

Official Journal

of the European Communities

ISSN 0378-6978

L 248

Volume 44

18 September 2001

English edition

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I

(Acts whose publication is obligatory)

COUNCIL REGULATION (EC) No 1824/2001**of 12 September 2001**

imposing a definitive anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in the People's Republic of China and consigned from or originating in Taiwan and on imports of certain refillable pocket flint lighters originating in the People's Republic of China and consigned from or originating in Taiwan

THE COUNCIL OF THE EUROPEAN UNION,

B. **PRESENT INVESTIGATION**

Having regard to the Treaty establishing the European Community,

1. Request for a review

Having regard to Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community ⁽¹⁾, and in particular Article 11(2) and (6) thereof,

Having regard to the proposal submitted by the Commission, after consulting the Advisory Committee,

Whereas:

- (4) Following the publication of a notice of impending expiry ⁽²⁾ of the anti-dumping duties imposed by Council Regulation (EC) No 1006/95 as extended by Council Regulation (EC) No 192/1999 ('existing measures'), the Commission received a request to review the existing measures pursuant to Article 11(2) of Council Regulation (EC) No 384/96 ('the basic Regulation').
- (5) The request was lodged on 3 February 2000 by the European Lighters Manufacturers Federation ('ELMF' or 'the applicant'), on behalf of Community producers representing a major proportion of the Community production of non-refillable lighters ('the applicant Community producers').

A. PREVIOUS PROCEDURES AND EXISTING MEASURES**2. Notice of initiation**

- (1) In 1991, the Council, by Regulation (EEC) No 3433/91 ⁽²⁾, imposed, *inter alia*, a definitive anti-dumping duty of 16,9 % on imports of gas-fuelled, non-refillable pocket flint lighters ('non-refillable lighters') originating in the People's Republic of China ('China').
- (2) In 1995, by Council Regulation (EC) No 1006/95 ⁽³⁾, the original *ad valorem* duty was replaced by a specific duty of ECU 0,065 per lighter.
- (3) By Regulation (EC) No 192/1999 ⁽⁴⁾ the Council, further to an anti-circumvention investigation, extended the above measures to (a) imports of gas-fuelled non-refillable pocket flint lighters consigned from or originating in Taiwan and (b) imports of certain refillable lighters originating in China or consigned from or originating in Taiwan with a free-at-Community frontier, duty unpaid value per piece lower than EUR 0,15.

- (6) Having determined, after consulting the Advisory Committee, that sufficient evidence existed for the initiation of an expiry review, the Commission initiated an investigation ⁽⁶⁾ pursuant to Article 11(2) of the basic Regulation.

3. Period of investigation

- (7) The investigation into the continuation and/or recurrence of dumping and injury covered the period from 1 January 1999 to 31 March 2000 (the 'investigation period' or 'IP'). The examination of the trends relevant for the assessment of the likelihood of a continuation and/or recurrence of injury covered the period from 1 January 1996 to the end of the IP (the 'period under review').

⁽¹⁾ OJ L 56, 6.3.1996, p. 1. Regulation as last amended by Regulation (EC) No 2238/2000 (OJ L 257, 11.10.2000, p. 2).

⁽²⁾ OJ L 326, 28.11.1991, p. 1.

⁽³⁾ OJ L 101, 4.5.1995, p. 38.

⁽⁴⁾ OJ L 22, 29.1.1999, p. 1.

⁽⁵⁾ OJ C 318, 5.11.1999, p. 3.

⁽⁶⁾ OJ C 127, 5.5.2000, p. 15.

4. Parties concerned by the investigation

- (8) The Commission officially advised the Community industry, the exporters and producers in China and their representatives, the Chinese authorities and the importers and users known to be concerned, of the initiation of the review. The Commission sent questionnaires to all these parties and to those who made themselves known within the time limit set in the notice of initiation. In addition, the producer in the analogue country was contacted and received a questionnaire. The parties directly concerned were given the opportunity of making their views known in writing and of requesting a hearing.
- (9) The applicant Community producers replied to the questionnaires. Further information was received from one non-applicant Community producer who did not oppose the proceeding.
- (10) The exporting producers in China did not reply to the Commission's questionnaire and did not cooperate in the investigation.
- (11) Out of the 72 unrelated importers and users contacted, only 13 replied and claimed not to have imported or to have discontinued imports of the product concerned originating in China. Of those 13, two importers replied fully to the questionnaire.

5. Verification of information received

- (12) The Commission sought and verified all information deemed necessary to determine whether or not there is a likelihood of a continuation or recurrence of dumping and injury and whether or not the continued imposition of the measures would be against the Community interest. Verification visits were carried out at the premises of the following companies:

(a) Community producers:

BIC SA, Clichy Cedex, France

Flamagas SA, Barcelona, Spain

Tokai Europe GmbH, Mönchengladbach, Germany

Swedish Match Lighter BV, Assen, the Netherlands.

(b) Producers in the analogue country

Swedish Match Philippines INC., Manila, Philippines.

(c) Unrelated importers in the Community

Daalgo, SL, Valencia, Spain.

C. PRODUCT UNDER CONSIDERATION AND LIKE PRODUCT

- (13) The product under consideration is the same as in the original investigations, i.e. gas-fuelled, non-refillable

lighters falling under CN code 9613 10 00 (TARIC code 9613 10 00*19) ⁽¹⁾.

- (14) As shown in the previous investigations, it has been established that non-refillable lighters produced and sold by the applicant Community producers and those imported from China are in all respects identical or share at least the same basic physical and technical characteristics and that no differences in usage exist among them. The same is true for those produced and sold in the Philippines which served as an analogue country. Therefore, they are considered to be like products within the meaning of Article 1(4) of the basic Regulation.

D. LIKELIHOOD OF A CONTINUATION OR RECURRENCE OF DUMPING

1. Preliminary remarks

- (15) The findings on dumping set out below should be viewed in the light of the fact that the Chinese exporting producers did not cooperate in the investigation and that findings therefore had to be based on facts available, i.e. Eurostat and Chinese export trade data, pursuant to Article 18 of the basic Regulation. The market share represented by the imports concerned was significant at the time of the original investigation, when it represented around 11 % of the total Community consumption. In the period following the imposition of the anti-dumping measures, this market share decreased to 9 % in 1995, and went down substantially thereafter to around 1,3 % during the IP.

2. Likelihood of a continuation of dumping

(a) Analogue country

- (16) The existing measures provide for a single countrywide duty on all imports into the Community of non-refillable lighters originating in China. In accordance with Article 11(9) of the basic Regulation, the Commission employed the same methodology as in the original investigation. Accordingly, normal value was determined on the basis of information obtained in a market economy third country ('the analogue country').
- (17) Thailand had served as an analogue country in the original investigation. In the subsequent review the Philippines had been used as an analogue country as the Thai producers refused to cooperate and since it was found that, taking into account the size of its domestic market, the openness of its market and its degree of access to parts and components, the Philippines was an appropriate and not unreasonable choice of analogue country. In the notice of initiation of this expiry review it was therefore envisaged to choose the Philippines again as analogue country for the purpose of establishing normal

⁽¹⁾ This TARIC code was added to the original code 9613 10 00*11 as of 1 July 2000. It is recalled — see recital 3 — that the measures were extended to non-refillable lighters originating in or consigned from Taiwan (TARIC codes 9613 10 00*19 and *11) and to certain refillable lighters originating in China and Taiwan, or consigned from Taiwan, falling under CN code ex 9613 20 90 (TARIC code 9613 20 90*21).

value. Since it was found that the findings of the previous review investigation were still valid, as no interested party commented on this choice of analogue country and since the Filipino producer which was contacted agreed to fully cooperate, the Philippines was, therefore, in accordance with Article 2(7) of the basic Regulation, considered to be an appropriate and not unreasonable choice of analogue country for establishing normal value in respect of China for the product concerned.

(b) *Normal value*

- (18) Firstly, it was established that the domestic sales of the Filipino producer were made in sufficient quantities and thus considered representative within the meaning of Article 2(2) of the basic Regulation.
- (19) It was subsequently examined whether the domestic sales of the cooperating Filipino producer to independent customers could be considered to have been made in the ordinary course of trade, in accordance with Article 2(4) of the basic Regulation. It was found that the weighted average selling price of all domestic sales during the investigation period was above the weighted average unit cost of production, and that the volume of individual sales transactions below unit cost of production was less than 20 % of the sales being used to determine normal value; therefore all domestic sales were regarded as having been made in the ordinary course of trade.
- (20) Normal value was therefore determined, as set out in Article 2(1) of the basic Regulation, on the basis of the price paid or payable, in the ordinary course of trade, by independent domestic customers of the cooperating Filipino producer during the investigation period, i.e. the weighted average of prices of all domestic sales per model made during the IP irrespective of whether these sales were profitable or not.

(c) *Export price*

- (21) As regards the exports to the Community, given that exporting producers in China did not cooperate, findings had to be based on the facts available, in accordance with Article 18(1) of the basic Regulation. The export price was thus determined on the basis of documented offers since the level of prices found in them was confirmed by Chinese export trade data.

(d) *Comparison*

- (22) For the purpose of a fair comparison, and in accordance with Article 2(10) of the basic Regulation, due allowance in the form of adjustments was made for differences in respect of transport and credit costs, which were demonstrated to affect prices and price comparability.

(e) *Dumping margin*

- (23) In accordance with Article 2(11) of the basic Regulation, the weighted average normal value, on an ex-works Philippines basis, was compared to the weighted average export price on an ex-works China basis, at the same level of trade. The above comparison showed the existence of very significant dumping. The dumping margin found was substantially higher than the 80,3 % found in the previous investigations.
- (24) The investigation did not reveal any reason why the level of dumping would disappear or decrease if the measures were to be repealed. It was therefore concluded that there is a likelihood of continuation of dumping. However, given the low level of imports originating in China during the IP, it was considered appropriate to also examine whether there would be a recurrence of dumping in increased export volumes should the existing measures be repealed.

3. Likelihood of recurrence of dumping

- (25) For the purposes of the examination of a likelihood of recurrence of dumping in significant quantities the following factors were assessed: existence of dumping and the background of circumvention, the evolution of production and capacity utilisation in China, and the evolution of world-wide Chinese lighter exports.

(a) *Existence of dumping and background of circumvention*

- (26) The dumping margin established in the previous investigations was high. The investigation carried out under the present review indicates that dumping has not been eliminated and was even substantially higher than during the previous investigations.
- (27) Furthermore, there is a record of circumvention of the anti-dumping measures imposed. This took place by way of transshipment through Taiwan and modification of the product whose only purpose was to avoid the payment of the anti-dumping duty. Consequently, as stated in recital 3, the measures were extended in 1999 to Taiwanese imports and to imports of certain refillable lighters from China.

- (28) The results of the anti-circumvention investigation as well as the current relatively low level of imports into the Community from China of the product concerned appear to demonstrate that while Chinese exporting producers continued to have a strong interest in selling to the Community, they could not compete on the Community market with their products at a non-dumped level.

(b) Evolution of production and capacity utilisation in China

- (29) The only data on domestic production and consumption of lighters in China were made available to the Commission by the applicant in its request for this review and during the investigation, as Chinese exporting producers did not cooperate. While the available data could not be confirmed by independent sources, no reason was found to dismiss them.
- (30) Chinese production of flint lighters alone has been estimated at 2,5 billion, more than twice the Chinese domestic consumption of the product concerned, estimated at 1,1 billion to 1,4 billion units including piezo lighters, which are not the product concerned. However, these figures are clearly underestimated if compared to the Chinese export statistics (see recital 33).
- (31) According to the website www.globalsources.com there are 786 suppliers of cigarette lighters in China, of which 140 for non-refillable and 161 for refillable lighters. The self-proclaimed biggest lighter manufacturer lists a monthly capacity of 45 million lighters. Also, three random companies, among the 20 biggest known, claim to produce or to have the capacity of producing 1 billion lighters a year; slightly less than the total Community consumption of refillable and non-refillable lighters.
- (32) Consequently, the enormous production capacity available in China combined with the size of the Chinese domestic market gives Chinese exporting producers considerable flexibility to switch both between markets and product types. These producers are therefore able to quickly increase production and direct it to any export market, including, were the measures to be repealed, the Community market.

*(c) Evolution of Chinese exports to third countries**1. General trend of increasing exports*

- (33) On the basis of Chinese export trade data, it was established that Chinese worldwide exports increased from 1,9 billion units of non-refillable lighters and 0,2 billion units of refillable lighters in 1996 to 2,7 billion and 0,7 billion units in 2000.
- (34) Furthermore, a significant fall in prices was observed, from USD 0,06 in 1996 to USD 0,03 in 2000 for non-refillable lighters and from USD 0,31 in 1996 to USD 0,14 in 2000 for refillable lighters.

2. Possible deflection of Chinese exports due to the introduction of restrictions in third countries

- (35) According to the available information, Canada and the United States of America have imposed import restric-

tions on Chinese lighters because of safety concerns. The American market is closed for non-child-resistant lighters and at the end of 1999 Canada forbade the entrance of Asian lighters for safety reasons. This shows that there is pressure on Chinese exporting producers to find alternative export markets.

3. Chinese exports to other representative export markets

- (36) It is important to note that, after the Council imposed anti-dumping duties in 1995, exporting producers from China easily penetrated other large export markets such as, for instance, Indonesia and, to a lesser extent, Russia and Japan, by charging export prices at similarly low levels as those to the Community.

4. Conclusion

- (37) The investigation has clearly shown that while the volume of non-refillable lighters imported into the Community from China during the investigation period was relatively small, the level of dumping found for these imports was even higher than in previous investigations.
- (38) The investigation has also shown that the volume of Chinese non-refillable lighter exports to the Community would in all probability reach substantial levels if the existing measures were to be repealed. This conclusion was reached in view of the substantial spare capacity available in China and the degree of circumvention found. This illustrates the strong continued interest of Chinese exporting producers in selling to the Community.
- (39) It was also concluded that such substantially increased exports to the Community would most likely be made at dumped prices. This is demonstrated by the low prices found for Chinese exports to other main third country markets. It is unlikely that Chinese exporting producers could resume significant exports to the Community without charging similarly low export prices, in particular since the current exports to the Community, even if not significant in terms of volume, are already dumped.
- (40) In summary, it is highly probable that imports to the Community from China will resume in significant quantities and at significant dumped prices, should measures be repealed.

E. DEFINITION OF THE COMMUNITY INDUSTRY

- (41) The applicant Community producers represent about 95 % of the Community production of non-refillable lighters and therefore constitute the Community industry within the meaning of Article 4(1) and Article 5(4) of the basic Regulation. The other Community producer was not considered to form part of the Community industry since it did not fully cooperate but only gave certain information necessary to establish the consumption of non-refillable lighters in the Community.

F. ANALYSIS OF THE SITUATION OF THE COMMUNITY MARKET**1. General remark**

- (42) To ensure comparability of annual trends, all parameters examined in the 15-month IP were annualised by multiplying the verified data by 12/15.

2. Consumption on the Community market

- (43) The apparent consumption in the Community of the product under consideration was established on the basis of:
- the units sold by the Community industry of its own-produced, non-refillable lighters,
 - the units sold by the non-applicant Community producer,
 - the imports of non-refillable lighters into the Community from China based on Eurostat data,
 - the imports of non-refillable lighters into the Community from all other third countries based on Eurostat data.
- (44) On this basis, the consumption of non-refillable lighters on the Community market decreased from about 873 million units in 1996 to about 770 million in the IP. Consumption decreased between 1996 and 1998 by 14,3 %, and subsequently increased in 1999 and during the IP. The overall contraction of the Community consumption during the period under review was 11,8 %.

Community consumption

	1996	1997	1998	1999	IP	Δ 1996 to IP (%)
Volume (million units)	872,881	785,833	747,784	761,478	769,551	
1996 = 100	100,0	90,0	85,7	87,2	88,2	- 11,8

Sources: Questionnaire replies from the Community industry and the other Community producer, extrapolations from Eurostat.

- (45) These figures are however underestimated since they do not include certain refillable lighters which amounted to around 153 million in 1997 and 104 million in the IP.

3. Evolution of imports originating in China*(a) Import volumes and market shares*

- (46) Given that the specific duty of ECU 0,065 per unit was established in 1995, import figures are also given for that year and the trend is calculated accordingly. Imports went down from almost 80 million units in 1995 to fewer than 10 million in the IP. Their market share dropped accordingly. Consumption in 1995, estimated at 882 million, was marginally different from that in 1996.

Imports from China

	1995	1996	1997	1998	1999	IP
Volume (million units)	79,569	12,244	7,721	18,956	10,345	9,789
Market share in %	9,0 ⁽¹⁾	1,4	1,0	2,5	1,4	1,3

⁽¹⁾ Calculated on the 1996 consumption (1995 not available).

Source: Eurostat.

(b) *Price evolution of the imports*

- (47) After the imposition of an anti-dumping duty against non-refillable lighters originating in China, prices, according to the best evidence available gathered from Eurostat, Chinese statistics and documented offers by Chinese operators still remained lower than the Community industry's prices. On the basis of the findings for the IP, the price difference, at the same level of trade, was around 48 %, even including the anti-dumping duty.

4. Economic situation of the Community industry

(a) *General comment*

- (48) At first sight, the measures seem successful with respect to the developments of certain economic indicators. However, the situation of the Community industry must also be judged in the light of the circumvention that was found to take place and which led to the extension of the anti-dumping duty in 1999.

(b) *Production*

- (49) As shown in the table below, the Community industry's production of non-refillable lighters decreased from 1 038 million to 912 million, i.e. by about 12 %, during the period under review. The Community industry undertook important restructuring during the same period to face the competition of low-priced imports. Production was adapted to obtain economies of scale and competitiveness was improved to respond to the evolution of demand, such as the increasing consumption and imports of piezo lighters. It should be pointed out that two manufacturing plants, in Greece and France, were closed down during the period under review.

Production

	1996	1997	1998	1999	IP	Δ 1996 to IP
Million units	1 038,3	1 015,8	943,9	890,3	911,7	
1996 = 100	100,0	97,8	90,9	85,8	87,8	- 12,2 %

Source: Questionnaire replies from Community industry.

(c) *Capacity and capacity utilisation rates*

- (50) Production capacity of the Community industry decreased from 1 221 million units in 1996 to 1 195 million units in the IP, or 2,1 %. Capacity utilisation decreased from 85 % to 76 %.

Capacity

	1996	1997	1998	1999	IP	Δ 1996 to IP
Million units	1 220,6	1 249,0	1 277,9	1 186,5	1 195,4	
1996 = 100	100,0	102,3	104,7	97,2	97,9	- 2,1
Capacity utilisation rate in %	85,1	81,3	73,9	75,0	76,3	- 10,3

Source: Questionnaire replies from the Community industry.

(d) *Sales in the Community*

- (51) The sales volume of the Community industry in the Community during the period under review increased by 4,9 %: from around 555 million units in 1996 to around 582 million units in the IP.

Total Community sales

	1996	1997	1998	1999	IP	Δ 1996 to IP (%)
Units (million)	555,070	585,924	587,301	583,180	582,292	
1996 = 100	100,0	105,6	105,8	105,2	104,9	4,9

Source: Questionnaire replies from the Community industry.

(e) *Market share*

- (52) The Community industry's market share increased from around 64 % to around 76 %.

Community industries market share

	1996	1997	1998	1999	IP	Δ 1996 to IP (%)
In per cent	63,6	74,6	78,5	76,6	75,7	
1996 = 100	100	117,3	123,4	120,4	119,0	19,0

Source: Questionnaire replies from the Community industry and Eurostat.

(f) *Sales prices in the Community*

- (53) The investigation showed that the Community industry's average sales price of the product concerned dropped by 8 % during the period under review, from 0,237 ECU/unit in 1996 to 0,217 EUR/unit in the IP. These average prices, after falling in 1997 and in 1998, slightly increased and stabilised in 1999 and the IP.

Average sales price

	1996	1997	1998	1999	IP	Δ 1996 to IP (%)
Community industry (ECU/EUR/unit)	0,237	0,228	0,216	0,218	0,217	
1996 = 100	100	96,2	91,1	92,0	91,6	- 8,4

Source: Questionnaire replies from the Community industry.

(g) *Profitability*

- (54) Weighted average profit of the Community industry, expressed as a percentage of net sales, for non-refillable lighters, decreased from 11,1 % in 1996 to 6,9 % in the IP. It should be noted that the profitability varies considerably among the members of the Community industry. In addition, one major company maintained that profitability between its flint and electronic lighters could not be separated and that the latter were more profitable. With this background, the profitability figures listed below could be overstated. Another member of the Community industry attributed the marked deterioration of its profitability during 1998 and 1999 to important setbacks of its exports to third countries; hence reduced production and higher overall production costs. In conclusion, the Community industry did not achieve the 15 % profit deemed appropriate in the original Regulation (EEC) No 3433/91 (recital 16) and in Regulation (EC) No 1006/95 (recital 63) or the 10 % profit deemed appropriate in Regulation No 423/97 ⁽¹⁾ on imports of non-refillable lighters originating in Thailand, the Philippines and Mexico (recital 81).

⁽¹⁾ OJ L 65, 6.3.1997, p. 1.

- (55) The profitability of the Community industry on the Community market for the product under consideration developed as follows:

Profit rate

	1996	1997	1998	1999	IP	Δ 1996 to IP (%)
In per cent	11,1	10,3	7,5	6,2	6,9	
1996 = 100	100,0	92,8	67,6	55,9	62,2	- 37,8

Source: Questionnaire replies of the Community industry.

(h) *Employment*

- (56) Employment for the product under consideration in the Community industry declined from 1 716 employees in 1996 to 1 496 employees in the IP, i.e. by 13 %. The reduction is due in essence to the Community industry's effort to increase competitiveness. It entailed closing two production sites as already mentioned, heightened automatisisation in the manufacturing and assembling process and centralisation of sales activities.

The employment situation of the Community industry developed as follows:

Personnel (Non-refillable lighters)

	1996	1997	1998	1999	IP	Δ 1996 to IP (%)
Manufacturing	1 467	1 428	1 395	1 287	1 270	
Other	249	243	241	230	226	
Total number	1 716	1 671	1 636	1 517	1 496	
1996 = 100	100,0	97,4	95,3	88,4	87,2	- 12,8

Source: Questionnaire replies from the Community industry.

(i) *Productivity*

- (57) Measured on the yearly number of lighters produced by the manufacturing personnel, productivity increased slightly from about 707 000 units in 1996 to around 718 000 in the IP, i.e. by around 2 %.

(j) *Stocks*

- (58) The closing stocks of the Community industry for non-refillable lighters decreased from 166 million units in 1996 to 160 million units in the IP, i.e. by around 4 %.

Stocks developed as follows:

Closing stocks

	1996	1997	1998	1999	IP	Δ 1996 to IP (%)
Units (millions)	166,4	178,9	168,3	162,8	159,3	
1996 = 100	100,0	107,5	101,1	97,8	95,7	- 4,3

Source: Questionnaire replies from the Community industry.

(k) *Investments*

- (59) Total investments of the Community industry for non-refillable lighters decreased from around ECU 15 million in 1996 to around EUR 12 million in the IP. The level of investment by the Community industry reflects its efforts to streamline its production. These investments developed as follows:

Investments

	1996	1997	1998	1999	IP	Δ 1996 to IP (%)
Million ECU/EUR	15,158	15,494	9,066	13,893	12,016	
1996 = 100	100,0	102,2	59,8	91,6	79,3	- 20,7

Source: Questionnaire replies from the Community industry.

(l) Return on investments

- (60) Return on investments of the Community industry decreased from 41 % in 1996 to 14 % in the IP. It developed as follows:

Return on investments

	1996	1997	1998	1999	IP	Δ 1996 to IP (%)
In per cent	41	34	17	16	14	
1996 = 100	100,0	82,9	41,5	39,0	34,2	- 65,8

Source: Questionnaire replies from the Community industry.

(m) Cash flow

- (61) Cash flow of the Community industry progressed favourably during the period under review, although it started to decrease during the IP. It developed as follows:

Cash flow

	1996	1997	1998	1999	IP	Δ 1996 to IP (%)
Million ECU/EUR	15,575	24,116	17,217	22,397	21,102	
1996 = 100	100,0	154,8	110,5	143,8	135,5	35,5

Source: Questionnaire replies from the Community industry.

(n) Wages

- (62) Wages paid by the Community industry increased per year on a pro-capita basis from ECU 33 069 in 1996 to EUR 34 828 in the IP, an increase of about 5 %.

Wages

	1996	1997	1998	1999	IP	Δ 1996 to IP (%)
ECU/EUR/person/year	33 069	33 553	33 649	34 597	34 828	
1996 = 100	100,0	101,5	101,8	104,6	105,3	5,3

Source: Questionnaire replies from the Community industry.

(o) Ability to raise capital

- (63) During the period under review the Community industry did not experience problems in raising funds, either through the groups some of the members belong to or through short-term bank credits.

(p) *Magnitude of dumping*

- (64) As concerns the impact on the situation of the Community industry of the magnitude of the actual margin of dumping found during the investigation period, it should be noted that the margin found for China is significantly higher than that found in the original investigation. The situation of the Community industry improved to a certain extent after the imposition of measures, but it has not completely recovered. Therefore, should measures be repealed, the impact of the dumping margin found in the current investigation would be significant.

5. Export activity of the Community industry

- (65) The Community industry's exports of non-refillable lighters to third countries amounted to 359 million units in the IP compared to 495 million in 1996. The overall decrease, about 27 % during the period under review, is to be seen in the context of the exports from China to markets other than the Community after the anti-dumping measures in 1995 came into force, as well as serious economic downturns suffered by certain importing third countries.
- (66) In detail, the development during the period under review was as follows:

Export volumes of the Community industry

	1996	1997	1998	1999	IP	Δ 1996 to IP (%)
In million units	494,775	477,459	432,232	376,281	359,031	
1996 = 100	100,0	96,5	87,4	76,1	72,6	- 27,4

Source: Questionnaire replies from the Community industry.

6. Import volumes and prices from other third countries

- (67) The total import volumes of non-refillable lighters from all third countries other than China decreased during the period under review from about 292 million units in 1996 to 165 million in the IP, corresponding to market shares of 33,5 % and 21,4 % respectively. Taiwan, a major exporter in 1997, exported only minor quantities in the IP, following the adoption of Regulation (EC) No 192/1999. Since then the major exporters into the Community have been Indonesia, Malaysia and Vietnam. Indeed imports from these three countries increased from about 17 million units in 1996 to 109 million in the IP; and their corresponding market shares went from 2,0 % to 14,2 %. Average import prices from these three countries decreased over the period under review and were on average as low as 0,067 EUR/unit in the IP. Thus, they were significantly lower than those of the Community industry, but higher than the available prices of the Chinese imports.

7. Conclusion

- (68) Since the measures originally imposed were amended in 1995 and extended in 1999, the situation of the Community industry has improved in respect of a number of economic indicators.
- (69) Certain economic factors in the Community, such as sales volumes and market share, as well as stocks, have shown positive developments for the Community industry during the period under review. Sales volumes rose by 4,9 % and the corresponding market share by 19 %; during the same period stock volumes decreased by about 4 %. Meanwhile, the Community industry's profitability decreased from 11 % in 1996 to about 7 % in the IP, far below the profit margins of 15 % and 10 % deemed appropriate in the earlier investigations. This investigation established that the generally positive factors except profitability were made possible because of the introduction of more effective anti-dumping measures during the previous years and as a result of the restructuring of the Community industry's facilities. However, it also made clear that competition from imported non-refillable lighters, especially resulting from circumvention activities, forced the Community industry to lower its selling prices by more than 8 %, thus negatively affecting profitability.

- (70) It has appeared that the market share once held by the Chinese exporters was replaced by low-priced imports from other third countries not subject to anti-dumping duties and by increased sales by the Community industry. The Chinese market share was reduced from about 9 % in 1996 to slightly above 1 % in the IP. At the same time the Community industry improved its own market share to around 76 % in the IP compared with less than 64 % in 1996. Together with the anti-dumping measures, the in-depth restructuring prompted these favourable effects: two factories were closed down and the remaining facilities streamlined; notably at the expense of personnel, which was reduced by almost 13 % during the period under review. Capacity was reduced by 2 %; but at the same time production was reduced by 12 % and capacity utilisation went down by 10 %.
- (71) In conclusion the investigation established that, although the situation of the Community industry has improved, it is likely to deteriorate if the measures were to be repealed.

G. LIKELIHOOD OF RECURRENCE OF INJURY

- (72) In order to assess the likely effect of the expiry of the measures in force, a number of factors were examined, in particular the availability of unused capacity in China, the exporters' behaviour on the Community market and on other third markets, the prices the exporters might charge if the duty were allowed to expire and the likely impact of these factors on the Community industry.
- (73) The information available, already reviewed in recitals 30 to 34, as well as the history of the past years demonstrate that there is a huge disproportion in China between consumption on the one hand and capacity and production on the other hand. Considering the attractiveness of the Community market, together with the safety rules limiting access to certain third country markets, the export potential of China at low prices towards the Community is very high. Chinese export prices to third countries in the year 2000 were, on average, even lower than those to the Community. Moreover, the lapsing of measures against Chinese imports would entail the lapsing of the circumvention measures with regard to certain refillable lighters from China and Taiwan. The imports of lighters covered by these measures, even if declining in volume (from almost 200 million units in 1998 at ECU 0,065 per unit according to Eurostat) were still high in 2000 with almost 52 million units.
- (74) In conclusion, in the absence of measures, there is likelihood of recurrence of injury and, having also regard to the situation on dumping, there is likelihood of recurrence of injurious dumping.

H. COMMUNITY INTEREST

1. Introduction

- (75) According to Article 21 of the basic Regulation, the Commission examined whether a prolongation of the existing anti-dumping measures would be against the interest of the Community as a whole. The determination of the Community interest must be based on an appreciation of all the various interests, such as the Community industry, the importers and users of the product concerned.
- (76) In the preceding investigations the adoption, amendment and extension of the measures against dumped non-refillable lighters were considered not to be against the interests of the Community. Furthermore, in the context of an expiry review, the scrutiny of a situation in which anti-dumping measures have been in place allows assessment of any negative, undue impact of the anti-dumping measures in force on the parties concerned.

- (77) In order to assess the likely impact of a continuation of the measures, the Commission requested information from all interested parties mentioned above. In addition to the Community industry, questionnaires were sent to 72 importers. Together with the two meaningful replies mentioned, few other comments were received. All of them were taken into account to examine whether, despite the findings of the likelihood of recurrence of injurious dumping, there were compelling reasons which would lead to the conclusion that it is not in the Community interest to maintain the existing measures.

2. Interest of the Community industry

- (78) If the anti-dumping measures were repealed, dumped and low-priced imports on the Community market would massively increase and the situation of the Community industry would start deteriorating again.
- (79) The Community industry is structurally viable; it has undergone in-depth restructuring of its operations and has invested heavily in recent years to enhance its competitiveness. However, it can be concluded that, without the continuation of anti-dumping measures, its situation will most likely deteriorate.

3. Interests of importers and traders

- (80) The few replies obtained from the importers/traders seem to indicate only a small interest for this review investigation, notably because of the availability of alternative sources abroad.
- (81) The importers who made themselves known consider that the existing measures should not be prolonged. Their main concern is that imports of non-refillable lighters could be completely excluded from the Community market, thus reducing free competition in the Community and triggering excessive prices and the switch to cheaper advertising gadgets, other than lighters, on the part of the users, who distribute such gadgets to final consumers buying their main products or services. One importer stated that the imposition of anti-dumping duties prompted him to stop trading in imported lighters. Considering the flow of imports during the period under review, his decision appears to be the result of other considerations than any shortage of available lighters not subject to duties.
- (82) It is true that imports of flint lighters from China and Taiwan have diminished, however the imports originating in other exporting countries, together with the existence of five known Community producers, have guaranteed competition on the Community market. It is therefore confirmed that importers and traders have enjoyed easy access to the product under consideration from third sources other than the Community industry and the imports concerned. Finally, these operators have also increasingly been relying on piezo lighters. In other terms, the impact of a prolongation of the existing measures on these imports is likely to be minimal.
- (83) The available data indicate that profitability of the cooperating importers has not been negatively influenced by the imposition of the anti-dumping measures and is likely not to suffer future, adverse effects if the existing measures are maintained.

4. Interests of consumers

- (84) Given the above, it is concluded that there are no compelling reasons on the grounds of Community interest against the continuation of the measures.

5. Consequences for competition on the Community market

- (85) Considering that competition has remained strong on the Community market amongst Community producers, the imports concerned and imports originating in third countries, it can be concluded that the continuation of the existing measures will not adversely affect the future competitive environment for the product under consideration on the Community market.

6. Conclusion on Community interest

- (86) Given the above, it is concluded that there are no compelling reasons on the grounds of Community interest against the continuation of the measures.

I. ANTI-DUMPING MEASURES

- (87) All parties were informed of the essential facts and considerations on the basis of which it is intended to recommend the maintenance of the existing measures. They were also granted a period to make representations subsequent to this disclosure. No comments which were of a nature to change the above conclusions were received.

It follows from the above that, as provided for by Article 11(2) of the basic Regulation, the anti-dumping measures applicable to imports of gas-fuelled, non-refillable pocket flint lighters, and to certain refillable lighters, originating in China or consigned from or originating in Taiwan, imposed by Regulation (EEC) No 3433/91 as amended by Regulation (EC) No 1006/95 and as extended by Regulation (EC) No 192/1999, should be maintained,

HAS ADOPTED THIS REGULATION:

Article 1

1. A definitive anti-dumping duty is hereby imposed on imports of gas-fuelled, non-refillable pocket flint lighters falling within CN code 9613 10 00 (TARIC code 9613 10 00*19) originating in the People's Republic of China.
2. The rate of the duty, applicable to the net, free-at-the Community frontier price, before duty, shall be set at EUR 0,065.

Article 2

The anti-dumping duties extended by Regulation (EC) No 192/1999 on imports of certain refillable pocket flint lighters originating in the People's Republic of China or consigned from or originating in Taiwan, falling within CN code ex 9613 20 90 (TARIC codes 9613 20 90*21 and 9613 20 90*29) and to imports of non-refillable lighters consigned from Taiwan and falling within CN code 9613 10 00 (TARIC code 9613 10 00*11) or originating in Taiwan and falling within CN code 9613 10 00 (TARIC code 9613 10 00*19) are maintained.

Article 3

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

Article 4

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

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

Done at Brussels, 12 September 2001.

For the Council
The President
L. MICHEL

COMMISSION REGULATION (EC) No 1825/2001
of 17 September 2001
establishing the standard import values for determining the entry price of certain fruit and vegetables

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Commission Regulation (EC) No 3223/94 of 21 December 1994 on detailed rules for the application of the import arrangements for fruit and vegetables ⁽¹⁾, as last amended by Regulation (EC) No 1498/98 ⁽²⁾, and in particular Article 4(1) thereof,

Whereas:

- (1) Regulation (EC) No 3223/94 lays down, pursuant to the outcome of the Uruguay Round multilateral trade negotiations, the criteria whereby the Commission fixes the standard values for imports from third countries, in respect of the products and periods stipulated in the Annex thereto.

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

HAS ADOPTED THIS REGULATION:

Article 1

The standard import values referred to in Article 4 of Regulation (EC) No 3223/94 shall be fixed as indicated in the Annex hereto.

Article 2

This Regulation shall enter into force on 18 September 2001.

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

Done at Brussels, 17 September 2001.

For the Commission

Franz FISCHLER

Member of the Commission

⁽¹⁾ OJ L 337, 24.12.1994, p. 66.

⁽²⁾ OJ L 198, 15.7.1998, p. 4.

ANNEX

to the Commission Regulation of 17 September 2001 establishing the standard import values for determining the entry price of certain fruit and vegetables

(EUR/100 kg)

CN code	Third country code ⁽¹⁾	Standard import value
0707 00 05	052	99,7
	999	99,7
0709 90 70	052	76,1
	999	76,1
0805 30 10	388	74,2
	524	75,5
	528	60,4
	999	70,0
0806 10 10	052	64,4
	999	64,4
0808 10 20, 0808 10 50, 0808 10 90	052	127,6
	388	94,5
	400	90,2
	508	72,0
	512	72,0
	528	49,4
	800	254,4
	804	99,1
	999	107,4
	052	105,1
0808 20 50	999	105,1
	052	109,7
0809 30 10, 0809 30 90	999	109,7
	052	64,8
0809 40 05	060	55,9
	064	58,4
	066	60,2
	068	52,4
	999	58,3

⁽¹⁾ Country nomenclature as fixed by Commission Regulation (EC) No 2032/2000 (OJ L 243, 28.9.2000, p. 14). Code '999' stands for 'of other origin'.

COMMISSION REGULATION (EC) No 1826/2001
of 17 September 2001
prohibiting fishing for monkfish by vessels flying the flag of the Netherlands

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 2847/93 of 12 October 1993 establishing a control system applicable to the common fisheries policy ⁽¹⁾, as last amended by Regulation (EC) No 2846/98 ⁽²⁾, and in particular Article 21(3) thereof,

Whereas:

- (1) Council Regulation (EC) No 2848/2000 of 15 December 2000 fixing for 2001 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels, in waters where limitations in catch are required ⁽³⁾, as amended by Commission Regulation (EC) No 1666/2001 ⁽⁴⁾, lays down quotas for monkfish for 2001.
- (2) In order to ensure compliance with the provisions relating to the quantity limits on catches of stocks subject to quotas, the Commission must fix the date by which catches made by vessels flying the flag of a Member State are deemed to have exhausted the quota allocated.
- (3) According to the information received by the Commission, catches of monkfish in the waters of ICES division VIIIa, b, d, e by vessels flying the flag of the Netherlands

or registered in the Netherlands have exhausted the quota for 2001. The Netherlands has prohibited fishing for this stock from 31 July 2001. This date should be adopted in this Regulation also,

HAS ADOPTED THIS REGULATION:

Article 1

Catches of monkfish in the waters of ICES division VIIIa, b, d, e by vessels flying the flag of the Netherlands or registered in the Netherlands are hereby deemed to have exhausted the quota allocated to the Netherlands for 2001.

Fishing for monkfish in the waters of ICES division VIIIa, b, d, e by vessels flying the flag of the Netherlands or registered in the Netherlands is hereby prohibited, as are the retention on board, transshipment and landing of this stock caught by the above vessels after the date of application of this Regulation.

Article 2

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

It shall apply from 31 July 2001.

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

Done at Brussels, 17 September 2001.

For the Commission

Franz FISCHLER

Member of the Commission

⁽¹⁾ OJ L 261, 20.10.1993, p. 1.

⁽²⁾ OJ L 358, 31.12.1998, p. 5.

⁽³⁾ OJ L 334, 30.12.2000, p. 1.

⁽⁴⁾ OJ L 223, 18.8.2001, p. 4.

COMMISSION REGULATION (EC) No 1827/2001**of 17 September 2001****imposing a provisional anti-dumping duty on imports of certain zinc oxides originating in the People's Republic of China**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community ⁽¹⁾, as last amended by Regulation (EC) No 2238/2000 ⁽²⁾, and in particular Article 7 thereof,

After consulting the Advisory Committee,

Whereas:

within the above time limit and showed that there were particular reasons why they should be heard were granted the opportunity to be heard.

- (5) 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. Replies were received from the six complainant Community producers, five exporting producers in the country concerned as well as from six importers in the Community which were not related to exporting producers. The Commission also received replies from 13 users, five suppliers and two users' associations. Six other producers of zinc oxide in the Community, which were not involved in the complaint, also provided the Commission with some general information on their activities.

A. PROCEDURE

- (1) On 20 December 2000 the Commission announced by a notice ('notice of initiation') published in the *Official Journal of the European Communities* ⁽³⁾ the initiation of an anti-dumping proceeding with regard to imports into the Community of certain zinc oxides originating in the People's Republic of China ('PRC').
- (2) The proceeding was initiated as a result of a complaint lodged in November 2000 by the European Association of Metals ('Eurometaux') on behalf of Asturiana de Zinc SA, Co.ge.fin. SpA, Elementis Pigments, Grillo Zinkoxid GmbH, Metaleurop GmbH and Union Minière Zinc Chemicals ('the complainant Community producers'), together representing a major proportion, in the current case 75 %, of the Community production of certain zinc oxides. The complaint contained evidence of dumping of the said product and of material injury resulting therefrom, which was considered sufficient to justify the initiation of an anti-dumping proceeding.
- (3) The Commission officially advised the exporting producers and importers/traders known to be concerned as well as their associations, the representatives of the exporting country concerned, users, suppliers and the complainant Community producers, of the initiation of the proceeding. Interested parties were given the opportunity to make their views known in writing and to request a hearing within the time limit set in the notice of initiation.
- (4) A number of exporting producers in the country concerned, as well as Community producers, Community users and importers/traders made their views known in writing. All parties who so requested
- (6) In order to allow exporting producers in the PRC to submit a claim for market economy treatment ('MET') or individual treatment if they so wished, the Commission sent to Chinese companies known to be concerned a market economy status and an individual treatment claim form. No other companies made themselves known within the deadlines set out in the notice of initiation. Five companies requested MET pursuant to Article 2(7)(b) of Regulation (EC) No 384/96 ('the basic Regulation') or individual treatment should the investigation establish that they did not meet the conditions for MET.
- (7) The Commission sought and verified all the information it deemed necessary for the purpose of a determination of dumping, injury and Community interest. Verification visits were carried out at the premises of the following companies:
- (a) Exporting producers in the PRC
- Liuzhou Nonferrous Metals Smelting Co. Ltd, Liuzhou
 - Liuzhou Fuxin Chemical Industry Co. Ltd, Liuzhou
 - Gredmann Guigang Chemical Ltd, Guigang
 - Liuzhou Zinc Products Co. Ltd, Liuzhou
 - Liuzhou Longcheng Chemical General Plant, Liuzhou
- (b) Analogue country
- United States of America: US Zinc Co. Millington, Tennessee

⁽¹⁾ OJ L 56, 6.3.1996, p. 1.

⁽²⁾ OJ L 257, 11.10.2000, p. 2.

⁽³⁾ OJ C 366, 20.12.2000, p. 7.

(c) Community producers

- Asturiana de Zinc SA, Madrid, Spain
- Co.ge.fin SpA, Bellusco, Italy
- Elementis Pigments, Durham, United Kingdom
- Grillo Zinkoxid GmbH, Goslar, Germany
- Metaleurop GmbH, Goslar, Germany
- Union Minière, Angleur, Belgium

(d) Unrelated importers in the Community

- Almiberia SA, San Antonio de Benageber, Spain

(e) Users

- Esmalglass SA, Villarreal-Onda, Spain.

- (8) The investigation of dumping and injury covered the period from 1 January 2000 to 31 December 2000 ('IP'). The examination of trends relevant for the assessment of injury covered the period from 1 January 1996 to the end of the IP ('analysis period').

B. PRODUCT CONCERNED AND LIKE PRODUCT**1. Product concerned**

- (9) The product concerned is zinc oxide (chemical formula: ZnO) with a purity in net weight of not less than 93 % zinc oxide. It is currently classifiable within CN code ex 2817 00 00 (TARIC code 2817 00 00*10). It should be noted that technical zinc oxide and feed grade zinc oxide have a zinc oxide content of less than 93 % and are therefore outside the scope of the product concerned. In addition, technical and feed grade zinc oxide differ from the product concerned in terms of both zinc content and appearance. Technical zinc oxide is a greyish to brownish powder whereas feed grade zinc oxide is a yellow brownish material. The product concerned is itself commercialised as a fine white powder. These three types of zinc oxide have different chemical properties and thus end uses they do not compete with each other, furthermore technical and feed grade zinc oxide are significantly less expensive. It should be noted that zinc peroxide (ZnO₂) is a completely different product: it does not have the same chemical characteristics and is considerably more expensive than zinc oxide.
- (10) Zinc oxide has a wide range of applications including, amongst others, the rubber, chemical, paint, ceramic and pharmaceutical industries.
- (11) A number of interested parties argued that there existed different grades of the product concerned and that these constituted different products and as such should be treated separately for the purposes of the investigation. This contention was rejected and it was determined that

all grades of the product concerned should be considered as a single product for the following reasons:

- all grades have the same basic chemical characteristics in that they share the same basic chemical composition (ZnO),
- they share the same physical characteristics in that zinc oxide is normally presented as a white powder and any further processing, such as granulation does not change the product's basic physical characteristics,
- grades are defined in terms of purity of zinc oxide content and impurities (such as lead and cadmium). There are, however no precise definition or standard norms for the definition of various grades. Each producer has its own classification system which supports their marketing effort and serves to differentiate their products from those of their competitors, but nevertheless, there are overlaps between grades offered in these various classifications,
- there is a significant degree of interchangeability between the grades as regards their end-use. This interchangeability can depend as much on the nature of any impurities in the product concerned as it can on the purity of the product in terms of its zinc oxide content. It was found, for example, that the purity of the zinc oxide used in the ceramic industry ranged between 98 % and 99,5 %, but that a more pure product could also be used. It is therefore concluded that a significant degree of competition and overlap exists between different grades of zinc oxide with a purity in net weight of not less than 93 % and that as such all grades should be considered as a single product.

2. Like product

- (12) Comments made by a number of users of the product concerned show clearly that imports originating in the PRC are perfect substitutable for zinc oxide purchased from the Community industry, since they share the same physical and chemical characteristics.
- (13) The Commission therefore established that zinc oxide produced by the Community producers and sold on the Community market is a like product to zinc oxide produced in the PRC and exported to the Community as well as that produced and sold domestically in the analogue country, since there are no differences in the basic characteristics and uses. The same is true with regard to zinc oxide produced by the Chinese producers which received MET and that sold on their domestic market.
- (14) Therefore, these products are alike within the meaning of Article 1(4) of the basic Regulation.

C. DUMPING**1. Market economy treatment**

- (15) Pursuant to Article 2(7)(b) of the basic Regulation, in anti-dumping investigations concerning imports originating in the PRC, normal value shall be determined in accordance with paragraphs 1 to 6 of the said Article for those producers which were found to meet the criteria laid down in Article 2(7)(c), i.e. where it is shown that market economy conditions prevail in respect of the manufacture and sale of the product concerned.
- (16) Five Chinese companies requested MET pursuant to Article 2(7)(b) of the basic Regulation and replied to the MET claim for exporting producers.
- (17) The Commission sought all information deemed necessary and verified on the spot all information submitted in the MET applications at the premises of the companies in question.
- (18) For three companies it was established that, overall, their decisions regarding prices and costs were made without significant state interference within the meaning of Article 2(7)(c) and that costs and prices reflected market values. These companies had accounts independently audited in line with international accounting standards and their production costs and financial situation was not subject to significant distortions carried over from the former non-market-economy system. Finally, the three companies were found to be subject to bankruptcy and property laws which guaranteed legal certainty and stability and exchange rate conversions were carried out at the market rate. Consequently, it was concluded that the following three companies fulfilled the conditions set out in Article 2(7)(c) of the basic Regulation:
- Liuzhou Nonferrous Metals Smelting Co. Ltd,
 - Liuzhou Fuxin Chemical Industry Co. Ltd,
 - Gredmann Guigang Chemical Ltd.
- (19) For the other two companies it was found that there was significant state interference in business decisions, including decisions relating to and costs for one company and that the financial situation, especially costs and accounts, were subject to significant distortions for both of them. Consequently, the two companies concerned did not fulfil one or more of the conditions set out in Article 2(7)(c) of the basic Regulation.
- (20) The companies concerned and the complainant Community producers were given an opportunity to comment on the above findings.
- (21) The exporting producers not granted MET contested the Commission's findings, in particular regarding state interference and distortion of the financial situation. However no new arguments were brought forward to alter the MET determination.

- (22) The Community industry opposed the granting of MET to the three Chinese companies. It argued that these companies were operating in a macroeconomic environment where state intervention was the predominant factor, that the State fixed the price of the zinc raw material, which was the main raw material in the production of zinc oxide and that certain companies did not apply all of the key international accounting principles.
- (23) In order to be granted MET, the companies concerned had to show that market economy conditions prevailed for their individual companies in respect of the manufacture and sale of the like product. The three companies' accounts had been audited in line with international accounting standards. The Commission had not found any indication of significant state interference in the trading of zinc raw materials.
- (24) It was therefore decided to grant MET to three companies and to reject the MET claims for the other two. The Advisory Committee was consulted and did not object to the Commission's conclusions.

2. Individual treatment

- (25) In accordance with Article 9(5) of the basic Regulation, it is the Commission's policy to calculate a countrywide duty for countries falling under Article 2(7), except in those cases where companies are either granted MET or are able to demonstrate that their export activities are determined by market forces and free from State interference. This would justify a departure from the determination of a single countrywide duty. In the latter case, an individual dumping margin would be based on a comparison of the company's own export prices with the normal value for the analogue country.
- (26) The two Chinese companies, which were not granted MET, also requested individual treatment. The Commission sought and verified all information deemed necessary for the purposes of determining whether or not these companies qualified for individual treatment. For one of these companies, it was found that the export prices and quantities and conditions and terms of sale are freely determined, the exporter is free to repatriate capital and profits and any state interference was not such as to permit circumvention of the measures if that exporter were granted an individual dumping margin. For the second company, it was found that the state interference, in particular the degree of state ownership, was such as to permit circumvention of the measures if the company were granted an individual dumping margin.

- (27) It was therefore considered justified to grant individual treatment to Liuzhou Longcheng Chemical General Plant, and to its related company Yinli Import and Export Co. Ltd and to reject individual treatment for the other company concerned, namely Liuzhou Zinc Products Co. Ltd.

3. Normal value

Determination of normal value for exporting producers not granted MET

Selection of the analogue country

- (28) According to Article 2(7) of the basic Regulation, for non-market-economy countries and for companies to which MET could not be granted, normal value has to be established on the basis of the price or constructed value in an analogue country.
- (29) In the notice of initiation, the Commission indicated its intention to use the United States of America ('USA') as an appropriate analogue country for the purpose of establishing normal value for the PRC.
- (30) The exporting producers in the PRC objected to this proposal. The main arguments against the USA were: differences in the level of economic development between Asia and the USA; the oligopolistic position of zinc oxide producers on the US market which was alleged to lead to artificially high prices; differences in end-uses, as the rubber industry is the major US market for zinc oxide whereas Chinese exports to the Community seem to be used primarily in the ceramic industry; furthermore, it was claimed that the cost structure in the USA could not be compared with that in the PRC, where labour costs, environmental compliance costs, etc. are lower than in the USA.
- (31) The interested parties in question suggested South Korea, Malaysia, Indonesia, Taiwan, or Thailand as an appropriate analogue country but did not substantiate their proposals.
- (32) The Commission sent a request for information on sales and market conditions to all known producers of the product concerned in the six market economy countries suggested above. Replies were received from one producer in Taiwan, one in Thailand and one in the USA. None of the producers in Indonesia, South Korea or Malaysia replied to the request for information.
- (33) The Commission subsequently sent a more detailed questionnaire to the producers in the USA, Taiwan and Thailand requesting information on domestic sales prices and costs of production for the product concerned.

- (34) The replies showed that:

- of the four known producers in Thailand, the sole company willing to cooperate had a low production volume and the Thai domestic market appeared to be influenced by high import duties,
- of several domestic producers in Taiwan, the sole company willing to cooperate had both a very low production volume and a very low domestic sales volume,
- the cooperating US producer had a significant volume of production as well as a high domestic sales volume.

- (35) Further analysis of the replies showed that the USA had a highly competitive market for the product concerned with eight Nafta producers operating on the US/Nafta market, a high number of end users in both the rubber and ceramic sectors, significant imports from third countries and no import duties. Moreover, both production methods, the indirect, or French process, and the direct, or American, process, are used in the PRC and the USA and give the same range of grades of purity of zinc oxide. The cost items in the USA could be compared to those in the PRC. The arguments on differences in costs between the PRC and the USA, like environmental compliance costs, labour costs, etc, were without proper basis and therefore found not to be relevant. USA's domestic sales were also representative as compared to Chinese export sales of the product concerned to the Community.

- (36) In view of the above it was concluded that the USA was the most appropriate and reasonable analogue country in accordance with Article 2(7) of the basic Regulation.

Determination of normal value in the analogue country

- (37) Pursuant to Article 2(7)(a) of the basic Regulation, normal value for the exporting producers not granted MET was established on the basis of verified information received from the producer in the analogue country, i.e. on the basis of the prices paid or payable on the domestic market of the USA for products comparable to those sold by the Chinese exporting producers to the Community.
- (38) The Commission examined whether sales of the product concerned in the USA were made in the ordinary course of trade. With regard to costs of production, the verification showed that the cost of the main raw material was based on the London Metal Exchange ('LME') quotations which provide reference prices for the world-wide pricing of activities relating to non-ferrous metals, in this case zinc materials and related zinc products.

- (39) As domestic sales by the USA producer concerned were made in the ordinary course of trade, normal value was established on the basis of the weighted average domestic sales prices of zinc oxide to unrelated customers by the cooperating USA producer in accordance with Article 2(4) of the basic Regulation.

Determination of normal value for exporting producers granted MET

- (40) The companies granted MET were requested to submit a full questionnaire reply including domestic sales information and information on costs of production of the product concerned and these replies were verified at the premises of the companies concerned.
- (41) As far as the determination of normal value is concerned, the Commission first established, for each exporting producer granted MET, whether its total domestic sales of zinc oxide were representative in comparison with its total export sales to the Community. In accordance with Article 2(2) of the basic Regulation domestic sales were considered representative when the total domestic sales volume of each exporting producer was at least 5 % of its total export sales volume to the Community.
- (42) The Commission subsequently identified those grades of zinc oxide, sold domestically by the companies having representative domestic sales, that were identical or directly comparable with the grades sold for export to the Community.
- (43) For each grade sold by the exporting producers on their domestic market which was found to be directly comparable with the grade sold for export to the Community 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 grade of zinc oxide were considered sufficiently representative when the total domestic sales volume of that grade during the IP represented 5 % or more of the total sales volume of the comparable grade of zinc oxide exported to the Community.
- (44) An examination was also made as to whether the domestic sales of each grade could be regarded as having been made in the ordinary course of trade by establishing the proportion of profitable sales to independent customers of the grade in question. In cases where the sales volume of zinc oxide, sold at a net sales price equal to or above the calculated cost of production, represented 80 % or more of the total sales volume, and where the weighted average price of that grade was equal to or above the cost of production ('profitable sales'), normal value was based on the weighted average of the prices of all domestic sales made during the IP

irrespective of whether these sales were profitable or not. In all other cases normal value was based on the actual domestic price calculated as a weighted average of profitable sales only, provided these sales represented 10 % or more of the total sales volume.

- (45) In cases where the volume of profitable sales of any grade of zinc oxide represented less than 10 % of the total sales volume, it was considered that this particular grade was sold in insufficient quantities for the domestic price to provide an appropriate basis for the establishment of the normal value.
- (46) In establishing the profitability of the three companies concerned the Commission's investigation revealed that the purchase prices of the basic zinc raw materials for the production of zinc oxide appeared to be below market prices. This finding was based on a comparison between actual prices paid by the three companies and zinc quotations on the LME, generally recognised in the metals trade as an accurate reference for establishing prices.
- (47) For all three companies granted MET it was found that, after adjusting their costs for zinc raw materials in accordance with the LME quotations, their domestic sales appeared not to be made in the ordinary course of trade. It was consequently not possible to use the domestic prices of any of the three exporters and recourse had to be made to constructed normal value. Normal value was constructed for the three companies in accordance with Article 2(3) of the basic Regulation. Costs for zinc raw materials were corrected in line with LME quotations. Domestic sales, general and administrative expenses reported by the exporting producers, where considered to be reliable, were applied without any adjustment. For the reasons noted above, none of the methods set out in the chapeau and in subparagraphs (a) and (b) of Article 2(6) of the basic Regulation could be used as domestic sales appeared not to be made in the ordinary course of trade and none of the companies concerned recorded a profit after adjustments had been made to their zinc raw material costs in accordance with the LME quotation. Therefore, profit was provisionally established by reference to the producer's profit in the analogue country, which, pursuant to Article 2(6)(c) of the basic Regulation, was considered to be the most reasonable approach in the circumstances.

4. Export prices

- (48) All export sales to the Community were made directly to independent importers in the Community and the export price was established pursuant to Article 2(8) of the basic Regulation by reference to the prices actually paid or payable.

5. Comparison

- (49) For one company in the PRC sales to the Community were made through a related company in Hong Kong. This company carried out the functions of a trader and an adjustment was made to the export price from this company in Hong Kong by deducting a commission from the export price to take account of the functions performed by it.
- (50) The comparison was made on an ex-factory basis and at the same level of trade. In order to ensure a fair comparison, account was taken, in accordance with Article 2(10) of the basic Regulation, of differences in factors which were claimed and demonstrated to affect prices and price comparability. On this basis, allowances for differences in transport, insurance, handling, loading and ancillary costs, credit, commissions, import charges and after sales costs (warranty/guarantee, etc.) were made.

6. Dumping margin

For the cooperating exporting producers granted MET/IT

- (51) For the three companies granted MET, the weighted average normal value of each grade of the product concerned exported to the Community was compared with the weighted average export price of the corresponding grade of the product concerned, as provided for under Article 2(11) of the basic Regulation.
- (52) For the company granted individual treatment, the weighted average normal value for each grade exported to the Community established for the analogue country was compared with the weighted average export price of the corresponding grade exported to the Community, as provided for under Article 2(11) of the basic Regulation.
- (53) The provisional weighted average dumping margins expressed as a percentage of the cif Community frontier price duty unpaid are:

	(%)
Liuzhou Nonferrous Metals Smelting Co. Ltd	16,9
Liuzhou Fuxin Chemical Industry Co. Ltd	17,8
Gredmann Guigang Chemical Ltd	24,7
Liuzhou Longcheng Chemical Plant	64,5

For all other exporting producers

- (54) In order to calculate the countrywide duty applicable to all other exporters in the PRC, the Commission first established the level of cooperation. A comparison was made between the total imports of the product concerned originating in the PRC calculated on the basis of Eurostat and the actual questionnaire replies received from exporters in the PRC. On this basis it was established that the level of cooperation was 65 %.
- (55) The dumping margin was consequently calculated as a weighted average of the dumping margin established for the sole remaining cooperating exporter which was neither granted MET nor IT and the dumping margin calculated on the basis of Article 18 of the basic Regulation for the remaining unknown exporters. The dumping margin for the sole remaining cooperating exporter mentioned above was calculated by comparing the weighted average normal value established for the analogue country and the weighted average export price reported by the exporter concerned. The dumping margin for the unknown exporters was established as the difference between the weighted average normal value established in the analogue country and the weighted average export price for the most dumped transactions of the abovementioned company. The resulting dumping margin was applied to the volume (extracted from Eurostat) exported by the unknown Chinese producers. It was considered that non-cooperating producers did not dump at a lower level and that there should be no bonus for non-cooperating.
- (56) On this basis the countrywide level of dumping was provisionally established at 69,8 % of the cif Community frontier price.

D. COMMUNITY INDUSTRY

1. Community production

- (57) Zinc oxide is manufactured in the Community by the following companies:
- six complainant producers who cooperated in the investigation and are the largest producers of zinc oxide in the Community,
 - six smaller non-complainant producers who provided some general information on their activities to the Commission but did not cooperate in the investigation. Of these six producers, five supported the complaint and one took no position,
 - Nine other small non-complainant producers who neither cooperated in the investigation nor expressed an opinion.

- (58) The zinc oxide produced by all these companies therefore constitutes the Community production within the meaning of Article 4(1) of the basic Regulation.

2. Definition of the Community industry

- (59) The six cooperating complainant Community producers fulfil the requirements of Article 5(4) of the basic Regulation, since they account for around 75 % of the total Community production of zinc oxide. They are therefore deemed to constitute the Community industry within the meaning of Article 4(1) of the same Regulation and will hereinafter be referred to as 'the Community industry'.

E. INJURY

1. Preliminary remarks

Import data

- (60) Import figures were established using Eurostat information. The CN heading under which the product concerned is currently classified, also includes feed grade zinc oxide and zinc peroxide. Evidence given in the complaint shows that only negligible quantities of such products are imported. Therefore no specific adjustment was made to estimate total imports.

LME zinc metal quotation and its importance to zinc oxide

- (61) The Commission established during the investigation that for all operators subject to normal market conditions, the quotation for zinc metal on the LME plays a fundamental role in determining the prices of both raw materials and end product. The LME quotation serves as a recognised reference point to which the zinc content of any item, be it zinc concentrate or zinc oxide, can be related. During the analysis period the LME evolved as described below. In 1997, the activities of speculators on the zinc market resulted in a price peak. The quotation is made in US dollars with the result that the price rise between 1999 and 2000 is magnified by the depreciation of the euro against the dollar.

	1996	1997	1998	1999	IP 2000
LME flat yearly average	807	1 160	914	1 010	1 220

(EUR/tonne)

2. Community consumption

- (62) Apparent consumption of zinc oxide in the Community was established on the basis of:
- the total imports of the product concerned into the Community as reported by Eurostat,
 - the total verified sales of the Community industry on the Community market,
 - the sales data of the six other Community producers who provided some general information to the Commission,
 - and evidence contained in the complaint concerning the remaining other Community producers.

- (63) Community consumption of zinc oxide reached approximately 257 000 tonnes during the IP. As shown in the table below, it increased by 9 % over the analysis period mostly due to the development of the use of zinc oxide in the ceramic industry.

Community consumption	1996	1997	1998	1999	IP 2000
Tonnes	236 415	244 446	256 989	248 250	257 058
1996 = 100	100	103	109	105	109

3. Imports from the PRC

Volume of dumped imports

- (64) The volume of the dumped imports originating in the PRC increased by nearly tenfold between 1996 and the IP from 4 459 tonnes to 47 367 tonnes. The most significant increase occurred in the IP when the imports concerned were 2,5 times the level of the previous year.
- (65) The market share of the imports concerned reached 18,4 % during the IP compared to less than 2 % at the start of the analysis period.

Imports from the PRC	1996	1997	1998	1999	IP 2000
Tonnes	4 459	10 081	15 892	19 070	47 367
1996 = 100	100	226	356	428	1 062
Market share (%)	1,9	4,1	6,2	7,7	18,4

Prices of dumped imports

Price evolution

- (66) The prices of the imports concerned increased by 23 % over the analysis period with significant movements being recorded in 1997 when prices rose by 10 % as the price of zinc metal on the world market reached record levels. Prices fell back in 1999, only to rebound strongly during the IP.

Cif prices	1996	1997	1998	1999	IP 2000
EUR/tonne	715	788	796	745	876
1996 = 100	100	110	111	104	123

Price undercutting

- (67) For the purposes of analysing price undercutting, weighted average sales prices to independent customers of the Community industry per grade at an ex-works level were compared to the corresponding weighted average export prices of Chinese exporting producers on the Community market during the IP on a cif basis.

- (68) Export prices of Chinese exporting producers were duly adjusted for customs duties and post-importation costs. These adjustments have been made on the basis of information collected during the investigation, notably from cooperating unrelated importers.
- (69) On this basis, the price-undercutting margin, expressed as a percentage of the Community industry's prices was found to be in the range of 6,0 to 13,7 % for those companies granted MET or IT, and 10,8 % on a weighted average basis.

4. Situation of the Community industry

Preliminary remarks

- (70) Community industry data were obtained from the verified questionnaire responses of the six cooperating Community producers. Three of the six cooperating producers had several production facilities producing zinc oxide, more often than not in different Member States of the Community. In these cases, individual replies to the Commission's questionnaires were received from each plant and verified by the Commission before being aggregated to give data for the Community industry as a whole.
- (71) In accordance with Article 3(5) of the basic Regulation, the examination of the impact of the dumped imports on the Community industry included an evaluation of all economic factors and indices having a bearing on the state of the industry.

Production, production capacity and capacity utilisation

- (72) The Community industry's production decreased by 6 % over the analysis period while the volume of imports originating in the PRC increased by almost tenfold. Over the same period, the Community industry increased its capacity by 2 % as a result of a relatively minor investment to meet the needs of a particular customer. The capacity utilisation rate of the Community industry declined over the period by six percentage points.

	1996	1997	1998	1999	IP 2000
Production (tonnes)	169 028	169 001	172 142	165 048	159 184
1996 = 100	100	100	102	98	94
Capacity (tonnes)	216 961	216 961	221 961	221 961	221 961
1996 = 100	100	100	102	102	102
Capacity utilisation (%)	78	78	78	74	72

Stocks

- (73) Year-end stock levels decreased by 15 % over the analysis period but remained relatively stable when expressed as a percentage of production.

	1996	1997	1998	1999	IP 2000
Stocks (tonnes)	12 183	10 783	13 263	11 233	10 380
1996 = 100	100	89	109	92	85

Sales volume, market share and growth

- (74) The sales made by the Community industry on the Community market during the analysis period decreased by 8 % in volume terms, whilst Community consumption went up by 9 % during the same period and imports concerned increased by more than tenfold.

	1996	1997	1998	1999	IP 2000
Sales volume (tonnes)	153 962	157 439	157 647	151 332	141 619
1996 = 100	100	102	102	98	92
Market share (%)	65	64	61	61	55

- (75) Consequently, the Community industry's market share decreased by 10 percentage points over the analysis period from 65 % of Community consumption in 1996 to 55 % during the IP. Thus, the Community industry did not benefit from the growth in consumption on the Community market.

Sales prices and costs

- (76) Over the analysis period the selling prices of the Community industry increased by 19 % while unit costs increased by 31 %. The necessary price increases were therefore suppressed due to the massive presence of low priced imports. Thus, the Community industry suffered price suppression over the analysis period.

	1996	1997	1998	1999	IP 2000
Average selling price delivered (EUR/tonne)	1 047	1 202	1 144	1 090	1 247
1996 = 100	100	115	109	104	119
Average cost of production (EUR/tonne)	979	1 180	1 117	1 187	1 283
1996 = 100	100	121	114	121	131

Profitability

- (77) The Community industry's profitability expressed in terms of return on net sales on the Community market fell sharply over the analysis period from a figure of + 8 % in 1996 to - 1 % in the IP.

	1996	1997	1998	1999	IP 2000
Profitability (%)	8	4	4	0	- 1

Investments and ability to raise capital

- (78) The level of investments decreased over the analysis period from EUR 5,2 million in 1996 to EUR 2,8 million in the IP. Approximately 86 % of expenditure over the analysis period was recorded under the category of machinery, equipment and other items. The investigation showed that most of this capital expenditure was spent on replacing or maintaining existing facilities.
- (79) It has been established that over the analysis period it became increasingly difficult for the Community industry to justify capital expenditure related to zinc oxide, especially for those plants mostly dedicated to the supply of the ceramic industry. This resulted in the cancellation of a number of investment programmes in the second half of the analysis period and in some cases, severe cut backs in even routine maintenance programmes. Furthermore, the Community industry's ability to raise capital from external providers of finance also became more difficult at this time as its deteriorating financial situation raised concerns in some lenders' minds.

Investment	1996	1997	1998	1999	IP 2000
EUR	5 230 899	2 731 329	3 432 534	4 288 935	2 809 980
1996 = 100	100	52	66	82	54

Return on investments

- (80) In assessing the impact of the dumped imports on the Community industry's return on investments, the Commission examined the pre-tax profit or loss on sales of zinc oxide compared to the assets employed in the zinc oxide sector.
- (81) In a limited number of cases, it was found that certain assets were used both in the production of zinc oxide and other products. The Commission satisfied itself that the method used to allocate assets relating solely to zinc oxide were appropriate. The data and trends shown in the table below demonstrate the considerable deterioration in its financial performance that occurred over the analysis period.

(%)					
Return on total assets	1996	1997	1998	1999	IP 2000
	12	7	3	- 1	- 6

Cash flow

- (82) The following table clearly demonstrates the marked deterioration in the cash flow generated by the Community industry's zinc oxide activities.

	1996	1997	1998	1999	IP 2000
Net cash inflow (outflow) from operating activities (thousand EUR)	13 197	4 234	8 852	4 830	- 2 356

Employment, productivity and wages

- (83) The following table shows the number of employees in the zinc oxide activities of the Community industry and the average total employment cost per employee (i.e. wage and social costs).

	1996	1997	1998	1999	IP 2000
Number of employees	551	544	532	509	484
1996 = 100	100	99	97	92	88
Average employment cost per employee (thousand/EUR)	40	39	42	43	46
1996 = 100	100	99	104	108	116
Productivity (production in tonnes per employee)	307	311	325	322	329
1996 = 100	100	101	106	105	107

- (84) The Community industry's number of employees at the end of the IP was 484. This represents a decrease of 12 % over the analysis period with the rate of decline accelerating from 1998 onwards. Productivity increased by 7 % over the analysis period.
- (85) The average wage per employee however rose by 16 %. Part of this increase can be attributed to exchange rate movements between the euro and the pound sterling. Approximately 18 % of the Community industry's workforce is located in the United Kingdom. Over the analysis period, the euro depreciated against the pound by 25 %.

Magnitude of dumping

- (86) Given the volume and the price of the dumped imports, the impact of the actual margins of dumping, which are significant, cannot be considered negligible.

5. Conclusion on injury

- (87) Between 1996 and the IP, the volume of dumped imports of zinc oxide originating in the PRC increased by 962 % from under 4 500 tonnes to over 47 000 tonnes. This resulted in an overall increase in their market share of 16 percentage points. The prices of the imports concerned remained below those of the Community industry throughout the analysis period with a weighted average price undercutting of 10,8 %.
- (88) Between 1996 and the IP the situation of the Community industry deteriorated both in terms of production (– 6 %) and sales volume (– 7 %) despite the increase in consumption. As a consequence, the Community industry's market share fell from 65 % to 55 %, i.e. by 10 percentage points. This decline was particularly significant between 1999 and the IP when imports originating in the PRC were growing at their fastest rate. Over the analysis period, the Community industry's profitability deteriorated and was negative during the IP. In the face of declining profitability, the Community industry was compelled to reduce its costs in an attempt to remain competitive. Levels of both employment and investment were cut back. Despite these efforts, costs rose rapidly because of the increase of zinc prices while average selling prices were prevented from increasing commensurately due to the presence of massive quantities of low priced dumped imports.

- (89) In view of the above, as evidenced most notably by the decrease in production, sales and employment, loss of market share, price suppression and declining profitability, it is provisionally concluded that the Community industry has suffered material injury within the meaning of Article 3 of the basic Regulation.

F. CAUSATION OF INJURY

1. Introduction

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

2. Effect of the dumped imports

- (91) The substantial increase in the volume of imports originating in the country concerned and their gain in market share over the analysis period, at prices which undercut those of the Community industry coincided with a serious deterioration in the situation of the Community industry notably in terms of production, sales volume, market share and profitability.
- (92) This deterioration was most marked between 1999 and the IP as the volume of the dumped imports originating in the PRC increased by approximately 150 % to reach record levels.
- (93) The Community industry's prices have always been at a level to ensure that the cost of raw material is covered by the selling price while the imports concerned have for extended periods been at levels below the cost of the zinc metal they contain. However, from 1999 onwards the Community industry's selling price has not been sufficient to cover the total costs of production and this resulted in losses being incurred. The Commission found that the effect of the dumped imports had been to suppress the selling prices of the Community industry and subsequently reduce its profitability. Evidence obtained as part of the investigation supported the claim that the increased offer of imports from the country concerned at dumped prices on the Community market had been used by some of the Community industry's customers to drive down prices during contract negotiations.
- (94) It is therefore considered that the pressure exerted by the imports concerned, which significantly increased their volume and market share from 1998 onwards and which were made at particularly low prices, undercutting those of the Community industry, resulted in a deterioration of the situation of the Community industry.

3. Effect of other factors

Imports originating in other third countries

- (95) Over the analysis period, the volume of imports originating in other third countries declined by 18 % from a level of approximately 23 000 tonnes in 1996 to 19 000 tonnes in the IP. These imports therefore did not benefit from the growth of consumption recorded over the analysis period and have lost 3 percentage points in market share, from 10 to 7 %.
- (96) Of the above imports, only those originating in Turkey and Poland were at levels above 1 % of Community consumption during the IP. The table below shows the development in both volume and price of the imports originating in third countries other than the PRC.

	1996	1997	1998	1999	IP
Other third countries					
Quantity (tonnes)	23 150	22 442	27 900	22 787	18 873
Market share (%)	9,8	9,2	10,9	9,2	7,3
Cif prices (EUR/tonne)	822	961	985	946	1 107
Of which Turkey					
Quantity (tonnes)	1 633	3 345	4 289	3 172	3 451
Market share (%)	0,7	1,4	1,7	1,3	1,3
Cif prices (EUR/tonne)	546	683	770	749	873
Of which Poland					
Quantity (tonnes)	3 236	2 843	2 168	2 669	2 961
Market share (%)	1,4	1,2	0,8	1,1	1,2
Cif prices (EUR/tonne)	720	716	823	806	846

- (97) In the case of imports originating in Turkey, they were very close to *de minimis* and appeared to contain a certain proportion of products other than the product concerned i.e. feed grade, which is less expensive than zinc oxide. In this respect it has to be noted that feed grade zinc oxide produced and sold by the Community industry on the Community market was at a lower price than its sales of zinc oxide (in the region of 20 % less expensive reflecting its lower quality).
- (98) Imports originating in Poland decreased over the analysis period to a level of under 3 000 tonnes in the IP. Their market share also decreased over the period from 1,4 % in 1996 to 1,2 % in the IP. Prices of the imports originating in Poland, although at low levels, were higher than those of imports originating in the country concerned for much of the analysis period.
- (99) On the basis of the above, it is provisionally concluded that imports originating in Turkey, Poland and other third countries did not contribute to the material injury suffered by the Community industry.

The export performance of the Community industry

- (100) The volume of the Community industry's exports increased by nearly 40 % over the analysis period to reach a figure of 15 748 tonnes. The exports of the Community industry during the IP represented approximately 10 % of production.
- (101) One interested party commented that this increase demonstrated the competitiveness of the Community industry and its robust financial state. Whilst it is accepted that the growth of export markets has been considerable, it should be noted that the actual tonnage concerned remains marginal when compared to the volume of total sales. Furthermore, it is to be remembered that the increase in exports did not prevent the decline in the production of the Community industry.
- (102) In conclusion, the Community industry has proven itself to be competitive as shown by the performance of its export activities. Thus, its export activities did not contribute to the injury suffered by the Community industry.

Changes in the pattern of consumption

- (103) Consumption of zinc oxide in the Community increased by 9 % over the analysis period. It is therefore considered that the material injury suffered by the Community industry cannot be attributed to a contraction of demand on the Community market.

Conclusion on causation

- (104) The substantial increase in the volume and market share of imports from the country concerned over the analysis period and their level of price undercutting during the IP had material negative consequences on the volumes and prices of the Community industry's sales. This in turn affected a number of the Community industry's economic indicators, in particular profitability. No other factors were found that could have contributed to the injury suffered by the Community industry.
- (105) It is therefore provisionally concluded that the dumped imports from the country concerned have caused material injury to the Community industry within the meaning of Article 3(6) of the basic Regulation.

G. COMMUNITY INTEREST**1. General remarks**

- (106) The Commission examined whether, despite the conclusion on injurious dumping, compelling reasons existed that could lead to the conclusion that it is not in the Community interest to adopt measures in this particular case. For this purpose and in accordance with Article 21(1) of the basic Regulation, the impact of possible measures on all parties involved in this proceeding and also the consequences of not taking measures were considered on the basis of all evidence submitted.

2. The investigation

- (107) The Commission sent questionnaires to importers, suppliers of raw materials, industrial users of the product concerned, and to associations representing user groups as well as other interested parties who made themselves known within the time limit set in the notice of initiation.
- (108) In total, 108 questionnaires were sent out, but only 24 replies were received within the time limits set.
- (109) Questionnaire responses were received within the time limits from:

Six unrelated importers of the product concerned:

- Explorer SRL (Italy)
- I.T.A.C.O Chimica SRL (Italy)
- I.T.A.C.O. International SRL (Italy)
- Almiberia SA (Spain)
- Quimialmel SA (Spain)
- L'Approchimide SRL (Italy)

Five direct suppliers of raw materials:

- Il.co.met Sas (Italy)
- Mapral SAS (France)

- Rezinal NV (The Netherlands)
- Nuova Eurozinco SpA (Italy)
- Wilhelm Grillo GmbH (Germany)

13 users of the product concerned including:

Ten producers of frits and glazes, a major input for the ceramic industry:

- Johnson Matthey Ceramics SA (Spain)
- Ramacolor (Italy)
- Fritta SL (Spain)
- Ferro Enamel Española SA (Spain)
- Torrecid S.A (Spain)
- Esmaltes SA (Spain)
- Esmalglass SA (Spain)
- Vernis SA (Spain)
- Cerdec Ceramics Iberica SA (Spain)
- Color Esmalt SA (Spain)

and three producers of chemicals and steel products:

- Sikel NV (Belgium)
- Hans Heubach GmbH & Co. KG (Germany)
- Infineum Italia Srl (Italy).

- (110) The Commission was also contacted by two professional associations, which provided aggregated information concerning the activities of their sector and also made representations on behalf of their members. They were:
- ASCER (Asociación Española de Fabricantes de Azulejos y Pavimentos Cerámicos), i.e. the Spanish ceramic tile manufacturers' association,
 - ANFFECC (Asociación Nacional de Fabricantes de Fritas, Esmaltes, y Colores Cerámicos), i.e. the Spanish frit and glaze manufacturers' association.

3. Likely effect of the imposition of measures on the Community industry

- (111) The Community industry is composed of six companies with production facilities for zinc oxide in the following Member States: France, Germany, Italy, the Netherlands, Spain and the United Kingdom. Substantial competition exists on the Community market due to the number of producers and production facilities.
- (112) In spite of the material injury suffered by the Community industry during the IP, there is no reason to doubt its long-term viability and competitiveness in a market where normal conditions of fair trade exist.
- (113) It should be noted that the Community industry's loss-making situation has resulted from its difficulty to compete with the low-priced, dumped imports, which have gained considerable market share over the analysis period. It is considered that the imposition of measures will restore fair competition to the market and allow the Community industry to increase its sales volume and market share. It is anticipated that an increase in the volumes of sales and production would also safeguard employment in the industry. The higher contribution towards its fixed costs which would result from an increase in the volume of sales at fair prices should also help to restore the profitability of the Community industry.
- (114) Should measures not be imposed, the continued decline in the profitability of the Community industry observed over the analysis period is likely to continue since it will not be able to compete with the low-priced, dumped imports. Its viability may be threatened and the continued existence of certain production facilities put in question. Without the imposition of measures, it is likely that Chinese zinc oxide will progressively gain market share in user markets other than the ceramic industry. Indeed, there is already some evidence that the Community industry has lost some market share in the technical rubber sector to Chinese zinc oxide.

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

4. Likely effect of the imposition of measures on other Community producers

- (116) Other producers of zinc oxide located in the Community share the concerns expressed by the Community industry. The sales of the six non-complainant producers, who provided some general information on their activities to the Commission, remained stable over the analysis period. Their market share in the IP was 7,3 % as opposed to 7,8 % at the start of the analysis period. These producers therefore did not benefit as a whole from the growth in Community consumption recorded over the same period. There is no reason to believe that the situation of the six non-complainant producers who provided information to the Commission and of the remaining producers of zinc oxide in the Community would differ greatly from that of the Community industry.
- (117) It is therefore provisionally concluded that the imposition of anti-dumping measures would be in the interest of the other Community producers.

5. Likely effects of the imposition of measures on importers

- (118) The Commission received questionnaire replies from six unrelated importers in the Community. These companies accounted for 46 % of the imports of the product concerned originating in the PRC during the IP.
- (119) Sales of zinc oxide during the IP represented between 8 % and 23 % of the turnover of the cooperating unrelated importers. It is to be noted that the impact on employment levels is expected to be minimal, i.e. around 25 employees in these companies may be considered to be directly linked to zinc oxide activities. This figure however has barely changed over the analysis period in spite of the dramatic increase in the level of imports from the country concerned, as these employees also work on other products not concerned by this investigation and would in all likelihood continue to do so even if measures were imposed.
- (120) Therefore, it is provisionally concluded that the situation of unrelated importers will not be greatly affected should anti-dumping measures be imposed.

6. Likely effects of the imposition of measures on suppliers of raw materials and zinc recycling activities

- (121) Suppliers of raw material to the Community industry can be categorised according to the type of products they offer which are mainly special high grade zinc, drosses from the galvanising industry and other zinc waste materials. Special high grade zinc represented 34 % by value of the Community industry's raw material purchases during the IP. However, the Commission did not receive any replies from suppliers of this raw material. It was therefore considered that most probably their situation would not be significantly affected by the imposition of any anti-dumping measures.
- (122) Five companies, which together employed 25 people in their activities supplying materials to the producers of zinc oxide, cooperated in the investigation. It was found that these companies were mostly active in collecting, recycling and trading the zinc residues of the galvanising industry. Indeed, a third of pure zinc used in the Community, by sectors such as the galvanising industry, is recycled and half of this recycled material is then used to produce zinc oxide. These suppliers represented 14 % of the Community industry's purchases of raw material by value in the IP.
- (123) The majority of these suppliers worked closely with the Community industry and other producers of zinc oxide located in the Community. A large part of their turnover was derived from sales made to zinc oxide producers. Therefore, any reduction in the Community industry's purchases, as the most significant producer of zinc oxide in the Community, would have a significant effect on the situation of these companies.

- (124) The imposition of measures would help to restore fair conditions of competition on the Community market, thus permitting the recycling of an important part of zinc residues to continue. The Commission has therefore provisionally concluded that the imposition of anti-dumping measures is in the interest of the upstream industries.

7. Likely effects of the imposition of measures on users

- (125) Zinc oxide has a wide range of applications. The most significant uses of zinc oxide are in the ceramic industry, which accounted for approximately 39 % of actual Community consumption in the IP, in rubber compounding (30 %), chemical and pharmaceutical applications (17 %) and other sectors, including paints (14 %). Most markets for zinc oxide, with the exception of the ceramic industry, which has recently increased its consumption due to technological advances, are generally mature and changes in demand are linked to the general state of the economy.

Tyre and rubber producers

- (126) As mentioned above, the manufacturers of tyres and other rubber products are important users of zinc oxide in the Community. However, the Commission did not receive any answers to its questionnaires from these companies. In the absence of evidence to suggest the contrary, it has been provisionally considered that they would not be significantly impacted by the imposition of any anti-dumping measures.

The ceramic tile industry

- (127) The ceramic tile industry consists of two tiers: the manufacturers of frits and glazes and the producers of tiles. These two tiers are interdependent. Indeed, the Community demand for frits and glazes is completely governed by the tile makers. The Community frits have acquired a world leadership in terms of technological advance and quality and thus have no serious competitors outside the Community. For this reason, it has been decided to consider these two tiers as one industry in the assessment of the impact of the imposition of measures although only the frit and glaze makers are direct users of zinc oxide in its primary form.
- (128) The Commission received replies from 10 frit and glaze companies. These companies accounted for 19 % of the consumption of zinc oxide in the Community in the IP, i.e. approximately half of the consumption of zinc oxide by the ceramic industry.
- (129) The Commission did not receive any replies to their questionnaires from tile makers and have therefore used the information provided by the Spanish ceramic tile manufacturers association and industry publications to estimate the impact of measures on the finished product of this industry. This association represents the vast majority of Spanish ceramic tile producers.
- (130) The consumption of zinc oxide in the tile industry increased dramatically from 1996 onwards due to the introduction of the single firing technique in the production process, which required a higher percentage of zinc oxide, compared to other techniques.
- (131) The Community producers of tiles are principally located in Spain (Castellón area) and Italy. Both Member States produced in excess of 600 million square metres of tiles in the IP. According to the Spanish trade association, direct employment in the Spanish ceramic tile industry exceeds 26 000 people, of whom 3 000 work in the manufacture of frits and glazes. The production of frits and glazes in the Community is increasingly concentrated in Spain. The largest market for Spanish produced frits and glazes outside Spain is Italy.

Impact of measures on frit and glaze makers

- (132) According to the information made available to the Commission, zinc oxide accounts, on average, for 20 % of the total manufacturing cost of frits and glazes. The imposition of measures would lead to an increase in the average price paid for their zinc oxide supplies and in turn to an estimated increase of less than 4 % in terms of their total cost, in view of the large weight of research and design and other costs in the full costs of production.

- (133) The producers argued that they would be unable to pass on any increase in their costs to their customers should measures be imposed on the product concerned from the PRC. They also contended that they would become less competitive on world markets, lose market share, with a possible threat to employment in the Community and be forced to move production overseas (delocalise). They also argued that the increase in the use of zinc oxide originating in the PRC was based entirely on economic reasons in that the industry did not require the more expensive higher purity grades produced by the Community industry.
- (134) With regard to the first argument, according to the replies received by the Commission, frit and glaze companies recorded profits in excess of 10 % of net turnover for the whole of the analysis period. The level of investment in new production capacity and research and development facilities has been substantial and ongoing for the last decade. It is therefore considered that they are in a sufficiently strong financial position to be able to absorb this increase in their costs if it could not be passed on to their customers.
- (135) Furthermore, the research and development undertaken by the frit and glaze makers allows them to constantly present new formulations and tile designs to their customers in the tile producing sector as this market has to renew its offer regularly in order to remain the leading player on the world market in terms of design style. Indeed, the speed with which new designs are brought to the market can be a crucial factor in gaining competitive advantage. It is therefore considered that there is a very strong operational link between the tile producers and the frit makers so that the former will accept an increase in the prices they have to pay if they are to continue to have access to the Community frit makers' new designs and technological advances.
- (136) With regard to the second argument, the frit and glaze industry has a distinct competitive advantage in terms of the quality and innovative characteristics of its products. This is borne out by the number of countries to which these producers export their products. Approximately 37 % of Spanish-produced glazes were exported outside the Community during the IP. The claim that the frit and glaze industry will be forced to delocalise appears unsubstantiated when one considers both the level of investment made by the industry recently in production facilities within the Community and its strong export competitiveness. Therefore, there is no threat to the level of employment in the Community due to delocalisation. There are also strong economic reasons for these producers to be located near to their customers in the Community. This is borne out by the concentration of these activities in the Castellón region of Spain.
- (137) As regards the final argument that the products of the Community producers no longer met the requirements of these users, the types of zinc oxide purchased by users in this sector were found to be comparable with those produced by the Community industry.
- (138) It is therefore considered in the light of the overall financial performance of the Community frit and glaze industry, its continued expansion and investment in new technology and facilities and its reputation for quality and innovation, that the likely impact of measures would not have a major adverse impact on its activities.

Impact of measures on ceramic tile producers

- (139) The Spanish association of tile manufacturers argued that the imposition of measures on zinc oxide originating in the PRC would increase the price of glazes used in the production of ceramic tiles and also increase the cost of the finished tile. It was further suggested that the impact of the imposition of measures would erode competitiveness and cause social-economic damage that would be more serious than could result from the alleged dumping itself.
- (140) As noted above, the Commission did not receive any cooperation from individual companies operating in this sector. Nor did the information submitted by the association provide detailed evidence of costs of production for individual producers. Therefore, in the absence of information concerning their costs of production, the Commission used official statistics concerning the volume and value of their production. It was estimated that each square metre of tile contains on average 48 g of zinc oxide and that each 10 % increase in the cost of this input would only raise the unit value of each square metre produced by 0,06 %.

- (141) In conclusion, it is provisionally considered that the likely impact of measures on ceramic tile producers would be limited.

Other users

- (142) The Commission received very few replies to their questionnaires from users in sectors other than those already mentioned. Only three other companies cooperated in the investigation. This lack of cooperation on the part of the majority of other users is considered to indicate that the impact of measures on them would be limited.
- (143) The three respondents operate in distinct sectors, comprising engine oils, zinc phosphate and electro-galvanised steel sheets for the automotive industry. All three purchased zinc oxide only from Community producers during the analysis period and represented 3 % of Community consumption in the IP.
- (144) One of these companies mentioned it would not be affected while the others argued that the imposition of measures would lead to an overall increase in the price of zinc oxide on the market.
- (145) Even though zinc oxide represents between 10 % and 26 % of the costs of these companies, it is considered that the imposition of measures would impact them only to the extent that the prices of the Community industry are likely to rise following the imposition of measures. Moreover, it is to be noted that any such rise in the prices of the Community industry would be the result of a return to normal market conditions.
- (146) It is therefore provisionally considered that in view of the above, i.e. the low level of cooperation and the situation of the cooperating users, that the imposition of anti-dumping measures on other users would not have a significant impact on their situation.

Conclusion

- (147) Recalling the conclusions reached above in respect of the users of zinc oxide in the present investigation, it is provisionally concluded that the imposition of measures would not significantly affect their situation.

8. Competition and trade distorting effects

- (148) With respect to the effects of possible measures on competition in the Community, one interested party argued that duties would unnecessarily strengthen the position of EU zinc oxide producers.
- (149) The Commission does not consider that measures would have such a distorting effect on the market. The consequence of measures would be to remove the distorting effects of the dumped imports and to re-establish fair market conditions for all operators. Moreover, given the number of producers of zinc oxide in the Community and the existence of various sources of supply outside the Community, it was considered that measures would not affect the existing high degree of competition on the market.
- (150) In view of the above, the imposition of provisional anti-dumping duties would not limit the choice of the user industries or weaken competition.

9. Conclusion

- (151) In view of the above, the Commission provisionally concluded that no compelling reasons exist not to impose provisional anti-dumping measures in the present case.

H. PROVISIONAL ANTI-DUMPING MEASURES

1. Injury elimination level

- (152) In order to prevent further injury being caused by the dumped imports, it was considered appropriate to adopt anti-dumping measures in the form of provisional duties.
- (153) For the purpose of determining the level of these duties, the Commission took account of the dumping margins found and the amount of duty necessary to eliminate the injury sustained by the Community industry.

- (154) To this end, the Commission determined a non-injurious price based on production costs of the Community industry, together with a reasonable profit margin of 8 %. This margin is regarded as an appropriate minimum that this industry could expect in the absence of injurious dumping. This is supported by the fact the Community industry recorded this profit margin at the beginning of the analysis period when the level of dumped imports was relatively low. The non-injurious price was compared with the prices of the dumped imports used to establish price undercutting, as outlined above. Differences resulting from this comparison were then expressed as a percentage of the total cif import value to establish the injury margin.
- (155) In order to calculate the residual injury margin applicable to all other exporting producers in the PRC, the export prices and methodology used to calculate the countrywide dumping margin as detailed at recital 55 were used.

2. Provisional measures

- (156) In the light of the foregoing, it is considered that a provisional anti-dumping duty should be imposed at the level of the dumping margin found, but should not be higher than the injury margin calculated above in accordance with Article 7(2) of the basic Regulation.
- (157) On the basis of the above, anti-dumping duty rates have been established by comparing the injury margins and the dumping margins. The injury margin was lower than the dumping margin for the following company: Liuzhou Longcheng Chemical General Plant and consequently the duty rate should be based on this margin. For the three remaining cooperating exporting producers the duty has been set at the level of the dumping margins found as these were lower than the injury margins.
- (158) As regards the countrywide duty to be applied to the remaining exporting producers, it was determined at the level of the injury margin as this was found to be lower than the countrywide dumping margin.
- (159) The individual company anti-dumping duty rates specified in this Regulation were established on the basis of the findings of the present investigation. Therefore, they reflect the situation found during that investigation with respect to these companies. These duty rates (as opposed to the countrywide duty applicable to 'all other companies') are thus exclusively applicable to imports of products originating in the country concerned and produced by the companies and thus by the specific legal entities mentioned. Imported products produced by any other company not specifically mentioned in the operative part of this Regulation with its name and address, including entities related to those specifically mentioned, cannot benefit from these rates and shall be subject to the duty rate applicable to 'all other companies'.
- (160) 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 forthwith with all relevant information, in particular any modification in the company's activities linked to production, domestic and export sales associated with e.g. that name change or that change in the production and sales entities. The Commission, if appropriate, will, after consultation of the Advisory Committee, amend the Regulation accordingly by updating the list of companies benefiting from individual duty rates.

I. FINAL PROVISION

- (161) 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 purposes of any definitive duty,

HAS ADOPTED THIS REGULATION:

Article 1

1. A provisional anti-dumping duty is hereby imposed on imports of zinc oxide (chemical formula: ZnO) with a purity in net weight of not less than 93 % zinc oxide, falling within CN heading ex 2817 00 00 (TARIC code 2817 00 00*10) and originating in the People's Republic of China.
2. The rate of the provisional anti-dumping duty applicable to the net, free-at-Community-frontier price, before duty, for products manufactured by the companies listed below, shall be as follows:

Companies	Provisional duties (%)	TARIC additional code
Liuzhou Nonferrous Metals Smelting Co. Ltd and its related export company Guangxi Liuzhou Nonferrous Metals Smelting Import & Export Co. Ltd	16,9	A277
Liuzhou Fuxin Chemical Industry Co. Ltd	17,8	A278
Gredmann Guigang Chemical Ltd and its related export company Rickeed Industries Ltd, Hong Kong	24,7	A279
Liuzhou Longcheng Chemical General Plant and its related export company Yinli Import and Export Co. Ltd	31,7	A280
All other companies	33,5	A999

3. Unless otherwise specified, the provisions in force concerning customs duties shall apply.
4. The release for free circulation in the Community of the product referred to in paragraph 1 shall be subject to the provision of a security, equivalent to the amount of the provisional duty.

Article 2

1. Without prejudice to Article 20 of Regulation (EC) No 384/96 interested parties may request disclosure of the essential facts and considerations on the basis of which this Regulation was adopted, make their views known in writing and apply to be heard orally by the Commission within one month of the date of entry into force of this Regulation.
2. Pursuant to Article 21(4) of Regulation (EC) No 384/96, the parties concerned may comment on the application of this Regulation within one month of the date of its entry into force.

Article 3

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

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, 17 September 2001.

For the Commission
Pascal LAMY
Member of the Commission

**COMMISSION REGULATION (EC) No 1828/2001
of 17 September 2001
on issuing A2 export licences for fruit and vegetables**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Commission Regulation (EC) No 2190/96 of 14 November 1996 on detailed rules for implementing Council Regulation (EC) No 2200/96 as regards export refunds on fruit and vegetables ⁽¹⁾, as last amended by Regulation (EC) No 298/2000 ⁽²⁾, and in particular Article 3(4) thereof,

Whereas:

- (1) Commission Regulation (EC) No 1705/2001 ⁽³⁾ set the indicative refund rates and the indicative quantities for A2 export licences, other than those applied for in the context of food aid.
- (2) For tomatoes, oranges, lemons, table grapes and apples, in view of the economic situation and taking account of information received by operators via their applications for A2 licences, the definitive refund rates should be set at a different rate from the indicative rates. The percentages for the issuing of licences for the quantities applied for should also be set. The definitive rates may not be more than 50 % more than the indicative rates.

- (3) Pursuant to Article 3(5) of Regulation (EC) No 2190/96, applications for rates in excess of the corresponding definitive rates shall be considered null and void,

HAS ADOPTED THIS REGULATION:

Article 1

1. For A2 export licences for which applications have been submitted pursuant to Article 1 of Regulation (EC) No 1705/2001 the actual date of application referred to in the second subparagraph of Article 3(1) of Regulation (EC) No 2190/96 is hereby set at 18 September 2001.
2. The licences referred to in the first paragraph shall be issued at the definitive refund rates and at the percentages for the quantities applied for as indicated in the Annex to this Regulation.
3. Pursuant to Article 3(5) of Regulation (EC) No 2190/96, applications referred to in the first paragraph for rates in excess of the corresponding definitive rates set out in the Annex shall be considered null and void.

Article 2

This Regulation shall enter into force on 18 September 2001.

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

Done at Brussels, 17 September 2001.

For the Commission

Franz FISCHLER

Member of the Commission

⁽¹⁾ OJ L 292, 15.11.1996, p. 12.

⁽²⁾ OJ L 34, 9.2.2000, p. 16.

⁽³⁾ OJ L 232, 30.8.2001, p. 10.

ANNEX

Product	Definitive refund rates (EUR/t net)	Percentages for the issuing of licences
Tomatoes	30	100 %
Oranges	35	95 %
Lemons	20	91 %
Table grapes	34	100 %
Apples	4	95 %

COMMISSION REGULATION (EC) No 1829/2001**of 17 September 2001****fixing Community producer and import prices for carnations and roses with a view to the application of the arrangements governing imports of certain floricultural products originating in Cyprus, Israel, Jordan, Morocco and the West Bank and the Gaza Strip**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 4088/87 of 21 December 1987 fixing conditions for the application of preferential customs duties on imports of certain flowers originating in Cyprus, Israel, Jordan, Morocco and the West Bank and the Gaza Strip ⁽¹⁾, as last amended by Regulation (EC) No 1300/97 ⁽²⁾, and in particular Article 5(2)(a) thereof,

Whereas:

Pursuant to Article 2(2) and Article 3 of abovementioned Regulation (EEC) No 4088/87, Community import and producer prices are fixed each fortnight for uniflorous (bloom) carnations, multiflorous (spray) carnations, large-flowered roses and small-flowered roses and apply for two-weekly periods. Pursuant to Article 1b of Commission Regulation (EEC) No 700/88 of 17 March 1988 laying down detailed rules for the application of the arrangements for the import into the Community of certain floricultural products originating in Cyprus, Israel, Jordan, Morocco and the West Bank and the

Gaza Strip ⁽³⁾, as last amended by Regulation (EC) No 2062/97 ⁽⁴⁾, those prices are determined for fortnightly periods on the basis of weighted prices provided by the Member States. Those prices should be fixed immediately so the customs duties applicable can be determined. To that end, provision should be made for this Regulation to enter into force immediately,

HAS ADOPTED THIS REGULATION:

Article 1

The Community producer and import prices for uniflorous (bloom) carnations, multiflorous (spray) carnations, large-flowered roses and small-flowered roses as referred to in Article 1b of Regulation (EEC) No 700/88 for a fortnightly period shall be as set out in the Annex.

Article 2

This Regulation shall enter into force on 18 September 2001.

It shall apply from 19 September to 2 October 2001.

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

Done at Brussels, 17 September 2001.

For the Commission

Franz FISCHLER

Member of the Commission

⁽¹⁾ OJ L 382, 31.12.1987, p. 22.

⁽²⁾ OJ L 177, 5.7.1997, p. 1.

⁽³⁾ OJ L 72, 18.3.1988, p. 16.

⁽⁴⁾ OJ L 289, 22.10.1997, p. 1.

ANNEX

to the Commission Regulation of 17 September 2001 fixing Community producer and import prices for carnations and roses with a view to the application of the arrangements governing imports of certain floricultural products originating in Cyprus, Israel, Jordan, Morocco and the West Bank and the Gaza Strip

(EUR/100 pieces)

Period: from 19 September to 2 October 2001				
Community producer price	Uniflorous (bloom) carnations	Multiflorous (spray) carnations	Large-flowered roses	Small-flowered roses
	30,31	14,73	35,99	16,92
Community import prices	Uniflorous (bloom) carnations	Multiflorous (spray) carnations	Large-flowered roses	Small-flowered roses
Israel	—	—	12,28	6,05
Morocco	—	—	—	—
Cyprus	—	—	—	—
Jordan	—	—	—	—
West Bank and Gaza Strip	—	—	—	—

**COMMISSION REGULATION (EC) No 1830/2001
of 17 September 2001
amending the import duties in the cereals sector**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 1766/92 of 30 June 1992 on the common organisation of the market in cereals ⁽¹⁾, as last amended by Regulation (EC) No 1666/2000 ⁽²⁾,

Having regard to Commission Regulation (EC) No 1249/96 of 28 June 1996 laying down detailed rules for the application of Council Regulation (EEC) No 1766/92 as regards import duties in the cereals sector ⁽³⁾, as last amended by Regulation (EC) No 2235/2000 ⁽⁴⁾, and in particular Article 2(1) thereof,

Whereas:

- (1) The import duties in the cereals sector are fixed by Commission Regulation (EC) No 1823/2001 ⁽⁵⁾.

- (2) Article 2(1) of Regulation (EC) No 1249/96 provides that if during the period of application, the average import duty calculated differs by EUR 5 per tonne from the duty fixed, a corresponding adjustment is to be made. Such a difference has arisen. It is therefore necessary to adjust the import duties fixed in Regulation (EC) No 1823/2001,

HAS ADOPTED THIS REGULATION:

Article 1

Annexes I and II to Regulation (EC) No 1823/2001 are hereby replaced by Annexes I and II to this Regulation.

Article 2

This Regulation shall enter into force on 18 September 2001.

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

Done at Brussels, 17 September 2001.

For the Commission

Franz FISCHLER

Member of the Commission

⁽¹⁾ OJ L 181, 1.7.1992, p. 21.

⁽²⁾ OJ L 193, 29.7.2000, p. 1.

⁽³⁾ OJ L 161, 29.6.1996, p. 125.

⁽⁴⁾ OJ L 256, 10.10.2000, p. 13.

⁽⁵⁾ OJ L 246, 15.9.2001, p. 24.

ANNEX I

Import duties for the products covered by Article 10(2) of Regulation (EEC) No 1766/92

CN code	Description	Import duty by land inland waterway or sea from Mediterranean, the Black Sea or Baltic Sea ports (EUR/tonne)	Import duty by air or by sea from other ports ⁽²⁾ (EUR/tonne)
1001 10 00	Durum wheat high quality	0,00	0,00
	medium quality ⁽¹⁾	0,00	0,00
1001 90 91	Common wheat seed	0,00	0,00
1001 90 99	Common high quality wheat other than for sowing ⁽³⁾	0,00	0,00
	medium quality	11,82	1,82
	low quality	23,44	13,44
1002 00 00	Rye	18,15	8,15
1003 00 10	Barley, seed	18,15	8,15
1003 00 90	Barley, other ⁽³⁾	18,15	8,15
1005 10 90	Maize seed other than hybrid	69,43	59,43
1005 90 00	Maize other than seed ⁽³⁾	69,43	59,43
1007 00 90	Grain sorghum other than hybrids for sowing	42,86	32,86

⁽¹⁾ In the case of durum wheat not meeting the minimum quality requirements for durum wheat of medium quality, referred to in Annex I to Regulation (EC) No 1249/96, the duty applicable is that fixed for low-quality common wheat.

⁽²⁾ For goods arriving in the Community via the Atlantic Ocean or via the Suez Canal (Article 2(4) of Regulation (EC) No 1249/96), the importer may benefit from a reduction in the duty of:

— EUR 3 per tonne, where the port of unloading is on the Mediterranean Sea, or

— EUR 2 per tonne, where the port of unloading is in Ireland, the United Kingdom, Denmark, Sweden, Finland or the Atlantic Coasts of the Iberian Peninsula.

⁽³⁾ The importer may benefit from a flat-rate reduction of EUR 24 or 8 per tonne, where the conditions laid down in Article 2(5) of Regulation (EC) No 1249/96 are met.

ANNEX II

Factors for calculating duties

(for 17 September 2001)

1. Averages over the two-week period preceding the day of fixing:

Exchange quotations	Minneapolis	Kansas-City	Chicago	Chicago	Minneapolis	Minneapolis	Minneapolis
Product (% proteins at 12 % humidity)	HRS2. 14 %	HRW2. 11,5 %	SRW2	YC3	HAD2	Medium quality (*)	US barley 2
Quotation (EUR/t)	127,83	117,78	113,67	99,91	196,31 (**)	186,31 (**)	117,15 (**)
Gulf premium (EUR/t)	—	17,64	11,55	4,02	—	—	—
Great Lakes premium (EUR/t)	20,70	—	—	—	—	—	—

(*) A discount of EUR 10/t (Article 4(1) of Regulation (EC) No 1249/96).

(**) Fob Duluth.

2. Freight/cost: Gulf of Mexico — Rotterdam: 19,80 EUR/t; Great Lakes — Rotterdam: 31,73 EUR/t.

3. Subsidy within the meaning of the third paragraph of Article 4 (2) of Regulation (EC) No 1249/96: 0,00 EUR/t (HRW2)
0,00 EUR/t (SRW2).

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 8 May 2001

on State aid granted by the Federal Republic of Germany to Philipp Holzmann AG

(notified under document number C(2001) 1419)

(Only the German text is authentic)

(Text with EEA relevance)

(2001/695/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

plan; the notification was followed up by a letter dated 20 December 1999.

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

(2) By letter of 16 February 2000, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty.

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

Having regard to Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽¹⁾, and in particular Article 7(3) thereof,

(3) By letter of 15 March 2000, Germany submitted its comments and further information, including the detailed restructuring plan. Additional information was sent to the Commission by letter of 28 March 2000 following a meeting with representatives of the German authorities on 20 March 2000.

Having called on the Member State concerned and other interested parties to give their views pursuant to the abovementioned provisions ⁽²⁾ and having regard to their comments,

Whereas:

(4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ⁽³⁾. The Commission called on interested parties to give their opinion. On 15 May 2000 it received a number of observations from a competitor, which were passed on to Germany for an opinion. Germany's comments were received by letter of 1 August 2000.

I. PROCEDURE

(1) In November 1999 the Commission learnt from the media that there were plans to grant State aid to Philipp Holzmann AG ('PH AG'). By letter of 25 November 1999, it called on Germany to provide further details. By letter of 10 December 1999, Germany notified the Commission of a subordinated loan (*nachrangiges Darlehen*) from the State-owned Kreditanstalt für Wiederaufbau ('KfW') and a federal guarantee (*Bundesbürgschaft*), both of which formed part of a broader restructuring

(5) On request, Germany provided further details of the notified aid by letters of 25 April 2000, 21 June 2000, 8 August 2000, 17 August 2000, 23 August 2000, 14 and 15 September 2000, 18 October 2000, 1, 13 and 24 November 2000, 14 and 20 December 2000, 10 and 24 January 2001, 2 and 16 February 2001, 14 March 2001 and 4 April 2001.

⁽¹⁾ OJ L 83, 27.3.1999, p. 1.

⁽²⁾ OJ C 110, 15.4.2000, p. 2.

⁽³⁾ See footnote 2.

- (6) On 31 August 2000 the Commission learnt that KfW planned to grant PH AG a loan and sent a request for information to Germany on the same day.
- (7) Germany provided further information about this loan by letters of 11 September 2000, 9 October 2000 and 1 November 2000. Commission representatives and representatives of the German authorities discussed the matter on 19 October 2000. Germany submitted a copy of the loan contract of 8 December 2000 between KfW and Philipp Holzmann AG by letter of 8 January 2001; further details were provided on 10 January 2001.

II. DETAILED DESCRIPTION OF THE AID

The Philipp Holzmann Group

- (8) The Philipp Holzmann Group (PH AG) is one of the largest German construction companies. According to its own estimates, PH AG, together with its subsidiaries, was Germany's second-largest supplier of construction services until 1998 and is now the third largest. Its activities encompass the design and planning, development and execution of construction projects of all kinds. Its core business comprises structural and civil engineering, including industrial engineering, housing and public buildings. Other activities include road building and steel construction and managing and maintaining buildings. Through its subsidiaries, Holzmann carries out its business on a global scale, mainly in Europe and the United States of America, but also in Asia.
- (9) In 1999 the group had a total output of DEM 12.08 billion (EUR 6,2 billion), of which DEM 5,6 billion (EUR 2,9 billion) was earned in Germany. It had an output of DEM 2,3 billion (EUR 1,2 billion) in 1999. In the same year the group's turnover totalled DEM 8,9 billion (EUR 4,55 billion); PH AG's turnover amounted to DEM 2.2 billion (EUR 1,1 billion). By the end of 1999 the group had over 28 000 employees worldwide and roughly 16 000 in Germany, some 5000 of whom were employed by PH AG. In other countries such as the United States, France, Austria, the Netherlands, Spain and Thailand, the group had over 12 000 employees.
- (10) PH AG and its subsidiaries are active in the core business. The main subsidiaries are active in the following areas:
- road building and other related field: Deutsche Asphalt Gruppe,
 - prefabricated concrete compound units ⁽⁴⁾: Imbau Gruppe,
 - facility management (Holzmann Technischer Service GmbH (HSG),
 - civil engineering: (Franki-Gruppe, Möbius Baugesellschaft (50 %),
 - building services (heating, ventilation and air-conditioning: Scheu und Wirth AG,
 - project development: Ph. Holzmann Bau Projekt AG,
 - steel construction: Lavis.
- (11) The group's international business is managed by Philipp Holzmann International, Frankfurt, and a number of subsidiaries. J. A. Jones Inc. is directly responsible for business activities in the United States of America, while Philipp Holzmann Österreich GmbH and Ast-Holzmann Baugesellschaft mbH are responsible for business in Austria. In global terms, the group claims that it was Europe's seventh-largest construction company in 1998 ⁽⁵⁾.
- (12) Before the November 1999 crisis and the subsequent restructuring, the main shareholders were the Belgian Gevaert Group (with approximately 30 % of the shares) and Deutsche Bank AG (with around 15 %); the remaining shares were dispersed. Following the capital increase in 2000, the main shareholders are now Deutsche Bank AG (around 20 %), Gevaert (around 13 %) and the other consortium banks participating in the capital increase.
- (13) Having suffered adverse business trends, the company embarked on a comprehensive restructuring programme in 1997 and 1998. However, in November 1999 it discovered considerable losses amounting to some EUR 1,2 billion for 1999, which had not been taken into account hitherto. Once the auditing of the accounts had been completed in 2000, it emerged that the group had lost EUR 1,39 billion and PH AG EUR 1,4 billion in 1999. The group had lost over EUR 3 billion between 1993 and 1999.
- (14) On 23 November 1999, PH AG filed for bankruptcy at the Frankfurt-am-Main district court. It had become necessary to file for insolvency after the creditor banks had been unable to agree on contributions to a restructuring plan put forward by PH AG's executive board and a consultancy firm.

⁽⁴⁾ Part of core business according to Holzmann's definition.

⁽⁵⁾ There were no European or Community-wide figures available on competitors' construction activities or turnover; however, Holzmann claims that it is much lower in the rankings if European or Community-wide construction activities or turnover are taken.

Restructuring aid

(15) The bankruptcy petition was withdrawn on 24 November 1999, when the creditors finally agreed to the restructuring plan after the Federal Government had announced the following aid measures:

(a) a DEM 150 million (EUR 76,7 million) subordinated loan from the Kreditanstalt für Wiederaufbau (KfW), a State-owned bank, with an interest rate of 3,5 % above Euribor. Initially, the loan runs until 30 June 2001; the term can be extended by a maximum of 12 months. The annual loan commitment fee (*Bereitstellungsprovision*) is 0,5 %;

(b) a federal guarantee of DEM 100 million (EUR 51,1 million) in respect of a loan of DEM 125 million (EUR 63,9 million), to be granted for a maximum of two years. The commission is 1,0 % per year.

(16) The two measures were notified in December 1999 as restructuring aid and as part of an overall restructuring plan comprising operational and financial measures. At that time Germany submitted a general restructuring plan (*Grobkonzept*) which specified only a few operational measures. The main features of this plan were to be worked out in detail in December 1999 and January 2000.

(17) The main operational measures included (a) laying off some 5 000 employees, (b) reducing the number of regional sites in Germany, (c) strict profit orientation in all sections of the company, (d) cost-cutting and cost-saving, (e) improvements in monitoring systems and process management, (f) streamlining the domestic portfolio and (g) reorganising subsidiaries and shareholdings.

(18) The main financial measures described in the notification were liquidity assistance and new equity of over DEM 1.5 billion to be provided by German banks ('consortium banks') which would share the burden in proportion to their 'value at risk'. They also included an increase in liquid capital preceded by a capital reduction which would endow PH AG with EUR 647 million of new capital, the purchase of convertible profit certi-

ficates (*Wandelgenussrechte*) to the value of EUR 396 million and a credit line (*Konsortialkredit*) of over EUR 500 million.

(19) According to the notification, the aid was the pivotal element enabling the restructuring plan which the banks had been discussing for some time to be put into practice.

Grounds for initiating the procedure

(20) In its decision to initiate the formal investigation procedure enshrined in Article 88(2) of the EC Treaty, the Commission took the view that the measures under investigation constitute State aid within the meaning of Articles 87(1) of the EC Treaty and 61(1) of the EEA Agreement, as they distort or may distort competition and adversely affect trade between Member States. The subordinated loan was to be granted by the State-owned KfW 'in the interests' of the Federal Republic of Germany, whilst the guarantee was to be granted by the Government. Both measures were therefore to be viewed as 'aid granted by a Member State or through State resources' within the meaning of Article 87(1) of the EC Treaty. PH AG and its subsidiaries are active throughout Europe. Since the notified measures improved the company's financial position, they were liable to affect the economic situation of competitors from other Member States⁽⁶⁾ and thus adversely affect trade between Member States. Owing to unclear wording in the notification, the Commission could not rule out the possibility that part of the aid, namely the subordinated loan from KfW, had already been granted, and it therefore asked Germany for clarification.

(21) The Commission, after its preliminary assessment, took the view that the notified aid was to be assessed on the basis of the Community guidelines on State aid for rescuing and restructuring firms in difficulty⁽⁷⁾ (hereinafter referred to as the 'guidelines') and that no other Community guidelines were applicable. Moreover, it considered that the form of the aid was incompatible with the guidelines' provisions on rescue aid and based its preliminary assessment on the conditions for the authorisation of restructuring aid set out in point 3.2.2 of the guidelines. The Commission concurred with Germany's statement in the notification describing PH AG as a company in difficulties within the meaning of point 2.1 of the guidelines. However, it expressed serious doubts as to the compatibility of the aid measures with the common market.

⁽⁶⁾ Judgment in Joined Cases C-278 to 280/92 *Spain v Commission* [1994] ECR I-4103.

⁽⁷⁾ OJ C 288, 9.10.1999, p. 2.

(a) Restoration of the company's viability

- (22) Germany had so far provided only a general restructuring plan (*Grobkonzept*) in which only a few operational measures were clearly defined. It was therefore impossible to assess the planned measures and the extent to which they were likely to overcome the structural deficiencies causing the problems. Moreover, the Commission could not establish a clear link between the operational part of the restructuring plan and the financial measures because the notification contained no details of the costs of the planned restructuring measures.
- (23) The Commission noted further that without detailed financial planning documents, such as projections of profit-and-loss accounts for the next five years, or a scenario and risk analysis it could not assess whether the submitted plan was appropriate.
- (24) Finally, in the light of earlier mismanagement, the Commission questioned whether the planned measures were sufficient to uncover all dubious liabilities within the company and its subsidiaries.

(b) Avoidance of undue distortions of competition

- (25) The only measure in return for aid mentioned in the notification is the reduction of the workforce (in the central and regional offices, in subsidiaries and through divestments). There was not enough detailed information concerning the likely impact on the market segments deemed relevant in the notification.
- (26) Moreover, in view of the overcapacity in the construction sector mentioned in the notification, the Commission had serious doubts as to whether divestments and workforce cuts could be considered an irreversible reduction in production capacity, and wondered whether there were no plans for other compensatory measures which might mitigate negative effects on competitors.
- (27) Finally, the Commission noted that Germany had presented no comparative assessment of the economic and social consequences of the disappearance of the firm in difficulty and that no quantitative data had been provided. In view of the company's market position, the Commission had serious doubts as to whether Germany's assessment gave a balanced picture of the likely impact of rescuing and restructuring it.

(c) Aid limited to the minimum

- (28) Germany had not provided evidence that aid was restricted to the minimum necessary for restoring the firm's viability, so that the beneficiary could not expand its production capacity during the implementation of the restructuring plan.
- (29) Since earlier rescue discussions between banks had failed, the Commission called on Germany to provide such information as was required to demonstrate the need for State aid and to give more explanations as to why the planned aid was of decisive importance, as described in the notification.
- (30) Finally, the Commission noted that public banks accounted for around 30 % of the funding of the restructuring plan. Although the notification explained that the size of the creditor banks' contributions was determined according to their 'value at risk', no further clarification was given. The Commission assesses contributions from public banks in the light of the market-economy investor principle. Since it lacked a precise interpretation of 'value at risk', it could not rule out the possibility that the participation of public banks clashed with this principle and hence could constitute additional State aid that had to be examined.
- (31) For these reasons, the Commission took the view that the notified measures constituted State aid and had serious doubts as to their compatibility with the common market.

III. COMMENTS FROM GERMANY

- (32) Germany confirmed that neither the guarantee nor the subordinated loan from KfW had been granted. The Federal Government's decision of 9 December 1999 on the guarantee lays down a condition as regards the obligation to provide notification: consequently, no guarantees have been issued, nor has a loan contract been concluded. Moreover, under the contract payments from the subordinate loan are subject to the Commission's approving the aid.

Restoration of the company's viability

- (33) Germany submitted the detailed restructuring plan as drawn up by the consultancy firm and presented to the consortium banks in February 2000. The plan included an assessment of competition in the German construction markets and an analysis of the reasons for the company's problems. An analysis of the potential risks linked with the unfinished construction sites was also submitted.

- (34) Germany also gave more details of the deficiencies which had led to the company's problems. According to its information, the following developments, mainly in Germany, were responsible for the losses:
- (a) the general aim of achieving growth 'above market trends': turnover was 'bought';
 - (b) the risky development on the company's own initiative of large-scale projects, after which, in some cases, it assumed operating risks after completing the construction stage (e.g. the *Kölnarena*);
 - (c) economic problems in the German construction sector due mainly to a continuing oversupply of construction services in the new *Länder*;
 - (d) inefficient cost management and inefficient organisational structures;
 - (e) the inefficient structure of shareholdings and subsidiaries (including outside Germany).
- (35) The operational restructuring measures include reductions in regional divisions/offices and the workforce, cost-cutting, improved management and cost control, and the streamlining of the portfolio. The approximately 600 affiliated companies in existence at the end of 1999 are to be reduced through mergers, sale or the closure of subsidiaries to between 300 and 350. There are plans to evaluate further possibilities to divest or merge. It is also planned to expedite the winding-up of two foreign subsidiaries, Philipp Holzmann Iberica (Spain) and Nord-France SA. In future, the focus should be on two principal regions, i.e. Germany and the United States of America.
- (36) The major restructuring measures set out in the plan presented concern Germany. The German workforce is to be cut by almost 5 000: some 3 400 jobs will be lost through the closure of regional divisions and offices and other rationalisation measures, whilst over 1 500 jobs will disappear as a result of the divestment of subsidiaries. The plan was to complete most of the rationalisation measures in 2000. An exact schedule for divestment of the subsidiaries in Germany, i.e. most of the subsidiaries except Imbau, Deutsche Asphalt, HSG and Scheu und Wirth (to be taken together with HSG), was not provided.
- (37) Information submitted in early 2001⁽⁸⁾ shows adjustments to the original plan. The detailed plan of February 2000 set out a new structure for PH AG, with seven main offices and 10 regional offices: this implied that 23 regional offices were to be closed. The modified plan provides for the closure of more head offices, so that the modified structure will comprise only five main offices and nine regional offices. The planned rationalisation measures and closures resulted in the dismissal of some 3 000 employees; a further 1 800 employees had left the company for other reasons (and had been replaced by about 700 new employees). A further 300 to 350 employees are due to leave owing to the additional closure of regional offices. Some 300 employees had been affected by the divestments already carried out in Germany and approximately 700 by job cuts in four subsidiaries. The closure of one subsidiary will result in the loss of another 300 jobs. Detailed decisions on further planned divestments of subsidiaries have now been taken (and include, for instance, Deutsche Asphalt); these divestments will result in the loss of a further 3 000 jobs within the group⁽⁹⁾. The restructuring measures will affect, or have already affected, over 7 000 employees, which is significantly more than was originally planned. The divestments planned or already carried out in Germany account for a turnover volume of approximately EUR 360 million. As to other countries, apart from the measures already planned concerning subsidiaries in France and Spain, subsidiaries in Austria and the Netherlands have now been divested as well. These closures and divestments correspond to a total turnover of around EUR 270 million and will affect some 1 300 employees.
- (38) In general terms, the group's activities in Germany are to focus on core business and facility management. Future core business will concentrate mainly on larger-scale construction projects. German subsidiaries active in other areas are to be divested or downsized. Moreover, Holzmann is withdrawing from the risky business of developing projects such as the *Kölnarena*. On request, the Commission was provided with the following data/estimates on turnover trends in three segments, categorised by size, of core business⁽¹⁰⁾:

⁽⁸⁾ Letters from Germany of 2 February 2001 and 14 March 2001.

⁽⁹⁾ Letter from Germany of 4 April 2001.

⁽¹⁰⁾ Letter from Germany of 4 April 2001.

Project size in million DEM	Holzmann's turnover share in three segments of core business ⁽¹⁾		
	1999	2000	2001
< 5 (2,56)	21 %	18 %	10 %
5 to 40 (2,56 to 20,5)	54 %	41 %	40 %
> 40 (20,5)	25 %	41 %	50 %
Total as percentage and in million EUR	100 % (1 943)	100 % (1 636)	100 % (1 278)

⁽¹⁾ Included in the core business for the purpose of this table PH AG with its branches as well as Imbau and Franki.

- (39) Furthermore, the foreseen divestments were clarified in March 2001. The plans now provide for the sale of Deutsche Asphalt and the divestment of the 50 % share in Möbius. Lavis is to be closed. There are also plans for cuts at Scheu und Wirth and Franki (see recital 51).
- (40) Other measures set out in the restructuring plan include the following: the employees' contribution through increased working hours (estimated at EUR 64 million), the contribution of the pension insurance association (*Pensionssicherungsverein*) (some EUR 7 million annually), increased efficiency combined with cost-saving measures (material, subcontractors, etc., estimated at over EUR 225 million) and operational liquidity increase through divestments and debt reduction amounting to approximately EUR 300 million.
- (41) By letter of 2 February 2001, Germany submitted an overview of restructuring costs and corresponding financial needs.
- (42) According to this overview, the restructuring costs, including the balance-sheet measure to avoid insolvency, are estimated as follows.

1. Avoiding insolvency	EUR 665 million
2. Liquidity/necessary increase in equity capital	EUR 1 043 million
3 Processing costs relating to the <i>Kölnarena</i> , Magdeburg City Square and the Sun Flower Tower projects	EUR 199 million
4. Staff	EUR 103 million
5. Divestments, restructuring and closure of subsidiaries, value adjustments	EUR 162 million
6. Additional risks arising from the bankruptcy procedure	EUR 141 million
Total of 2 to 6	EUR 1 648 million

The financial resources provided to cover these costs were as follows.

1. Ranking waiver (balance-sheet measure)	EUR 665 million
2. Capital increase	EUR 647 million
3 Conversion of loans from item 1 into capital (convertible profit participation rights or <i>Wandelgenussrechte</i>)	EUR 391 million
4. Cash deposit from item 3	EUR 5 million
5. Consortium credit	EUR 511 million
6. Subordinated loan from KfW plus guaranteed bank loan	EUR 141 million
Total of 2 to 6	EUR 1 695 million

- (43) The 'asset deal', with a total book value of EUR 621 million and an estimated market value of EUR 675 million, provided for the sale of 33 projects to the banks which had originally financed the project. The 'special purpose vehicle' (SPV) related to 83 projects not financed by the banks with a total estimated market value of EUR 281 million and provided for the sale of the assets to the SPV companies not consolidated with the group. It was also planned to divest the Taunusanlage building. The main aims of these sales were to reimburse the consortium credit line (leading to a reduction of the balance sheet, i.e. the assets on one side and the debts on the other) and, if possible, to generate additional cash for the liquidity reserve. The consortia credit line of EUR 511 million was to be reimbursed in the course of 2000 and by 30 November 2000 at the latest. Disagreements on the valuation of the immovable property assets and some organisational problems made it impossible to meet the schedule (see recitals 59 et seq.).
- (44) The business plan for the years 2000 to 2004, including an output and liquidity plan and profit-and-loss accounts on the basis of the three required scenarios — best case, intermediate or 'real' case and worst case — were submitted, along with a risk analysis focussing on liquidity reserves under different assumptions. It should be borne in mind that the original restructuring plan was based on the best-case scenario and that plans were subsequently adjusted in line with actual trends. The main differences between best-case and worst-case scenarios had to do with deviations in the operating and overall annual results and with differences in the necessary liquidity reserves. It was calculated that EUR 480 million to EUR 490 million more liquidity was needed in the worst-case scenario, owing to delays in important measures such as the divestment of real estate property and the debt reduction or as a result of necessary restructuring measures within subsidiaries which are to be divested later.
- (45) The auditors' reports for 1999 were also submitted along with information on measures to terminate contracts and commitments involving future risks and to uncover hidden liabilities.
- (46) The auditors' reports for 1999 were also submitted along with information on measures to terminate contracts and commitments involving future risks and to uncover hidden liabilities.
- (47) According to the information provided, demand has been declining in the German construction sector since 1995. The main reason for this development has been the enormous increase in output in the new *Länder* to satisfy growing demand after unification. Since 1995 the market has been characterised by declining demand, owing to the oversupply of construction services. The forecast for the German construction sector for the year 2000, according to Germany, was 1 % growth. The detailed restructuring plan of February 2000 also includes a market study/analysis forecasting long-term stagnation of the sector. The data submitted for the years 1999 to 2005 show estimated average growth in investment of 1,3 %: for 2000, however, growth is estimated at 2 % in real terms.
- (48) The above data indicate that the German construction industry is a sector suffering from overcapacity. However, Germany notes that, in contrast to manufacturing, capacity in the construction sector does not consist of production lines and factory halls but almost exclusively of employees and, to a lesser extent, of mobile equipment and machines which are mostly leased. Consequently, capacity utilisation can only be measured, if at all, in output per employee. The estimates submitted show that the output per employee in the old *Länder* is roughly 8 to 10 % below the peak year of 1994/95, whilst it is roughly 20 % below that year in the new *Länder*.
- (49) Germany has identified three relevant segments within the core business as being significant in the light of Holzmann's future strategy: large-scale projects, medium-sized projects and small projects (see also recital 38).
- (50) It appeared to be very difficult for Germany to submit data on or even estimates of market volume, Holzmann's position in these three segments and the effects of restructuring on the company's market presence. Germany reckons that Holzmann has dropped from second to third place in the construction sector over the last few years, behind Hochtief and the Walther group. The same is said to be true of the core business although Holzmann may be only the fourth-largest supplier in this sector. Germany was able to submit only rough estimates of market shares. The share in both the overall construction sector and the core business is estimated at roughly 2 to 3 %. Market shares in the three segments were assessed as follows: less than 1 % for small

Avoidance of undue distortions of competition

- (46) By letter of 15 March 2000, Germany supplied information on developments in the construction sector. As around 85 % of Holzmann's European construction sector output of approximately EUR 4 billion (1998) was earned in Germany, the fundamental problems are

⁽¹¹⁾ These indications are based on analyses in the field of merger control. Germany referred to the decision (1995) of the Federal Cartel Office concerning the merger once planned between Holzmann and Hochtief, see *Wirtschaft und Wettbewerb* 1995, p. 515; see also merger Case Bank Austria/Creditanstalt (OJ C 160, 27.5.1997, p. 4, points 84, 85 and 86).

projects, 3 to 4 % for medium-sized projects and 4 to 5 % for large-scale projects. There are plans to reduce turnover in the core business by 16 % in 2000 and a further 22 % in 2001. For small projects, turnover should be reduced by 25 % in 2000 and by 50 % in 2001; turnover for medium-sized projects should be cut by 35 % and 23 % respectively over the same period. Turnover for large-scale projects is estimated to have grown by 30 % in 2000 and to have remained more or less the same or fallen slightly in 2001.

tractors (according to the information provided, around two thirds of Holzmann's turnover is earned via subcontractors). According to data provided by Germany, bankruptcy proceedings affecting subcontractors would have hit some 37 500 jobs⁽¹²⁾. It was also explained that insolvency proceedings had probably enabled an unspecified number of jobs with Holzmann to be maintained at least temporarily through the establishment of independent companies. In the event of termination of the company, all jobs with Holzmann would have been lost and, moreover, all partner companies and subcontractors would have suffered very considerable economic losses because all construction projects would have been halted.

(51) Germany has also explained in detail the impact of divestments on other construction areas. Holzmann is to withdraw from road construction and asphalt production on the recently planned divestment of Deutsche Asphalt, which is one of the sector's leading companies, with a workforce of over 2 500 and a turnover of approximately EUR 300 million. Moreover, Lavis' steel construction business (which had a turnover of EUR 7 million in 2000) is to be closed and the 50 % share in Möbius, a civil engineering firm (with a turnover of EUR 62 million), is to be divested. Scheu und Wirth's activities in the field of heating, ventilation and air-conditioning (current turnover: EUR 91 million) are to be significantly reduced (they are to be cut back by about one third and integrated into HSG, facility management), and the south German branch of Franki, which is active in the field of special structural engineering, is to be closed. In addition, many small niche markets have been or are to be dropped, including geophysics and specialised engineering services.

(52) As regards other Member States, Holzmann has withdrawn completely from France (Nord-France's turnover for 1999 was only EUR 5 million) and Spain (PH-Iberica had a turnover of EUR 80 million in 1999). One of the two Austrian subsidiaries (Held & Francke, with a turnover of EUR 83 million) has been divested, as has one of the two Dutch companies (Hillen & Roosen, with a turnover of EUR 102 million).

(53) Moreover, a quantitative analysis provided by Germany of the social and economic consequences of the disappearance of the firm by comparison with those stemming from the implementation of the restructuring plan reveals that restructuring has already led to some 6 000 redundancies within the group itself and around 2 050 with subcontractors. By comparison, an insolvency procedure would have been far more risky for subcon-

Aid limited to the minimum

(54) Information concerning the need for aid and explanations as to why negotiations between the creditor banks had initially failed was provided in the course of the proceedings, and further details were given at meetings with the representatives of the German authorities and three major creditor banks in February and March 2001. According to this information, the 20 core creditor banks agreed in principle on the restructuring plan, but not on the individual contributions to finance the restructuring. As a result of the deadlock, PH AG filed for insolvency on 23 November 1999. The main reason for this disagreement was that Deutsche Bank, as the largest shareholder, had different interests from the other banks, which were only creditors. Consequently, some banks did not agree, in particular, that they should participate in the capital increase. Deutsche Bank finally increased its contribution quite significantly, but some financial gaps could still not be closed, so it was inevitable that PH AG would file for insolvency.

(55) According to Germany, the main reason for these gaps were the additional risks of over EUR 141 million (including downtime costs) arising from the danger of insolvency, which grew by the day. The gaps were closed by the Federal Government's promise to grant the aid in question, making it possible to withdraw the insolvency petition on 24 November 1999.

(56) More detailed information was later provided in the light of the participation of public banks in the consortium of the main creditor banks and the concept of 'value at risk'. According to this information, nine public banks were represented in the consortium of creditors: their total contribution represented approximately 26 % of the capital increase or 33 % of the consortium credit. The individual shares for all the banks — public and private — were calculated on the basis of their shares of outstanding claims. Deutsche Bank, as the largest shareholder, provided a larger share. Germany also submitted documents listing the outstanding debt claims and the calculations of the contributions made on this basis.

⁽¹²⁾ The estimate included certain risk probabilities for different categories of subcontractor, depending on their turnover with Holzmann (in absolute figures and as a proportion).

IV. COMMENTS FROM OTHER INTERESTED PARTIES

- (57) After publication of the Commission decision to initiate proceedings, a competitor submitted its opinion, namely that the aid gave Holzmann, which was itself to blame for its difficulties because it charged dumping prices, a competitive advantage, whereas other companies were not benefiting from State aid. The aid enabled Holzmann to maintain its dumping price policy. Holzmann's workforce had been reduced in return for the aid by divesting some subsidiaries, whilst the working hours in the remaining subsidiaries were increased, thereby cancelling out the impact of the job cuts. Finally, the participation of public banks in the consortium of creditors could be regarded as additional (covert) aid.

V. GERMANY'S REACTION TO THE COMMENTS FROM OTHER INTERESTED PARTIES

- (58) Germany responded to these observations as follows: State aid, like the employees' contribution, is temporary and cannot therefore give the company any competitive advantages or affect its price policy. Moreover, Holzmann had given assurances that the aid would not be used for competition purposes. Furthermore, it planned to withdraw from mass-market business, cut its output by 39 % between 1998 and 2001, and reduce the workforce by as much as 49 %. Both public and private banks were Holzmann's creditors and were therefore among the core banks supporting the restructuring measures in proportion to their 'value at risk' share. This could not be regarded as State aid.

VI. NEW CREDIT LINES PROVIDED BY THE CONSORTIUM BANKS AND KfW

- (59) The consortium credit was to be reimbursed by 30 November 2000. However, during the summer of 2000 it became clear that it would be impossible to comply with this aspect of the plan, the main reason being that the planned divestments of immovable property were not carried out as planned and within the scheduled time. Owing to the lack of agreement between Holzmann and the banks about the value of the assets, the asset deal package was very significantly downscaled, and Holzmann can now sell many projects directly. This is why it is taking longer than was planned to divest the assets in question. In addition, the structures of the SPV were altered, some projects withdrawn, others added and implementation delayed. The sale of the Taunus equipment (*Taunusanlage*) was also delayed.

- (60) In addition to the difficulty of selling the assets as planned, the notified aid could not be paid out because the Commission's investigation was still in progress.

- (61) Consequently, reimbursement of the consortium credit line of EUR 511 billion (DEM 1 billion, 'consortium credit I') had to be held over. Furthermore, provision was made for an additional credit line of EUR 63,9 million (DEM 125 million), to be granted by KfW.

- (62) The Commission learned about these plans on 31 August 2000 and sent a request for information the same day. In its reply of 11 September 2000, Germany provided information about the interest rate for the planned loan (2,95 percentage points above Euribor), the commission (0,5 % per year) and the main conditions, i.e. the seniority principle: the loan could be used only once other credit lines were exhausted and prior reimbursement. The prolongation of consortium credit I by at least a basic amount of EUR 95 million (DEM 185 million) was mentioned as a precondition for granting this loan.

- (63) As it was unclear when these measures would enter into effect and what the exact relationship between the consortium credit line and the KfW credit line would be as regards take-up and reimbursement, the Commission sent out further requests for information on 20 September and 22 November 2000. Germany replied to these requests (see recital 7). In addition, talks were held on 19 October 2000 between the Commission and representatives of the German authorities, KfW and Holzmann's advisers. The credit contracts were submitted on 8 January 2001, and the final replies arrived on 10 January 2001. According to the information submitted, the following financial restructuring measures became effective on 1 December 2000:

- (a) the term for reimbursement of consortium credit I was extended, i.e. reimbursement of the money taken up (EUR 171 million) was now scheduled for 31 January 2001 ⁽¹³⁾;
- (b) the consortium banks granted a new consortium credit line ('consortium credit II') to the value of EUR 256 million (DEM 500 million) until 29 November 2001. The interest rate is 2,95 percentage points above Euribor and the commission is 0,5 % p.a.;
- (c) KfW granted a credit line of EUR 63,9 million (DEM 125 million) (KfW II) until 29 November 2001, with the same interest rate and commission as consortium credit II.

⁽¹³⁾ According to recent information submitted on 15 March 2001, the consortium credit I was finally to be reimbursed on 16 March 2001 owing to further delays in the sale of the assets.

In addition, other existing credit lines were further extended until 29 November 2001, provided that they had not been included in the convertible profit participation rights (*Wandelgenussrechte*).

has been submitted to the banks. Both credit lines serve to cover liquidity needs and are linked with the scheduled implementation of the restructuring measures.

VII. ASSESSMENT OF THE AID MEASURES

(64) The two credits, consortium credit II and KfW II, are directly linked to each other: KfW II can be drawn only when the other credit lines are exhausted (seniority principle). Reimbursement will be carried out through the ongoing divestment of assets (asset deal and own marketing) and in proportion to consortium credit II. As soon as the take-up of consortium credit II is EUR 95 million (DEM 185 million) or less, the KfW loan will be reimbursed as a priority. The loan amount of consortium credit II will be reduced with every repayment, up to the sum of EUR 95 million. It must, whatever happens, be reduced by EUR 51 million by 31 March 2001 and by a further EUR 128 million by 30 June 2001; these reductions enter into force automatically if they are not achieved at an earlier stage through reimbursement from the results of sales. KfW II will be reduced proportionally under these exceptional circumstances. Under normal circumstances, the full KfW II line can be drawn until 30 October 2001 and has to be finally reimbursed by 29 November 2001.

(67) The aid measures are designed to improve PH AG's financial position. The company, together with its subsidiaries, is one of the largest suppliers of construction services in Germany, where it achieved 85 % of its Community-wide output of roughly EUR 4 billion (1998 figures for the group as a whole). The Philipp Holzmann Group also has significant activities in other Member States such as the Netherlands and Austria, as it once did in Spain and France. After restructuring, the group's EU business outside Germany will be mainly in Austria. The measures in question will probably affect competitors in Germany and other Member States, thereby distorting or threatening to distort competition, and are likely to have an adverse impact on trade between Member States.

The subordinated loan from KfW and the guarantee provided by the Federal Government

(65) According to the interpretation of Germany, KfW II does not constitute aid. The Federal Government stated that the credit framework conditions were in conformity with the market because the interest rate is the same as for consortium credit II provided by the creditor banks and because the risk is smaller for KfW owing to the seniority principle. Germany also submitted a letter from ABN AMRO Bank to Holzmann in which ABN AMRO states that it regards an interest rate of between 2,95 and 3,5 percentage points above Euribor for a non-rated company in respect of a non-secured credit as being in conformity with the market. It also stated that KfW II, unlike the subordinated loan, was not granted in the interests of the Federal Republic of Germany (*Zuweisungsgeschäft*) but provided by the 'commercial arm' of KfW. Furthermore, a letter from Germany of 10 January 2001 stated that the purpose of KfW II was to finance 'normal business activity', whereas the notified aid (the guaranteed loan, for instance) was intended to finance a company in difficulties during its restructuring phase.

(68) The KfW is a State-owned bank which is to grant the subordinated loan 'in the interests of the Federal Republic of Germany'. As the federal guarantee is also provided by the Government, both measures must be considered 'aid granted by a Member State or through State resources' within the meaning of Article 87(1) of the EC Treaty.

(69) Germany does not dispute this assessment in its opinion on the initiation of proceedings in accordance with Article 88(2) of the EC Treaty. The Commission confirms the view it expressed on initiating the Article 88(2) procedure.

The credit line granted by KfW

(66) However, the preambles to the contracts of KfW II and consortium credit II submitted on 8 January 2001 clearly refer to the restructuring of Holzmann. They state that restructuring plan I, for which consortium credit line I was made available and which was largely put into practice, has been updated in the light of recent developments and that the updated restructuring plan

(70) In the Commission's view, and contrary to Germany's opinion, the credit line granted by KfW with effect from 1 December 2000 ('KfW II') in connection with the new credit line made available by the banks ('consortium credit II') also constitutes State aid.

(71) Firstly, Germany's explanation that KfW II was not, unlike the subordinated loan, granted in the interests of the Federal Republic of Germany (*Zuweisungsgeschäft*) but provided by KfW's 'commercial arm', is not convincing. Germany has presented no evidence that KfW II was provided by the or a commercial arm of KfW or that KfW is made up of two clearly separable parts.

- (72) Moreover, Germany's argument that the conditions governing KfW II are usual for the market is not convincing in view of the circumstances and Holzmann's financial situation in the autumn of 2000, when the new credit lines were negotiated and finally granted.
- (73) It is true that KfW II has the same interest rate and commission as the consortium credit II granted by the creditor banks and is similar with respect to the conditions governing their reimbursement (i.e. proportional reimbursement of both lines if an amount of more than EUR 95 million of consortium credit II is used, and even priority reimbursement for KfW if this is not the case, but no reduction of the KfW credit line with each reimbursement). However, the similarity of conditions does not in itself prove that KfW, which is State-owned, conducts its business like a private investor acting in accordance with market principles. The decisive factor is the economic context in which KfW granted the credit line. When it emerged in the autumn of 2000 that the immovable property could not be sold in the way and within the time frame envisaged and that consortium credit I could not, therefore, be reimbursed by 30 November 2000, the creditor banks granted the necessary extension of the deadline for reimbursement of consortium credit I and the new line of consortium credit II in their own interests. In the event of renewed insolvency, the risk for their outstanding claims was high and further financial support for Holzmann was clearly the better alternative in terms of rational economic behaviour. KfW, on the other hand, was not among the company's creditors at the time and was therefore not at any risk of losing a claim. To provide a non-secured (i.e. non-secured by tangible or intangible assets or by a guarantee) credit line under these circumstances does not correspond with the behaviour of a market investor. As far as the Commission is aware, no other independent bank, that is, a bank not belonging to the consortium of creditor banks, has offered Holzmann a loan, and that includes ABN AMRO.
- (74) Germany's explanation that the purpose of KfW II is to finance 'normal business' rather than Holzmann's restructuring is not convincing either. The contracts governing KfW II and consortium credit II contain clear references to Holzmann's continued restructuring and adjustments thereto in their preambles and conditions, and both credits are directly linked to each other as regards use, reimbursement and duration (see recital 63). Furthermore, Holzmann needs cash not only to finance the restructuring costs directly but also to survive on the market during the restructuring phase. The particular characteristics of the construction industry are such that construction projects have to be pre-financed to a considerable extent. According to the Commission's information, a liquidity reserve of about 15 % of output is needed. Consortium credit II and KfW II serve this purpose because the liquidity originally planned was not available at the end of 2000, the main reason being the delayed sale of assets and the non-availability of the aid measures initially planned.
- (75) Consequently, KfW II must be considered as aid granted by a Member State or through State resources within the meaning of Article 87(1) of the EC Treaty. KfW is a State-owned financial institution; no proof has been provided that a commercial arm exists or that it is independent of State interests. Moreover, KfW made the credit line available to Holzmann when it was in a difficult financial position, without any risk of the loss of a claim and without requiring security in the form of material or non-material assets. In such cases the loan is effectively a grant⁽¹⁴⁾. The provisions laid down in the preamble to the credit contract and the conditions governing the use and availability of KfW II are linked to the implementation of the restructuring plan. KfW II therefore constitutes a further aid measure that modifies the notified restructuring plan. Its compatibility can, taking into account the rights of other interested parties and given that the change in question is not substantial in relation to the restructuring plan as a whole, be assessed together with the notified aid, which is the subject of the procedure under Article 88(2) of the EC Treaty. The Commission notes that Germany has provided all the information necessary to evaluate this additional aid measure.
- (76) The risk of making available State loans and grants to a company in difficulty is that the sum in question may be lost if the firm goes bankrupt⁽¹⁵⁾. PH AG's economic situation leads the Commission to conclude that the total of all loans and guarantees should be considered aid, i.e. EUR 127,8 million for the notified measures in respect of which no payments have yet been made and EUR 63,9 million for KfW II, to be reimbursed by 29 November 2001.
- Compatibility of aid measures with the common market**
- (77) As the aid measures in question were not granted under an authorised aid scheme, the Commission has to assess their compatibility with the common market directly in accordance with Article 87 of the EC Treaty.
- (74) Germany's explanation that the purpose of KfW II is to finance 'normal business' rather than Holzmann's restructuring is not convincing either. The contracts governing KfW II and consortium credit II contain clear references to Holzmann's continued restructuring and adjustments thereto in their preambles and conditions, and both credits are directly linked to each other as

⁽¹⁴⁾ Commission communication to the Member States (OJ C 307, 13.11.1993, p. 3, point 41).

⁽¹⁵⁾ Commission notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 71, 11.3.2000, p. 14).

(78) Article 87(1) stipulates that, save as otherwise provided in the EC Treaty, any aid granted by a Member State or through State resources which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it adversely affects trade between Member States, incompatible with the common market.

(79) However, Article 87 of the EC Treaty provides for exemptions to the principle that State aid is incompatible with the common market. The exemptions under Article 87(2) of the EC Treaty could provide a basis for arguing that the aid is compatible with the single market. However, the aid measures under examination neither (a) do not have a social character and are granted to individual consumers, nor (b) do they make good the damage caused by natural disasters or exceptional occurrences, nor (c) are they granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany. These exemptions do not, therefore, appear to be applicable in the present case.

(80) As regards the exceptions provided for in Article 87(3)(b) and (d) of the EC Treaty, the aid in question is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State, nor is it intended to promote culture or heritage conservation: it does not display any of the features of such projects.

(81) Consequently, the Commission assesses the aid measures on the basis of the exemptions laid down in Article 87(3)(c) of the EC Treaty. The Commission's assessment of aid to facilitate the development of certain economic activities, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, is governed by specific Community guidelines. The Commission considers that the only guidelines applicable in the present case are the Community guidelines on State aid for rescuing and restructuring firms in difficulty ⁽¹⁶⁾. Furthermore, it takes the view that the aid measures described help fund the restructuring of the company and should therefore be regarded as restructuring aid.

(82) The guidelines state that restructuring aid can be granted only if it does not run counter to the Community interest. The guidelines for restructuring set out certain conditions for the authorisation of aid by the Commission, which are examined below.

Eligibility of the company

(83) In the Commission's view, there is sufficient proof that PH AG qualifies as a company in difficulty under point 2.1 of the guidelines. As indicated in recital 14, the company filed for insolvency on 23 November 1999 because of excessive losses. The insolvency petition could only be withdrawn when, on 24 November 1999, the Federal Government declared its intention to grant the subordinated loan and the State-backed guarantee. The company was still in difficulties, as defined under point 2.1 of the guidelines, when the State-owned KfW provided another credit line on 1 December 2000. At that time the company was still implementing the scheduled restructuring plan. Owing to delays affecting certain measures such as the asset deal and other divestments and to the unavailability of the notified aid, Holzmann was unable to reimburse consortium credit I in good time and needed additional liquidity.

(84) Holzmann's restructuring is funded mainly from its own resources (such as divestments of assets and subsidiaries, and significant reductions in the workforce and regional offices) and by shareholders and creditors. It has been sufficiently demonstrated that the remaining amounts covered by the aid in question would not also have been covered by the shareholders and creditors (see recitals 54 and 115).

Restoration of the company's viability

(85) Under point 3.2.2(b) of the guidelines, the granting of aid is made conditional on the implementation of the restructuring plan, which, in all cases of individual aid, has to be approved by the Commission and assessed to determine whether it is an appropriate means of restoring the company's long-term viability.

(86) The Commission based its assessment on the information submitted by Germany, in particular the detailed planning of the individual restructuring measures, the projected profit-and-loss accounts for five years, the scenario and risk analyses, the analysis of the structural deficiencies causing the problems and the costs of the planned restructuring measures (see recital 33 et seq.). The conclusions which the Commission drew from its analysis were confirmed by an expert opinion drawn up by an independent consultancy firm.

(87) The Commission also based its assessment on the information which Germany provided about the ongoing implementation of the restructuring plan and about adjustments to certain measures, including the timing of certain divestments requiring the granting of two additional credit lines (consortium credit II and KfW II) in December.

⁽¹⁶⁾ Cf. point 21 and footnote 7.

- (88) In the Commission's view, the detailed restructuring plan as agreed with the creditor banks in February 2000 proposed the measures described below, which, taken overall, were and still are appropriate as a means of restoring long-term viability. Nearly all the significant measures relate to Germany alone (apart from divestments of subsidiaries in other Member States, see recital 110), with the result that the assessment of the restructuring plan also focuses on Germany.
- (89) Taking into account the main reasons for Holzmann's failure in the past (see recital 34), key measures such as the radical reduction of the workforce coupled with a reduction in output, withdrawal from the risky fields of project development and management, withdrawal from or scaling-down of areas not belonging to the core business, better internal monitoring mechanisms and leaner structures as regards internal organisation and shareholdings are a sound way of trying to restore profitability and avoid past mistakes. These operational improvements are the result of internal measures and include the abandonment of loss-making activities. Moreover, all the measures are feasible and most of them have already been implemented.
- (90) The financial measures were necessary and appropriate, firstly to avoid excessive debt (ground for insolvency) at the end of 1999 and secondly to fund Holzmann's restructuring.
- (91) Some of the assumptions in the original planning, however, were too optimistic from the outset. Other developments in 2000 could not have been foreseen. Firstly, the schedule for the sale of immovable property (asset deal and SPV) was unrealistic from the outset given the structure of the agreements; it was inevitable that there would be disputes about prices between the banks as intermediate buyers and creditors.
- (92) Secondly, the operating profit margins calculated in the business plan appeared to be too optimistic, given the rather poor overall prospects for the development of the German construction sector. The original restructuring plan predicted that investment in the German construction sector would grow by roughly 2 % in 2000. Though the actual decline⁽¹⁷⁾ could not have been foreseen when the plan was drawn up, an assumption of 0 % to 1 % growth as forecast by external studies would have been a more cautious approach⁽¹⁸⁾. Predictions of operating profitability were therefore too optimistic in the original plan. Given actual economic trends in the sector, it was impossible to achieve such a level of profitability. This in turn had a negative impact on those subsidiaries which were already in a bad state. Four subsidiaries (HIG, Kemmer, Franki and Lavis) could not be divested as originally planned. Three of them now have to be restructured and one is to be closed (Lavis), causing more costs than anticipated.
- (93) Thirdly, measures such as carrying out the planned cost cutbacks and better and faster debt reduction are also bound to last longer than planned. Moreover, it should be borne in mind that actual losses in 1999 were more than EUR 153 million, higher than calculated when the original restructuring plan was drawn up.
- (94) Finally, the notified aid was not available as the Commission had not completed its investigation in 2000.
- (95) In view of these developments, in particular the failure to sell the planned assets, it was impossible to reimburse consortium credit I in November 2000 and the envisaged generation of cash did not materialise as foreseen. It was for these reasons and because the aid was not available that the following substantial changes were made to the plan: extension of consortium credit I (reimbursement) and provision of new credit lines, including KfW II (see recital 63), direct marketing of a significant proportion of the projects originally included in the asset deal, and restructuring of the SPV with a view to the divestment of the other projects. Furthermore, as a result of economic trends in the sector, more regional offices are now to be closed, which will lead to over 300 additional job losses. The plans to divest, close and downsize subsidiaries have also been couched in more definite terms and include more significant divestments than envisaged in the original plan (see recital 37).
- (96) On the basis of the detailed information on the changes submitted during its examination under the Article 88(2) procedure, the Commission can take them into account in its assessment. It concludes that the changes are based on more realistic assumptions and take account of actual developments to the extent necessary.
- (97) The Commission is aware that most of the planned measures have been implemented as foreseen and that the company is making every effort to carry out the outstanding measures, in particular the divestment of further assets and subsidiaries. Holzmann's planned reduction in turnover in its German core business (approximately 16 % in 2000 and a further 22 % in 2001) is essential to restore profitability and is based mainly on a step-by-step withdrawal from unprofitable activities such as mass-market business.

⁽¹⁷⁾ Statistical results for 2000 were not yet available, but no one doubts that there was a serious decline in investment in 2000 (according to an estimate in weekly report 01/2001 of the German Business Institute (DIW), Table 7, investment fell by 3 %).

⁽¹⁸⁾ See, for example, estimates of 0,2 % in the DIW weekly report 43/1999 (Table 2.2).

- (98) The Commission is aware that the Holzmann Group will not achieve either the slightly positive result originally planned or a balanced result ⁽¹⁹⁾. This goal would be an ambitious one even if optimistic assumptions were made: however, bearing in mind the negative trends in the German construction industry in 2000, it can hardly be achieved. The two main divisions most particularly affected by these trends are now to be closed. Economic trends in 2000, together with the abovementioned delays in introducing some measures and higher costs for the restructuring of subsidiaries, appear to have caused operating losses estimated at over EUR 170 million for the group in Germany alone, probably causing cash drains ⁽²⁰⁾. On the basis of the available estimates, the Commission believes the company has a limited liquidity reserve for 2001. However, according to the Commission's information, the liquidity should be sufficient provided that the economic situation of the construction industry does not further adversely affect operating results, that the remaining restructuring measures, in particular the sale of assets and the divestment of subsidiaries, are implemented quickly and that the notified aid measures are available. In this connection, the Commission notes that developments in 2001 will be decisive.
- (99) In its assessment and on the basis of the criteria set out in the guidelines, the Commission concludes that the restructuring measures already implemented or planned constitute a sound, consistent and, in principle, appropriate means of enabling Holzmann to restore its long-term viability, provided that the company deals quickly with the appropriate divestments and reductions, thereby ensuring its short-term survival.

Avoidance of undue distortions of competition

- (100) In principle, in accordance with point 3.2.1 of the guidelines, any distortions of competition must be offset by the benefits flowing from the firm's survival, in particular where the net effect of redundancies resulting from the firm's going out of business, combined with the effect on its suppliers, would demonstrably exacerbate local, regional or national employment problems, and,

⁽¹⁹⁾ Holzmann itself announced on 14 March 2001 that the group had an estimated deficit of roughly EUR 50 million for 2000, caused mainly by the continuing recession in the German construction industry, delays in the sale of assets and unexpected costs arising from the restructuring of some German subsidiaries.

⁽²⁰⁾ The Commission had to base its assessment on the business plan and the monthly reports drawn up for the creditor banks. The data included in those documents seem to derive from several sources within the group and therefore need to be treated with some caution. The resources of the Commission even with the help of consultants did not allow for a proper audit to be carried out. The audited annual figures for 2000 were not yet available and even if they had been, the real operational results depending on the level of created reserves and on the accounting methods might not have been known.

in some cases, by adequate compensatory measures in favour of competitors.

- (101) The comparative analysis submitted by Germany in the course of the procedure estimates that the restructuring measures have led to direct job losses of some 6 000 within Holzmann and its subsidiaries and of roughly 2 050 with subcontractors, whereas, if there had been an insolvency procedure, the direct job losses at Holzmann would have been - at least in the short term - on a similar scale, but over 35 000 additional jobs would have been lost as a result of subsequent insolvency procedures affecting subcontractors. The Commission views this comparative scenario as more realistic than if Holzmann were to 'disappear' completely, with potential job losses of 55 000 to 60 000, as originally presented.
- (102) The estimated high number of jobs which would be lost by subcontractors in the event of insolvency appears, however, to be exaggerated because, for instance, even subcontractors transacting a relatively small proportion of their business with Holzmann (for example 7,5 % or less) were included in the calculation, even if the risk of bankruptcy is low (a probability of 10 % or less). However, the argument that subcontractors would have suffered more if Holzmann had undergone an insolvency procedure than as a result of the current restructuring is convincing. Firstly, over two thirds of Holzmann's output is produced by subcontractors. Secondly, construction projects have to be pre-financed to a significant extent and smaller firms in particular do not usually have extensive liquidity reserves. If one major company undergoes an insolvency procedure, this can easily trigger a domino effect. The Commission therefore agrees with the Federal Government that the firm's survival has economic and social advantages.
- (103) Under point 3.2.2(c) of the guidelines, measures must be taken to mitigate as far as possible the adverse effects of aid on competitors. This is generally done by limiting or reducing the company's presence on the relevant market(s): this presence must be proportionate to the distortive effects of the aid and, in particular, to the relative importance of the company on its market(s).
- (104) The amount of notified aid of EUR 127,8 million is low (under 10 %) by comparison with the whole financial package needed to restore the viability of the company, which totals almost EUR 2 billion. This proportion does not change significantly if the KfW II aid measure of

EUR 63,9 million granted in December for one year (see recital 113) is taken into account. By comparison with the overall financial measures needed to restore the viability of the company, the amount of aid and the resultant distortion of competition are relatively modest. By comparison, the measures reducing the company's market presence are significant and, in the Commission's judgment, sufficient to mitigate the adverse effects on competitors.

- (105) According to the information provided, the Holzmann Group was the second-largest player on the German construction market in 1998; according to Germany's estimates, the company was probably the third-largest player in 1999, with a total turnover of approximately EUR 2,8 billion. Holzmann's position in the core business as defined by Germany was estimated as third or possibly even fourth, with a turnover of EUR 1,9 billion in 1999 and an estimated turnover of EUR 1,6 billion in 2000. Bearing in mind total turnover of the whole construction sector (EUR 104 billion in 1999) and of the core construction business (estimated at EUR 92 billion), the company's share of these two sectors lies between some 2 % and 3 %. As to the three relevant segments of the core business, Holzmann's market shares were estimated as follows: less than 1 % for small projects, 3 % to 4 % for medium-sized projects and 4 % to 5 % for large projects ⁽²¹⁾.
- (106) Following the closure of regional offices and the reduction in the workforce, it is estimated that turnover in the core business will be reduced by 16 % in 2000 and by a further 22 % in 2001. More regional offices are now being closed than was proposed in the original plan. Holzmann is to reduce very considerably its presence as regards small projects (cutting its turnover by 25 % in 2000 and by a further 50 % in 2001) and medium-sized projects (reduction in turnover of 35 % and 23 % respectively). The planned increase in its presence as regards large-scale projects, which Holzmann views as its core area of expertise (30 % increase in turnover in 2000, remaining stable in 2001), is essential when it comes to restoring viability.
- (107) Holzmann is also going to withdraw completely from road building and asphalt production by selling off Deutsche Asphalt, which, with over 2 500 employees and a turnover of around EUR 300 million, is one of the leading firms in this sector. In addition, the steel

construction business is to be closed down and the 50 % share in Möbius, a civil engineering firm, is to be divested (see recital 51). The heating, ventilation and air-conditioning business is also to be radically downsized, as is Franki's specialised civil engineering business in southern Germany. In addition, many small niche areas have been or are to be abandoned.

- (108) These divestments, closures and reductions now far exceed those originally planned. Despite Holzmann's simultaneous efforts to increase productivity, these measures will considerably reduce its market presence, and this should dispel the concerns expressed by third parties (see recital 57) in this regard.
- (109) Supply exceeds demand in the German construction sector, the main reason for this being the persistent downward trend in the new *Länder*. However, the situation is not one of structural overcapacity as referred to in point 3.2.2(c)(i) of the guidelines, which implicitly refers to manufacturing rather than services, where capacity can, in principle, be adapted far more readily to market conditions. The Commission agrees with Germany's view that the production capacity of construction companies consists mainly of employees and, to a lesser extent, of equipment such as cranes and excavators, which are generally leased. Both 'types of capacity' are mobile and can be redeployed without investment costs so that an irreversible reduction of these capacities, rendering them permanently incapable of achieving the previous rate of output, is impossible. In the case in question, however, capacity is to be reduced in accordance with point 3.2.2(c)(ii) of the guidelines, through swingeing job cuts within the company and the divestment of assets and subsidiaries.
- (110) The vast majority of the measures will affect Germany, where past problems have originated. However, in line with the general aim of streamlining the company as regards the structure of the portfolio and its subsidiaries, significant divestments of subsidiaries in Austria, the Netherlands and Spain are also planned. Holzmann is withdrawing completely from France and Spain.

⁽²¹⁾ The market shares may be underestimated, in particular as regards large-scale projects, owing to the broad definition of the core business. However, no better data or estimates were available. In an earlier submission, Germany referred to the decision of the Federal Cartel Office (see footnote 8), according to which Holzmann's market share in the large-scale projects segment in the early 1990s was estimated as being significantly higher (around 20 %), but declared that, even taking that calculation as a basis, its share had meanwhile dropped to below 15 %, if not less. However, in that context it should be noted that the Federal Cartel Office included a rather small number of suppliers when calculating market shares, which was one of the reasons for the annulment of the decision by the Court of Appeals (*Kammergericht*) in 1998 (*Kart 3/95, Wirtschaft und Wettbewerb* 5/1998).

- (111) In the Commission's view, these reductions and divestments are sufficient to compensate for the distortions of competition caused by the aid measures in question. In this context, it has also taken into account the fact that more reductions within PH AG and more divestments, cuts and closures of subsidiaries are now planned than was originally intended.

Aid limited to the minimum

- (112) In the Commission's view, Germany has satisfactorily demonstrated that the amount of aid is limited to the strict minimum needed to enable restructuring to be undertaken, taking into account the company's existing resources, the group to which it belongs and its shareholders. The company will not be supplied with any excess liquidity of which it could make improper use to expand capacity.
- (113) The amount of notified aid (EUR 127,8 million) is small by comparison with the contribution made by the consortium banks to the financial package, which accounts for over 90 % (of which more than 65 % comes from private banks; see recital 56). As to the new credit lines granted in December 2000, the KfW II aid measure (EUR 63,9 million) accounted for 20 % of the total, including consortium credit II (EUR 256 million). Taken together, the aid measures still amount to less than 10 % of the overall financial package. However, it should be borne in mind that some of the financial measures apply for different lengths of time. Taking this into account, at no time do aid measures account for more than 15 % of the total available financial resources.
- (114) Germany has also demonstrated that the amount of notified aid was the minimum necessary to cover the additional risks of EUR 141 million which emerged during the negotiations in November 1999 and include downtime costs caused by the increasing risk of an insolvency petition. Furthermore, given Holzmann's financial situation, there is no risk that the aid will provide the company with surplus cash. It will not enable the beneficiary to pursue an aggressive strategy on the market or to expand its capacity. Such a misuse of funds would also be incompatible with the beneficiary's aim of restoring profitability.
- (115) When initiating the procedure, the Commission, bearing in mind that previous rescue and restructuring discussions between banks had failed, required Germany to provide more detailed explanations as to why the planned State initiative had proven decisive. From the information provided by Germany and the explanations given by the creditor banks, the Commission concludes that previous failures in negotiations were not caused by the banks' doubts regarding the restructuring plan, but by differences of opinion over contributions to the financial package, in particular as regards the shares of individual creditors in the capital increase. Even when this problem was solved, the remaining financial shortfalls, including the additional risks mentioned above, could not be covered. In the Commission's view, it has

therefore been sufficiently proven that the notified aid measures were necessary in order to have the restructuring plan adopted and adequately funded, so that it could be implemented in the agreed form.

- (116) The main reasons for granting the KfW II aid together with consortium credit II were that the asset deal and the SPV were not implemented as planned and that the notified aid was unavailable. Taking into account the beneficiary's liquidity situation when these modifications took place, this aid measure was limited to the minimum necessary. The KfW II credit line can be used until 30 October 2001, but only once the other credit frameworks are exhausted. The latest possible date for reimbursement is 29 November 2001. Even if all the aid measures in question overlap for a short time there is therefore no possibility of Holzmann's receiving excess liquidity.
- (117) Finally, on initiating the procedure the Commission could not exclude that the participation of public banks was out of line with the market investor principle and hence constituted additional State aid to the company since there was no explanation of the 'value at risk' for determining the individual contributions of the creditor banks. The information submitted by Germany (see recital 56) shows that the combined contributions of the nine public creditor banks ranged from 26 % of the capital increase to 33 % of consortium credit I. The total figure was 32 % in the case of consortium credit II. On the basis of the information submitted, including details of outstanding credits, the Commission concludes that the individual contributions, graduated on the basis of the 'value at risk', were calculated in the same way for private and public banks on the basis of outstanding credits and that the contribution to the capital increase was proportionately lower, as Deutsche Bank, the main shareholder, took over a larger share. Accordingly, the participation of the public banks in the consortium of credit banks is consistent with the market-economy investor principle and does not constitute aid.

VIII. CONCLUSION

- (118) The Commission finds that the measures described above constitute State aid within the meaning of Article 87(1) of the EC Treaty. It concludes that the aid measures fulfil the conditions laid down in the Community guidelines on state aid for rescuing and restructuring firms in difficulty and are compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty. They can therefore be authorised,

HAS ADOPTED THIS DECISION:

Article 1

The State aid for the restructuring of Philipp Holzmann AG, which comprises the measures listed below, is compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty.

- (a) a DEM 150 million (EUR 76,7 million) subordinated loan from the State-owned Kreditanstalt für Wiederaufbau, whose initial term runs until 30 June 2001 and may be extended by a further 12 months;
- (b) a DEM 100 million (EUR 51,1 million) federal guarantee with a maximum term of two years;

- (c) a DEM 125 million (EUR 63,9 million) credit line granted by the State-owned Kreditanstalt für Wiederaufbau until 29 November 2001.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 8 May 2001.

For the Commission

Mario MONTI

Member of the Commission

CORRIGENDA**Corrigendum to Commission Regulation (EC) No 2388/2000 of 13 October 2000 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff**

(Official Journal of the European Communities L 264 of 18 October 2000)

On page 160, CN code 2009 80 69, column 3:

for: '20,7',

read: '20';

on page 169, CN code 2202 90 99, column 3:

for: '5,5...',

read: '5,4...'.
