviews initiated pursuant to Article 11(3) of the basic Regulation. Therefore, this argument had to be dismissed.

(24) The Rainbow group also invoked the procedural requirement in Article 2(7)(c) that an MET determination shall be made within three months of the initiation of the investigation. Rainbow itself acknowledges that exceeding this deadline is in itself insufficient ground to contest the results of the investigation, but it highlights that the Commission services already had all the information necessary to calculate the dumping margin at their disposal when MET findings were disclosed. In its argumentation Rainbow however ignores the fact that even though the Commission indeed for administrative efficiency requested and verified all necessary information from the group of companies concerned at the same time, it had not had at its disposal information about the analogue country that would have made it possible to determine the dumping margin in case of rejecting MET. Indeed, information concerning the normal value in the analogue country was made available to the Commission only after the findings concerning MET had been disclosed to Rainbow. Thus the timing of the MET determination could not have any impact on its content. In the light of the above, this claim is rejected as unfounded.

(25) With respect to criterion 1, it has been submitted as a general comment that the theoretical possibility of State influence or State control per se does not automatically mean that there is an actual and significant State interference within the meaning of Article 2(7)(c). Rainbow repeatedly quotes a decision of the Court of First Instance [1] to argue that State control does not equal significant State interference because this would 'lead to the exclusion, in principle, of state-controlled companies from entitlement to MES, irrespective of the real factual, legal and economic context in which they operate.' Rainbow also claims that it would mean an unreasonable burden of proof on MET applicants if they were to show that there can never be a possibility for the State to interfere in business decisions. Further it argues that the State action would have to render the company's decisions incompatible with market considerations so as not to be in line with criterion 1.

(26) Contrary to the above assertions by the Rainbow group, the current investigation established specific and significant State interference in the operations of several companies within the group. In the case of the group company in which the hiring and dismissal of personnel was subject to the approval of the local government, it is the company's own rules of internal functioning, i.e. its Articles of Association, that clearly provide the authority for the State to interfere in its operational decisions. In the case of another group company, the State partner was found to have had an influence in the company in a manner which is incompatible with market considerations. Firstly, the State partner had contributed most of the capital to this company without this fact being reflected in the share of its ownership of the company. Secondly, the company's operations were always loss-making, which was mostly detrimental to the State partner given the capital it invested. Thirdly, the State partner itself incurred continuous losses as it supplied inputs such as water and electricity to the group company at below market prices and without proper receipt of payment.

(27) Concerning the conclusion on State interference in the financing and investment decisions of another member of the group of companies concerned, it was submitted that factual findings of the Commission on a loan and its conditions were incorrect. The Commission however, has evidence collected during the verification showing that the company was instructed by a local government agency to take a loan which was not related to its business operations. The company reasons that the financing decisions were taken as a favour to this government agency and not as an obligation and the transaction in question was without further risk to the company since it would have had the possibility to seek compensation through the non-payment of utilities' invoices issued to it by the agency. The evidence collected by the Commission shows that the land use right of the company is indirectly used as a security in the relevant financial transaction; therefore the company bears significant risk. The land use right itself was acquired through the same government agency to whom the company alleges to have been providing

[1] *Zhejiang Xinan Chemical Industrial Group Co. Ltd* v *Council*, Case T-498/04, 2009 ECR II-1969, at paragraph 92.

only a favour. The allegation that a compensation would have been possible through non-payment for utilities demonstrates a basic misunderstanding of basic accounting standards (offsetting) and contradicts the company's further claim that influence on financial operations as such do not mean an influence on 'decisions on firms regarding prices, costs and inputs' as required by Article 2(7)(c). Furthermore, investment decisions are clearly and significantly influenced by the government agency as there are company-specific requirements set in the land use right agreement of the company on the investment to be performed and these requirements go beyond local zoning laws contrary to what has been suggested by the company. Therefore the claim that State interference in the financing and investment decisions do not amount to an influence according to Article 2(7)(c) is rejected.

(28) As to the group company producing one of the raw materials used in the production of sodium cyclamate, it was claimed that any shortcomings with respect to the company's decision-making and financial situation would have a very limited impact as the raw material produced by this company represents only around 10 % of the cost of production of sodium cyclamate. As the Commission was able to calculate the difference between profitable sales price and actual sales price of the raw material, the company suggests that it would be more appropriate to adjust the costs of low-priced raw material rather than rejecting MET. However, the objective of the MET assessment is to ascertain that inputs reflect market values and business decisions are made in response to market signals. It should be noted that Article 2(7)(c) of the basic Regulation explicitly requires that costs of major inputs substantially reflect market value in order the conditions for the MET to be met without making any reference to the possibility of adjusting the distorted costs of major inputs. Therefore this claim has to be rejected.

(29) The company's claim concerning the abnormally low prices paid for water and electricity and labour costs — arguing that these are not major inputs only representing in total around 14 % of the total cost of production of the raw material — had to be rejected as this is considered, both individually and cumulatively, a significant enough cost element to have an impact on the total costs of the company. In the case of labour costs it is also noted that it was not possible to fully verify these elements as the company was not able to provide contracts or other documentation. Therefore it could not be ascertained that these costs reflected market values.

(30) With respect to criterion 2 it was argued that the Commission ignored the materiality principle pursuant to which omissions or misstatements of items are material only if they could influence the economic decisions that users make on the basis of financial statements and that such immaterial shortcomings would not need to be reported by the auditor either.

(31) Contrary to what the group claims, there were serious shortcomings in the accounting of the companies in relation to basic accounting principles (see, for more details, the next paragraph). Secondly, the objective of requiring a clear set of accounts for MET purposes is not for a user making economic decisions but to ensure that the financial statements provide a true and fair view of revenues, costs, etc. The objective of the MET investigation is to establish whether accounts are kept and audited in accordance with international accounting standards.

(32) The Rainbow group disputed that its companies breached the elements of the IAS rules and accounting practices mentioned in the MET assessment such as the accrual principle, faithful representation of transactions principle and offsetting, going concern principle, correct classification of balance sheets items, recognition of losses, only business related transactions and recordings within the accounts, correct classification and depreciation of expenses, respect of IAS and/or Chinese GAAP rules on the recognition of the value and depreciation of assets. The abovementioned breaches of IAS were identified from the information provided by the group in its MET claim form and all issues were subject to verification at the premises of the companies. The arguments presented by the companies on these issues following the disclosure of the MET findings were not such as to warrant a change in the conclusion that, in regard to these issues, the companies failed criterion 2.

(33) With respect to criterion 3, the Rainbow group claims that the provision of infrastructure investments to one company for free is a normal activity that also takes place in market economies in order to attract investments and that the impact of this subsidisation would be negligible on the financial situation of the company in the RIP. However, the fact that a company

could avoid payments for infrastructure developments and at the same time benefited from very low rental prices for the same land do not reflect a normal situation in a market economy. This benefit on the other hand had a direct impact on the financial position of the production company and its ability to take decisions in response to market signals.

(34) The Commission accepted the claimant's arguments concerning GT Enterprise's land use right as explained in recital 21. Arguments presented concerning the land use right by the other companies however were not such as to reverse findings as the company itself acknowledges that it had not paid the agreed amount for its land use right in one case. In the case of another land use right the Rainbow group claims that prices of land in that region had been rising sharply and thus it is normal that the land was valued significantly higher a few years after its acquisition date. However, the evidence provided by the company referred to price increases for residential properties in the region and thus it is irrelevant. Rainbow ultimately claimed that the Commission's approach of requiring positive evidence that a company has paid a price that reflects market value imposes an unreasonable burden of proof. However, Article 2(7)(c) of the basic Regulation explicitly requires that a claim for market economy treatment must 'contain sufficient evidence that the producers operates under market economy conditions'. Therefore this argument had to be rejected.

(35) Rainbow group contests the finding on assets transferred to one company without a monetary consideration or otherwise at prices reflecting market values on the basis that this company had stopped production in the RIP. Indeed the company stopped production. However, the company was still selling its previously produced products on the domestic market. Thus an MET assessment had to be performed for this company as well to ascertain that there were no significant distortions carried over from the former non-market economy system that could affect prices.

(36) It is therefore considered that GT Enterprise failed to meet the first and second criteria for MET, Jintian Industrial (Nanjing) Ltd failed to meet criterion two and three, Golden Time Chemical (Jiangsu) Ltd failed to meet criteria one and two and three for MET and Nanjing Jinzhang Industrial Ltd failed to meet criteria one, two and three. If one related company associated with the production and sale of the product concerned does not qualify for MET, MET cannot be granted to the group of related companies. Therefore, as all of the companies assessed for MET individually failed to meet the relevant criteria it is concluded that the Rainbow group cannot be granted MET. In these circumstances, after consulting the Advisory Committee, the group of companies concerned was denied MET.

2.2. **Individual treatment (IT)**

(37) Pursuant to Article 2(7)(a) of the basic Regulation, a countrywide 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 to be granted IT. Briefly, and for ease of reference only, these criteria are set out below:

— in the case of wholly or partly foreign owned firms or joint ventures, exporters are free to repatriate capital and profits,

— export prices and quantities, and conditions and terms of sale are freely determined,

— the majority of the shares belong to private persons. State officials appearing on the Boards of Directors or holding key management positions shall either be in minority or it must be demonstrated that the company is nonetheless sufficiently independent from State interference,

— exchange rate conversions are carried out at the market rate, and

— State interference is not such as to permit circumvention of measures if individual exporters are given different rates of duty.

(38) The two exporting producers within the group having exported sodium cyclamate during the RIP claimed IT. It was not necessary to make an IT assessment for the other companies in the Rainbow group given that they are not exporters of the product concerned. On the basis of the information available and verified during the verification visits, it was found that these two exporting producers fulfilled the requirements foreseen in Article 9(5) of the basic Regulation and thus could be granted IT.

2.3. **Dumping**

2.3.1. *Analogue country*

(39) 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 price or constructed value in a market economy third country (analogue country).

(40) In the notice of initiation the Commission indicated its intention to use Indonesia (the analogue country in the original investigation) as appropriate analogue country for the purpose of establishing normal value and invited interested parties to comment thereon.

(41) The Commission has received no comments on the choice of the analogue country.

(42) The Commission sought cooperation from producers in Indonesia. Letters and relevant questionnaires were sent to all known companies. Of the several companies contacted, only one producer submitted the necessary information for the determination of normal value and agreed to partially cooperate with the review. As the company could not accept a verification visit at its premises, the Commission analysed the information provided for completeness and consistency. The information was found to be sufficient and reliable for the determination of the normal value and, whenever necessary, the Indonesian producer provided clarifications sought by the Commission. The information used was cross-checked with information provided in the review request.

(43) The investigation established that Indonesia has a competitive market for the like product.

(44) The investigation further revealed that the production volume of the cooperating Indonesian producer constitutes considerably more than 5 % of the volume of Chinese exports of the product concerned to the Union, hence the production was representative in terms of volume. As for the quality, technical specifications and standards of the like product in Indonesia, no major overall differences were found when compared to Chinese products. Therefore, the Indonesian market was deemed sufficiently representative for the determination of normal value.

(45) It is noted that to the Commission's knowledge there are no other production facilities elsewhere in the world, besides the known producers in Spain, the PRC and Indonesia.

(46) In view of all the above it was concluded that Indonesia constitutes an appropriate analogue country in accordance with Article 2(7)(a) of the basic Regulation.

2.3.2. *Determination of normal value*

(47) Pursuant to Article 2(7)(a) of the basic Regulation, normal value was established on the basis of information received from the producer in the analogue country as set out below. It is noted that the Indonesian producer was investigated in a previous investigation concerning imports of sodium cyclamate from Indonesia ([1]). The data now provided by the company in its questionnaire response were found to be reliable and a solid basis to establish normal value for the purposes of this investigation. Indeed, average sales prices as well as the average cost of production followed a similar trend in line with the evolution of the average raw material cost. In addition, this trend could be confirmed by a similar evolution of the average raw material cost observed in the Union market.

(48) The domestic sales of the Indonesian producer of the like product were found to be representative in terms of volume compared to the product concerned exported to the Union by the group of companies concerned in the PRC.

(49) The Commission subsequently identified those product types, sold domestically by the producer in the analogue country, that were identical or directly comparable to the types sold for export to the Union. The standard product type of the Indonesian producer was found to be directly comparable.

(50) For the standard product type sold by the producer in the analogue country on its domestic market and found to be directly comparable with the type sold for export to the Union, it was established whether domestic sales were sufficiently representative for the purposes of Article 2(2) of the basic Regulation. Domestic sales of a particular type of sodium cyclamate were considered sufficiently representative when the total domestic sales volume of that type during the IP represented 5 % or more of the total sales volume of the comparable type exported to the Union by the group of companies concerned.

(51) An examination was also made as to whether the domestic sales could be regarded as having been made in the ordinary course of trade, by establishing for the standard product type the proportion of profitable sales to independent customers on the domestic market during the investigation period. Since the volume of profitable sales of the like product per product type represented more than 80 % of the total sales volume of that type and where the weighted average price of that type was equal to or above the cost of production, normal value

([1]) See Implementing Regulation (EU) No 492/2010 (OJ L 140, 8.6.2010, p. 2).

was based on the actual domestic price, calculated as a weighted average of the prices of all domestic sales of that type made during the IP, irrespective of whether these sales were profitable or not.

(52) In the determination of the normal value for the product type that had not been sold on the domestic market by the producer in the analogue country, the weighted average sales price of all the sales of the standard product type was used, after having adjusted for differences within the two product types.

2.3.3. *Export price*

(53) All exporting producers within the group of companies concerned made export sales to the Union through their related trading company located outside the Union. The export price was established on the basis of the prices of the product when sold by the related trading company to the Union, i.e. to an independent buyer, in accordance with Article 2(8) of the basic Regulation on the basis of prices actually paid or payable.

2.3.4. *Comparison*

(54) The normal value and export price were compared on an ex-works basis. For the purpose of ensuring a fair comparison between the normal value and the export price, due allowance in the form of adjustments was made for differences affecting price and price comparability in accordance with Article 2(10) of the basic Regulation. Accordingly, adjustments were made for differences in transport, insurance, handling, loading and ancillary costs and credit cost where applicable and supported by verified evidence.

2.3.5. *Dumping margin*

(55) The dumping margin was established on the basis of a comparison of a weighted average normal value with a weighted average export price for all exporting producers, in accordance with Article 2(11) of the basic Regulation.

(56) This comparison showed a dumping margin of 14,2 %, expressed as a percentage of the CIF frontier price, duty unpaid.

2.4. **Lasting nature of changed circumstances**

(57) In accordance with Article 11(3) of the basic Regulation, it was examined whether the circumstances on the basis of which the current dumping margin was based have changed and whether such change was of a lasting nature.

(58) The current findings are based on the rejection of the claim for the market economy treatment to the group of companies concerned in the current review whereas the member of the group of related companies investigated in the original investigation GT Enterprise was granted MET. The circumstances that led to the different conclusion are firstly due to the fact that in the current review four companies within the group were investigated as compared to only GT Enterprise in the original investigation. The group was recently enlarged and reorganised with considerable investments and there is no indication that this situation would change in the foreseeable future. Secondly, as regards GT Enterprise, it was found that the company's practice of not keeping a clear set of accounting audited in line with international accounting standard is an established practice and nothing indicates that this would change in the future. Also, its Articles of Association allowing for State influence had been in force for a longer period and there were no indications for their amendment in the future. In these circumstances, it is considered that the non-MET status of the group is of a lasting nature.

(59) Furthermore, as regards export price, the investigation showed certain stability in pricing policies of the group of companies concerned over a longer period since the price of the product concerned charged to the Union and to other third countries did not differ significantly and followed the same trend between 2007 and the RIP. This supports the conclusion that the newly calculated dumping margin is likely to be of a lasting nature.

(60) It was therefore considered that the investigation showed that the structure and behaviour of the group of companies concerned, including the circumstances that led to the initiation of the current review, were unlikely to change in the foreseeable future in a manner that would affect the findings of the current review. Therefore it was concluded that the changed circumstances are of a lasting nature and that the application of the measure at its current level is no longer sufficient to offset dumping.

3. **AMENDMENT OF THE ANTI-DUMPING MEASURES**

(61) In view of the findings of increased dumping as well as the lasting nature of the changed circumstances, it is considered that the existing measures are no longer sufficient to counteract the dumping which is causing injury. The measures imposed by Implementing Regulation (EU) No 492/2010 on imports of sodium cyclamate originating in the PRC should therefore be modified for GT Enterprise and the same duty should be imposed to the other exporting producer within the group by amending that Regulation accordingly.

(62) No individual injury margin can be established in the current review, since it is limited to the examination of dumping as far as the GT Enterprise and its related companies within the group are concerned. Therefore, the dumping margin established in the current review was compared to the injury margin as established in the original investigation. Since the latter was higher than the dumping margin found in the current review,

a definitive anti-dumping duty should be imposed for the group of companies concerned at the level of the dumping margin found in the current review.

(63) Regarding the form of the measure, it was considered that the amended anti-dumping duty should take the same form as the duties imposed by Implementing Regulation (EU) No 492/2010. To ensure efficiency of the measures and to discourage price manipulation it was considered appropriate to impose duties in the form of a specific amount per kilo. As a result, the anti-dumping duty to be imposed on imports of the product concerned produced and sold for export to the Union by the group of companies concerned, calculated on the basis of the dumping margin as established in the current review expressed as a specific amount per kilo, should be EUR 0,23 per kilo.

4. DISCLOSURE

(64) The group of companies concerned as well as the other parties concerned were informed of the essential facts and considerations on the basis of which it was intended to propose the amendment of the anti-dumping measures in force.

(65) Rainbow group commented on the final disclosure. These comments related mostly to the withdrawal of the complaint in the ongoing investigation concerning imports of sodium cyclamate originating in the People's Republic of China limited to two Chinese exporting producers, Fang Da Food Additive (Shen Zhen) Limited and Fang Da Food Additive (Yang Quan) Limited ('Fang Da group') ('parallel proceeding') ([1]). Rainbow claimed that the withdrawal of the complaint in the parallel proceeding should, logically and legally, also result in the termination of anti-dumping measures against other producers in the PRC or, at the least, result in the termination of the current review with respect to Rainbow group.

(66) It demanded the termination of the anti-dumping measures imposed by Implementing Regulation (EU) No 492/2010 arguing that in the absence of any finding that imports by Fang Da were not dumped and/or imports by Fang Da were not causing injury, the principle of non-discrimination contained in Article 9(5) of the basic Regulation mandates the termination of the anti-dumping measures imposed. To support its argument it referred to previous Council Regulations where simultaneous interim reviews concerning imports of some countries were terminated without the imposition of measures following the non-imposition of measures in anti-dumping investigations concerning the imports of the same products from other countries (LAECs ([2]), flat-rolled products of iron or non-alloy steel ([3])). However, it should be noted that these cases refer to investigations where several countries were concerned and the principle of non-discrimination was applied vis-à-vis imports from different countries. Secondly, in these cases the reason for terminating the measures on some countries was that measures on other countries were not imposed because the Council did not adopt the proposal within the statutory time limits (LAECs, flat-rolled products of iron or non-alloy steel). Therefore even though indeed it was found necessary to terminate the proceedings of anti-dumping measures in the simultaneous proceedings in the quoted cases in order to respect the principle of non-discrimination, these have no relevance for the current review. A further reference to the approach taken in monosodium glutamate ([4]) concerns a case where the complainant intended to withdraw its complaint concerning imports of Brazil even though these were found to have been dumped. In that case it was envisaged not to accept the withdrawal of the complaint because it was concluded that to take measures against the other countries in the absence of measures against Brazil would have been discriminatory.

(67) Furthermore, the two situations are quite different. In the parallel proceeding, the complaint was withdrawn and it was concluded that the termination was not against the Union interest. In the current review, the request was maintained and it was found that the dumping by the Rainbow group increased. Therefore, increasing the duty for that group does not constitute discrimination.

(68) The Rainbow group also demanded that the withdrawal of the complaint should result in the termination of the current review with respect to Rainbow group as the two proceedings were initiated on the basis of the same procedural document, covered the same period of investigation and in the complaint the complainant treated Fang Da group and Rainbow group together for all practical purposes.

(69) Secondly, it claimed that despite the investigation against Fang Da group being initiated under Article 5 of the basic Regulation, the investigation concerning imports of the Fang Da group and the interim review concerning the imports of Rainbow group are legally and for all practical purposes in essence the same proceeding. Finally it stated that having created the distinction between proceedings and investigations, Article 9(3) of the basic Regulation in effect means that even though Fang Da group was subject to a zero duty following the original investigation, it remained subject to the proceeding. For this reason, the withdrawal of the complaint concerning the imports by the Fang Da group should thus in view of the Rainbow group concerned result in the termination of the current review as well.

([1]) OJ C 50, 17.2.2011, p. 9.
([2]) OJ L 22, 27.1.2000, p. 1, recitals 134 and 135.
([3]) OJ L 294, 17.9.2004, p. 3.
([4]) OJ L 264, 29.9.1998, p. 1.

(70) It should be noted in this respect that the document presented by the complainant constituted both the complaint for the anti-dumping investigation on the basis of Article 5 of the basic Regulation and the request for this interim review on the basis of Article 11(3) of the basic Regulation. It also presented sufficient evidence to justify initiating both proceedings individually. Indeed, the Commission has initiated the Article 5 investigation and the interim review in two separate notices of initiation. Thus the anti-dumping investigation based on Article 5 of the basic Regulation and the interim review based on Article 11(3) of the basic Regulation are two different proceedings.

(71) Rainbow group presented further arguments speculating on the possible reasons for the withdrawal of the complaint. As these arguments are hypothetical and irrelevant, they cannot be addressed and are thus rejected.

(72) Finally, Rainbow group stated that the Commission has manifestly violated its rights to have 10 days to comment on the final disclosure as a non-confidential version of the withdrawal letter was disclosed to it seven days before the deadline to submit comments.

(73) As explained in recital 70, the Article 5 investigation in the framework of which Rainbow group received an information letter about the withdrawal of the complaint is a separate proceeding from the current review. Rainbow group was an interested party in the Article 5 review and only for this reason was it notified of the withdrawal of the complaint. This notification letter was not part of the final disclosure in the current review. The Rainbow group had 30 days to comment on the final disclosure in the current proceeding. Therefore its right to have sufficient time to comment was not violated.

(74) To sum up, the comments received were not such as to change the above conclusion,

HAS ADOPTED THIS REGULATION:

Article 1

The table in Article 1(2) of Council Implementing Regulation (EU) No 492/2010 is hereby amended by replacing the following:

Country	Company	Rate of duty (EUR per kilogramme)	TARIC additional code
'The People's Republic of China	Golden Time Enterprise (Shenzhen) Co. Ltd, Shanglilang, Cha Shan Industrial Area, Buji Town, Shenzhen City, Guangdong Province, People's Republic of China	0,11	A473'

with the following:

Country	Company	Rate of duty (EUR per kilogramme)	TARIC additional code
'The People's Republic of China	Golden Time Enterprise (Shenzhen) Co. Ltd, Shanglilang, Cha Shan Industrial Area, Buji Town, Shenzhen City, Guangdong Province, People's Republic of China; Golden Time Chemical (Jiangsu) Co., Ltd, No 90-168, Fangshui Road, Chemical Industry Zone, Nanjing, Jiangsu Province, People's Republic of China	0,23	A473'

Article 2

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

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

Done at Brussels, 7 May 2012.

For the Council
The President
N. WAMMEN

COMMISSION IMPLEMENTING REGULATION (EU) No 399/2012

of 7 May 2012

concerning the classification of certain goods in the Combined Nomenclature

THE EUROPEAN COMMISSION,

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

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

Whereas:

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

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

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

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

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

HAS ADOPTED THIS REGULATION:

Article 1

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

Article 2

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

Article 3

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

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

Done at Brussels, 7 May 2012.

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

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

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

ANNEX

Description of the goods	Classification (CN code)	Reasons
(1)	(2)	(3)
An unassembled article, (so-called "safety net for trampoline") comprising: — a net with 6 snap closures, — 6 upper metal bars with cellular plastic covering, — 6 lower metal bars with cellular plastic covering and welded mounting brackets, — 12 rubber bands with hooks, — 12 screws with locking nuts. Each upper bar is to be fitted to the lower bar which is then fastened to the legs of the trampoline using the screws and locking nuts. The net is sewn into the shape of a cylinder and it comes in a size to fit a specific trampoline. The net has an entrance opening that can be closed by a zipper. The snap closures on the upper part of the net are to be fastened to the top end of the metal bars. The rubber bands with hooks are used to fasten the bottom of the net to the frame of the trampoline.	9506 91 90	Classification is determined by General Rules 1, 2 (a) and 6 for the interpretation of the Combined Nomenclature, Note 1 (t) to Section XI, Note 3 to Chapter 95 and by the wording of CN codes 9506, 9506 91 and 9506 91 90. Given its shape and characteristics, in particular the fact that it is ready to be installed onto a specific trampoline due to the presence of the metal bars, screws, nuts, snap closures and rubber bands with hooks, the safety net is suitable for use solely with the appropriate trampoline (see Note 3 to Chapter 95). The safety net is therefore to be considered as an accessory to an article for general physical exercise of heading 9506. Classification under heading 5608 as other made up nets is excluded, as articles of Chapter 95 are excluded from Section XI (see Note 1 (t) to Section XI). The safety net for trampoline is therefore to be classified under CN code 9506 91 90 as other articles and equipment for general physical exercise, gymnastics or athletics.

COMMISSION IMPLEMENTING REGULATION (EU) No 400/2012

of 7 May 2012

concerning the classification of certain goods in the Combined Nomenclature

THE EUROPEAN COMMISSION,

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

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

Whereas:

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

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

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

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

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

HAS ADOPTED THIS REGULATION:

Article 1

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

Article 2

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

Article 3

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

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

Done at Brussels, 7 May 2012.

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

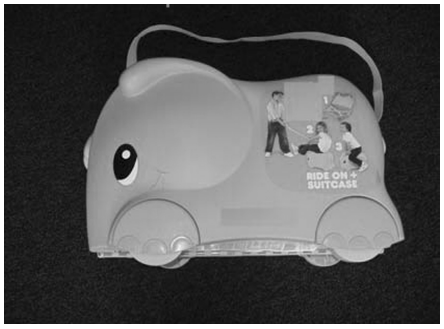
[1] OJ L 256, 7.9.1987, p. 1.

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

ANNEX

Description of the goods	Classification (CN code)	Reasons
(1)	(2)	(3)
An article having the shape of an almost square, stylised elephant, measuring approximately 32 × 48 × 24 cm, consisting of two halves that are made of moulded, rigid plastic. It has four wheels and a removable shoulder strap that can also be used to pull the article along. The two halves are held together by an integral hinged seam across the bottom and by two security snap closures at its opposite ends, which stop the article from opening immediately all the way. The hinges allow the two halves of the article to lie flat on the ground when opened. One half of the article is fitted with two textile straps forming an X when linked by a clip. It also has a small flat textile pocket attached on the inside. The other half of the article is fitted with a separation flap of textile material holding one flat pocket with a zip closure. The separation flap is fixed to the side of the article, where the hinges are, and can be attached to the opposite side of that half. (suitcase) (See photographs nos. 660 A and B) (*)	4202 12 50	Classification is determined by General Rules 1 and 6 for the interpretation of the Combined Nomenclature, Note 1(d) to Chapter 95, and the wording of CN codes 4202, 4202 12 and 4202 12 50. The article has the objective characteristics of suitcases of heading 4202, for example the moulded rigid plastic material, the hinges, the closure system, the straps, separation flap and pockets, the wheels and the fact that it is shaped and can be used as a container that opens like a typical hinged suitcase. These characteristics indicate that the article is to be considered as a suitcase and not a wheeled toy. Therefore, classification as a wheeled toy similar to pedal cars of heading 9503 is excluded. The article is therefore to be classified under CN code 4202 12 50, as a suitcase of moulded plastic material.

(*) The photographs are purely for information.



660 A

660 B

COMMISSION IMPLEMENTING REGULATION (EU) No 401/2012

of 7 May 2012

concerning the classification of certain goods in the Combined Nomenclature

THE EUROPEAN COMMISSION,

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

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

Whereas:

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

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

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

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

(5) The Customs Code Committee has not issued an opinion within the time limit set by its Chairman,

HAS ADOPTED THIS REGULATION:

Article 1

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

Article 2

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

Article 3

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

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

Done at Brussels, 7 May 2012.

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

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

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

ANNEX

Description of the goods	Classification (CN code)	Reasons
(1)	(2)	(3)
A conical shaped article (approximately 40 cm high), made by sewing 2 nonwoven triangle shaped panels of red textile material together, with an applied trim of [] white colour at the base, and a white bobble at the top. (headgear) (See photograph no. 658) (*)	6505 00 90	Classification is determined by General Rules 1 and 6 for the interpretation of the Combined Nomenclature and by the wording of CN codes 6505 and 6505 00 90. Apart from dolls' hats, other toy hats or carnival articles, hats and other headgear of all kinds, irrespective of the materials of which they are made and of their intended use, are classified in Chapter 65 (see also the Harmonized System Explanatory Notes to Chapter 65, General, first paragraph). Headgear made up from lace, felt or other textile fabric in the piece is classified within heading 6505 (see also the Harmonized System Explanatory Notes to heading 65.05, first paragraph). By virtue of Note 1(o) to Section XI (Textiles and Textile Articles), headgear of Chapter 65 is excluded from that Section. Textile articles that have a utilitarian function are excluded from Chapter 95, even when they have a festive design (see also the Harmonized System Explanatory Notes to heading 95.05, point (A), last paragraph). Classification under subheading 9505 10 90 as other articles for Christmas festivities is therefore excluded. The article clearly has the characteristics of headgear and is designed to be worn as such. The article is therefore to be classified under CN code 6505 00 90 as headgear.

(*) The photograph is purely for information.

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COMMISSION REGULATION (EU) No 402/2012

of 10 May 2012

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

THE EUROPEAN COMMISSION,

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

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

After consulting the Advisory Committee,

Whereas:

A. PROCEDURE

1. Initiation

(1) On 12 August 2011, the European Commission (the 'Commission') announced, by a notice published in the *Official Journal of the European Union* [2] ('Notice of Initiation'), the initiation of an anti-dumping proceeding with regard to imports into the Union of aluminium radiators originating in the People's Republic of China ('PRC').

(2) The proceeding was initiated following a complaint lodged by the International Association of Aluminium Radiator Manufacturers Limited Liability Consortium (AIRAL Scrl - 'the complainant'), representing a major proportion, in this case more than 25 % of the total Union production of aluminium radiators. The complaint contained *prima facie* evidence of dumping of the said product and of material injury resulting therefrom, which was considered sufficient to justify the initiation of an investigation.

2. Parties concerned by the proceeding

(3) The Commission officially advised the complainant, other known Union producers, the exporting producers in the PRC, producers in the analogue country, importers, distributors, and other parties known to be concerned, and representatives of the PRC of the initiation of the proceeding. Interested parties were given an opportunity to make their views known in writing and to request a hearing within the time limit set in the notice of initiation.

(4) The complainant, other Union producers, the exporting producers in the PRC, importers and distributors made their views known. All interested parties, who so requested and showed that there were particular reasons why they should be heard, were granted a hearing.

(5) In view of the apparent high number of Union producers, importers and exporting producers sampling was envisaged in the notice of initiation, in accordance with Article 17 of the basic Regulation. In order to enable the Commission to decide whether sampling would be necessary and if so, to select a sample, importers and exporting producers were asked to make themselves known to the Commission and to provide, as specified in the notice of initiation, basic information on their activities related to the product concerned (as defined in section 3 below) during the period from July 2010-June 2011.

(6) 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 authorities of the PRC. Only one group of companies, Sira (Tianjin) Aluminium Products Co. Ltd and Sira Group (Tianjin) Heating Radiators Co. Ltd (the 'Sira Group'), came forward and requested MET. Requests for IT were received from Zhejiang Flyhigh Metal Products Co., Ltd. and Metal Group Co., Ltd.

(7) As regards the Union producers and as duly explained in recital 24 below, eight Union producers provided the requested information and agreed to be included in a sample. On the basis of the information received from the cooperating Union producers, the Commission selected a sample of four Union producers on the basis of their sales/production volume, their size and geographic location in the Union.

[1] OJ L 343, 22.12.2009, p. 51.
[2] OJ C 236, 12.8.2011, p. 18.

(8) As explained in recital 27 below, only three unrelated importers provided the requested information and agreed to be included in a sample. However two of these importers did not import/purchase the product concerned. Therefore, in view of the limited number of cooperating importers, sampling was deemed to be no longer necessary.

(9) As explained in recital 28 below, 18 exporting producers in the PRC provided the requested information and agreed to be included in a sample. On the basis of the information received from these parties, the Commission selected a sample of two exporting producers having the largest volume of exports to the Union.

(10) The Commission sent questionnaires to all parties known to be concerned and to all the other companies that made themselves known within the deadlines set out in the notice of initiation, namely to the exporting producers in the PRC, the four sampled Union producers, the cooperating importers in the Union and to the European Consumers' Organization BEUC, with the request to send the users' questionnaire to its associated companies.

(11) Replies were received from the two sampled exporting producers in the PRC, from the four sampled Union producers and one unrelated importer. None of the users replied to the questionnaire.

(12) In addition, one claim for individual examination in accrodance with Article 17(3) of the basic Regulation was received from one group of related exporting producers. The examination of these claims at the provisional stage would have been too burdensome to be carried out. A decision whether individual examination will be granted to this group of companies will be taken at the definitive stage.

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

Producers in the Union

— Armatura Krakow SA, UL. Zakopianska 72, 30-418 Krakow, Poland;

— Fondital S.p.A., via Cerreto 40, 25079 Vobarno, Brescia, Italy;

— Global Srl, via Rondinera 51, 24060 Rogno, Bergamo, Italy;

— Radiatori 2000 S.p.A., via Francesca 54/A, 24040 Ciserano, Bergamo, Italy

Importers in the Union

— Hydroland Chorobik Gawęda Malec Wojtycza Sp.j., Jawornik 658, 32-400 Myślenice, Poland.

Exporting producers in the PRC

— Zhejiang Flyhigh Metal Products Co., Ltd. ('Zhejiang Flyhigh'), Jinyun

— Metal Group Co., Ltd., Wuyi

3. **Investigation period**

(14) The investigation of dumping and injury covered the period from 1 July 2010 to 30 June 2011 (the 'investigation period' or the 'IP'). The examination of trends relevant for the assessment of injury covered the period from January 2008 to the end of the IP ('period considered').

B. **PRODUCT CONCERNED AND LIKE PRODUCT**

1. **Product concerned**

(15) The product concerned is aluminium radiators and elements or sections of which such radiator is composed, whether or not such elements are assembled in blocks, excluding radiators and elements and sections thereof of the electrical type ('the product concerned'). The product concerned currently falls within CN codes, ex 7615 10 10, ex 7615 10 90, ex 7616 99 10 and ex 7616 99 90.

(16) The product definition was contested by the Sira Group based on an alleged difference between the two production processes which are used to manufacture radiators. Within the Sira Group there are two Chinese exporting producers one of which used the die-casting production technique whereas the second company used the extrusion method. Sira Group argued that the extrusion method should be excluded from the definition of the product concerned because of alleged differences in physical and technical characteristics, raw materials, production costs and sales prices and because the extrusion technique is uncommon in the EU and in the PRC.

(17) Another Chinese party, the China Chamber of Commerce for Imports and Exports of Machinery and Electronic Products (CCCME) requested clarification of this issue because of differences in costs and prices of radiators manufactured by the two production techniques.

(18) In this respect, although there are minor differences it is clear that the radiators produced by both methods have the same basic physical and technical characteristics and have the same uses. Radiators produced by both methods are highly substitutable. These basic characteristics are, primarily, lightness, low thermal inertia and high heat conductibility. Differences in costs and prices and the fact that the extrusion technique may involve the use of a slightly different aluminium alloy do not change these basic characteristics. In terms of price comparisons, any differences are properly accounted for in the structure of the product type comparison system employed in this investigation ('PCN-system') which means that only like for like comparisons would be made.

(19) Furthermore, aluminium radiators should be considered as one single product whatever their manufacturing process because they are sold through the same channels of sales and because end-user and consumer perception of them is that they are made of aluminium (with well-known characteristics as mentioned above) rather than any differentiation based on production method. In view of the above, this claim is therefore rejected.

(20) CCCME also contested the fact that steel plate or even cast iron radiators are not included within the product scope. However, although such products have similar uses, they have different basic physical and technical characteristics as the basic raw material (aluminium alloy) is replaced by steel or iron which have different physical and technical characteristics in terms of weight, thermal inertia and conductibility. This claim is therefore rejected.

(21) CCCME made further comments relating to references in the complaint to sales via 'tender processes'. These comments revealed that it assumed that this concerned public procurement. The tender processes referred to in the complaint, however, related to normal business practice whereby an EU purchaser of radiators asks potential suppliers to quote prices before placing orders. None of the Chinese imports used in the calculations involved a public procurement process.

(22) CCCME also commented on references in the Complaint to 'design radiators', assuming that such radiators are excluded from the product definition. Again, these comments were based on a misunderstanding as the product definition does not exclude such radiators. These comments were therefore dismissed.

2. **Like product**

(23) The investigation has shown that aluminium radiators produced in and exported from the PRC and aluminium radiators manufactured and sold in the Union by the Union producers have the same basic physical and technical characteristics as well as the same basic uses and are therefore considered to be alike within the meaning of Article 1(4) of the basic Regulation.

C. **SAMPLING**

1. **Sampling of Union producers**

(24) In view of the apparent large number of Union producers, sampling was provided for in the notice of initiation for the determination of injury, in accordance with Article 17 of the basic Regulation.

(25) In the notice of initiation the Commission announced that it had provisionally selected a sample of Union producers. This sample consisted of four companies, out of the eight Union producers that were known to produce the like product prior to the initiation of the investigation, selected on the basis of their sales volume, their size and geographic location in the Union. They represented 66 % of the total estimated Union production during the IP. Interested parties were invited to consult the file for inspection by interested parties and to comment on the appropriateness of this choice within 15 days of the date of publication of the notice of initiation. One interested party requested to take also production volume into consideration for the selection of the sample. It was accepted to change the sample accordingly. No interested party opposed to the final sample composed of four companies.

2. **Sampling of unrelated importers**

(26) In view of the potentially large number of importers involved in the proceeding, sampling was envisaged for importers in the notice of initiation in accordance with Article 17 of the basic Regulation.

(27) Only three unrelated importers provided the requested information and agreed to cooperate. Since two of these importers did not report imports or purchases the product concerned, sampling was no longer deemed to be necessary.

3. **Sampling of exporting producers**

(28) A total of 18 exporting producers in the PRC provided the requested information and agreed to be included in a sample. These companies exported around 5 million elements [1] or slightly less than 50 % of the Chinese exports to the EU market in the IP. On the basis of the information received from these parties, the Commission selected a sample of two exporting producers having the largest representative volume of

[1] In general, the aluminium radiator is presented in an array of identical and assemblable elements. The elements can be assembled vertically or horizontally to form a prevalently horizontal or prevalently vertical radiator.

production, sales and exports which could reasonably be investigated within the time available. The two exporting producers, Zhejiang Flyhigh Metal Products Co., Ltd. and Metal Group Co., Ltd., represented around 62 % of the sales volume of the 18 exporting producers which provided data for the sampling exercise.

(29) One group of exporting producers (the Sira Group) contested their exclusion from the sample on the basis that it manufactured a certain type of radiator (using the extrusion production method) and that its inclusion in the sample would, therefore, increase the representativity of the sample. However, the addition of one extra group was not required as the sample originally selected yet represented more than 60 % of the exports reported by the co-operating companies. In addition, it is not necessary for the sample to cover all types of the product concerned. The claim for inclusion of Sira Group was therefore rejected and the original sample was confirmed.

D. **DUMPING**

1. **Market Economy Treatment and Individual treatment**

1.1. *Market Economy Treatment (MET)*

(30) 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 exporting producers which were found to meet the criteria laid down in Article 2(7)(c) of the basic Regulation.

(31) However, the two sampled exporting producers only requested Individual Treatment ('IT'). MET criteria were therefore not investigated.

1.2. *Individual Treatment (IT)*

(32) 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. Briefly, and for ease of reference only, these criteria are set out below:

— In the case of wholly or partly foreign owned firms or joint ventures, exporters are free to repatriate capital and profits;

— Export prices and quantities, and conditions and terms of sale are freely determined;

— The majority of the shares belong to private persons. State officials appearing on the Boards of Directors or holding key management positions shall either be in minority or it must be demonstrated that the company is nonetheless sufficiently independent from State interference;

— Exchange rate conversions are carried out at the market rate; and

— State interference is not such as to permit circumvention of measures if individual exporters are given different rates of duty

(33) Both sampled exporting producers claimed IT. These claims were examined. The investigation showed that the sampled companies fulfilled all the conditions of Article 9(5) of the basic Regulation.

(34) Both sampled exporting producers were therefore granted IT.

2. **Analogue country**

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

(36) In the notice of initiation, the Commission indicated its intention to use Russia as an appropriate analogue country for the purpose of establishing normal value for the PRC and invited interested parties to comment on this.

(37) No comments were received concerning Russia as proposed analogue country. None of the interested parties suggested alternative analogue country producers of like product in addition to those mentioned in the complaint during the course of investigation.

(38) No co-operation from Russia was received although all known Russian producers were contacted repeatedly during the investigation and received analogue country questionnaires.

(39) The Commission through its own research tried to identify any additional producers in third countries.

(40) Letters and questionnaires were therefore sent to all known producers in other third countries (i.e. Turkey, Iran, Croatia, India, South Africa and Switzerland). However, despite follow-up action ultimately no co-operation was received.

(41) As explained in the recitals 38, 39 and 40 above, the investigation revealed no other market economy third country which could be used as an analogue country in this proceeding. Consequently, in absence of such market economy third country, it was provisionally concluded in accordance with Article 2(7)(a) of the basic Regulation, that it was not possible to determine normal value for the sampled producers based on the domestic prices or constructed normal value in a market economy third country or the price from such a third country to other countries, including the Union, and that it was therefore necessary to determine normal value based on any other reasonable basis, in this case on the basis of the prices actually paid or payable in the Union for the like product. This was considered appropriate due to the lack of cooperation as mentioned above but also because of the size of the EU market, the existence of imports and the strong internal competition on the EU market for this product.

3. **Normal Value**

(42) As MET was not claimed by the two sampled companies, the normal value for all Chinese exporting producers was determined, as explained in recital 41 above, on the basis of the prices actually paid or payable in the Union for the like product. Following the choice of the prices paid or payable in the Union, normal value was calculated on the basis of the data verified at the premises of the sampled Union producers listed in recital 13 above.

(43) In accordance with Article 2(2) of the basic Regulation, the Commission first examined whether the EU sales of the like product to independent customers were representative. The Union sales of the Union producers of the like product were found to be representative compared to the product concerned exported to the Union by the exporting producers included in the sample.

(44) The Commission subsequently examined whether these sales could be considered as having been 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 EU sales to independent customers. EU sales transactions were considered profitable where the unit price was equal to or above the cost of production. Cost of production on the Union market during the IP was therefore determined. This analysis showed that EU sales of some product types were profitable, i.e. the unit net sales price was above the calculated unit cost of production.

(45) The normal value of each product type was based on the actual sales price (ex-works) for profitable sales and on a constructed normal value for non profitable sales.

(46) Normal value was constructed by adding to the cost of manufacturing of the EU industry its SG&A and profit. Pursuant to Article 2(6) of the basic Regulation, the amounts for SG&A and profit of 4,43 % were established on the basis of the actual data pertaining to production and sales in the ordinary course of trade of the like product of the EU producers.

4. **Export prices**

(47) As the sampled exporting producers were granted IT and made export sales to the Union directly to independent customers in the Union, the export prices were based on the prices actually paid or payable for the product concerned, in accordance with Article 2(8) of the basic Regulation.

5. **Comparison**

(48) The comparison between normal value and export price was made on an ex-works basis. For the purpose of ensuring a fair comparison between the normal value and the export price, due allowance in the form of adjustments was made for differences affecting prices and price comparability in accordance with Article 2(10) of the basic Regulation. Appropriate adjustments for indirect taxes, freight, insurance, packing, handling and credit costs were granted in all cases where they were found to be reasonable, accurate and supported by verified evidence.

(49) For one of the exporting producers it was clear that the company had not classified the product concerned correctly when using the system as required by the questionnaire. One of the specifications of product concerned related to the thermal output of the radiators. However the company did not posses evidence to support the thermal output reported for its exported models. The thermal output actually reported was not correct and did not correspond to other specifications, such as weight and dimensions. Therefore it was necessary to use only the remaining specifications for comparison purposes.

(50) Using the PCN-system to classify product types, there was a high degree of matching for one sampled exporting producer. However, for the other sampled exporting producer a resembling technique was employed because no direct matches could be identified. Where the resembling technique was employed the details were disclosed to the party involved.

6. **Dumping margins**

(51) According to Article 2(11) and (12) of the basic Regulation, the dumping margin for the sampled exporting producers was established based on the comparison of

the weighted average normal value with the weighted average export price expressed as a percentage of the CIF Union frontier price, duty unpaid.

(52) A weighted average of these two dumping margins was calculated for the non sampled co-operating companies.

(53) Given the low degree of co-operation from the PRC (below 50 %), it is considered appropriate that the countrywide dumping margin applicable to all other exporting producers in the PRC should be based on the most dumped transactions to a particular customer of the cooperating exporters.

(54) The provisional dumping margins thus established, expressed as a percentage of the CIF Union frontier price, duty unpaid, are as follows:

Table 1

Company Name	Status	Dumping Margin
Zhejiang Flyhigh	IT	23,0 %
Metal Group Co. Ltd.	IT	70,8 %
Other co-operating companies		32,5 %
Countrywide dumping margin		76,6 %

E. **INJURY**

1. **Total Union production**

(55) All available information concerning Union producers, including information provided in the complaint, data collected from Union producers before and after the initiation of the investigation, and the verified questionnaire responses of the sampled Union producers, was used in order to establish the total Union production for the period considered.

(56) Aluminium radiators were manufactured by eight producers in the Union during the IP. All available information concerning Union producers, including information provided in the complaint and data collected from Union producers before and after the initiation of the investigation, was used in order to establish the total Union production during the IP.

(57) On this basis, the total Union production, in number of elements, was estimated to be around 64 million during the IP. Given that the Union producers supporting the complaint accounted for the total Union production, they constitute the Union industry within the meaning of Articles 4(1) and 5(4) of the basic Regulation and will be hereafter referred to as the 'Union industry'.

2. **Union consumption**

(58) Eurostat import statistics could not be used in this investigation since the CN codes covering aluminium radiators include other aluminium products, such as electrical radiator, as well.

(59) Union consumption was thus established on the basis of the data contained in the complaint concerning in particular the sales volume of the Union industry in the Union and the imports made by the exporting producers in the PRC. This data was cross-checked with the received replies to the sampling questionnaires and the data obtained and verified at the premises of the sampled Union producers and the exporting producers in the PRC.

(60) On this basis the Union consumption was found to have developed as follows:

Table 2

	2008	2009	2010	IP
Union consumption (elements)	46 000 000	40 500 000	39 000 000	44 246 066
Index (2009 = 100)	*114*	*100*	*96*	*109*

Source: Complaint data and questionnaire replies

(61) Total consumption on the EU market decreased by 3,8 % during the period considered. Between 2008 and 2009 there was a decrease by about 12 %, in line with the global negative effects of the economic crisis, after which consumption decreased further by 3,7 %. It however recovered from 2010 to the IP, when it increased by 13,5 %, but it did not reach the initial level of 2008. The above table also shows that consumption increased by 9 % in the period from 2009 to the IP.

3. **Imports from the country concerned**

(62) Imports into the Union from the PRC developed as follows during the period considered:

Table 3

	2008	2009	2010	IP
Volume of imports from the PRC (elements)	6 000 000	7 000 000	8 000 000	10 616 576
Index (2009 = 100)	*86*	*100*	*114*	*152*
Market share	13,0 %	17,3 %	20,5 %	24,0 %
Index (2009 = 100)	*75*	*100*	*119*	*139*

Source: Complaint data and questionnaire replies

(63) Notwithstanding the evolution of consumption, the volume of imports from the PRC increased significantly by 77 % over the period considered. The increase was continuous and was the sharpest between 2010 and the IP (+ 33 %). Similarly, the market share held by Chinese exporting producers shows a steady increasing trend over the period considered, passing from 13 % in 2008 to 24 % during the IP. This trend should be seen in the light of the overall decrease in consumption by 3,8 % during the same period.

3.1. *Prices of imports and price undercutting*

Table 4

Imports from the PRC	2008	2009	2010	IP
Average price in EUR/elements	4,06	3,25	4,07	4,02
Index (2009 = 100)	*125*	*100*	*125*	*123*

Source: Complaint data and questionnaire replies

(64) The above table shows that the average import price from the PRC slightly decreased during the period considered. In a first step, between 2008 and 2009, it decreased significantly by 20 %, then it increased by 25 % between 2009 and 2010. Finally it decreased again towards the end of the period considered.

(65) The investigation also showed that the import prices from the PRC consistently remained below the sales prices of the Union industry during the period considered. The drop in prices in 2009 coincided with a sharp increase in Chinese market share from 13 % to 17,3 % of the Union market and the constant price undercutting explains the steady increase in the market share held by Chinese exporting producers in particular between 2009 and the IP.

(66) In order to determine price undercutting during the IP, the weighted average sales prices per product type of the sampled Union Producers charged to unrelated customers on the Union market, adjusted to an ex-works level, were compared to the corresponding weighted average prices of the imports from the cooperating Chinese producers to the first independent customer on the Union market, established on a CIF basis, with appropriate adjustments for the existing customs duties and post-importation costs.

(67) The price comparison was made on a type-by-type basis for transactions at the same level of trade, duly adjusted where necessary, and after deduction of rebates and discounts. The result of the comparison, when expressed as a percentage of the sampled Union producers turnover during the IP, showed a weighted average undercutting margin of 6,1 % by the Chinese exporting producers.

4. **Economic situation of the Union industry**

4.1. *Preliminary remarks*

(68) As mentioned in recitals 24 and 25 above, sampling was used for the examination of the possible injury suffered by the Union industry. It should be noted that one of the Union producers included in the sample only started producing aluminium radiators in 2009. In order to provide a consistent trend analysis for the period considered, it was considered appropriate to set 2009 as benchmark year for the injury analysis, namely index 100. For the sake of completeness an index for 2008 has been also established based on the data available.

(69) The data provided and verified by the four sampled EU producers was used in order to establish micro indicators, such as unit price, unit cost, profitability, cash flow, investments, return on investments, ability to raise capital and stocks. The index for 2008 was established on the basis of the data available for the three existing producers in 2008 compared to the data of the same three producers in 2009 (index 100).

(70) The data provided for the eight EU producers of aluminium radiators was used to establish macro indicators, such as Union industry production, production capacity, capacity utilization, sales volume, market share and employment. The index for 2008 was established on the basis of the data available for the seven existing producers in 2008 compared to the data available for the same seven producers in 2009 (index 100).

(71) In the context of Article 3(5) of the basic Regulation, the examination of the economic situation of the Union industry over the period considered includes an evaluation of all economic factors established mentioned in that Article.

4.2. *Production, production capacity and capacity utilization*

Table 5

	2008	2009	2010	IP
Production volume *(elements)*		55 533 555	60 057 377	64 100 484
Index (2009 = 100)	*116*	*100*	*108*	*115*
Production capacity (elements)		93 426 855	95 762 788	107 218 125
		100	103	115
Capacity utilisation	70 %	59 %	63 %	60 %
Index (2009 = 100)	*119*	*100*	*106*	*101*

Source: Complaint data and questionnaire replies

(72) All available information concerning Union producers, including information provided in the complaint, data collected from Union producers before and after the initiation of the investigation, and the verified questionnaire responses of the sampled Union producers, was used in order to establish the total Union production for the period considered.

(73) The table above shows that production decreased over the period considered. In line with a decrease in demand, production decreased sharply in 2009, after which it recovered in 2010 and during the IP. Production remained relatively stable between 2009 and the IP despite an increase in consumption by 9 %. The level of production is also dependent on the export activity of the Union industry which remained significant throughout the period considered.

(74) Despite the limited decrease in consumption capacity utilisation decreased from 70 % in 2008 to 60 % during the IP. It remained relatively stable in the period between 2009 and the IP.

4.3. *Sales volume and market share*

Table 6

	2008	2009	2010	IP
Sales volume *(elements)*	40 000 000	33 500 000	31 000 000	33 629 490
Index (2009 = 100)	*119*	*100*	*93*	*100*
Market share	87 %	82,7 %	79,5 %	76 %
Index (2009 = 100)	*105*	*100*	*96*	*92*

Source: Complaint data and questionnaire replies

(75) The Union industry sales volume decreased by 16 % over the period considered and its market share continuously dropped from 87 % in 2008 to 76 % during the IP. In 2009 the Union industry sales volume decreased by 16 %, hence it lost more than four percentage points of market share. In 2010 sales volume further dropped by 7 % and its market share decreased from 82,7 % to 79,5 %. During the IP, in a context of increasing consumption (+ 13,5 %), the Union industry market share dropped further to 76 %. It was thus unable to benefit from the growing consumption and to regain some of the market share previously lost.

4.4. *Growth*

(76) During the period considered it emerged that Union consumption decreased slightly by 3,8 %, while sales volume and market share of the Union industry decreased significantly, respectively by 15,9 % and by 12,6 %, during the same period. At the same time, imports from the PRC increased significantly by 76,9 % over the period considered. As a consequence, the market share of the Union industry decreased by 11 percentage points over the same period.

4.5. *Employment*

Table 7

	2008	2009	2010	IP
Number of employees		1 598	1 642	1 641
Index (2009 = 100)	*102*	*100*	*103*	*103*
Productivity (unit/employee)	114	100	105	112
Index (2009 = 100)				

Source: Complaint data and questionnaire replies

(77) The number of employees increased slightly over the period considered, but this in turn led to a decrease in productivity. However, it should be noted that the upwards trend regarding employment is only due to the fact that one of the sampled companies, the smallest of the sample started producing in 2009. Otherwise the trend in employment would have been negative.

(78) Productivity of the Union industry workforce, measured as output per person employed per year, decreased slightly over the period considered. It reached its lowest level in 2009, after which it started to recover towards the IP, without reaching the initial levels. Between 2009 and the IP productivity increased by 12 %.

4.6. *Average unit prices in the Union and cost of production*

Table 8

	2008	2009	2010	IP
Unit price in EU to unrelated customers *(Euro per element)*		5,31	5,47	5,62
Index (2009 = 100)	*113*	*100*	*103*	*106*
Unit Cost EUR/Element		4,92	5,34	5,61
Index (2009 = 100)	*113*	*100*	*109*	*114*

Source: questionnaire replies sampled producers

(79) The trend of the average sales prices shows a significant decrease by 6 % over the period considered. In the period from 2009 to the IP, in line with an increasing consumption and a recovery in the market, prices recovered by 6 % but did not reach the level of 2008.

(80) In parallel, the relative costs to produce and sell the like product slightly decreased over the period considered but it was far from allowing the Union industry to remain profitable in 2010 and during the IP. If in 2009, the 11,5 % decrease in costs matched with a 11,5 % decrease in sales prices, in 2010 and during the IP, the Union industry experienced a sharp increase in costs and could only slightly increase its prices to cover the extra costs. This resulted in a further loss in profitability and in market share since the Union industry prices were constantly higher than the Chinese imports prices.

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

Table 9

	2008	2009	2010	IP
Profitability of EU sales *(% of net sales)*	7,4 %	7,5 %	2,4 %	0,2 %
Index (2009 = 100)	*99*	*100*	*32*	*2*
Cash Flow		27 712 871	14 228 145	843 570
Index (2009 = 100)	*112*	*100*	*51*	*3*
Investments (EUR)	25 404 161	15 476 164	12 072 057	8 945 470
Index (2009 = 100)	*165*	*100*	*78*	*58*
Return on Investments	36 %	49 %	21 %	2 %
Index (2009 = 100)	*73*	*100*	*43*	*4*

Source: Questionnaire replies sampled EU producers

(81) Profitability of the Union industry was established by expressing the pre-tax net profit of the sales of the like product as a percentage of the turnover of these sales. Over the period considered, and also on the period from 2009 to the IP, profitability of the Union industry decreased dramatically and barely reached the break even level.

(82) The trend in cash flow, which is the ability of the industry to self-finance its activities, followed to a large extent the negative trend in profitability. The lowest level was achieved during the IP. Similarly, the return on investment decreased from 36 % in 2008 to 2 % in the IP.

(83) The evolution of profitability, cash flow and return on investment during the period considered limited the ability of the Union industry to invest in its activities and undermined its development. The Union industry managed to invest heavily in the beginning of the period considered and modernize its machineries to produce more efficiently, but investments thereafter steadily decreased by 64,7 % during the remainder of the period considered.

4.8. *Stocks*

Table 10

	2008	2009	2010	IP
Closing stock of Union industry *Index (2009 = 100)*	137	100	131	299

Source: Questionnaire replies sampled EU producers

(84) The stock level of the sampled Union industry increased significantly during the period considered. In 2009 the level of closing stock decreased by 27 %; afterwards, in 2010 and in the IP increased by 30,8 % and 128,4 % respectively.

5. **Magnitude of the actual dumping margin**

(85) The dumping margins are specified above in the dumping section. All margins established are significantly above the de minimis level. Furthermore, given the volume and the prices of dumped imports from the PRC the impact on the EU market of the actual margin of dumping cannot be considered negligible.

6. **Conclusion on injury**

(86) The investigation showed that most of the injury indicators pertaining to the economic situation of the Union industry deteriorated or did not develop in line with consumption during the period considered. This observation particularly applies to the period from 2009 up to the end of the IP.

(87) Over the period considered, in the context of a decreasing consumption, volume of imports from the PRC increased steadily and significantly. At the same time, the Union industry sales volume decreased overall by 16 % and its market share dropped from 87 % in 2008 to 76 % in the IP. Even when consumption recovered by 9 %, from 2009 to the IP, the Union industry market share continued to decrease further. The Union industry was unable to regain the market share previously lost in view of the significant expansion of the dumped imports from the PRC in the EU market. The low-priced dumped imports increased steadily over the period considered, constantly undercutting the prices of the Union industry.

(88) Furthermore, the injury indicators related to the financial performance of the Union industry, such as cash flow and profitability were seriously affected. This means that the ability of the Union industry to raise capital and to invest was undermined.

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

F. **CAUSATION**

1. **Introduction**

(90) In accordance with Article 3(6) and 3(7) of the basic Regulation, it was examined whether the dumped imports originating in the PRC have caused injury to the Union industry to a degree that enables it to be classified as material. Known factors other than the dumped imports, which might have injured the Union industry, were examined to ensure that any injury caused by those other factors was not attributed to the dumped imports.

2. **Effect of the dumped imports**

(91) The investigation showed that the Union consumption decreased by 3,8 % over the period considered, while the volume of dumped imports from the PRC increased dramatically by about 77 %, their market share also increased from 13 % in 2008 to 24 % in the IP. At the same time, sales volume of the Union industry decreased by 16 % and market share dropped from 87 % in 2008 to 76 % in the IP.

(92) In the period from 2009 up to the IP, Union consumption increased by 9 %, while the Union industry market share dropped again, in contrast to an annual increase in dumped imports from the PRC by 52 % in that period.

(93) With regard to price pressure, it should be highlighted that in 2009 average import prices from the PRC decreased by 20 % forcing the Union industry to significantly decrease its sales prices by about 11,5 %. In 2010 and during the IP, the Union industry tried to increase its prices, because of increased costs. This resulted in a further loss of market share, since the Union industry prices were constantly higher than the prices of dumped imports from the PRC. This situation led in particular to a significant deterioration in profitability, sales volume and market share of the Union industry.

(94) Prices of dumped imports from the PRC decreased in the period considered. Even if in the period from 2009 to the IP, import price from the PRC increased by 23 %, they consistently remained significantly lower than sales prices of the Union industry during the period considered and in particular during the IP, thus keeping price in the Union market.

(95) Based on the above it is concluded that the massive increase of the dumped imports from the PRC at prices constantly undercutting those of the Union industry have had a determining role in the material injury suffered by the Union industry, which is reflected in particular in its poor financial situation, in the drop in sales volume and in market share and in the deterioration of most of the injury indicators.

3. **Effect of other factors**

3.1. *Imports from third countries*

(96) As clarified in recital 58 above, Eurostat import statistics could not be used in this investigation since the CN codes covering aluminium radiators and elements and sections thereof include all sorts of aluminium products. In the absence of any other reliable information, it was established on basis of the complaint, that apart from the PRC, there is no other non-EUcountry which produced and exported aluminium radiators to the EU during the period considered.

3.2. *Economic crisis*

(97) The economic crisis partially explains the contraction of the Union consumption in particular in 2009 and 2010. However, it is noteworthy that in a situation of decreasing consumption in the period considered and in a situation of increasing consumption in the period between 2009 and the IP, the volume of dumped imports from the PRC at prices undercutting those of the Union industry kept on increasing in the Union market.

(98) The performances of the low-priced dumped imports contrast with those of the Union industry. Indeed, the investigation showed that as from 2009 and up to the IP, even if Union consumption increased in line with the general economic recovery, the Union industry market share kept decreasing. Even if production volume tended to increase, there was a surplus which had to be put into the stocks.

(99) Under normal economic conditions and in the absence of strong price pressure and surge in import of dumped products, the Union industry might have had some difficulty in coping with the decrease in consumption and the increase in fixed costs per unit due to the decreased capacity utilisation it experienced. However, the investigation clearly suggests that the dumped imports from the PRC have intensified the effect of the economic downturn. Even during the general economic recovery, the Union industry was unable to recover and to regain sales volumes and the market share lost throughout the period considered.

(100) Therefore, although the economic crisis may have contributed to the Union industry's poor performance, overall, it cannot be considered to have an impact such as to break the causal link between the dumped imports and the injurious situation of that industry suffered in particular during the IP.

3.3. *Development of the Union industry cost of production*

(101) The investigation showed that the cost to produce aluminum radiators is directly linked to the price development of aluminum, the main raw material used to produce this product. Even if, as shown in table 8 above, Union industry cost of production decreased significantly in 2009, sales prices decreased at the same pace. In 2010 and during the IP, costs increased more than sale prices and thus did not allow for a recovery, in particular in the profitability of the Union industry. This situation occurred when the import price of the products imported from the PRC were consistently undercutting those of the Union industry.

(102) In a market economy, it could be expected that prices on the market would regularly adapt to reflect the development in the various components of the cost of production. This did however not happen. The investigation confirmed that dumped imports from the PRC, undercutting the Union industry prices, continued to depress the Union market prices and thus prevented the Union industry from keeping its market share and adjusting prices to cover for its costs and achieve a reasonable profit level in particular during the IP.

(103) The increase in raw material prices was therefore not such as to break the causal link between the dumped imports and the material injury suffered by the Union industry in particular during the IP.

3.4. *Export performance of the sampled Union industry*

Table 11

	2008	2009	2010	IP
Export sales in elements		18 280 847	20 245 515	17 242 607
Index (2009 = 100)	*126*	*100*	*111*	*94*

Source: Questionnaire replies sampled EU producers

(104) The export activity of the Union industry constituted an important share of its business during the period considered. The core exports markets of the Union industry were mainly Russia and other East European countries where the products sold were of relatively lower quality and were thus cheaper compared to the radiators sold in the Union market.

(105) The above table shows that the export turnover of the Union industry decreased in the period considered. This may partly be explained by the fact that, as available information suggests, growing export volumes of aluminium radiators from the PRC were also present in those export markets.

(106) Nevertheless, it is clear that the export activity allowed the Union industry to achieve economies of scales and thus to reduce its overall costs of production. Hence, it can reasonably be considered that the export activity of the Union industry could not be a potential cause of the material injury it had suffered in particular during the IP. Any negative impact the export sales decrease may have had on the Union Industry, it cannot be such as to break the causal link between that injury and the low-priced dumped imports from China.

4. **Conclusion on causation**

(107) The above analysis demonstrated that there was a substantial increase in the volume and market share of the dumped imports originating in the PRC in the period considered and also from the period from 2009 up to the IP. It was found that these imports were constantly undercutting the prices charged by the Union industry on the Union market and in particular during the IP.

(108) This increase in volume and market share of the low-priced dumped imports from the PRC was continuous and coincided with the negative development in the economic situation of the Union industry. This situation worsened in the IP, when the Union industry was unable to regain its lost market share and profitability and other financial indicators such as cash flow and return on investments reached their lowest levels.

(109) The analysis of the other known factors, including the economic crisis, showed that any negative impact of these factors cannot be such as to break the causal link established between the dumped imports from the PRC and the injury suffered by the Union industry.

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

G. **UNION INTEREST**

1. **Preliminary remarks**

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

2. **Interest of the Union industry**

(112) The Union industry has suffered material injury caused by the dumped imports from the PRC. It is recalled that most of the injury indicators showed a negative trend during the period considered. In the absence of measures, a further deterioration in the Union industry's situation appears unavoidable.

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

(114) Should measures not be imposed, further losses in market share could be expected and the Union industry would remain loss-making. This would be unsustainable in the medium to long-term. In view of the losses incurred and the high level of investment in production made at the beginning of the period considered it can be expected that most Union producers would be unable to recover their investments, should measures not be imposed.

(115) It is therefore provisionally concluded that the imposition of anti-dumping duties would be in the interest of the Union industry.

3. **Interest of users and importers**

(116) There was no cooperation from users in this investigation.

(117) As regards importers, only one importer located in Poland cooperated in this investigation by responding to the questionnaire and accepting a verification visit. This importer had small losses for the product concerned during the IP. However, the business of the product concerned is relatively small in relation to the total company's activities. Therefore, imposition of measures is not likely to have a severe impact on its total profits.

4. **Conclusion on Union interest**

(118) In view of the above, it is provisionally concluded that based on the information available concerning the Union interest, there are no compelling reasons against the imposition of provisional measures on imports of the product concerned originating in the PRC.

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

1. **Injury elimination level**

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

(120) For the purpose of determining the level of these measures, account was taken of the dumping margins found and the amount of duty necessary to eliminate the injury sustained by the Union industry, without exceeding the dumping margins found.

(121) When calculating the amount of duty necessary to remove the effects of the injurious dumping, it was considered that any measures should allow the Union industry to cover its costs of production and to obtain a profit before tax that could be reasonably achieved by an industry of this type in the sector under normal conditions of competition, i.e. in the absence of dumped imports, on sales of the like product in the Union. It is considered that the profit that could be achieved in the absence of the dumped imports should be based on the average pre-tax profit margin of the sampled Union producers in the year 2008. It is thus considered that a profit margin of 7, 4 % of turnover could be regarded as an appropriate minimum which the Union industry could have expected to obtain in the absence of injurious dumping.

(122) On this basis, a non-injurious price was calculated for the Union industry for the like product. The non-injurious price was obtained by adjusting the sales prices of the sampled Union producers by the actual profit/loss made during the IP and by adding the above mentioned profit margin.

(123) The necessary price increase was then determined on the basis of a comparison of the weighted average import price of the cooperating exporting producers in the PRC, as established for the price undercutting calculations, with the non-injurious price of the products sold by the Union industry on the Union market during the IP. Any difference resulting from this comparison was then expressed as a percentage of the average total CIF import value.

2. **Provisional measures**

(124) In the light of the foregoing, it is considered that, in accordance with Article 7(2) of the basic Regulation, provisional anti-dumping measures should be imposed in respect of imports originating in the PRC at the level of the lower of the dumping and the injury margins, in accordance with the lesser duty rule.

(125) On the basis of the above, the anti-dumping duty rates have been established by comparing the injury elimination margins and the dumping margins. Consequently, the proposed anti-dumping duty rates are as follows:

Company	Dumping margin	Injury margin	Provisional Duty
Zhejiang Flyhigh Metal Products Co., Ltd	23,0 %	12,6 %	12,6 %
Metal Group Co. Ltd.	70,8 %	56,2 %	56,2 %
Other co-operating companies	32,5 %	21,2 %	21,2 %
Countrywide dumping margin	76,6 %	61,4 %	61,4 %

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

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

I. FINAL PROVISION

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

HAS ADOPTED THIS REGULATION:

Article 1

1. A provisional anti-dumping duty is hereby imposed on imports of aluminium radiators and elements or sections of which such radiator is composed, whether or not such elements are assembled in blocks, excluding radiators and elements and sections thereof of the electrical type, currently falling within CN codes, ex 7615 10 10, ex 7615 10 90, ex 7616 99 10 and ex 7616 99 90 (TARIC codes 7615 10 10 10, 7615 10 90 10, 7616 99 10 91, 7616 99 90 01 and 7616 99 90 91) and originating in the People's Republic of China.

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

Company	Duty (%)	TARIC additional code
Zhejiang Flyhigh Metal Products Co., Ltd	12,6	B272
Metal Group Co. Ltd.	56,2	B273
Jinyun Shengda Industry Co., Ltd..	21,2	B274
Ningbo Ephriam Radiator Equipment Co., Ltd	21,2	B275
Ningbo Everfamily Radiator Co., Ltd	21,2	B276
Ningbo Ningshing Kinhil Industrial Co. Ltd.	21,2	B277
Ningbo Ninhshing Kinhil International Co., Ltd.	21,2	B278
Sira (Tianjin) Aluminium Products Co., Ltd	21,2	B279
Sira Group (Tianjin) Heating Radiators Co., Ltd.	21,2	B280
Yongkang Jinbiao Machine Electric Co., Ltd	21,2	B281
Yongkang Sanghe Radiator Co., Ltd.	21,2	B282
Zhejiang Aishuibao Piping Systems Co., Ltd	21,2	B283
Zhejiang Botai Tools Co., Ltd	21,2	B284
Zhejiang East Industry Co., Ltd	21,2	B285

[1] European Commission, Directorate-General for Trade, Directorate H, 1049 Brussels, Belgium.

Company	Duty (%)	TARIC additional code
Zhejiang Guangying Machinery Co., Ltd	21,2	B286
Zhejiang Kangfa Industry & Trading Co., Ltd.	21,2	B287
Zhejiang Liwang Industrial and Trading Co., Ltd.	21,2	B288
Zhejiang Ningshuai Industry Co., Ltd	21,2	B289
Zhejiang Rongrong Industrial Co., Ltd.	21,2	B290
Zhejiang Yuanda Machinery & Electrical Manufacturing Co., Ltd	21,2	B291
All other companies	61,4	B999

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

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

Article 2

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

2. Pursuant to Article 21(4) of Regulation (EC) No 1225/2009, 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 that of 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, 10 May 2012.

For the Commission
The President
José Manuel BARROSO

COMMISSION IMPLEMENTING REGULATION (EU) No 403/2012

of 10 May 2012

amending for the 170th time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with the Al Qaida network

THE EUROPEAN COMMISSION,

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

Having regard to Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with the Al-Qaida network, [1] and in particular Article 7(1)(a) and 7a(5) thereof,

Whereas:

(1) Annex I to Regulation (EC) No 881/2002 lists the persons, groups and entities covered by the freezing of funds and economic resources under that Regulation.

(2) On 30 April 2012 and 3 May 2012 the Sanctions Committee of the United Nations Security Council decided to remove three natural persons from its list of persons, groups and entities to whom the freezing of funds and economic resources should apply after considering the de-listing requests submitted by these persons and the Comprehensive Reports of the Ombudsperson established pursuant to United Nations Security Council Resolution 1904(2009).

(3) Annex I to Regulation (EC) No 881/2002 should therefore be updated accordingly.

HAS ADOPTED THIS REGULATION:

Article 1

Annex I to Regulation (EC) No 881/2002 is amended in accordance with the Annex to this Regulation.

Article 2

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

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

Done at Brussels, 10 May 2012.

For the Commission,
On behalf of the President,
Head of the Service for Foreign Policy Instruments

[1] OJ L 139, 29.5.2002, p. 9.

ANNEX

Annex I to Regulation (EC) No 881/2002 is amended as follows:

(1) The following entries under the heading 'Natural persons' are deleted:

'Sa'd Abdullah Hussein Al-Sharif (*alias* Sa'd al-Sharif). Date of birth: 11.2.1964. Place of birth: Al-Medinah, Saudi Arabia. Nationality: Saudi Arabian. Passport No: (a) B 960789, (b) G 649385 (issued on 8.9.2006, expiring on 17.7.2011). Other information: Brother-in-law and close associate of Usama Bin Laden; said to be head of Usama Bin Laden's financial organization. Date of designation referred to in Article 2a (4) (b): 25.1.2001.'

(2) 'Mounir Ben Habib Ben Al-Taher Jarraya (alias (a) Mounir Jarraya, (b) Yarraya). Address: (a) Via Mirasole 11, Bologna, Italy, (b) 8 Via Ariosto, Casalecchio di Reno (Bologna), Italy. Date of birth: (a) 25.10.1963, (b) 15.10.1963. Place of birth: (a) Sfax, Tunisia, (b) Tunisia. Nationality: Tunisian. Passport No: L065947 (Tunisian passport issued on 28.10.1995, expired on 27.10.2000). Date of designation referred to in Article 2a (4) (b): 25.6.2003.'

(3) 'Fethi Ben Al-Rabei Ben Absha Mnasri (*alias* (a) Mnasri Fethi ben Rebai, (b) Mnasri Fethi ben al-Rabai, (c) Mnasri Fethi ben Rebaj, (d) Fethi Alic, (e) Amor, (f) Abu Omar, (g) Omar Tounsi, (h) Amar). Address: Birmingham, United Kingdom. Date of birth: (a) 6.3.1969, (b) 6.3.1963, (c) 3.6.1969. Place of birth: (a) Al-Sanadil Farm, Nefza, Governorate of Baja, Tunisia; (b) Tunisia; (c) Algeria. Nationality: Tunisian. Passport No: L497470 (Tunisian passport issued on 3.6.1997, expired on 2.6.2002). Other information: Mother's name is Fatima Balayish. Date of designation referred to in Article 2a(4)(b): 25.6.2003.'

COMMISSION IMPLEMENTING REGULATION (EU) No 404/2012

of 10 May 2012

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

THE EUROPEAN COMMISSION,

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

Having regard to Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) [1],

Having regard to Commission Implementing Regulation (EU) No 543/2011 of 7 June 2011 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 in respect of the fruit and vegetables and processed fruit and vegetables sectors [2], and in particular Article 136(1) thereof,

Whereas:

(1) Implementing Regulation (EU) No 543/2011 lays down, pursuant to the outcome of the Uruguay Round multilateral trade negotiations, the criteria whereby the Commission fixes the standard values for imports from third countries, in respect of the products and periods stipulated in Annex XVI, Part A thereto.

(2) The standard import value is calculated each working day, in accordance with Article 136(1) of Implementing Regulation (EU) No 543/2011, taking into account variable daily data. Therefore this Regulation should enter into force on the day of its publication in the *Official Journal of the European Union*,

HAS ADOPTED THIS REGULATION:

Article 1

The standard import values referred to in Article 136 of Implementing Regulation (EU) No 543/2011 are fixed in the Annex to this Regulation.

Article 2

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

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

Done at Brussels, 10 May 2012.

For the Commission,
On behalf of the President,
José Manuel SILVA RODRÍGUEZ
Director-General for Agriculture and Rural Development

[1] OJ L 299, 16.11.2007, p. 1.
[2] OJ L 157, 15.6.2011, p. 1.

ANNEX

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

(EUR/100 kg)

CN code	Third country code (1)	Standard import value
0702 00 00	AL	143,3
	MA	74,0
	TN	124,7
	TR	116,2
	US	39,7
	ZZ	99,6
0707 00 05	JO	200,0
	TR	123,3
	ZZ	161,7
0709 93 10	JO	225,1
	TR	119,8
	ZZ	172,5
0805 10 20	EG	46,0
	IL	60,9
	MA	41,9
	TR	44,3
	ZZ	48,3
0805 50 10	TR	81,6
	ZZ	81,6
0808 10 80	AR	111,2
	BR	88,9
	CL	119,9
	CN	97,1
	MA	85,1
	MK	29,3
	NZ	132,7
	US	132,6
	UY	85,3
	ZA	91,1
	ZZ	97,3

(1) Nomenclature of countries laid down by Commission Regulation (EC) No 1833/2006 (OJ L 354, 14.12.2006, p. 19). Code 'ZZ' stands for 'of other origin'.

DIRECTIVES

COMMISSION DIRECTIVE 2012/16/EU

of 10 May 2012

amending Directive 98/8/EC of the European Parliament and of the Council to include hydrochloric acid as an active substance in Annex I thereto

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Directive 98/8/EC of the European Parliament and of the Council of 16 February 1998 concerning the placing of biocidal products on the market [1], and in particular the second subparagraph of Article 16(2) thereof,

Whereas:

(1) Commission Regulation (EC) No 1451/2007 of 4 December 2007 on the second phase of the 10-year work programme referred to in Article 16(2) of Directive 98/8/EC of the European Parliament and of the Council concerning the placing of biocidal products on the market [2] establishes a list of active substances to be assessed, with a view to their possible inclusion in Annex I, IA or IB to Directive 98/8/EC. That list includes hydrochloric acid.

(2) Pursuant to Regulation (EC) No 1451/2007, hydrochloric acid has been evaluated in accordance with Article 11(2) of Directive 98/8/EC for use in product-type 2, private area and public health area disinfectants and other biocidal products, as defined in Annex V to that Directive.

(3) Latvia was designated as rapporteur Member State and submitted the competent authority report, together with a recommendation, to the Commission on 16 October 2009 in accordance with Article 14(4) and (6) of Regulation (EC) No 1451/2007.

(4) The competent authority report was reviewed by the Member States and the Commission. In accordance with Article 15(4) of Regulation (EC) No 1451/2007, the findings of the review were incorporated, within the Standing Committee on Biocidal Products on 9 December 2011, in an assessment report.

(5) It appears from the evaluations that biocidal products used as private area and public health area disinfectants and other biocidal products, in accordance with the said product-type 2, and containing hydrochloric acid may be expected to satisfy the requirements laid down in Article 5 of Directive 98/8/EC. It is therefore appropriate to include hydrochloric acid in Annex I to that Directive.

(6) Not all potential uses have been evaluated at Union level. It is therefore appropriate that Member States assess those uses or exposure scenarios and those risks to human populations and to environmental compartments that have not been representatively addressed in the Union level risk assessment and, when granting product authorisations, ensure that appropriate measures are taken or specific conditions imposed in order to reduce the identified risks to acceptable levels.

(7) In view of the corrosivity of the substance as well as the possible measures identified to mitigate the related risk, it is appropriate to require that exposure during non-professional use is minimised through the design of the packaging, unless it can be demonstrated in the application for product authorisation that risks for human health can be reduced to acceptable levels by other means.

(8) The provisions of this Directive should be applied at the same time in all Member States in order to ensure equal treatment on the Union market of biocidal products containing the active substance hydrochloric acid and also to facilitate the proper operation of the biocidal products market in general.

(9) A reasonable period should be allowed to elapse before an active substance is included in Annex I to Directive 98/8/EC, in order to permit Member States and interested parties to prepare themselves to meet the new requirements entailed and to ensure that applicants who have prepared dossiers can benefit fully from the 10-year period of data protection, which, in accordance with Article 12(1)(c)(ii) of Directive 98/8/EC, starts from the date of inclusion.

(10) After inclusion, Member States should be allowed a reasonable period to implement Article 16(3) of Directive 98/8/EC.

(11) Directive 98/8/EC should therefore be amended accordingly.

[1] OJ L 123, 24.4.1998, p. 1.
[2] OJ L 325, 11.12.2007, p. 3.

(12) The measures provided for in this Directive are in accordance with the opinion of the Standing Committee on Biocidal Products,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Annex I to Directive 98/8/EC is amended in accordance with the Annex to this Directive.

Article 2

1. Member States shall adopt and publish, by 30 April 2013 at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive.

They shall apply those provisions from 1 May 2014.

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

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

Article 3

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

Article 4

This Directive is addressed to the Member States.

Done at Brussels, 10 May 2012.

For the Commission
The President
José Manuel BARROSO

ANNEX

In Annex I to Directive 98/8/EC, the following entry is added:

No	Common name	IUPAC name Identification numbers	Minimum purity of the active substance in the biocidal product as placed on the market	Date of inclusion	Deadline for compliance with Article 16(3) (except for products containing more than one active substance, for which the deadline to comply with Article 16(3) shall be the one set out in the last of the inclusion decisions relating to its active substances)	Expiry date of inclusion	Product type	Specific provisions (*)
'56	Hydrochloric acid	Hydrochloric acid CAS No: not applicable EC No: 231-595-7	999 g/kg	1 May 2014	30 April 2016	30 April 2024	2	When assessing the application for authorisation of a product in accordance with Article 5 and Annex VI, Member States shall assess, where relevant for the particular product, those uses or exposure scenarios and those risks to human populations and to environmental compartments that have not been representatively addressed in the Union level risk assessment. Member States shall ensure that authorisations of products for non-professional use are subject to the packaging being designed to minimise user exposure, unless it can be demonstrated in the application for product authorisation that risks for human health can be reduced to acceptable levels by other means.'

(*) For the implementation of the common principles of Annex VI, the content and conclusions of assessment reports are available on the Commission website: http://ec.europa.eu/comm/environment/biocides/index.htm

DECISIONS

COMMISSION IMPLEMENTING DECISION

of 8 May 2012

amending Decision 2008/855/EC as regards animal health control measures relating to classical swine fever in Germany

(notified under document C(2012) 2992)

(Text with EEA relevance)

(2012/250/EU)

THE EUROPEAN COMMISSION,

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

Having regard to Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market [1], and in particular Article 9(4) thereof,

Having regard to Council Directive 90/425/EEC of 26 June 1990 concerning veterinary and zootechnical checks applicable in intra-Community trade in certain live animals and products with a view to the completion of the internal market [2], and in particular Article 10(4) thereof,

Whereas:

(1) Commission Decision 2008/855/EC of 3 November 2008 concerning animal health control measures relating to classical swine fever in certain Member States [3] lays down certain control measures in relation to classical swine fever in the Member States or regions thereof listed in the Annex thereto. That list includes parts of the territory of the federal States Rhineland-Palatinate and North Rhine-Westfalia in Germany.

(2) Germany has informed the Commission about recent developments with regard to classical swine fever in feral pigs in the regions of the federal States Rhineland-Palatinate and North Rhine-Westfalia listed in the Annex to Decision 2008/855/EC.

(3) That information indicates that classical swine fever in feral pigs has been eradicated in the federal States Rhineland-Palatinate and North Rhine-Westfalia. Accordingly, the measures provided for in Decision 2008/855/EC should no longer apply to those regions and the entry for Germany in the list set out in Part I of the Annex thereto should be deleted.

(4) Decision 2008/855/EC should therefore be amended accordingly.

(5) 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

In the Annex to Decision 2008/855/EC, point 1 of Part I is deleted.

Article 2

This Decision is addressed to the Member States.

Done at Brussels, 8 May 2012.

For the Commission
John DALLI
Member of the Commission

[1] OJ L 395, 30.12.1989, p. 13.
[2] OJ L 224, 18.8.1990, p. 29.
[3] OJ L 302, 13.11.2008, p. 19.

III

(Other acts)

EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY DECISION

No 35/10/COL

of 3 February 2010

amending, for the 80th time, the procedural and substantive rules in the field of State aid by introducing a new chapter on the application of State aid rules to public service broadcasting

THE EFTA SURVEILLANCE AUTHORITY [1],

HAVING REGARD to the Agreement on the European Economic Area [2], in particular to Articles 61 to 63 and Protocol 26 thereof,

HAVING REGARD to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice [3], in particular to Article 24 and Article 5(2)(b) thereof,

WHEREAS:

Under Article 24 of the Surveillance and Court Agreement, the Authority shall give effect to the provisions of the EEA Agreement concerning State aid,

Under Article 5(2)(b) of the Surveillance and Court Agreement, the Authority shall issue notices or guidelines on matters dealt with in the EEA Agreement, if that Agreement or the Surveillance and Court Agreement expressly so provides or if the Authority considers it necessary,

The Procedural and Substantive Rules in the Field of State Aid were adopted on 19 January 1994 by the Authority [4],

On 27 October 2009, the European Commission (hereinafter referred to as the Commission) published a Communication from the Commission on the application of State aid rules to public service broadcasting [5],

The Commission's Communication is also of relevance for the European Economic Area,

Uniform application of the EEA State aid rules is to be ensured throughout the European Economic Area,

According to point II under the heading 'GENERAL' at the end of Annex XV to the EEA Agreement, the Authority, after consultation with the Commission, is to adopt acts corresponding to those adopted by the Commission,

The Authority consulted the Commission, and the EFTA States by letters on the subject dated 26 January 2010 (Events Nos 543973, 543974 and 543997),

HAS ADOPTED THIS DECISION:

Article 1

The State Aid Guidelines shall be amended by introducing a new chapter on the application of State aid rules to public service broadcasting. The new chapter is contained in the Annex to this Decision.

[1] Hereinafter referred to as the Authority.
[2] Hereinafter referred to as the EEA Agreement.
[3] Hereinafter referred to as the Surveillance and Court Agreement.
[4] Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the Authority on 19 January 1994, published in the *Official Journal of the European Union* (hereinafter referred to as OJ) L 231, 3.9.1994, p. 1 and EEA Supplement No 32, 3.9.1994, p. 1, as amended. Hereinafter referred to as the State Aid Guidelines. The updated version of the State Aid Guidelines is published on the Authority's website: http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines

[5] OJ C 257, 27.10.2009, p. 1.

Article 2

Only the English version is authentic.

Done at Brussels, 3 February 2010.

For the EFTA Surveillance Authority

Per SANDERUD
President

Kurt JÄGER
College Member

ANNEX

APPLICATION OF STATE AID RULES TO PUBLIC SERVICE BROADCASTING ([1])

1. **Introduction and scope**

(1) Over the last three decades, broadcasting has undergone important changes. The abolition of monopolies, the emergence of new players and rapid technological developments have fundamentally altered the competitive environment. Television broadcasting was traditionally a reserved activity. Since its inception, it has mostly been provided by public undertakings under a monopoly regime, mainly as a consequence of the limited availability of broadcasting frequencies and the high barriers to entry.

(2) In the 1970s, however, economic and technological developments made it increasingly possible for the EFTA States to allow other operators to broadcast. EFTA States have therefore decided to introduce competition in the market. This has led to a wider choice for consumers, as many additional channels and new services became available; it has also favoured the emergence and growth of strong European operators, the development of new technologies, and a larger degree of pluralism in the sector, which means more than a simple availability of additional channels and services. Whilst opening the market to competition, EFTA States considered that public service broadcasting ought to be maintained, as a way to ensure the coverage of a number of areas and the satisfaction of needs and public policy objectives that would otherwise not necessarily be fulfilled to the optimal extent.

(3) At the same time, the increased competition, together with the presence of State-funded operators, has also led to growing concerns for a level playing field, which have been brought to the Authority's attention by private operators. The complaints allege infringements of Articles 59 and 61 of the EEA Agreement in relation to public funding of public service broadcasters.

(4) The previous Chapter on the application of State aid rules to public service broadcasting of the State Aid Guidelines ([2]) has first set out the framework governing State funding of public service broadcasting. It has served as a good basis for the Authority to handle cases in the field of financing of public service broadcasters.

(5) In the meantime, technological changes have fundamentally altered the broadcasting and audiovisual markets. There has been a multiplication of distribution platforms and technologies, such as digital television, IPTV, mobile TV and video on demand. This has led to an increase in competition with new players, such as network operators and internet companies, entering the market. Technological developments have also allowed the emergence of new media services such as online information services and non-linear or on-demand services. The provision of audiovisual services is converging, with consumers being increasingly able to obtain multiple services on a single platform or device or to obtain any given service on multiple platforms or devices. The increasing variety of options for consumers to access media content has led to the multiplication of audiovisual services offered and the fragmentation of audiences. New technologies have enabled improved consumer participation. The traditional passive consumption model has been gradually turning into active participation and control over content by consumers. In order to keep up with the new challenges, both public and private broadcasters have been diversifying their activities, moving to new distribution platforms and expanding the range of their services. Most recently, this diversification of the publicly funded activities of public service broadcasters (such as online content, special interest channels) prompted a number of complaints by other market players also including publishers.

(6) In the 2003 *Altmark* judgment ([3]), the Court of Justice of the European Union (hereinafter referred to as the Court of Justice) defined the conditions under which public service compensation does not constitute State aid. In 2005, the Authority adopted a new Chapter on State aid in the form of public service compensation ([4]) and included it into its State Aid Guidelines. Moreover, in 2006, the Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest ([5]) was incorporated into

([1]) This Chapter corresponds to the Communication from the Commission on the application of State aid rules to public service broadcasting (OJ C 257, 27.10.2009, p. 1).

([2]) Adopted by Decision No 90/04/COL of 23 April 2004 amending for the 46th time the procedural and substantive rules in the field of State aid by introducing a new Chapter 24C: The application of the State aid rules to public service broadcasting (OJ L 327, 13.12.2007, p. 21 and EEA Supplement No 59, 13.12.2007, p. 1).

([3]) Case C-280/2000 *Altmark Trans GmbH and Regierungspräsidium Magdeburg* v *Nahverkehrsgesellschaft Altmark GmbH* (*Altmark*) (2003) ECR I-7747.

([4]) OJ L 109, 26.4.2007, p. 44 and EEA Supplement No 20, 26.4.2007, p. 1, also available on the Authority's website http://www.eftasurv.int/?1=1&showLinkID=16997&1=1

([5]) OJ L 312, 29.11.2005, p. 67.

the EEA Agreement as Act referred to at point 1h of Annex XV to the EEA Agreement, as adapted by Protocol 1 thereto (hereinafter referred to as Decision 2005/842/EC) ([6]). The EFTA States are currently in the process of incorporation of Directive 2007/65/EC (Audiovisual Media Services Directive) ([7]), extending the scope of the EEA-wide audiovisual regulation to emerging media services.

(7) These changes in the market and in the legal environment have called for an update to the Chapter on the application of State aid rules to public service broadcasting. The 2005 State Aid Action Plan ([8]) announced that the European Commission (hereinafter referred to as the Commission) would 'revisit its Communication on the application of State aid rules to public service broadcasting. Notably with the development of new digital technologies and of internet-based services, new issues have arisen regarding the scope of public service activities'.

(8) In the course of 2008 and 2009, the Authority and the EFTA States took part in the Commission's public consultations on the review of the 2001 Communication on the application of State aid rules to public service broadcasting ([9]). The present Chapter consolidates the Commission's and the Authority's case practice in the field of State aid in a future-orientated manner based on the comments received in the public consultations. It clarifies the principles followed by the Authority in the application of Articles 61 and 59(2) of the EEA Agreement to the public funding of audiovisual services in the broadcasting sector ([10]), taking into account recent market and legal developments. The present Chapter is without prejudice to the application of the internal market rules and fundamental freedoms in the field of broadcasting.

2. **The role of public service broadcasting**

(9) Public service broadcasting, although having a clear economic relevance, is not comparable to a public service in any other economic sector. There is no other service that at the same time has access to such a wide sector of the population, provides it with so much information and content, and by doing so conveys and influences both individual and public opinion.

(10) Furthermore, broadcasting is generally perceived as a very reliable source of information and represents, for a not inconsiderable proportion of the population, the main source of information. It thus enriches public debate and ultimately can ensure that all citizens participate to a fair degree in public life. In this connection, safeguards for the independence of broadcasting are of key importance, in line with the general principle of freedom of expression as embodied in Article 10 of the European Convention on Human Rights, a general principle of law the respect of which is ensured by the Court of Justice ([11]).

(11) The role of the public service ([12]) in general is recognised by the EEA Agreement, in particular in Article 59(2), which reads as follows:

'Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Agreement, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties.'

(12) The importance of public service broadcasting for social, democratic and cultural life was reaffirmed in the Act referred to at point 33 of Annex XI to the EEA Agreement *(Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 25 January 1999 concerning public service broadcasting)* ([13]), as adapted by Protocol 1 thereto (hereinafter referred to as the Resolution concerning public service

([6]) Joint Committee Decision No 91/2006 (OJ L 289, 19.10.2006, p. 31 and EEA Supplement No 52, 19.10.2006, p. 24), entry into force on 8.7.2006.
([7]) Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ L 332, 18.12.2007, p. 27).
([8]) COM(2005) 107 final.
([9]) OJ C 320, 15.11.2001, p. 5. This Communication corresponds to the previous Chapter on the application of State aid rules to public service broadcasting adopted by the Authority on 23 April 2004, see footnote 2 above.
([10]) For the purpose of the present Chapter, the notion '*audiovisual service(s)*' refers to the linear and/or non-linear distribution of audio and/or audiovisual content and of other neighbouring services such as online text-based information services. This notion of '*audiovisual service(s)*' must be distinguished from the narrower concept of '*audiovisual media service(s)*', as defined in Article 1(a) of Directive 2007/65/EC (Audiovisual Media Services Directive).
([11]) Case C-260/89 *ERT* (1991) ECR I-2925.
([12]) For the purpose of the present Chapter, the term '*public service*' has to be intended as referring to the term '*service of general economic interest*' used in Article 59(2) of the EEA Agreement.
([13]) OJ C 30, 5.2.1999, p. 1.

broadcasting) ([14]). As underlined by the Resolution concerning public service broadcasting '*broad public access, without discrimination and on the basis of equal opportunities, to various channels and services is a necessary precondition for fulfilling the special obligation of public service broadcasting*'. Moreover, public service broadcasting needs to '*benefit from technological progress*', bring '*the public the benefits of the new audiovisual and information services and the new technologies*' and to undertake '*the development and diversification of activities in the digital age*'. Finally, '*public service broadcasting must be able to continue to provide a wide range of programming in accordance with its remit as defined by the Member States in order to address society as a whole; in this context it is legitimate for public service broadcasting to seek to reach wide audiences*'.

(13) The role of public service broadcasting in promoting cultural diversity was also recognised by the 2005 Unesco Convention on the Protection and Promotion of the Diversity of Cultural Expressions ([15]). The Convention states that each party may adopt '*measures aimed at protecting and promoting the diversity of cultural expressions within its territory*'. Such measures may include, among others, '*measures aimed at enhancing diversity of the media, including through public service broadcasting*' ([16]).

(14) These values of public broadcasting are equally important in the rapidly changing new media environment. This has also been highlighted in the recommendations of the Council of Europe concerning media pluralism and diversity of media content ([17]), and the remit of public service media in the information society ([18]). The latter recommendation calls upon the members of the Council of Europe to '*guarantee public service media (…) in a transparent and accountable manner*' and to '*enable public service media to respond fully and effectively to the challenges of the information society, respecting the public/private dual structure of the European electronic media landscape and paying attention to market and competition questions*'.

(15) At the same time and notwithstanding the above, it must be noted that commercial broadcasters, of whom a number are subject to public service requirements, also play a significant role in achieving the objectives of the Resolution concerning public service broadcasting to the extent that they contribute to pluralism, enrich cultural and political debate and widen the choice of programmes. Moreover, newspaper publishers and other print media are also important guarantors of an objectively informed public and of democracy. Given that these operators are now competing with broadcasters on the internet, all these commercial media providers are concerned by the potential negative effects that State aid to public service broadcasters could have on the development of new business models. As recalled by the Directive 2007/65/EC (Audiovisual Media Services Directive), '*the coexistence of private and public audiovisual media service providers is a feature which distinguishes the European audiovisual media market*.' Indeed, it is in the common interest to maintain a plurality of balanced public and private media offer also in the current dynamic media environment.

3. **The legal context**

(16) The application of State aid rules to public service broadcasting has to take into account a wide number of different elements. The State aid assessment is based on Article 61 of the EEA Agreement on State aid and Article 59(2) of the EEA Agreement on the application of the rules of the EEA Agreement and the competition rules, in particular, to services of general economic interest. Protocol 3 to the Agreement on the Establishment of a Surveillance Authority and of a Court of Justice (hereinafter referred to as Protocol 3) established the rules of procedure in State aid cases.

(17) The EEA Agreement does not contain a provision similar to Article 167 of the Treaty on the Functioning of the European Union (hereinafter referred to as TFEU) (ex Article 151 of the EC Treaty) concerning culture or a '*cultural exemption*' for aid to promote culture similar to that contained in Article 107(3)(d) TFEU (ex Article 87(3)(d) of the EC Treaty). However, this does not mean that an exemption for such measures is excluded. As accepted by the Authority in previous cases, such support measures might be approved on cultural grounds on the basis of Article 61(3)(c) of the EEA Agreement ([19]).

([14]) The Resolution concerning public service broadcasting was incorporated to the EEA Agreement as an act which the Contracting Parties shall take note of by Decision No 118/1999 (OJ L 325, 21.12.2000, p. 33 and EEA Supplement No 60, 21.12.2000, p. 423 (Icelandic) and p. 424 (Norwegian)), entry into force on 1.10.1999.

([15]) Unesco Convention on the Protection and Promotion of the Diversity of Cultural Expressions was signed in Paris on 20.10.2005. It was then ratified by Norway and accepted by Iceland.

([16]) Article 6(1) and 6(2)(h) of the Unesco Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

([17]) Recommendation CM/Rec(2007)2 of the Committee of the Ministers to Member States on media pluralism and diversity of media content, adopted on 31.1.2007 at the 985th meeting of the Ministers' Deputies.

([18]) Recommendation CM/Rec(2007)3 of the Committee of Ministers to Member States on the remit of public service media in the information society, adopted on 31.1.2007 at the 985th meeting of the Ministers' Deputies.

([19]) For instance, EFTA Surveillance Authority Decision No 180/09/COL of 31 March 2009 on the aid schemes for audiovisual productions and development of screenplays and educational measures (OJ C 236, 1.10.2009, p. 5 and EEA Supplement No 51, 1.10.2009, p. 17). See also the Chapter on State aid to cinematographic and other audiovisual works of the Authority's State Aid Guidelines, adopted by the EFTA Surveillance Authority Decision No 788/08/COL of 17 December 2008 amending, for the 67th time, the procedural and substantive rules in the field of State aid by amending the existing chapters on reference and discount rates and on State aid granted in the form of guarantees and by introducing a new chapter on recovery of unlawful and incompatible State aid, on State aid to cinematographic and other audiovisual works and State aid for railway undertakings, not published yet, available on the Authority's website: http://www.eftasurv.int/?1=1&showLinkID=15643&1=1

(18) The regulatory framework concerning '*audiovisual media services*' is coordinated at European level by the Directive 2007/65/EC (Audiovisual Media Services Directive). The financial transparency requirements concerning public undertakings are regulated by the Act referred to at point 1a of Annex XV to the EEA Agreement (*Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings*) ([20]), as adapted by Protocol 1 thereto (hereinafter referred to as Directive 2006/111/EC (Transparency Directive)) ([21]).

(19) These rules are subject to interpretation by the EFTA Court within the 'EFTA pillar' and by the Court of Justice within the 'European Union pillar'. The Authority has also adopted several sets of guidelines on the application of the State aid rules which correspond to similar guidelines issued by the Commission. In particular, in 2005, the Authority adopted the Chapter on State aid in the form of public service compensation and in 2006, Decision 2005/842/EC was incorporated into the EEA Agreement, clarifying the requirements of Article 59(2) of the EEA Agreement. The latter is also applicable in the field of broadcasting, to the extent that the conditions provided in Article 2(1)(a) of Decision 2005/842/EC are met ([22]).

4. Applicability of Article 61(1) of the EEA Agreement

4.1. *The State aid character of State financing of public service broadcasters*

(20) In line with Article 61(1) of the EEA Agreement, the concept of State aid includes the following conditions: (a) there must be an intervention by the State or by means of State resources; (b) the intervention must be liable to affect trade between the Contracting Parties; (c) it must confer an advantage of the beneficiary; (d) it must distort or threaten to distort competition ([23]). The existence of State aid has to be assessed on an objective basis, taking into account the jurisprudence of the Court of Justice and the EFTA Court.

(21) The effect of State intervention, not its purpose, is the decisive element in any assessment of its State aid content under Article 61(1) of the EEA Agreement. Public service broadcasters are normally financed out of the State budget or through a levy on broadcasting equipment holders. In certain specific circumstances, the State makes capital injections or debt cancellations in favour of public service broadcasters. These financial measures are normally attributable to the public authorities and involve the transfer of State resources ([24]).

(22) State financing of public service broadcasters can also be generally considered to affect trade between the Contracting Parties. As the Court of Justice has observed, '*when aid granted by the State or through State resources strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade the latter must be regarded as affected by that aid*' ([25]). This is clearly the position as regards the acquisition and sale of programme rights, which often takes place at an international level. Advertising, too, in the case of public service broadcasters who are allowed to sell advertising space, has a cross-border effect, especially for homogeneous linguistic areas across national boundaries. Moreover, the ownership structure of commercial broadcasters may extend to more than one EEA State. Furthermore, services provided on the internet normally have a global reach.

(23) Regarding the existence of an advantage, the Court of Justice clarified in the *Altmark* case that public service compensation does not constitute State aid provided that four cumulative conditions are met. First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit. Finally, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the bidder capable of providing those services at the least cost to the community, the level of compensation must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations.

([20]) OJ L 318, 17.11.2006, p. 17.
([21]) Joint Committee Decision No 55/2007 (OJ L 266, 11.10.2007, p. 15 and EEA Supplement No 48, 11.10.2007, p. 12), entry into force on 9.6.2007.
([22]) According to Article 2(1)(a) of Decision 2005/842/EC, it applies to State aid in the form of '*public service compensation granted to undertakings with an average annual turnover before tax, all activities included, of less than EUR 100 million during the two financial years preceding that in which the service of general economic interest was assigned, which receive annual compensation for the service in question of less than EUR 30 million*'.
([23]) Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 *TV2/Danmark* v *Commission (TV2)* (2008) ECR II-2935, paragraph 156.
([24]) Regarding the qualification of licence fee funding as State resources, see *TV2* judgment, cited above, paragraphs 158–159.
([25]) Cases C-730/79 *Philip Morris Holland* v *Commission* (1980) ECR 2671, paragraph 11; C-303/88 *Italy* v *Commission* (1991) ECR I-1433, paragraph 27; C-156/98 *Germany* v *Commission* (2000) ECR I-6857, paragraph 33.

(24) To the extent that the funding fails to satisfy the above conditions, it would be considered as selectively favouring only certain broadcasters and thereby distorting or threatening to distort competition.

4.2. *Nature of the aid: existing aid as opposed to new aid*

(25) The funding schemes currently in place in most of the EFTA States were introduced a long time ago. As a first step, therefore, the Authority must determine whether these schemes may be regarded as '*existing aid*' within the meaning of Article 1(1) of Part I of Protocol 3. In line with this provision, '*the EFTA Surveillance Authority shall, in cooperation with the EFTA States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the EEA Agreement*'.

(26) Pursuant to Article 1(b)(i) of Part II of Protocol 3, existing aid includes '*… all aid which existed prior to the entry into force of the EEA Agreement in the respective EFTA States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the EEA Agreement*'.

(27) Pursuant to Article 1(b)(v) of Part II of Protocol 3, existing aid also includes '*aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the European Economic Area and without having been altered by the EFTA State*'.

(28) In accordance with the case-law of the Court of Justice ([26]), the Authority must verify whether or not the legal framework under which the aid is granted has changed since its introduction. The Authority believes that a case-by-case approach is the most appropriate ([27]), taking into account all the elements related to the broadcasting system of a given EFTA State.

(29) According to the case-law in *Gibraltar* ([28]), not every alteration to existing aid should be regarded as changing the existing aid into new aid. According to the General Court, '*it is only where the alteration affects the actual substance of the original scheme that the latter is transformed into a new aid scheme. There can be no question of such a substantive alteration where the new element is clearly severable from the initial scheme.*'

(30) In light of the above considerations, in its decision-making practice the Authority has generally examined: (a) whether the original financing regime for public service broadcasters is existing aid in line with the rules indicated in paragraphs 26 and 27 above; (b) whether subsequent modifications affect the actual substance of the original measure (i.e. the nature of the advantage or the source of financing, the purpose of the aid, the beneficiaries or the scope of activities of the beneficiaries) or whether these modifications are rather of a purely formal or administrative nature; and (c) in case subsequent modifications are substantial, whether they are severable from the original measure, in which case they can be assessed separately, or whether they are not severable from the original measure so that the original measure is as a whole transformed into a new aid.

5. Assessment of the compatibility of State aid under Article 61(3) of the EEA Agreement

(31) Although compensation for public service broadcasting is typically assessed under Article 59(2) of the EEA Agreement, the derogations listed in Article 61(3) of the EEA Agreement may in principle also apply in the field of broadcasting, provided that the relevant conditions are met.

(32) The EEA Agreement does not contain a provision corresponding to Article 167(4) TFEU, which obliges the Commission to take cultural aspects into account in its actions under other provisions of the Treaty on the Functioning of the European Union, in particular in order to respect and to promote the diversity of its cultures. Nor does it contain a cultural exemption similar to Article 107(3)(d) TFEU, which allows the Commission to regard aid to promote culture as compatible with the common market where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest. This does not, however, mean that the application of the State aid rules does not leave any room for the consideration of cultural

([26]) C-44/93 *Namur-Les Assurances du Crédit SA* v *Office National du Ducroire and the Belgian State* (1994) ECR I-3829.

([27]) See, for example, the decisions of the Commission in the following cases: E 8/06, *State funding for Flemish public service broadcaster VRT* (OJ C 143, 10.6.2008, p. 7); E 4/05, *State aid financing of RTE and TNAG (TG4)* (OJ C 121, 17.5.2008, p. 5); E 9/05, *Licence fee payments to RAI* (OJ C 235, 23.9.2005, p. 3); E 10/2005, *Licence fee payments to France 2 and 3* (OJ C 240, 30.9.2005, p. 20); E 8/05, *Spanish national public service broadcaster RTVE* (OJ C 239, 4.10.2006, p. 17); C 2/04, *Ad hoc financing of Dutch public broadcasters* (OJ L 49, 22.2.2008, p. 1); C 60/99, *Commission Decision 2004/838/EC of 10 December 2003 on State aid implemented by France for France 2 and France 3* (OJ L 361, 8.12.2004, p. 21); C 62/99, *Commission Decision 2004/339/EC of 15 October 2003 on the measures implemented by Italy for RAI SpA* (OJ L 119, 23.4.2004, p. 1); NN 88/98, *Financing of a 24-hour advertising-free news channel with licence fee by the BBC* (OJ C 78, 18.3.2000, p. 6) and NN 70/98, *State aid to public broadcasting channels Kinderkanal and Phoenix* (OJ C 238, 21.8.1999, p. 3).

([28]) Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission (Gibraltar)* (2002) ECR II-2309.

aspects. The EEA Agreement recognises the need for strengthening cultural cooperation in Article 13 of Protocol 31. In this respect, it should be recalled that the Authority established in a decision-making practice regarding State aid for film production and film related activities that measures in favour of cinematographic and audiovisual production might be approved on cultural grounds under the application of Article 61(3)(c) of the EEA Agreement, provided that this approach takes the criteria developed by the Commission sufficiently into account and that the approach does not deviate from the Commission's practice prior to the adoption of Article 107(3)(d) TFEU ([29]).

(33) It is for the Authority to decide on the actual application of any exemption provision in Article 61(3) of the EEA Agreement and how cultural aspects should be taken into account. It should be recalled that the provisions granting exemption from the prohibition of State aid have to be applied strictly. Accordingly, the Authority considers that the cultural derogation may be applied in those cases where the cultural product is clearly identified or identifiable ([30]). Moreover, the Authority takes the view that the notion of culture must be applied to the content and nature of the product in question, and not to the medium or its distribution per se ([31]). Furthermore, the educational and democratic needs of an EFTA State have to be regarded as distinct from the promotion of culture ([32]).

(34) State aid to public service broadcasters usually does not differentiate between cultural, democratic and educational needs of society. Unless a funding measure is specifically aimed at promoting cultural objectives, such aid cannot in principle be approved under Article 61(3)(c) of the EEA Agreement as cultural aid. State aid to public service broadcasters is generally provided in the form of compensation for the fulfilment of the public service mandate and is assessed under Article 59(2) of the EEA Agreement, on the basis of the criteria set out in the present Chapter.

6. **Assessment of the compatibility of State aid under Article 59(2) of the EEA Agreement**

(35) In accordance with Article 59(2) of the EEA Agreement, '*[u]ndertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Agreement, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties*'.

(36) The Court of Justice has consistently held that Article 106 TFEU (ex Article 86 of the EC Treaty), corresponding to Article 59 of the EEA Agreement, provides for a derogation and must therefore be interpreted restrictively. The Court of Justice has clarified that in order for a measure to benefit from such a derogation, it is necessary that all the following conditions be fulfilled:

(i) the service in question must be a service of general economic interest and clearly defined as such by the Member State (definition) ([33]);

(ii) the undertaking in question must be explicitly entrusted by the Member State with the provision of that service (entrustment) ([34]);

(iii) the application of the competition rules of the Treaty (in this case, the ban on State aid) must obstruct the performance of the particular tasks assigned to the undertaking and the exemption from such rules must not affect the development of trade to an extent that would be contrary to the interests of the Community (proportionality test) ([35]).

(37) In the specific case of public broadcasting the above approach has to be adapted in the light of the Resolution concerning public service broadcasting, which refers to the '*public service remit as conferred, defined and organised by each Member State*' (definition and entrustment) and provides for a derogation from the Treaty rules in the case of the

([29]) See, for instance, Decision No 32/02/COL of 20 February 2002, Decision No 169/02/COL of 18 September 2002, Decision No 186/03 of 29 October 2003, Decision No 179/05/COL of 15 July 2005 and Decision No 342/06/COL of 14 November 2006. See also the Chapter on State aid to cinematographic and other audiovisual works of the Authority's State Aid Guidelines.
([30]) For example, Commission Decisions NN 88/98, *BBC 24-hours* (OJ C 78, 18.3.2000, p. 6) and NN 70/98, *Kinderkanal and Phoenix*, cited above.
([31]) For example, Commission Decision N 458/2004, *State aid to Espacio Editorial Andaluza Holding sl.* (OJ C 131, 28.5.2005, p. 12).
([32]) NN 70/98, *Kinderkanal and Phoenix*, cited above.
([33]) Case 172/80 *Zuechner* (1981) ECR 2021.
([34]) Case C-242/95 *GT-Link* (1997) ECR 4449.
([35]) Case C-159/94 *EDF and GDF* (1997) ECR I-5815.

funding of public service broadcasting *'in so far as such funding is granted to broadcasting organisations for the fulfilment of the public service remit (…) and (…) does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account'* (proportionality).

(38) It is for the Authority to assess, on the basis of evidence provided by the EFTA States, whether these criteria are satisfied. As regards the definition of the public service remit, the role of the Authority is to check for manifest errors (see section 6.1). The Authority further verifies whether there is an explicit entrustment and effective supervision of the fulfilment of the public service obligations (see section 6.2).

(39) In carrying out the proportionality test, the Authority considers whether or not any distortion of competition arising from the public service compensation can be justified in terms of the need to perform the public service and to provide for its funding. The Authority assesses, in particular on the basis of the evidence that EFTA States are bound to provide, whether there are sufficient guarantees to avoid disproportionate effects of public funding, overcompensation and cross-subsidisation, and to ensure that public service broadcasters respect market conditions in their commercial activities (see section 6.3 and following).

(40) The analysis of the compliance with the State aid requirements must be based on the specific characteristics of each national system. The Authority is aware of the differences in the national broadcasting systems and in the other characteristics of the EFTA States' media markets. Therefore, the assessment of the compatibility of State aid to public service broadcasters under Article 59(2) is made on a case-by-case basis, according to the Commission's and the Authority's practice ([36]), in line with the basic principles set out in the following sections.

(41) The Authority will also take into account the difficulty some EFTA States may have to collect the necessary funds, if costs per inhabitant of the public service are, *ceteris paribus,* higher ([37]) while equally considering potential concerns of other media in these EFTA States.

(42) As the Commission's and the Authority's practice demonstrates, a measure which does not fulfil all of the *Altmark* criteria, will still have to be analysed according to Article 106(2) TFEU, respectively Article 59(2) of the EEA Agreement ([38]).

6.1. *Definition of public service remit*

(43) In order to meet the condition mentioned in point 36(i) above for application of Article 59(2) of the EEA Agreement, it is necessary to establish an official definition of the public service mandate. Only then can the Authority assess with sufficient legal certainty whether the derogation under Article 59(2) of the EEA Agreement is applicable.

(44) Definition of the public service mandate falls within the competence of the EFTA States, which can decide at national, regional or local level, in accordance with their national legal order. Generally speaking, in exercising that competence, account must be taken of the concept of *'services of general economic interest'* (hereinafter referred to as SGEI).

(45) The definition of the public service mandate by the EFTA States should be as precise as possible. It should leave no doubt as to whether a certain activity performed by the entrusted operator is intended by the EFTA State to be included in the public service remit or not. Without a clear and precise definition of the obligations imposed upon the public service broadcaster, the Authority would not be able to carry out its tasks under Article 59(2) of the EEA Agreement and, therefore, could not grant any exemption under that provision.

(46) Clear identification of the activities covered by the public service remit is also important for non-public service operators, so that they can plan their activities. Moreover, the terms of the public service remit should be sufficiently precise, so that EFTA States' authorities can effectively monitor compliance, as described in the following section.

([36]) See, for example, the decisions of the Commission in the following cases: E 8/06, *State funding for Flemish public service broadcaster VRT* (OJ C 143, 10.6.2008, p. 7); E 4/05, *State aid financing of RTE and TNAG (TG4)* (OJ C 121, 17.5.2008, p. 5); E 3/05, *Aid to the German public service broadcasters* (OJ C 185, 8.8.2007, p. 1); E 9/05, *Licence fee payments to RAI* (OJ C 235, 23.9.2005, p. 3); E 10/05, *Licence fee payments to France 2 and 3* (OJ C 240, 30.9.2005, p. 20); E 8/05, *Spanish national public service broadcaster RTVE* (OJ C 239, 4.10.2006, p. 17); C 2/04, *Ad hoc financing of Dutch public service broadcasters* (OJ L 49, 22.2.2008, p. 1). See also EFTA Surveillance Authority Decision No 306/09/COL of 8 July 2009 on the Norwegian Broadcasting Corporation, available on the Authority's website http://www.eftasurv.int/?1=1&showLinkID=16906&1=1

([37]) Similar difficulties may also be encountered when public service broadcasting is addressed to linguistic minorities or to local needs.

([38]) Commission Decision C 62/1999, RAI, paragraph 99 and C 85/2001, RTP, paragraph 158.

(47) At the same time, given the specific nature of the broadcasting sector, and the need to safeguard the editorial independence of the public service broadcasters, a qualitative definition entrusting a given broadcaster with the obligation to provide a wide range of programming and a balanced and varied broadcasting offer is generally considered legitimate under Article 59(2) of the EEA Agreement ([39]). Such a definition is generally considered consistent with the objective of fulfilling the democratic, social and cultural needs of a particular society and guaranteeing pluralism, including cultural and linguistic diversity. As expressed by the General Court, the legitimacy of such a widely defined public service remit rests upon the qualitative requirements for the services offered by a public service broadcaster ([40]). The definition of the public service remit may also reflect the development and diversification of activities in the digital age and include audiovisual services on all distribution platforms.

(48) As regards the definition of the public service in the broadcasting sector, the role of the Authority is limited to checking for manifest error. It is not for the Authority to decide which programmes are to be provided and financed as a service of general economic interest, nor to question the nature or the quality of a certain product. The definition of the public service remit would, however, be in manifest error if it included activities that could not reasonably be considered to meet the democratic, social and cultural needs of each society. That would normally be the position in the case of advertising, e-commerce, teleshopping, the use of premium rate numbers in prize games ([41]), sponsoring or merchandising, for example. Moreover, a manifest error could occur where State aid is used to finance activities which do not bring added value in terms of serving the social, democratic and cultural needs of society.

(49) In this context, it must be recalled that the public service remit describes the services offered to the public in the general interest. The question of the definition of the public service remit must not be confused with the question of the financing mechanism chosen to provide these services. Therefore, whilst public service broadcasters may perform commercial activities such as the sale of advertising space in order to obtain revenue, such activities cannot be viewed as part of the public service remit ([42]).

6.2. *Entrustment and supervision*

(50) In order to benefit from the exemption under Article 59(2) of the EEA Agreement, the public service remit should be entrusted to one or more undertakings by means of an official act (for example, by legislation, contract or binding terms of reference).

(51) The entrustment act(s) shall specify the precise nature of the public service obligations in line with section 6.1 above, and shall set out the conditions for providing the compensation, as well as the arrangements for avoiding and repaying any overcompensation.

(52) Whenever the scope of the public service remit is extended to cover new services, the definition and entrustment act(s) should be modified accordingly, within the limits of Article 59(2) of the EEA Agreement. In the interest of allowing public service broadcasters to react swiftly to new technological developments, EFTA States may also foresee that the entrustment with a new service is provided following the assessment outlined in section 6.7 below, before the original entrustment act is formally consolidated.

(53) It is not sufficient, however, that the public service broadcaster be formally entrusted with the provision of a well-defined public service. It is also necessary that the public service be actually supplied as provided for in the formal agreement between the State and the entrusted undertaking. It is therefore desirable that an appropriate authority or appointed body monitors its application in a transparent and effective manner. The need for such an appropriate authority or body in charge of supervision is apparent in the case of quality standards imposed on the entrusted operator. It is not for the Authority to judge on the fulfilment of quality standards: it must be able to rely on appropriate supervision by the EFTA States of compliance by the broadcaster with its public service remit including the qualitative standards set out in that remit ([43]).

(54) It is within the competence of the EFTA State to choose the mechanism to ensure effective supervision of the fulfilment of the public service obligations, therefore enabling the Authority to carry out its tasks under Article 59(2) of the EEA Agreement. Such supervision would only seem effective if carried out by a body effectively independent

([39]) Case T-442/03 *SIC* v *Commission* (2008) ECR II-1161, paragraph 201 and *TV2* judgment, cited above, paragraphs 122–124.
([40]) These qualitative criteria are according to the General Court '*the justification for the existence of broadcasting SGEIs in the national audiovisual sector*'. There is '*no reason for a widely defined broadcasting SGEI which sacrifices compliance with those qualitative requirements in order to adopt the conduct of a commercial operator*', see *SIC* v *Commission*, cited above, paragraph 211.
([41]) Regarding the qualification of prize games, including the dialling of a premium rate number as teleshopping or advertising, under the Directive 2007/65/EC (Audiovisual Media Services Directive), see Case C-195/06 *Österreichischer Rundfunk (ORF)* (2007) ECR I-8817.
([42]) See *TV2* judgment, cited above, paragraphs 107–108.
([43]) See Case *SIC* v *Commission*, cited above, paragraph 212.

from the management of the public service broadcaster, which has the powers and the necessary capacity and resources to carry out supervision regularly, and which leads to the imposition of appropriate remedies in so far it is necessary to ensure respect of the public service obligations.

(55) In the absence of sufficient and reliable indications that the public service is actually supplied as mandated, the Authority would not be able to carry out its tasks under Article 59(2) of the EEA Agreement and, therefore, could not grant any exemption under that provision.

6.3. *Choice of funding of public service broadcasting*

(56) Public service duties may be either quantitative or qualitative or both. Whatever their form, they could justify compensation, as long as they entail supplementary costs that the broadcaster would normally not have incurred.

(57) Funding schemes can be divided into two broad categories: '*single-funding*' and '*dual-funding*'. The '*single-funding*' category comprises those systems in which public service broadcasting is financed only through public funds, in whatever form. '*Dual-funding*' systems comprise a wide range of schemes, where public service broadcasting is financed by different combinations of State funds and revenues from commercial or public service activities, such as the sale of advertising space or programmes and the offering of services against payment.

(58) As stated in the Resolution concerning public service broadcasting: '*[T]he provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting (…)*'. The Authority has therefore no objection in principle to the choice of a dual financing scheme rather than a single funding scheme.

(59) While EFTA States are free to choose the means of financing public service broadcasting, the Authority has to verify, under Article 59(2) of the EEA Agreement, that the State funding does not affect competition in the EEA in a disproportionate manner, as referred to in paragraph 37 above.

6.4. *Transparency requirements for the State aid assessment*

(60) The State aid assessment by the Authority requires a clear and precise definition of the public service remit and a clear and appropriate separation between public service activities and non-public service activities including a clear separation of accounts.

(61) Separation of accounts between public service activities and non-public service activities is normally already required at national level as it is essential to ensure transparency and accountability when using public funds. A separation of accounts provides a tool for examining alleged cross-subsidisation and for defending justified compensation payments for general economic interest tasks. Only on the basis of proper cost and revenue allocation can it be determined whether the public financing is actually limited to the net costs of the public service remit and thus acceptable under Article 59(2) of the EEA Agreement.

(62) Member States are required by Directive 2006/111/EC (Transparency Directive) to take transparency measures in the case of any undertaking granted special or exclusive rights or entrusted with the operation of a service of general economic interest and receiving public service compensation in any form whatsoever in relation to such service and which carries out other activities, that is to say, non-public service activities. These transparency requirements are: (a) the internal accounts corresponding to different activities, i.e. public service and non-public service activities must be separate; (b) all costs and revenues must be correctly assigned or allocated on the basis of consistently applied and objectively justifiable cost accounting principles; and (c) the cost-accounting principles according to which separate accounts are maintained must be clearly established ([44]).

(63) These general transparency requirements apply also to broadcasters, in so far as they are entrusted with the operation of a service of general economic interest, receive public compensation in relation to such service, and also carry out other, non-public service activities.

(64) In the broadcasting sector, separation of accounts poses no particular problem on the revenue side. For this reason, the Authority considers that, on the revenue side, broadcasting operators should give detailed account of the sources and amount of all income accruing from the performance of public and non-public service activities.

(65) On the cost side, all the expenses incurred in the operation of the public service may be taken into consideration. Where the undertaking carries out activities falling outside the scope of the public service, only the costs associated

([44]) Article 4 of Directive 2006/111/EC (Transparency Directive).

with the public service may be taken into consideration. The Authority recognises that, in the public broadcasting sector, separation of accounts may be more difficult on the cost side. This is because, in particular in the field of traditional broadcasting, EFTA States may consider the whole programming of a broadcaster covered by the public service remit, while at the same time allowing for its commercial exploitation. In other words, public service and non-public service activities may share the same inputs to a large extent and the costs may not always be severable in a proportionate manner.

(66) Costs specific to non-public service activities (e.g. the marketing cost of advertising) should always be clearly identified and separately accounted. In addition, input costs which are intended to serve the development of activities in the field of public and non-public services simultaneously should be allocated proportionately to public service and non-public service activities respectively, whenever it is possible in a meaningful way.

(67) In other cases, whenever the same resources are used to perform public service and non-public service tasks, the common input costs should be allocated on the basis of the difference in the firm's total costs with and without non-public service activities ([45]). In such cases, costs that are entirely attributable to public service activities, while benefiting also non-public service activities, need not be apportioned between the two and can be entirely allocated to the public service activity. This difference to the approach generally followed in other utilities sectors is explained by the specificities of the public broadcasting sector. In the field of public broadcasting, the net benefits of commercial activities related to the public service activities have to be taken into account for the purpose of calculating the net public service costs and therefore to reduce the public service compensation level. This reduces the risk of cross-subsidisation by means of accounting common costs to public service activities.

(68) The main example for the situation described in the preceding paragraph would be the cost of producing programmes in the framework of the public service mission of the broadcaster. These programmes serve both to fulfil the public service remit and to generate audience for selling advertising space. However, it is virtually impossible to quantify with a sufficient degree of precision how much of the program viewing fulfils the public service remit and how much generates advertising revenue. For this reason, the distribution of the cost of programming between the two activities risks being arbitrary and not meaningful.

(69) The Authority considers that financial transparency can be further enhanced by an adequate separation between public service and non-public service activities at the level of the organisation of the public service broadcaster. Functional or structural separation normally makes it easier to avoid cross-subsidisation of commercial activities from the outset and to ensure transfer pricing and the respect of the arm's length principle. Therefore, the Authority invites EFTA States to consider functional or structural separation of significant and severable commercial activities, as a form of best practice.

6.5. *Net cost principle and overcompensation*

(70) As a matter of principle, since overcompensation is not necessary for the operation of the service of general economic interest, it constitutes incompatible State aid that must be repaid to the State subject to the clarifications provided in the present section with regard to public service broadcasting.

(71) The Authority starts from the consideration that the State funding is normally necessary for the undertaking to carry out its public service tasks. However, in order to satisfy the proportionality test, it is as a general rule necessary that the amount of public compensation does not exceed the net costs of the public service mission, also taking into account other direct or indirect revenues derived from the public service mission. For this reason, the net benefit of all commercial activities related to the public service activity will be taken into account in determining the net public service costs.

(72) Undertakings receiving compensation for the performance of a public service task may, in general, enjoy a reasonable profit. This profit consists of a rate of return on own capital that takes account of the risk, or absence of risk, incurred by the undertaking. In the broadcasting sector, the public service mission is often carried out by broadcasters that are not profit oriented or that do not have to remunerate the capital employed

([45]) This implies reference to the hypothetical situation in which the non-public service activities were to be discontinued: the costs that would be so avoided represent the amount of common costs to be allocated to non-public service activities.

and do not perform any other activity than the provision of the public service. The Authority considers that in these situations, it is not reasonable to include a profit element in the amount of compensation for the fulfilment of the public service mission ([46]). However, in other cases, for example where specific public service obligations are entrusted to commercially run undertakings which need to remunerate the capital invested in them, a profit element which represents the fair remuneration of capital taking into account risk may be considered reasonable, if duly justified and provided that it is necessary for the fulfilment of the public service obligations.

(73) Public service broadcasters may retain yearly overcompensation above the net costs of the public service (as '*public service reserves*') to the extent that this is necessary for securing the financing of their public service obligations. In general, the Authority considers that an amount of up to 10 % of the annual budgeted expenses of the public service mission may be deemed necessary to withstand cost and revenue fluctuations. As a rule, overcompensation above this limit must be recovered without undue delay.

(74) By way of exception, public service broadcasters may be allowed to keep an amount in excess of 10 % of the annual budgeted expenses of their public service mission in duly justified cases. This is only acceptable provided that this overcompensation is specifically earmarked in advance of and in a binding way for the purpose of a non-recurring, major expense necessary for the fulfilment of the public service mission ([47]). The use of such clearly earmarked overcompensation should also be limited in time depending on its dedication.

(75) In order to allow the Authority to exercise its duties, EFTA States shall lay down the conditions under which the above overcompensation may be used by the public service broadcasters.

(76) The overcompensation mentioned above shall be used for the purpose of financing public service activities only. Cross-subsidisation of commercial activities is not justified and constitutes incompatible State aid.

6.6. *Financial control mechanisms*

(77) EFTA States shall provide for appropriate mechanisms to ensure that there is no overcompensation, subject to the provisions of paragraphs 72 to 76 above. They shall ensure regular and effective control of the use of public funding, to prevent overcompensation and cross-subsidisation, and to scrutinise the level and the use of '*public service reserves*'. It is within the competence of EFTA States to choose the most appropriate and effective control mechanisms in their national broadcasting systems, taking also into account the need to ensure coherence with the mechanisms in place for the supervision of the fulfilment of the public service remit.

(78) Such control mechanisms would only seem effective if carried out by an external body independent from the public service broadcaster at regular intervals, preferably on a yearly basis. EFTA States shall make sure that effective measures can be put in place to recover overcompensation going beyond the provisions of the previous section 6.5 and cross-subsidisation.

(79) The financial situation of the public service broadcasters should be subject to an in-depth review at the end of each financing period as provided for in the national broadcasting systems of the EFTA States, or in the absence thereof, a time period which normally should not exceed four years. Any '*public service reserves*' existing at the end of the financing period, or of an equivalent period as provided above, shall be taken into account for the calculation of the financial needs of the public service broadcaster for the next period. In case of '*public service reserves*' exceeding 10 % of the annual public service costs on a recurring basis, EFTA States shall review whether the level of funding is adjusted to the public service broadcasters' actual financial needs.

6.7. *Diversification of public broadcasting services*

(80) In recent years, audiovisual markets have undergone important changes, which have led to the ongoing development and diversification of the broadcasting offer. This has raised new questions concerning the application of the State aid rules to audiovisual services which go beyond broadcasting activities in the traditional sense.

(81) In this respect, the Authority considers that public service broadcasters should be able to use the opportunities offered by digitisation and the diversification of distribution platforms on a technology neutral basis, to the benefit

([46]) Of course, this provision does not preclude public service broadcasters from earning profits with their commercial activities outside the public service remit.

([47]) Such special reserves may be justified for major technological investments (such as digitisation) which are foreseen to occur at a certain point in time and are necessary for the fulfilment of the public service remit; or for major restructuring measures necessary to maintain the continuous operation of a public service broadcaster within a well-defined time period.

of society. In order to guarantee the fundamental role of public service broadcasters in the new digital environment, public service broadcasters may use State aid to provide audiovisual services over new distribution platforms, catering for the general public as well as for special interests, provided that they are addressing the same democratic, social and cultural needs of the society in question, and do not entail disproportionate effects on the market, which are not necessary for the fulfilment of the public service remit.

(82) In parallel with the rapid evolution of the broadcasting markets, the business models of broadcasters are also undergoing changes. In fulfilling their public service remit, broadcasters are increasingly turning to new sources of financing, such as online advertising or the provision of services against payment (so-called pay-services, like access to archives for a fee, special interest TV channels on a pay-per-view basis, access to mobile services for a lump sum payment, deferred access to TV programmes for a fee, paid online content downloads, etc.). The remuneration element in pay services can be related, for example, to the payment of network distribution fees or copyrights by broadcasters (for example if services over mobile platforms are provided against payment of a mobile distribution fee).

(83) Although public broadcasting services have traditionally been free-to-air, the Authority considers that a direct remuneration element in such services — while having an impact on access by viewers ([48]) — does not necessarily mean that these services are manifestly not part of the public service remit provided that the pay element does not compromise the distinctive character of the public service in terms of serving the social, democratic and cultural needs of citizens, which distinguishes public services from purely commercial activities ([49]). The element of remuneration is one of the aspects to be taken into account when deciding on the inclusion of such services in the public service remit, as it may affect the universality and the overall design of the service provided as well as its impact on the market. Provided that the given service with a pay element satisfies specific social, democratic and cultural needs of society without leading to disproportionate effects on competition and cross-border trade, EFTA States may entrust public service broadcasters with such a service as part of their public service remit.

(84) As set out above, State aid to public service broadcasters may be used for distributing audiovisual services on all platforms provided that the material requirements of the Article 59(2) of the EEA Agreement are met. To this end, EFTA States shall consider, by means of a prior evaluation procedure based on an open public consultation, whether significant new audiovisual services envisaged by public service broadcasters meet the requirements of Article 59(2) of the EEA Agreement, i.e. in the public service broadcasting context, whether they serve the democratic, social and cultural needs of the society, while duly taking into account its potential effects on trading conditions and competition.

(85) It is up to the EFTA States to determine, taking into account the characteristics and the evolution of the broadcasting market, as well as the range of services already offered by the public service broadcaster, what shall qualify as '*significant new service*'. The '*new*' nature of an activity may depend among others on its content as well as on the modalities of consumption ([50]). The '*significance*' of the service may take into account for instance the financial resources required for its development and the expected impact on demand. Significant modifications to existing services shall be subject to the same assessment as significant new services.

(86) It is within the competence of the EFTA States to choose the most appropriate mechanism to ensure the consistency of audiovisual services with the material conditions of Article 59(2) of the EEA Agreement, taking into account the specificities of their national broadcasting systems, and the need to safeguard editorial independence of public service broadcasters.

(87) In the interest of transparency and of obtaining all relevant information necessary to arrive at a balanced decision, interested stakeholders shall have the opportunity to give their views on the envisaged significant new service in the context of an open consultation. The outcome of the consultation, its assessment as well as the grounds for the decision shall be made publicly available.

([48]) As the Council of Europe provided, in its Recommendation on the remit of public service media in the information society, '*(…) Member States may consider complementary funding solutions paying due attention to market and competition questions. In particular, in the case of new personalised services, Member States may consider allowing public service media to collect remunerations (…). However, none of these solutions should endanger the principle of universality of public service media or lead to discrimination between different groups of society (…) When developing new funding systems, Member States should pay due attention to the nature of the content provided in the interest of the public and in the common interest.*'

([49]) For example, the Authority considers that requiring direct payment from users for the provision of a specialised premium content offer would normally qualify as commercial activity. On the other hand, the Authority, for example, considers that the charging of pure transmission fees for broadcasting a balanced and varied programming over new platforms such as mobile devices would not transform the offer into a commercial activity.

([50]) For example, the Authority considers that some forms of linear transmission, such as the simultaneous transmission of the evening TV news on other platforms (e.g. internet, mobile devices), may be qualified as not being '*new*' for the purposes of this Chapter. Whether other forms of retransmission of public broadcasters' programs on other platforms qualify as significant new services, should be determined by EFTA States, taking into account the specificities and the features of the services in question.

(88) In order to ensure that the public funding of significant new audiovisual services does not distort trade and competition to an extent contrary to the common interest, EFTA States shall assess, based on the outcome of the open consultation, the overall impact of a new service on the market by comparing the situation in the presence and in the absence of the planned new service. In assessing the impact on the market, relevant aspects include, for example, the existence of similar or substitutable offers, editorial competition, market structure, market position of the public service broadcaster, level of competition and potential impact on private initiatives. This impact needs to be balanced with the value of the services in question for society. In the case of predominantly negative effects on the market, State funding for audiovisual services would appear proportionate only if it is justified by the added value in terms of serving the social, democratic and cultural needs of society ([51]), taking also into account the existing overall public service offer.

(89) Such an assessment would only be objective if carried out by a body which is effectively independent from the management of the public service broadcaster, also with regard to the appointment and removal of its members, and has sufficient capacity and resources to exercise its duties. EFTA States shall be able to design a procedure which is proportionate to the size of the market and the market position of the public service broadcaster.

(90) The considerations outlined above shall not prevent public service broadcasters from testing innovative new services (e.g. in the form of pilot projects) on a limited scale (e.g. in terms of time and audience) and for the purpose of gathering information on the feasibility of and the value added by the foreseen service, in so far as such test phase does not amount to the introduction of a fully-fledged, significant new audiovisual service.

(91) The Authority considers that the above assessment at the national level will contribute to ensuring compliance with the EEA State aid rules. This is without prejudice to the competences of the Authority and the Commission to verify that EFTA States respect the provisions of the EEA Agreement, and to their right to act, whenever necessary, also on the basis of complaints or on its own initiative.

6.8. *Proportionality and market behaviour*

(92) In accordance with Article 59(2) of the EEA Agreement, public service broadcasters shall not engage in activities which would result in disproportionate distortions of competition that are not necessary for fulfilling the public service mission. For example, the acquisition of premium content as part of the overall public service mission of public service broadcasters is generally considered legitimate. However, disproportionate market distortions would arise in the event that public service broadcasters were to maintain exclusive premium rights unused without offering to sub-license them in a transparent and timely manner. Therefore, the Authority invites EFTA States to ensure that public service broadcasters respect the principle of proportionality also with regard to the acquisition of premium rights, and to provide rules for the sub-licensing of unused exclusive premium rights by public service broadcasters.

(93) When carrying out commercial activities, public service broadcasters shall be bound to respect market principles and, when they act through commercial subsidiaries, they shall keep arm's length relations with these subsidiaries. EFTA States shall ensure that public service broadcasters respect the arm's length principle, undertake their commercial investments in line with the market economy investor principle, and do not engage in anti-competitive practices with regard to their competitors, based on their public funding.

(94) An example of anti-competitive practice may be price undercutting. A public service broadcaster might be tempted to depress the prices of advertising or other non-public service activities (such as commercial pay services) below what can reasonably be considered to be market-conform, so as to reduce the revenue of competitors, in so far as the resulting lower revenues are covered by the public compensation. Such conduct cannot be considered as intrinsic to the public service mission attributed to the broadcaster and would in any event affect trading conditions and competition in the European Economic Area to an extent which would be contrary to the common interest and thus infringe Article 59(2) of the EEA Agreement.

(95) In view of the differences between the market situations, respect of market principles by public service broadcasters, in particular the questions as to whether public service broadcasters are undercutting prices in their commercial offering, and whether they are respecting the principle of proportionality with regard to the acquisition of premium rights ([52]), shall be assessed on a case-by-case basis, taking into account the specificities of the market and of the service concerned.

([51]) See also footnote 40 above on the justification of a broadcasting SGEI.

([52]) For example, one of the relevant issues may be to consider whether public service broadcasters are consistently overbidding for premium programme rights in a way which goes beyond the needs of the public service mandate and results in disproportionate distortions on the marketplace.

(96) The Authority considers that it is, in the first place, up to the national authorities to ensure that public service broadcasters respect market principles. To this end, EFTA States shall have appropriate mechanisms in place which allow assessing any potential complaint in an effective way at the national level.

(97) Notwithstanding the preceding paragraph, where necessary, the Authority may take action on the basis of Articles 53, 54, 59 and 61 of the EEA Agreement.

7. **Temporal application**

(98) This Chapter will be applied from the first day of its adoption by the Authority. It will replace the previous Chapter on the application of the State aid rules to public service broadcasting in the Authority's State Aid Guidelines.

(99) In accordance with the Chapter on applicable rules for the assessment of unlawful State aid ([53]), the Authority will apply, in the case of non-notified aid:

(a) this Chapter, if the aid was granted after its adoption;

(b) the previous Chapter on the application of the State aid rules to public service broadcasting, adopted on 23 April 2004, in all other cases.

([53]) Adopted by Decision No 154/07/COL of 3 May 2007 to amend the State aid Guidelines for the 63rd time, updating and incorporating a new chapter on the rules applicable to unlawful aid (OJ L 73, 19.3.2009, p. 23 and EEA Supplement No 15, 19.3.2009, p. 1), available on the Authority's website: http://www.eftasurv.int/?1=1&showLinkID=15119&1=1

CORRIGENDA

Corrigendum to Commission Delegated Regulation (EU) No 392/2012 of 1 March 2012 supplementing Directive 2010/30/EU of the European Parliament and of the Council with regard to energy labelling of household tumble driers

(Official Journal of the European Union L 123 of 9 May 2012)

On page 3, in Article 8:

for: '29 May 2012'

read: '29 May 2013'

On page 3, in Article 9(1):

for: '29 September 2012'

read: '29 September 2013'

On page 3, in Article 9(2):

for: '29 May 2012'

read: '29 May 2013'

On page 3, in Article 9(3):

for: '29 May 2012'

read: '29 May 2013'

On page 3, Article 10(2) is replaced as follows:

for: '2. It shall apply from 29 May 2012. However, Article 3(d) and (e) and Article 4(b), (c) and (d) shall apply from 29 September 2012.'

read: '2. It shall apply from 29 May 2013. However, Article 3(d) and (e) and Article 4(b), (c) and (d) shall apply from 29 September 2013.'

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