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I

(Acts whose publication is obligatory)

COUNCIL REGULATION (EC) No 1322/2006**of 1 September 2006****amending Regulation (EC) No 1470/2001 imposing a definitive anti-dumping duty on imports of integrated electronic compact fluorescent lamps (CFL-i) originating in the People's Republic of China**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community⁽¹⁾ (the 'basic Regulation'), and in particular Article 11(3) thereof,

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

Whereas:

1.2. Request for an interim review

- (3) On 3 August 2004, the Commission received a request pursuant to Article 11(3) of Regulation (EC) No 384/96 limited in scope to the examination of the product scope. The request was submitted by Steca Batterieladesysteme und Präzisionselektronik GmbH, an importer of CFL-i produced in the People's Republic of China (the applicant). The applicant imported CFL-i working on direct current voltage (DC-CFL-i). The applicant alleged that the latter had different basic technical and physical characteristics as well as different end uses and applications to CFL-i working on alternating current voltage (AC-CFL-i). The applicant further alleged that only AC-CFL-i should be subject to the anti-dumping duties in force because only these were targeted by the original investigation. Consequently, the applicant claimed that DC-CFL-i should be explicitly excluded from the scope of the anti-dumping duty and the definition of the product concerned of the original Regulation amended accordingly. The applicant also requested that any exclusion of the DC-CFL-i from the product scope should have retroactive effect.

1. PROCEDURE**1.1. Existing measures**

- (1) By Regulation (EC) No 1470/2001⁽²⁾ (the 'original Regulation'), the Council imposed definitive anti-dumping duties ranging from 0 % to 66,1 % on imports of integrated electronic compact fluorescent lamps ('CFL-i') originating in the People's Republic of China (the 'original investigation').
- (2) By Regulation (EC) No 866/2005⁽³⁾, further to an investigation in accordance with Article 13 of the basic Regulation, the Council extended the definitive anti-dumping measures imposed by the original Regulation to imports of the same product consigned from the Socialist Republic of Vietnam, the Islamic Republic of Pakistan and the Republic of the Philippines.

1.3. Initiation

- (4) Having determined, after consulting the Advisory Committee, that sufficient *prima facie* evidence existed, the Commission announced by a notice (the notice of initiation) published in the *Official Journal of the European Union*⁽⁴⁾ the initiation of a partial interim review in accordance with Article 11(3) of the basic Regulation, limited in scope to the examination of the product scope.

1.4. Investigation

- (5) The Commission officially advised the authorities of the People's Republic of China ('PRC'), the producers/exporters in the PRC, the importers in the Community known to be concerned, the producers in the Community and the associations of producers in the Community of the initiation of the investigation. Interested parties were given the opportunity to make their views known in writing and request a hearing within the time limit set in the notice of initiation.

⁽¹⁾ OJ L 56, 6.3.1996, p. 1. Regulation as last amended by Regulation (EC) No 2117/2005 (OJ L 340, 23.12.2005, p. 17).

⁽²⁾ OJ L 195, 19.7.2001, p. 8.

⁽³⁾ OJ L 145, 9.6.2005, p. 1.

⁽⁴⁾ OJ C 301, 7.12.2004, p. 2.

- (6) The Commission requested from all parties known to be concerned, and all other companies which made themselves known within the deadlines set out in the notice of initiation, basic information concerning total turnover, sales value and volume in the European Community, production capacity, actual production, value and volume of total imports of CFL-i and of DC-CFL-i only. The Commission sought and verified all information deemed necessary for the purpose of the assessment as to whether there is a need for amendment of the scope of the existing measures.
- (7) Five producers/exporters in the PRC, one producer in the Community, one importer related to an exporter/-producer in the PRC and 11 unrelated importers in the Community cooperated in the present investigation and submitted the basic information mentioned in recital 6.

1.5. Investigation period

- (8) The investigation period covered the period from 1 November 2003 to 31 October 2004 (the 'IP').

1.6. Disclosure

- (9) All interested parties were informed of the essential facts and considerations on the basis of which the present conclusions were reached. In accordance with Article 20(5) of the basic Regulation, parties were granted a period within which they could make representations subsequent to this disclosure.
- (10) The oral and written comments submitted by the parties were considered and, where appropriate, the findings have been modified accordingly.

2. PRODUCT CONCERNED

- (11) The product concerned is, as defined in Article 1 of the original Regulation, CFL-i, currently classifiable within CN code ex 8539 31 90. A CFL-i is an electronic compact fluorescent discharge lamp with one or more glass tubes, with all lighting elements and electronic components fixed to or integrated in the lamp foot. As stated in recital 11 of Commission Regulation (EC) No 255/2001 of 7 February 2001 imposing a provisional anti-dumping duty on imports of CFL-i originating in the PRC ⁽¹⁾ (the 'provisional Regulation') and confirmed by the definitive findings of the original Regulation, the product concerned is designed to replace normal incandescent lamps and fits into the same lamp socket as the incandescent lamps.
- (12) While during the original investigation different product types have been identified depending on, *inter alia*, the

lifetime, the wattage and the cover of the lamp, the different input voltage has not been investigated, nor was it raised by any interested party during the original investigation.

3. RESULTS OF THE INVESTIGATION

3.1. Methodology

- (13) In order to assess whether DC-CFL-i and AC-CFL-i should be considered as one single product or two different products, it was examined whether DC-CFL-i and AC-CFL-i shared the same basic physical and technical characteristics and end-uses. In this regard, the interchangeability and the competition between AC-CFL-i and DC-CFL-i in the Community were also assessed.

3.2. Basic physical and technical characteristics

- (14) All CFL-i are composed of two main elements: one (or more) gas discharge tube(s) and one electronic ballast. Basically, the electronic ballast supplies electrons into the gas discharge tube. The electrons activate the gas that emits energy in the form of light.
- (15) The input voltage for AC-CFL-i and DC-CFL-i, however, differs; i.e. it is alternating for AC-CFL-i whereas it is direct for DC-CFL-i. As a consequence, the electronic ballasts used in DC-CFL-i must have different components to the ones used in AC-CFL-i because they need to fulfil additional functions, namely to change the direct voltage into alternating voltage in order to ensure that light can be produced.
- (16) The Community industry argued that in the original investigation the product produced in the analogue country (Mexico) was considered as a like product even if CFL-i produced in this country were destined for lower voltages. Therefore, AC-CFL-i being used in low voltage systems should also be considered as being the same product as DC-CFL-i. It should, however, be noted that although the voltage system in Mexico was different from the one in the Community, the CFL-i produced in Mexico and those produced in the Community were both functioning on alternating current. Both had exactly the same functions, i.e. to replace normal incandescent lamps in the respective markets.
- (17) In the present review, the difference between the two types of lamp is not only the voltage as in the above-mentioned case of the Mexican lamps, but also the structure of the power supply used by the DC-CFL-i and AC-CFL-i, which requires the use of different components, and therefore, confers to each type different technical characteristics.

⁽¹⁾ OJ L 38, 8.2.2001, p. 8.

3.3. Basic end uses and interchangeability

- (18) As mentioned in recital 11, the product concerned by the original investigation is designed to replace normal incandescent lamps.
- (19) Based on the information submitted by the Community industry and the Chinese exporting producers, the total consumption of the Community market for DC-CFL-i represents less than 2 % of the total CFL-i consumption. It follows that AC-CFL-i is the most imported and most used type of CFL-i in the Community market, i.e. almost 100 % of total imports and total Community sales are AC-CFL-i.
- (20) Given the above, AC-CFL-i are designed to replace the most-used incandescent lamps and fit into the same lamp sockets as these incandescent lamps. Since DC-CFL-i do not use the same input current, they will not produce light if used in a socket for normal incandescent lamps. In the opposite case, if AC-CFL-i are screwed into a socket supplied with direct current, no light will be produced either. Consequently, in order to produce light with DC-CFL-i, direct current needs to be supplied and in order to produce light with AC-CFL-i, alternating current needs to be supplied.
- (21) Furthermore, AC-CFL-i are used in the applications listed in recital 110 of the provisional Regulation, i.e. by private households, industry and a large number of commercial establishments such as shops and restaurants, whereas DC-CFL-i are, unless rare exceptions, not used in these applications. Users of AC-CFL-i are mostly connected to the public electricity network, while DC-CFL-i are used in areas without connection to public electricity network and rely therefore mainly on other sources of electricity supply (battery, solar systems, photovoltaic panels). They are used in isolated or rural areas for mining purposes, to lighten shelters, in camping lighting, on vessels, etc. On this basis, it was considered that DC-CFL-i cannot replace normal incandescent lamps and consequently that AC-CFL-i and DC-CFL-i are not interchangeable.
- (22) Therefore, it is concluded that in the sense of the original Regulation, normal incandescent lamps are considered lamps which are used in alternating current supply.
- (23) The Community industry claimed that, notwithstanding the above, AC-CFL-i and DC-CFL-i have the same basic end-uses, i.e. producing light. They should therefore be considered as a single product. In this regard, the Community industry compared AC-CFL-i and DC-CFL-i to different types of cars depending whether they use

petrol or diesel motors. The Community industry argued that both types of cars would have the same functions, i.e. motorised street transport of persons, and would therefore be considered as one single product.

- (24) However, besides the fact that the determination of whether cars with petrol motors and cars with diesel motors form one single product is not subject to the present interim review, the above comparison was considered inappropriate because focused on the wrong parameter (the motor). In the present case, the relevant parameter is whether the product has the physical and technical characteristics to produce light when used in a socket for normal incandescent lamps.
- (25) Some parties claimed that a very limited number of specific models of AC-CFL-i could function both on alternating and direct current. Those lamps were found to have the same end uses as AC-CFL-i functioning only on alternating current. They are therefore considered lamps which are used in alternating current supply.
- (26) It follows from the above that AC-CFL-i and DC-CFL-i are not interchangeable and do not, therefore, share the same basic end-uses.

3.4. Competition between AC-CFL-i and DC-CFL-i

- (27) As mentioned above, AC-CFL-i and DC-CFL-i are not used in the same areas of applications and are thus not interchangeable but supply different markets. Furthermore, due to their specific end-uses, DC-CFL-i can only be purchased in specialised shops or directly from the producers. In contrast, AC-CFL-i can be purchased in most of the mass consumer distribution stores.
- (28) The sole cooperating EC producer claimed that, in areas where alternating current is available, consumers may choose to be equipped with photovoltaic panels and solar panels which supply direct current. Therefore, it was claimed that there would be competition between DC and AC-CFL-i. It is noted that choosing between two sources of energy supply is a choice that goes well beyond the sole use of CFL-i because of the level of investment needed and the fact that this choice affects all electrically fed apparatus in the house. It is therefore highly unlikely that the investment in photovoltaic panels would result only from the competition between DC and AC-CFL-i. It is also noted that DC-CFL-i are more expensive than AC-CFL-i, and therefore it is considered that this claim is not supported by economic logic. On this basis, the claim had to be rejected.

- (29) Since DC-CFL-i and AC-CFL-i can not be used on the same types of power grids, it is concluded that there is no competition between those types.

3.5. Distinction between DC-CFL-i and AC-CFL-i

- (30) The argument was made that DC-CFL-i and AC-CFL-i could not be clearly distinguished. In this respect, it is noted that although both DC-CFL-i and AC-CFL-i fall within the same CN code ex 8539 31 90, a distinction can easily be made. Indeed, to distinguish DC-CFL-i from AC-CFL-i, the following criterion can be applied: the DC-CFL-i do not produce light when screwed in an alternating current voltage socket and switched on.
- (31) Moreover, DC-CFL-i are clearly marked, i.e. the low input voltage is clearly indicated on the product, in order to prevent consumers from using such lamps in alternating current sockets, and consequently from destroying them.

4. CONCLUSION ON THE PRODUCT SCOPE

- (32) The above findings show that DC-CFL-i and AC-CFL-i do not share the same basic physical and technical characteristics, and do not have the same basic end-uses. They are not interchangeable and do not compete with each other on the Community market. On this basis, it is concluded that DC-CFL-i and AC-CFL-i are two different products and the anti-dumping duty in force on imports of CFL-i originating in the PRC should not be applied to imports of DC-CFL-i. It also follows that DC-CFL-i were not subject to the original investigation although this was not explicitly spelled out in the original Regulation.
- (33) Based on the above, the scope of application of the existing measures should be clarified by an amendment to the original Regulation.
- (34) Since measures imposed by Regulation (EC) No 1470/2001 were extended to imports of CFL-i consigned from Vietnam, Pakistan and/or the Philippines, whether declared as originating in Vietnam, Pakistan or the Philippines or not by Regulation (EC) No 866/2005, this Regulation should be amended accordingly.

5. REQUEST FOR RETROACTIVE APPLICATION

- (35) Given that the conclusions in recitals 32 and 33 that DC-CFL-i were not part of the product concerned in the original investigation leading to the imposition of anti-dumping measures on imports of CFL-i from the PRC,

the clarification of the product scope should have a retro-active effect to the date of the imposition of the existing definitive anti-dumping duties.

- (36) Consequently, the definitive anti-dumping duties paid pursuant to Council Regulation (EC) No 1470/2001 on imports of CFL-i in the Community should be reimbursed for those import transactions which were related to DC-CFL-i. The reimbursement must be requested from national customs authorities in accordance with applicable national customs legislation and without prejudice to the Communities own resources, and in particular Article 7(1) of Council Regulation (EC, Euratom) No 1150/2000 of 22 May 2000 implementing Decision 94/728/EC, Euratom on the system of the Communities' own resources ⁽¹⁾,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 1470/2001 is amended as follows:

1. Article 1(1) is replaced by the following:

'1. A definitive anti-dumping duty is hereby imposed on imports of electronic compact fluorescent discharge lamps functioning on alternating current (including electronic compact fluorescent discharge lamps functioning on both alternating and direct current), with one or more glass tubes, with all lighting elements and electronic components fixed to the lamp foot, or integrated in the lamp foot, falling within CN code ex 8539 31 90 (TARIC code 8539 31 90*91 until 10 September 2004 and TARIC code 8539 31 90*95 from 11 September 2004 on), and originating in the People's Republic of China.'

2. Article 2(1) is replaced by the following:

'1. The amounts secured by way of provisional anti-dumping duties pursuant to Regulation (EC) No 255/2001 on imports of electronic compact fluorescent discharge lamps functioning on alternating current (including electronic compact fluorescent lamps functioning on both alternating and direct current) with one or more glass tubes, with all lighting elements and electronic components fixed to the lamp foot or integrated in the lamp foot originating in the People's Republic of China shall be collected at the rate of the duty definitively imposed. The amounts secured by way of provisional duties pursuant to Regulation (EC) No 255/2001 on imports manufactured by Zhejiang Sunlight Group Co., Ltd shall be collected at the rate of duty definitively imposed on imports manufactured by Zhejiang Yankon Group Co., Ltd (TARIC additional code A241).'

⁽¹⁾ OJ L 130, 31.5.2000, p. 1.

Article 2

Article 1(1) of Council Regulation (EC) No 866/2005 is replaced by the following:

‘1. The definitive anti-dumping duty of 66,1 % imposed by Regulation (EC) No 1470/2001 on imports of electronic compact fluorescent discharge lamps functioning on alternating current (including electronic compact fluorescent discharge lamps functioning on both alternating and direct current), with one or more glass tubes, with all lighting elements and electronic components fixed to the lamp foot, or integrated in the lamp foot falling within CN code ex 8539 31 90 (TARIC code 8539 31 90*91 until 10 September 2004 and TARIC code 8539 31 90*95 from 11 September 2004 on), and originating in the People’s Republic of China, is hereby extended to electronic compact fluorescent discharge lamps functioning on alternating current (including electronic compact fluorescent discharge lamps functioning on both alternating and direct current), with one or more glass tubes, with all lighting elements and elec-

tronic components fixed to the lamp foot or integrated in the lamp foot consigned from Vietnam, Pakistan and/or the Philippines whether declared as originating in Vietnam, Pakistan or the Philippines or not (TARIC code 8539 31 90*92).’

Article 3

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

It shall apply from 9 February 2001.

2. Any reimbursement of anti-dumping duties paid on the basis of Regulation (EC) No 1470/2001 between 9 February 2001 and the date of entering into force of the present Regulation shall be made without any prejudice to the provisions of Regulation (EC, Euratom) No 1150/2000 and in particular Article 7 thereof.

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

Done at Brussels, 1 September 2006.

For the Council
The President
E. TUOMIOJA

COMMISSION REGULATION (EC) No 1323/2006**of 6 September 2006****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⁾, 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 7 September 2006.

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

Done at Brussels, 6 September 2006.

For the Commission

Jean-Luc DEMARTY

*Director-General for Agriculture and
Rural Development*

⁽¹⁾ OJ L 337, 24.12.1994, p. 66. Regulation as last amended by Regulation (EC) No 386/2005 (OJ L 62, 9.3.2005, p. 3).

ANNEX

to Commission Regulation of 6 September 2006 establishing the standard import values for determining the entry price of certain fruit and vegetables

(EUR/100 kg)		
CN code	Third country code ⁽¹⁾	Standard import value
0702 00 00	052	83,4
	999	83,4
0707 00 05	052	85,3
	999	85,3
0709 90 70	052	85,1
	999	85,1
0805 50 10	388	63,0
	524	47,9
	528	58,0
	999	56,3
0806 10 10	052	74,7
	220	178,5
	400	181,8
	624	105,2
	999	135,1
0808 10 80	388	87,1
	400	95,4
	508	80,5
	512	100,7
	528	59,3
	720	81,1
	800	174,2
	804	107,2
	999	98,2
0808 20 50	052	105,7
	388	91,7
	720	88,3
	999	95,2
0809 30 10, 0809 30 90	052	114,3
	999	114,3
0809 40 05	052	70,3
	066	44,7
	098	41,6
	624	150,5
	999	76,8

⁽¹⁾ Country nomenclature as fixed by Commission Regulation (EC) No 750/2005 (OJ L 126, 19.5.2005, p. 12). Code '999' stands for 'of other origin'.

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 16 March 2005

concerning State aid that Italy (Regione Lazio) intends to grant for the reduction of greenhouse gas emissions

(notified under document number C(2005) 587)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2006/598/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

(2) Italy wrote on 23 July 2003.

Having regard of the Treaty establishing the European Community, and in particular Article 88, paragraph 2, first indent,

(3) ACEA S.p.A. ('ACEA'), beneficiary of the aid, wrote on 8 September 2003. The letter was sent to Italy for comments, together with a number of other demands, on 15 September 2003. The demands concerned:

Having regard of the agreement on the European Economic Area, and in particular Article 62, paragraph 1, point (a),

— a demand for a copy of the Memorandum of Understanding between ACEA and Electrabel for the constitution of AEP;

After having invited the interested parties to present their observation according to these Articles ⁽¹⁾, and having regard of these observations,

— the conditions of transfer of ACEA's activities to AEP, in particular if the measure under consideration had been taken into account;

Whereas:

I. THE PROCEDURE

(1) With its decision of 13 May 2003, notified to Italy by means of letter of the same day, the Commission decided to open the investigation procedure based on Article 88(2) on the case mentioned in the subject and invited Italy and all interested parties to submit comments ⁽²⁾.

— on which of the activities of ACEA the recovery would impinge.

⁽¹⁾ OJ C 188, 8.8.2003, p. 8.

⁽²⁾ See footnote 1.

(4) Italy responded on 18 March 2004, and again on 29 April 2004.

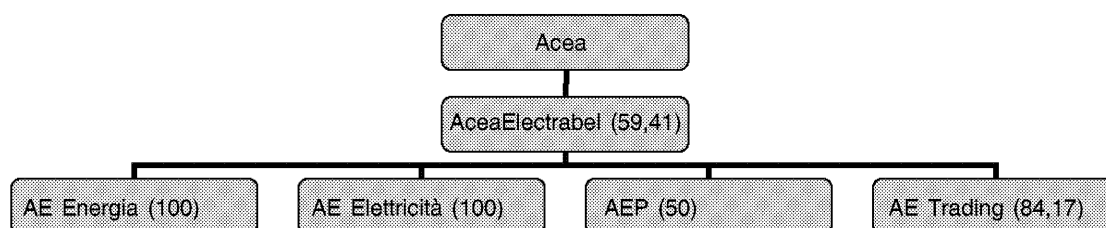
II. DESCRIPTION OF THE CASE

- (5) The case originally concerned two energy saving projects supported by the Region Lazio, a district heating project and a windpower plant. Both projects were declared compatible, but it was decided to open the proceedings pursuant to Article 6 of Council Regulation (EC) No 659/1999 of 22 March 1999, based on the Deggendorf jurisprudence⁽³⁾. The present case thus concerns only the energy saving project. The project consists in a district heating network in the area of Torrino Mezzocammino, near Rome. The distribution network will be supplied by energy produced in a partly repowered and upgraded (converted) cogeneration plant and will provide heating to a new neighbourhood. Two other neighbourhoods near Rome — Torrino Sud and Mostacciano — are already linked to the combined heat and electricity power plant by means of district heating pipelines. The new project represents an extension of the network. The pipelines will have an extension of 14 km.
- (6) Investment costs for this project amount to EUR 9 500 000. They are limited to the amount of the investment related to the heat distribution system, to the exclusion of the re-powered turbine. The aid amount is limited to EUR 3 800 000.

- (7) The legal base of the measure is the Deliberazione of the Giunta Regionale del Lazio n. 4556 of 6 August 1999, which selected the projects to fund through the 'carbon tax'. The measure is financed through the funds collected with the 'carbon tax' introduced by Article 8 of the budgetary law ('finanziaria') approved on 23 December 1998 (legge n. 448/98). On 20 July 2000 the Ministry of the Environment adopted a decree (decreto n. 337 del Ministero dell'Ambiente) lying down the operational criteria that the Region had to respect in spending the resources collected through the tax.

III. DESCRIPTION OF THE BENEFICIARY

- (8) The undertaking benefiting from the aid was ACEA S.p.A., former municipalizzata of Rome. After a series of reorganisations which involved a number of other undertakings, notably Electrabel, the beneficiary is now a different one, AceaElectrabel Produzione (AEP). AEP is controlled at 50 % by Electrabel Italia, and at 50 % by AceaElectrabel. The first is controlled at 100 % by Electrabel (Belgium). The second is controlled at 40,59 % by Electrabel Italia, and at 59,41 % by ACEA S.p.A.



Note: Chart of the ACEA Group; the figures between brackets indicate the level of control by the parent company; the rest belongs to Electrabel Italia, Italian subsidiary of the Belgian group Electrabel.

IV. REASONS FOR OPENING ARTICLE 88(2) PROCEDURE

- (9) The Commission considered⁽⁴⁾ that the project under examination does comply with the relevant provisions of the Environmental Guidelines. Nevertheless, the Commission expressed doubts and decided to open the investigation procedure, as it considered that the principles and criteria endorsed in the Court jurisprudence ('Deggendorf') are applicable.

- (10) It appeared that the intended recipient, ACEA S.p.A., is one of the former 'aziende municipalizzate' (public utilities owned by local public administrative bodies) in the energy sector which has benefited of the aid schemes assessed in the Commission Decision 2003/193/EC of 5 June 2002 on State aid granted by Italy in the form of tax exemptions and subsidised loans to public utilities with a majority public capital holding⁽⁵⁾ (State aid C 27/99, ex NN 69/98). Even though that decision only concerns the schemes as such and does not deal with the individual situation of the recipients, at least one of those schemes was intended to benefit to all undertakings meeting certain conditions, and at the relevant time ACEA met those conditions.

⁽³⁾ Judgement of the Court of 15 May 1997 in the case C-355/95 P (Textilwerke Deggendorf GmbH v Commission of the European Communities and Federal Republic of Germany), Rec. 1997, p. I-2549.

⁽⁴⁾ Point 3.4 of the decision to open the procedure, C(2003) 1468 fin of 13.5.2003, on case N 90/2002.

⁽⁵⁾ OJ L 77, 24.3.2003, p. 21.

- (11) The Commission Decision 2003/193/EC declared such non-notified schemes unlawful and incompatible and imposed to the Italian State to recover any possible amount disbursed under those schemes. ACEA has challenged that decision before the Court of First Instance ⁽⁶⁾ and, in that context it has submitted that it had benefited from the relevant scheme. Financial reports by ACEA explicitly refer to the risk of recovery, for instance the semi-annual report of September 2004 ⁽⁷⁾.
- (12) Following two reminders of the Commission addressed to the Italian authorities concerning their obligation to recover those amounts, the Italian authorities have informed the Commission that, after more than two years from the adoption of the decision in case 2003/193/EC, they are still in the process of fulfilling their recovery obligation by adopting and implementing the appropriate administrative measures. In particular they have not clarified whether the sums that have been received by ACEA have been recovered yet. Based on the above mentioned information, it should be inferred that ACEA S.p.A. has received and not yet reimbursed certain amounts under the incompatible aid schemes assessed in the Decision 2003/193/EC.
- (13) Therefore, the Commission concluded, on the one hand, that it was unable to determine the amount of aid which ACEA S.p.A. had already received prior to the new aid granted under the project and which still has to be reimbursed.
- (14) On the other hand, the Commission concluded that it could not assess the cumulative effect of both the 'old' and 'new' aid accruing to ACEA S.p.A. and its likely distortionary impact on the common market.
- (17) Italy contests that the measure constitutes aid, as it concerns a local project with no impact on trade; furthermore since heating is not tradable, and it cannot be taken as a substitute for other energy sources, there is no distortion of competition.
- (18) Italy then develops a number of arguments against the application of the Deggendorf jurisprudence (recitals 19 to 23):
- (19) Italy claims that the Deggendorf jurisprudence should not apply in this case, given the different origin of the case. The present case is a regional case (granting authority being the Regione Lazio), while the case concerning the municipalizzate was a national case.
- (20) Italy claims that there is no absolute identity in the beneficiaries. The Deggendorf jurisprudence should apply only to individual aid and not to schemes.
- (21) Italy claims that the Deggendorf jurisprudence should apply only when decisions are incontrovertible, while the decision of the Commission is not final, as there is an appeal pending. Italy states that the Commission cannot exercise such a pressure on Members States' policies before all enforcement means foreseen by the Treaty have been used.
- (22) Italy claims that the Commission is making a use of the Deggendorf jurisprudence which is too wide. It notes that a possible consequence would be that Member States would stop notifying.

V. COMMENTS FROM ITALY AND FROM THIRD PARTIES

1.1. Comments from Italy

- (15) The arguments of the Italian authorities are the following (recitals 16 to 27):
- (16) Italy raises the issue of the identity of the beneficiary, which has changed since the decision of the Commission. In fact, Italy points out that the beneficiary of the aid had changed even prior to that date. However, Italy recognises that the Commission was not made aware of this fact prior to the decision to open the current procedure. The change of the beneficiary would have as a consequence that the Deggendorf jurisprudence should not apply and that the present case would be without object.
- (23) Italy points out two other features of the project under examination which would not favour the application of the Deggendorf jurisprudence: (a) the energy saving objectives of the project are in line with Commission and EU policies; (b) ACEA would be penalised compared to other municipalizzate, and the Commission would be exercising pressure towards a single subject, through illegitimate means.
- (24) In reply to the Commission's questions, Italy points out that (recitals 25 to 27):
- (25) The Memorandum of Understanding shows that AEP is subject to double control of AEA and Electrabel.

⁽⁶⁾ Case T-297/02 (OJ C 289, 23.11.2002, p. 37).

⁽⁷⁾ Available on the Internet site of ACEA: www.aceaipa.it

(26) In the Joint Venture Agreement the project under consideration was not taken into account, nor was the recovery decision.

(27) ACEA has various activities, and that it is not possible to determine on which of these the recovery of the aid will impinge.

1.2. Comments from third parties

(28) The beneficiary of the aid ACEA, made a number of comments, which, to a very large extent, are identical to those submitted by Italy. There are however three additional comments in particular on the application of the Deggendorf jurisprudence:

(29) The first additional argument from ACEA is that, in the present case, contrary to the Deggendorf case, there are no urgent and serious reasons for the recovery, nor has a long period passed since the decision on the unlawful aid.

(30) The second argument from ACEA points out that, again contrary to the Deggendorf case, ACEA bears no responsibility or unwillingness concerning the recovery; to the contrary, ACEA declares itself as willing to payback, and makes clear that the delay does not depend on it.

(31) The third additional argument that ACEA puts forward is the claim that the Commission is not coherent in its application of the jurisprudence Deggendorf. ACEA mentions the Commission Decision 98/466/EC of 21 January 1998 granting conditional approval to aid which France has decided to grant to Société française de production⁽⁸⁾, where a previous negative decision concerning the same beneficiary is mentioned, but where Deggendorf was not applied.

VI. ASSESSMENT

(32) The assessment of the case will look first at whether the measure under consideration is an aid, and whether it can be considered compatible according to the Treaty.

(33) Secondly, the assessment will look at the identity of the beneficiary and the application of the Deggendorf jurisprudence.

1.1. Existence of aid

(34) A number of comments from Italy and from ACEA concern the finding of the Commission that the project is an aid (see paragraph 5.3).

(35) The project is funded through state resources coming from the budget of the Regional Government, and deriving in particular from the 'carbon tax', which was introduced by the Budget Law for the year 1999. The first condition for the existence of an aid is respected.

(36) The measure is selective, as it benefits only one producer, initially ACEA and now AEP. The second condition for the existence of an aid is respected.

(37) Concerning the impact on trade, the 2003 Decision (point 3.1) says: 'Heat is not traded but is substitutable to other primary or secondary energy products, which are themselves traded.'

(38) This is confirmed by other decisions of the Commission, for instance on the case Italy, Regione Piemonte, Aid for the reduction of polluting emissions (N 614/02)⁽⁹⁾, when it says that a local district heating project 'will allow households to substitute heat to other primary or secondary sources of energy such as oil or electricity which are traded among Member States'.

(39) The objective of district heating is to replace individual heating in buildings in an entire neighbourhood. In other words, the heating provided by the district heating power generator replaces the heating generated by small boilers, which in turn use other energy sources such as oil, gas, or by electricity. Oil, gas and electricity are traded among Member States. There is a substitution effect and the project under consideration does then have an impact on trade. In any event, both the ACEA and the Electrabel groups are active in a number of areas, in particular energy and electricity production and distribution, where intra-Community trade takes place. The third condition for the existence of aid is also respected.

⁽⁸⁾ OJ L 205, 22.7.1998, p. 68.

⁽⁹⁾ OJ C 6, 10.1.2004, p. 21.

- (40) Finally, the measure is also distortive, as it favours only a producer that may have its position strengthened in the global energy market, which may then possibly lead to a change in market conditions. Impact on trade and distortion stemming from the measure are thus confirmed, and are consistent with the findings of the Commission in other cases ⁽¹⁰⁾.
- (41) All the four conditions for the existence of an aid are thus respected, and the Commission confirms its finding that the project under examination should be considered as such.
- (46) In view of the fact that the reference investment is nil as the alternative is individual heating of households, the Commission accepted that the full investment cost is eligible. In addition, there is no cost saving accruing from the extension of the network. Therefore, the full cost of the investment can be considered as eligible. The aid granted corresponds to a maximum gross intensity of 40 %.
- (47) Therefore, in terms of eligible investment costs and aid intensity, the district heating project, taken in isolation, appears to be in line with points 30 and 37 of the Guidelines.

1.2. Compatibility of the aid

- (42) The Commission then examined if the aid under consideration could have been considered compatible, according to article 87(3)c. It first recognised that the project intends to reach environmental objectives. Second, it looked at whether the measure could fall within the rules foreseen by the Environmental Guidelines. The Commission looked in particular at points 30 and 37.
- (43) Point 30 of the Guidelines stipulates that 'investments in energy saving as defined in point 6 are deemed equivalent to investments to promote environmental protection. Such investments play a major role in achieving economically the Community objectives for the environment. They are, therefore, eligible for investment aid at the basic rate of 40 % of eligible costs'.
- (44) Within the project under consideration, only investment concerning district heating, consisting in pipelines for the distribution of heat and its accessories, is eligible to aid. The regional authorities of Lazio have provided the Commission with technical and economic evidence which proves that the proposed distribution network for district heating would actually mark a significant step forward in energy saving as compared to the existing — i.e. pre-investment — situation, *ceteris paribus*. Therefore, point 30 of the Guidelines applies.
- (45) Point 37 of the Guidelines stipulates that 'eligible costs must be confined strictly to the extra investment costs necessary to meet the environmental objectives'.
- (48) Based on this analysis the Commission would be able to declare the project, taken in isolation, as compatible to the rules concerning state aid. In taking this decision, the Commission balanced environmental aspects with competition policy, as it is precisely supposed to do. As it is indicated in point 4 of the Environmental Guidelines 'taking long-term environmental requirements into account does not mean that all aid must be authorised'.
- (49) Accepting the point of view of Italy, that since the project intended to reach environmental objectives the Commission should then have approved it, would ignore the fact that what matters most for competition rules is the modality through which the objectives are met. It is established jurisprudence that in providing guidelines on the ways it will examine State aid notifications, the Commission indicates to the Member States the less distortive ways of reaching the environmental goals. However, the environmental objective of the aid does not justify a derogation from general rules and principles concerning all State aid measures, whatever their objective.

1.3. Identity of the beneficiary

- (50) The first aspect of the assessment in the present case is to analyse the identity of the beneficiary.
- (51) A number of comments from Italy ⁽¹¹⁾ concern the change of beneficiary, the conditions of transfer of the part of the firm that is going to carry out the project and the Memorandum of Understanding between ACEA and Electrabel.
- (52) It is useful to underline that, before taking the decision to open the current procedure, the Commission was not made aware that the beneficiary of the aid had become AEP. It's a fact that was communicated from the Italian authorities only in the course of the current procedure.

⁽¹⁰⁾ In the case N 707/02 — The Netherlands — MEP — Diffusion of renewable energy, approved by the Commission on 19.3.2003 it is written that the scheme will only favour the producers of renewable electricity and producers of CHP electricity who are feeding that electricity into the grid. The financial assistance provided to these selective groups of producers of electricity will strengthen their position on the global electricity market, which may possibly lead to a change in market conditions. Such strengthening of the position of the relevant undertakings as compared with other undertakings competing with them within the Community must be regarded as affecting trade between Member States.

⁽¹¹⁾ See recitals 16 and 25 to 27.

- (53) As mentioned above, in the section describing the beneficiary, AEP is different from ACEA. It is a distinct company, jointly controlled by ACEA and Electrabel. But the Commission, in its appreciation in the State aid area, must go beyond the legal separation. As recently confirmed by the Court of First Instance, with extensive references to the jurisprudence of the European Court of Justice and of the Court of First Instance itself ⁽¹²⁾.
- (54) 'It should be noted that, according to settled case-law, where legally distinct natural or legal persons constitute an economic unit, they should be treated as a single undertaking for the purposes of Community competition law (see, to that effect, Case 170/83 Hydrotherm [1984] ECR 2999, paragraph 11, and, by analogy, Case T-234/95 DSG v Commission [2000] ECR II-2603, paragraph 124). In the field of State aid, the question whether there is an economic unit arises primarily in relation to the question whether there is an aid beneficiary (see, to that effect, Case 323/82 Intermills v Commission [1984] ECR 3809, paragraphs 11 and 12). It has been held in that regard that the Commission has a broad discretion in determining whether companies which form part of a group should be regarded as an economic unit or rather as legally and financially independent for the purpose of applying the rules governing State aid (see, to that effect, Joined Cases T-371/94 and T-394/94 British Airways and Others v Commission [1998] ECR II-2405, paragraphs 313 and 314, and, by analogy, DSG v Commission, paragraph 124).'
- (55) The Commission has to assess if ACEA and a company that is still part of the ACEA group should be regarded as an economic unit. To this respect, the analysis of the situation of AEP confirms that this is the case.
- (56) ACEA recognises that it has joint control over AEP, together with Electrabel. It mentions it explicitly in one of the submissions ⁽¹³⁾. This is confirmed by the financial reporting of ACEA, which lists AEP among the consolidated companies. The fact that ACEA exercises control on AEP jointly with Electrabel and not alone is not relevant.
- (57) AEP is mentioned in the accounts of ACEA: in page 35 of the report for the first half of 2004, it is written that 'having regard of the possibility allowed by Article 37 of the legislative decree 127/91, are also included within the consolidation boundaries the following undertakings over which the holding exercise the control jointly with other partners and on the basis of agreements with them'. The list includes AEP.
- (58) The Memorandum of Understanding between ACEA and Electrabel, concerning the transfer of the branch from ACEA to AEP does not mention the project at all. However, it is clear that AEP inherited the project and became the intended beneficiary of the aid as a result of a restructuring within the ACEA group and that it pursues some of the activities that were previously performed by ACEA itself. Furthermore, Article 4 of the agreement to confer the branch to AEP (named at that time GEN.CO) says that any dispute concerning that branch would be left out from the agreement itself, and that the conferred undertaking would not be subject to any dispute that may arise, even if they would originate after December 1, 2002 (date of entering into effect of the agreement) but would be based on facts preceding that date.
- (59) An agreement between two parties cannot lead to an exemption from the obligation to reimburse the illegal and incompatible aid. If such an agreement would be accepted, it could lead to the systematic circumvention of the obligation of the companies to reimburse the illegal and incompatible aid. Furthermore, it should be noted that, at the time of the entering into effect of the agreement, the decision on the aid granted to ACEA had already been taken by the Commission and that ACEA at that time had already introduced an action for annulment of this decision. The obligations imposed on ACEA were therefore well known, so that a circumvention of the State aid recovery obligation cannot be excluded.
- (60) Therefore we conclude that ACEA and AEP are to be considered as a single entity and that, notwithstanding the reorganisation that has taken place within the ACEA group, the group itself, including ACEA, must be considered as beneficiary of the aid. In addition, a different approach might make it possible to circumvent State aid rules.

1.4. The Deggendorf Jurisprudence

- (61) After more than two years from the Decision 2003/193/EC, Italy has yet to define the amounts which the municipalizzate have to reimburse, let alone recover the aid which had been declared illegal and incompatible. The situation thus has not changed since the opening of the proceedings in 2003. More, the Commission decided to bring Italy to the Court for non-implementation of the Decision 2003/193/EC ⁽¹⁴⁾. The latest development is the inclusion in the so-called Legge Comunitaria for 2004, whose approval is still pending by both Chambers of Parliament, of a provision which sets out the main directions for the recovery, like asking local governments to indicate possible beneficiaries or asking beneficiaries to self-declare the amount of aid perceived.

⁽¹²⁾ Judgement of the Court of First Instance of 14 October 2004, in the case T-137/02 (Pollmeier Malchow GmbH & Co. KG v Commission of European Communities).

⁽¹³⁾ Letter from Italy of 29.4.2004.

⁽¹⁴⁾ Decision notified under document number C(2005) 41 of 20.1.2005. See press release IP05/76 of 20.1.2005.

(62) Therefore the Commission considers that the situation that was in place at the moment of the opening is still present. The Commission confirms that it still cannot determine the exact amount of the advantages perceived by ACEA prior to the new aid. Neither the Italian government nor ACEA have put forward any specific elements showing that, in the case of ACEA, the advantages arising from the scheme considered as incompatible must be considering as not constituting aid, or constituting existing aid, or compatible aid because of the specific features of its beneficiary. On the contrary, because of its size and because of the activities it performed at the time of the grant of the aid in different markets, including the production and distribution of energy and electricity, advantages granted to ACEA must be considered as affecting intra-Community trade and distorting competition. In addition, the advantages are considerable since they correspond to the amounts due under the Italian corporate tax (IRPEG) for three years. Therefore, the ACEA group, including AEP, is still in receipt of illegal and incompatible aid which still has to be reimbursed and the distortion of competition is still in place.

(63) Under such circumstances, and even if the exact amount of the first aid is not known, the cumulative effect of the two aids accruing to ACEA and its distortionary impact on the common market render the grant of the notified aid incompatible with the common market.

1.5. Application of the Deggendorf jurisprudence to the case

(64) Italy and ACEA put forward a number of arguments on the application of the Deggendorf jurisprudence to this case.

(65) To recall, the Deggendorf jurisprudence established by the Court⁽¹⁵⁾ states that the Commission, when examining the compatibility of an aid, should take into account all the relevant elements and in particular the cumulative effect of the new aid and of aid which has been declared incompatible and has not yet been reimbursed. This jurisprudence gives the possibility to suspend the granting of compatible aid as long as the previous illegal and incompatible aid has not been reimbursed.

(66) First, it is worth repeating what is mentioned in the paragraphs 51 to 60 concerning the identity of the beneficiary. For the present case, the Commission considers, for the arguments presented above, that AEP is still part

of the ACEA Group, and that to the effect of this case the beneficiary is basically the same.

(67) The fact that this is a regional case, while the case concerning the municipalizzate was a national case, is not relevant⁽¹⁶⁾. For the Commission, all cases are national, as is confirmed by the fact that the national authorities are the only direct interlocutors of the Community institutions. Proof is that the measure was notified by Italy, and that Italy is the addressee of the decision, according to Articles 87 and 88 of the EC Treaty. Furthermore, the resources involved are national, whether they are distributed from the national government or a regional institution. Hence this argument does not hold.

(68) The Deggendorf jurisprudence applies whenever a beneficiary of an aid has not paid back what the Commission decided, irrespective of the fact that the case is individual or concerns a scheme⁽¹⁷⁾. The Commission must consider that ACEA was among the beneficiaries of the aid to the municipalizzate, since at least part of that aid was given to all undertakings falling into that category, hence also to ACEA.

(69) Furthermore, ACEA presented observations in the course of that procedure in its quality of third interested party arguing for the compatibility of those schemes. The Commission Decision declared such non-notified schemes unlawful and incompatible and imposed to the Italian State to recover any possible amount disbursed under those schemes⁽¹⁸⁾. ACEA has challenged that decision before the Court of First Instance⁽¹⁹⁾ and, in that context it has submitted that it had benefited from the relevant scheme. As explained above, neither Italy nor ACEA have put forward any specific reasons that could prevent or limit recovery in its specific case.

(70) Financial reporting by ACEA mentions the decision of the Commission and the financial risks that may derive for the group. It even quantifies the likely amounts of the aid that Italy should recover from ACEA, at least for the years 1998 and 1999, since in 1997 ACEA reported a loss (hence no benefits in terms of reduced tax). ACEA mentions possible figures for 1998 (EUR 28 million) and for 1999 (EUR 290 million, due to some exceptional operations of de-merging).

⁽¹⁶⁾ See recital 19.

⁽¹⁷⁾ See recital 20.

⁽¹⁸⁾ Article 3 of the Commission Decision stipulates that all necessary measure must be taken by Italy in order to recover from the beneficiaries the unlawful aid thus granted.

⁽¹⁹⁾ See footnote 6.

⁽¹⁵⁾ See footnote 3.

- (71) Contrary to the claim that Deggendorf should apply only when the decision of the Commission are incontrovertible (e.g. only when they are finally confirmed by a ruling of the Court) ⁽²⁰⁾, the Commission reminds that its decisions have immediate effect and validity, as is recognised by Italy ⁽²¹⁾. This is in line with the general principle that appeals do not have any suspension effects (Article 242 EC Treaty). Also, it should be mentioned that no interim measures have been asked for this case.
- (72) Italy claims that the use of the Deggendorf jurisprudence is an exceptional way to proceed, and should be applied only as *extrema ratio*. Contrary to this point of view, an effective control of State aid policy would push to a constant and immediate use of the Deggendorf jurisprudence in order to ensure the effectiveness of the system, whose purpose is to take into account all State aid that is still available to the beneficiary, thereby reducing distortions of competition and to ensure an effective application of its decisions.
- (73) Contrary to the claim by Italy that the application of the Deggendorf jurisprudence by Italy would lead to a reduced number of notifications from Member States ⁽²²⁾, the Commission notes that notification is not an option, but an obligation according to Article 88(3) of the EC Treaty. Non-notified aid becomes illegal, even if it may be compatible.
- (74) Concerning the claim by Italy that the Commission is exercising a particular pressure ⁽²³⁾, the Commission notes that this case is a simple application of the existing jurisprudence. ACEA is penalised only to the extent it is the beneficiary of another aid.
- (75) Furthermore, it should be pointed out that ACEA is not particularly penalised. The Commission approved (Decision on case N 614/02 mentioned in paragraph 38) a number of projects in the Region Piemonte. Two of the projects approved were to be carried out by AEM, the municipalizzata from Torino, and by ASM, the municipalizzata from Settimo Torinese. In the case of AEM, the decision considered whether the Deggendorf jurisprudence would apply. It finally said no, because of the *de minimis* rule, the amount in question being limited to EUR 17 240. The local authority further took the engagement to verify if there was no cumulation with other *de minimis* aid over a three years period, for a total amount over EUR 100 000, in which case there would have been aid which would not have been granted precisely because of Deggendorf.
- (76) In the case of ASM, the same Decision on case N 614/02 (mentioned in paragraphs 38 and 75) said:
- ‘In view of the Deggendorf case law ⁽²⁴⁾, the Italian authorities have therefore committed to check if Azienda Sviluppo Multiservizi S.p.A. and the other beneficiaries have indeed benefited of such aid and if so not to grant the present State aid before the unlawful and incompatible State aid previously granted has been reimbursed in line with the above mentioned decision.’
- (77) Finally, the fact that ACEA had various activities, and that it cannot determine on which of these the recovery of the aid will impinge ⁽²⁵⁾, does not influence this case. It would be too easy for a company to escape to a recovery decision simply by not specifying on which part of its activities or on which branch the recovery would fall.
- (78) To the contrary, it can be argued that, since part of the aid that was declared illegal and incompatible concerned a fiscal measure, all branches of ACEA have benefited from it in the past. Fiscal aid, being operating aid, is not as such referable to any activity of the firm in particular. The illegal and incompatible aid covered thus the entire economic activity of ACEA, including the branch that was then transferred to AEP. This implies that part of that non-recovered aid can be attributed to AEP too.

1.6. On third parties' comments

- (79) Contrary to what is said by ACEA ⁽²⁶⁾, indeed a long period has passed since the decision to recover was made, without any real step taken by the Italian authorities to recover the aid. At the end of January 2005, Italy had yet to approve the procedure for the recovery. Article 14.3 of the Regulation (EC) No 659/1999 of 22 March 1999 ⁽²⁷⁾ clearly indicates that recovery shall be effected without delay. Until now, as mentioned above, no clear procedure has been defined to recover the aid, and no recovery proceedings have been started yet.
- (80) The goodwill of ACEA ⁽²⁸⁾ does not change the situation *de facto*, which is still of a non recovered aid. The issue under examination — the recovery of an aid that was declared illegal — is a factual one, and is not influenced by the disposition of one of the parties in one sense or another. Furthermore, beyond a simple expression of goodwill, ACEA could have acted towards speeding up the recovery, for instance by indicating the amounts that would be involved, and especially by putting a reserve in a blocked bank account.

⁽²⁰⁾ See recital 21.

⁽²¹⁾ Letter from Italy, 23.7.2003, p. 6.

⁽²²⁾ See recital 22.

⁽²³⁾ See recital 23.

⁽²⁴⁾ See footnote 3.

⁽²⁵⁾ See recital 27.

⁽²⁶⁾ See recital 29.

⁽²⁷⁾ OJ L 83, 27.3.1999, p. 1.

⁽²⁸⁾ See recital 30.

- (81) Finally, concerning a pretended incoherence by the Commission in the application of the Deggendorf jurisprudence, of which the decision on SFP would be an example ⁽²⁹⁾, it should be noted that the 1998 decision ⁽³⁰⁾ was based on a commitment from France to reimburse the previous aid which had been the subject of a negative decision. So, Deggendorf was not applicable. The Decision 1998/466/EC also says that no further aid can be given, except in exceptional circumstances. In 2002, the Commission has adopted a decision on a new intervention from France in favour of SFP, but it concluded that the intervention was not an aid. As a consequence, there was no reason to apply the Deggendorf jurisprudence.

VII. CONCLUSION

- (82) On the basis of the considerations above, the Commission finds that the aid amounting to EUR 3 800 000 for a district heating project near Rome to be granted to the company AEP, taken in isolation, would be compatible with the Treaty.
- (83) The payment of the aid to AEP is however suspended until the moment that Italy submits the proof of the reimbursement of the aid by ACEA that was declared illegal and incompatible in the case assessed in the Decision 2003/193/EC, in application of the Deggendorf jurisprudence,

HAS ADOPTED THE PRESENT DECISION:

Article 1

1. The aid that Italy intends to grant to the company AEP for a district heating project on the base of '*Deliberazione della Giunta Regionale del Lazio n. 4556*' of 6 August 1999 is compatible with the common market.

2. The aid referred to in paragraph 1 may not be granted before Italy has submitted evidence that ACEA has reimbursed the previous aid assessed on the case covered by the Decision 2003/193/EC, and the interests.

Article 2

Italy informs the Commission, within a deadline of two months starting from the date of the notification of this Decision, of the measures taken to comply with it.

Article 3

This Decision is addressed to Italy.

Done at Brussels, 16 March 2005.

For the Commission

Neelie KROES

Member of the Commission

⁽²⁹⁾ See recital 31.

⁽³⁰⁾ See in particular the third paragraph in the introduction.

COMMISSION DECISION
of 6 April 2005
on the aid scheme which Italy is planning to implement for ship financing

(notified under document number C(2005) 844)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2006/599/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above,

Whereas:

(4) By letter dated 30 April 2003, the Commission informed Italy that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the notified measure.

(5) The Commission Decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽¹⁾. The Commission invited interested parties to submit their comments on the aid.

(6) The Commission received no comments from interested parties.

(7) By letters dated 4 June 2003, 22 July 2003 and 3 June 2004 the Italian authorities submitted their observations on the Commission's Decision to initiate the procedure. A meeting between the Italian authorities and the Commission took place on 27 January 2004.

I. PROCEDURE

(1) On 26 November 1998 the Commission approved the Italian shipbuilding guarantee scheme provided for in Article 5 of Law No 261 of 31 July 1997, and considered that the aid intensity provided for by the scheme amounted to 1 %.

(2) That Article was amended by Law No 413 of 30 November 1998. On 16 May 2001 Italy notified the Commission of the adoption of a decree of the Minister for the Treasury, the Budget and Economic Planning, which supplemented the guarantee scheme, arguing that, with these modifications and additions, the scheme should be considered free of aid. It is this notification which is the subject of the present decision.

(3) Following the notification there was some correspondence with Italy in order to obtain further information. In addition, the Commission had numerous informal contacts with the Italian authorities and with their consultant, and met them on two occasions.

(8) By letter dated 3 November 2004 the Italian authorities asked the Commission to define its position on the case. The Commission replied to that letter on 22 December 2004; it did not receive any further correspondence from Italy.

II. DESCRIPTION OF THE SCHEME

(9) The Special Guarantee Fund for Ship Financing (*Fondo speciale di garanzia per il credito navale* — 'the Fund') was provided for in Article 5 of Law No 261 of 31 July 1997. Following a tender procedure, the financial, administrative and technical management of the Fund was entrusted to Mediocredito Centrale SpA ('Mediocredito'). The Fund is intended to cover the risk of failure to recover loans for the construction and conversion of ships granted by banks to Italian and foreign shipowners for work carried out in Italian shipyards. For this purpose the Fund is to provide second-priority end-financing guarantees to the ship-owners. The Italian authorities have confirmed that the Fund is not yet operative, so that no guarantees have yet been granted.

⁽¹⁾ OJ C 145, 21.6.2003, p. 48.

- (10) The financing loan must have a duration of no more than 12 years and amount to no more than 80 % of the contract price; the interest rate must be no lower than that referred to in the resolution of the OECD Council of 3 August 1981, as amended, or may be equal to the market rate in the event that the financing does not receive any other public assistance aimed at reducing the burden of interest. In addition, the financing is to be secured by a first mortgage on the vessel.
- (11) The scheme provides guarantees to shipowners assessed as being economically and financially sound by Mediocredito on the basis of the criteria specified in the decree.
- (12) A guarantee can be given on a sum no greater than 40 % of the loan and — within this limit — may cover up to 90 % of the final loss incurred by the banks for capital, contractual interest and interest on arrears, at a rate no higher than the reference rate in force on the date of legal proceedings for recovery of the debt, and costs, including court and out-of-court expenses incurred.
- (13) The one-off premium to be paid by the beneficiaries of the Fund is fixed, and was originally set at 1,6 % of the guaranteed amount, independently of the duration of the guaranteed loan. The Italian authorities subsequently informed the Commission that they intended to redefine the one-off premium, which would now be a maximum of 2,3 % of the guaranteed amount for a 12-year loan, and proportionally less for shorter loans. This one-off 2,3 % premium is equivalent to a premium of 0,5 % per annum on the outstanding guaranteed amount of a 12-year loan.
- (14) The Italian authorities considered introducing a mechanism of risk differentiation, whereby different projects would be charged different premiums according to the risk involved in financing the project. However, this system was only briefly outlined, and no other detail or information on its operation has been provided to the Commission.
- (16) Among other things, the Commission wondered whether a State-provided guarantee scheme which charged the same premium to all users independently of the individual risks of the financed project — in a sector where there was a market willing to offer such guarantees — could be considered likely to be self-financing.
- (17) Also, the Commission had doubts that the premiums paid by the beneficiaries were in line with the market, or sufficient to cover all the costs of the scheme.
- (18) Last, the Commission could not be certain that a percentage of only 10 % of the most risky part of the loan would be enough to ensure that the lender assessed the creditworthiness of the borrower properly and minimised the risks associated with the transaction.

IV. COMMENTS FROM ITALY

- (19) The Italian authorities submit that the Fund does not involve aid, for the following reasons:
- (i) the rules of the Fund permit guarantees to be granted only to shipowners of meeting strict economic criteria, with a risk profile below the average; these beneficiaries have similar risk profiles, and thus no substantial differentiation of guarantee premiums appears necessary;
 - (ii) a market survey conducted among several credit institutions operating in Italy has shown that the average market premium for similar guarantees is substantially equivalent to that proposed by the Italian authorities.
- (20) Thereafter, by letter of 3 June 2004, the Italian authorities indicated their readiness to adopt a system of risk differentiation whereby projects would be charged different premiums according to the financial risk involved. This system takes as its point of departure the original 0,5 % p.a. premium. Essentially, the premiums would vary according to the length of the loan and the risk of the project. Three different risk profiles would be established. For a 12-year loan, the one-off premium to be paid by the beneficiaries would amount to 2,065 % for the lowest risk category, to 2,603 % for the medium risk category, and to 3,142 % for the highest risk category. This would correspond to a premium ranging between 0,4563 % p.a. of the guaranteed amount for the least risky projects to 0,6562 % p.a. for the most risky ones.

III. GROUNDS FOR INITIATING THE PROCEDURE

- (15) In its decision to initiate proceedings, the Commission expressed doubts as to whether the scheme satisfied all the tests in point 4(3) of the notice of 11 March 2000 on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (the 'Guarantees Notice')⁽²⁾, which would have allowed the Commission to conclude that there was no aid involved.

⁽²⁾ OJ C 71, 11.3.2000, p. 14.

- (21) The authorities would establish different ranges of values according to six financial parameters which the authorities would have to assess when a potential beneficiary applied for the scheme. The applicant's overall performance in these parameters would result in it being placed into one of the three different risk categories. However, this system has never been further elaborated, and no other concrete details on its possible operation have been submitted by the Italian authorities.

V. ASSESSMENT

1. Existence of State aid within a meaning of Article 87(1) of the Treaty

- (22) Article 87(1) of the Treaty states that any aid granted by a Member State or through State resources which distorts or threatens to distort competition by favouring certain undertakings is incompatible with the common market in so far as it affects trade between Member States.
- (23) The measure to be assessed here consists of a guarantee fund providing cover for the financing of loans granted by banks to shipowners for shipbuilding or conversion work carried out in Italian shipyards. The Commission outlined its approach to such securities in the Guarantees Notice ⁽³⁾.
- (24) The Guarantees Notice explains why — under certain conditions — a State guarantee can constitute State aid: 'The State guarantee enables the borrower to obtain better financial terms for a loan than those normally available on the financial markets. Typically, with the benefit of the State guarantee, the borrower can obtain lower rates and/or offer less security. In some cases, the borrower would not, without a State guarantee, find a financial institution prepared to lend on any terms (...). The benefit of a State guarantee is that the risk associated with the guarantee is carried by the State. This carrying of a risk by the State should normally be remunerated by an appropriate premium. Where the State forgoes such a premium, there is both a benefit for the undertaking and a drain on the resources of the State. Thus, even if no payments are ever made by the State under a guarantee, there may nevertheless be a State aid under Article 87(1)' ⁽⁴⁾.
- (a) *Economic advantage*
- (25) The main question in the present case is whether the premiums charged for the guarantee reflect an adequate market price. In light of the general principles of State aid review, and on the basis of the provisions outlined above, it is evident that the underlying principle of the Guarantees Notice is that the benchmark for assessing whether a guarantee is free of State aid is the market. If the State obtains a remuneration for the guarantee that is equivalent to what a private market operator would charge to equivalent beneficiaries, the beneficiaries are not being granted any advantage, and the State is acting like any private investor or creditor operating on the financial market. If, however, the price paid by the beneficiaries and the conditions applied to the guarantees are more favourable than those available in the market, then there is a clear economic advantage to the beneficiaries, and therefore (assuming the other conditions are met) State aid within the meaning of the Treaty.
- (26) Point 4.3 of the Guarantees Notice lays down six conditions on the basis of which the Commission will assess whether a State guarantee scheme constitutes State aid. In the first place, therefore, the Commission must consider whether the notified scheme fulfils these conditions; if it does, the Commission can conclude immediately that there is no aid element involved.
- (27) Point 4.3 states that a State guarantee scheme that fulfils all the following conditions does not constitute State aid under Article 87(1):
- (a) the scheme does not allow guarantees to be granted to borrowers who are in financial difficulty;
 - (b) the borrowers would in principle be able to obtain a loan on market conditions from the financial markets without any intervention by the State;
 - (c) the guarantees are linked to a specific financial transaction, are for a fixed maximum amount, do not cover more than 80 % of each outstanding loan or other financial obligation (except for bonds and similar instruments) and are not open-ended;
 - (d) the terms of the scheme are based on a realistic assessment of the risk so that the premiums paid by the beneficiary enterprises make it, in all probability, self-financing;
 - (e) the scheme provides for the terms on which future guarantees are granted and the overall financing of the scheme to be reviewed at least once a year;

⁽³⁾ See footnote 2.

⁽⁴⁾ Points 2.1.1 and 2.1.2 of the Notice.

(f) the premiums cover both the normal risks associated with granting the guarantee and the administrative costs of the scheme, including, where the State provides the initial capital for the start-up of the scheme, a normal return on that capital.

(28) In the present case conditions (a), (b), (c) and (e) are fulfilled, but conditions (d) and (f) are not, as the risk carried by the State is not remunerated by an appropriate premium.

(29) Point 4.3(d) and (f) of the Notice require that the terms of the scheme be based on a realistic assessment of the risk, so as to make the system in all probability self-financing, and that the premiums collected be sufficient to cover the normal risks associated with granting the guarantees and the administrative costs of the scheme, including, where the State provides the initial capital for the start-up of the scheme, a normal return on that capital. Italy has not been able to demonstrate to the satisfaction of the Commission that the premiums provided for in the scheme can make it self-financing and cover all administrative costs.

(i) Inadequacy of the proposed premium

(30) Credit institutions operating on the financial market would charge their clients higher premiums for similar guarantees, given that a one-off premium of 2,3 % does not appear sufficient to ensure that in all likelihood all costs due to possible defaults and to administrative expenses will be covered. This is also true for the range of premiums between 2,065 % and 2,603 % mentioned in the Italian authorities' letter of 3 June 2004.

(31) The Italian authorities have not had any similar guarantee schemes in operation in the past, and consequently do not possess any reliable historical or empirical data (on e.g. industry defaults, the revenues of the scheme, or the actual administrative costs of running the scheme) which might have enabled them to demonstrate that the scheme would be self-financing.

(32) The Italian authorities argue that the premium proposed is derived from a comparable market benchmark, and should therefore be considered adequate. This is not borne out by the Commission's information.

(33) First, the Italian authorities themselves in their letter of 7 October 1998 state that the average market price of a

bank guarantee amounts, in their view, to 0,915 % p.a. This is much higher than the annual premium that would correspond to the one-off premiums proposed by the Italian authorities initially or in the premiums proposed in their letter of 3 June 2004.

(34) Second, the inadequacy of the proposed premium is confirmed by more recent data likewise provided to the Commission by the Italian authorities themselves. In 2003 the Italian authorities conducted a market survey with the aim of investigating how much credit institutions would charge their clients for similar guarantees. According to the letters received from the Italian banks and submitted to the Commission, all banks questioned would charge premiums higher than 0,5 % p.a., or a range of premiums higher than that proposed by Italy in its letter of 3 June 2004. The premiums suggested by the banks are as follows:

Banca CARIGE	between 0,50 % and 0,75 % p.a.
BNL	ca 0,60 % p.a.
Unicredit	0,60 % p.a.
Citigroup	0,60 % p.a.
Deutsche Bank	between 0,70 % and 0,80 % p.a.
ABN Amro	between 0,70 % and 0,75 % p.a.
Banca Intesa	ca 0,75 % p.a.
Banca di Roma	between 0,75 % and 1,25 % p.a.

(35) Third, the inadequacy of the proposed premium is confirmed by the experience the Commission has gained in assessing ship financing schemes in Germany, which, unlike the Italian Fund, have been running for several years. In December 2003 the Commission approved the guarantee schemes operated by the German Länder (State aid measure No N 512/03⁽⁵⁾) on the grounds that the notified measures did not constitute State aid within the meaning of the Treaty.

(36) The German case showed that, to ensure that the default risks (and the administrative costs) were in all probability covered, higher premiums were needed: the German schemes carried premiums which varied between 0,8 % and 1,5 % p.a., depending on the creditworthiness of the beneficiary.

⁽⁵⁾ OJ C 62, 11.3.2004, p. 2.

(37) As the German scheme and the Italian scheme are substantially analogous and raise similar issues, the Commission suggested that the Italian authorities give careful consideration to the Decision in the case of the German Länder guarantee schemes, especially because, as already mentioned, the Länder had already had various guarantee schemes for shipbuilding in place in the past. While the Italian authorities had not been able to produce any evidence to show that the scheme would be 'in all probability self-financing', the German authorities had extensive and reliable historical data on which to base their estimates ⁽⁶⁾.

(38) The Commission accordingly provided Italy with a non-confidential copy of the Commission Decision on the guarantee schemes operated by the German Länder. In addition, when the Italian authorities expressed their desire to have more complete and detailed information on the German case, if possible from the German authorities themselves, the Commission provided the Italian authorities and their consultant with contact details for the German authorities and their consultant.

(ii) Lack of risk differentiation

(39) In addition, the Commission considers that the Fund is not based on a realistic assessment of the risks and would therefore not in all probability be self-financing.

(40) The information available to the Commission indicates that ship financing is a sector in which it is possible to assess and price individual risks, and that a functioning market for the granting of end-financing guarantees for shipbuilding does exist. It appears, therefore, that a ship financing guarantee scheme that charges the same premium to all users, if it functions under the same conditions and restrictions as market operators, will not in all probability be self-financing. This is so because it would always be possible for beneficiaries with lower than average risk to find a guarantor willing to cover their risk at premiums cheaper than the average premium. Unless the system was compulsory, this would leave the guarantee scheme offered by the public authorities with the higher than average risks, so that the system would not be adequately financed.

(41) The information supplied indicates that the guarantee scheme for ship financing provided by Italy carries a fixed premium, and that the use of the scheme is not compulsory. At the same time, Italy confirms that it is possible to assess individual risks and that a market to provide such guarantees does exist. On this basis, the

premium guarantee system at issue cannot be held to be 'in all probability self-financing'.

(42) As mentioned above, however, in their submission of 4 June 2004 the Italian authorities manifested a willingness to adopt a system whereby different projects carrying different risks would be charged different premiums. But that willingness has never been transformed into a concrete proposal. The new system was briefly outlined in that letter, but no other details or information on its operation have been provided since, although the authorities were aware that this was an issue of crucial importance for the Commission's Decision.

(43) In any event, even if it were to be held that such a system could ensure a realistic assessment of the risks, the low level of the premiums proposed (see above) would still indicate that the measure was capable of conferring an economic advantage on shipowners using the scheme.

(iii) Coverage of administrative costs

(44) Finally, the Italian authorities have not provided the Commission with reliable and detailed estimates of all the administrative costs related to the planning, the setting-up and the running of the scheme, despite the fact that the Commission raised the issue in the decision initiating the procedure.

(45) The Commission considers that if the premiums collected may prove insufficient to cover all the losses due to defaults, then they are even less likely to be sufficient to cover all the administrative costs as well.

(46) Lastly, the Italian authorities have informed the Commission that the Law has allocated EUR 258 228 449,54 (LIT 500 billion) for the operation of the Fund, which the State has earmarked in the budget; no return on this capital is provided for.

(iv) Conclusion

(47) It follows from the argument set out so far that the premium or the range of premiums proposed by the Italian authorities are not capable of ensuring that the scheme is self-financing and that all administrative costs are covered. In addition, the terms of the scheme are not based on a realistic assessment of the risks. *A fortiori*, therefore, the private investor test is not met.

⁽⁶⁾ It should be pointed out that the market for shipbuilding appears to be global, and the market for finance to shipbuilding appears to be at least pan-European. Therefore, important lessons could be learnt from the German case irrespective of the fact that the schemes there assessed did not concern Italy.

- (48) On this basis, the Commission believes that the proposed measure is capable of conferring an economic advantage on the beneficiaries of the Fund.

(b) Use of State resources and selectivity of the measure

- (49) It is clear that State resources are to be used, given that the measure is a scheme providing public guarantees and that the financing will be provided by the State budget. State guarantees may constitute a drain on the resources of the State if the State takes a financial risk and forgoes an appropriate premium payable by the beneficiaries.

- (50) It is likewise evident that the measure is selective, as these State guarantees are to be available only to ship-owners who intend to have shipbuilding or conversion work carried out in Italian shipyards (and who meet the criteria set out in the Italian legislation).

(c) Distortion of competition and effect on intra-Community trade

- (51) The economic advantage conferred by the Fund on specific undertakings may, by its very nature, distort competition, as the State guarantees may facilitate access by these undertakings to certain activities otherwise not open to them. The granting of the guarantees by the State, without an adequate remuneration on the part of the beneficiaries, may give these undertakings and the Italian shipbuilding industry a competitive advantage over European and non-European competitors who have not got the benefit of similar measures.

- (52) There is ample intra-Community trade within the global shipbuilding market. The measure is thus capable of affecting trade between Member States.

- (53) In conclusion, as all the criteria of Article 87(1) are met, the proposed measure constitutes State aid within the meaning of the EC Treaty.

2. Compatibility of the aid

- (54) The conditions under which aid is compatible or may be considered compatible with the common market are set out in Article 87(2) and (3). Article 87(3)(e) enables the Council to specify categories of aid that may be considered compatible with the common market by

taking a decision by qualified majority on a proposal from the Commission.

- (55) At the time of the notification, aid to the shipbuilding sector was regulated by Council Regulation (EC) No 1540/98 of 29 June 1998 establishing new rules on aid to shipbuilding ⁽⁷⁾ (the 'Shipbuilding Regulation'). According to the Shipbuilding Regulation aid could be granted to the industry only under the conditions and for the objectives which the Regulation laid down. Operating aid was not permissible for shipbuilding contracts concluded after 31 December 2000.

- (56) On 1 January 2004 the new Framework on State Aid to Shipbuilding (the 'Shipbuilding Framework') ⁽⁸⁾ entered into force: it confirmed the prohibition of any operating aid within this sector. Consequently, only aid in compliance with the requirements indicated and for the purposes provided for in the Framework could be considered compatible.

- (57) According to the case-law of the Court of Justice ⁽⁹⁾, unless otherwise specified in transitional transitory rules, notified State aid measures have to be assessed according to the rules in force at the time the decision on their compatibility is adopted. In the case at issue, therefore, the aid has to be assessed under the Shipbuilding Framework.

- (58) The decision to initiate proceedings was adopted when the Shipbuilding Regulation was in force, and it was accordingly based on the Shipbuilding Regulation. But there is no need to initiate the administrative procedure afresh when the relevant provisions of two consecutive legislative acts are not substantially different. This requirement is clearly fulfilled in the present case ⁽¹⁰⁾.

- (59) In the Shipbuilding Framework and the Shipbuilding Regulation, aid to shipbuilding includes all aid granted directly or indirectly to shipyards, to shipowners or to third parties which are available as aid for the building or conversion of ships, such as credit facilities, guarantees and tax concessions ⁽¹¹⁾.

⁽⁷⁾ OJ L 202, 18.7.1998, p. 1.

⁽⁸⁾ Framework on State Aid to Shipbuilding (2003/C 317/06) (OJ C 317, 30.12.2003, p. 11).

⁽⁹⁾ See judgment of the Court of First Instance in Case T-176/01 Ferriere Nord SpA v Commission of the European Communities [2004] ECR, 18 November 2004, not yet reported, in particular paragraphs 134 to 140.

⁽¹⁰⁾ See also Case T-136/01 Ferriere Nord, paragraphs 74 to 82.

⁽¹¹⁾ See Article 2(2) of the Shipbuilding Regulation and paragraph 11 of the Shipbuilding Framework.

- (60) As regards the compatibility of the aid with the common market, the decision to initiate proceedings was based on the fact that the aid was operating aid and as such was incompatible under the Shipbuilding Regulation since 1 January 2001⁽¹²⁾. The same rule continues to apply under the Shipbuilding Framework, which does not allow the granting of operating aid.
- (61) The decision to initiate proceedings also considered the possibility of assessing the compatibility of the aid in the light of the OECD rules on credit facilities granted for the building and conversion of vessels⁽¹³⁾. It stated that although the OECD Arrangement and Sector Understanding made provision for guarantees, the provisions of the Arrangement in relation to minimum premium benchmarks did not apply until such time as they had been reexamined by the parties to the Sector Understanding. This is still the case⁽¹⁴⁾.
- (62) The initiating decision did not assess the aid in the light of other compatibility provisions of the Shipbuilding Regulation, as it was obvious that the aid was not closure aid, rescue or restructuring aid, innovation aid, aid for research and development or environmental aid. It is likewise obvious that the aid does not aim at favouring these objectives within the meaning of the Shipbuilding Framework either, even though the provisions of the Framework are slightly different. Similarly, it is obvious that the aid does not pursue other horizontal objectives now authorised under the Shipbuilding Framework (training, employment, or promotion of SMEs).
- (63) It should also be stressed that the Italian authorities have never argued that the measure should be considered compatible. They have consequently never provided any information to the Commission in order to allow it to consider whether the aid qualifies for any of the exemptions from the general prohibition laid down in Article 87(1) of the Treaty.
- (64) The Commission accordingly takes the view that none of the exemptions from the prohibition of State aid to the

shipbuilding industry is applicable in the present case, and consequently that the measure, which constitutes State aid, is not compatible with the common market.

VI. CONCLUSION

- (65) The Commission concludes that the Fund scheme is a State aid scheme which is incompatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The State aid for ship financing which Italy is planning to implement on the basis of Article 5 of Law No 261 of 31 July 1997, as amended by Article 1 of Law No 413 of 30 November 1998 and supplemented by the Decree of the Minister for the Treasury, the Budget and Economic Planning dated 14 December 2000, is incompatible with the common market.

The aid may accordingly not be implemented.

Article 2

Italy shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

Article 3

This Decision is addressed to the Italian Republic.

Done at Brussels, 6 April 2005.

For the Commission

Neelie KROES

Member of the Commission

⁽¹²⁾ See Article 3(1) of the Shipbuilding Regulation.

⁽¹³⁾ See Article 3(4) of the Shipbuilding Regulation.

⁽¹⁴⁾ See paragraph 23 of the Shipbuilding Framework, which refers to the same OECD provisions as the decision initiating proceedings.

COMMISSION DECISION**of 4 September 2006****establishing the classes of external fire performance for certain construction products as regards double skin metal faced sandwich panels for roofs***(notified under document number C(2006) 3883)***(Text with EEA relevance)****(2006/600/EC)**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Directive 89/106/EEC of 21 December 1988, on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products ⁽¹⁾, and in particular Article 20(2) thereof,

Whereas:

(1) Directive 89/106/EEC envisages that in order to take account of different levels of protection for the construction works at national, regional or local levels, it may be necessary to establish in interpretative documents classes corresponding to the performance of products in respect of each essential requirement. Those documents have been published as the 'Communication of the Commission with regard to the interpretative documents of Directive 89/106/EEC' ⁽²⁾.

(2) With respect to the essential requirement of safety in the event of fire, interpretative document No 2 lists a number of interrelated measures which together define the fire safety strategy to be variously developed in the Member States.

(3) Interpretative document No 2 identifies one of those measures as the limitation of the generation and spread of fire and smoke within a given area by limiting the potential of construction products to contribute to the full development of a fire.

(4) The level of that limitation may be expressed only in terms of the different levels of reaction-to-fire performance of the products in their end-use application.

(5) By way of a harmonised solution, a system of classes was adopted in Commission Decision 2001/671/EC of 21 August 2001 implementing Council Directive 89/106/EEC as regards the classification of the external fire performance of roofs and roof coverings ⁽³⁾.

(6) In the case of certain construction products, it is necessary to use the classification established in Decision 2001/671/EC.

(7) The external fire performance of some roofs and roof coverings, within the classification provided for in Decision 2001/671/EC, is well established and sufficiently well known to fire regulators in Member States, so that they do not require testing for this particular performance characteristic.

(8) The measures provided for in this Decision are in accordance with the opinion of the Standing Committee on Construction,

HAS ADOPTED THIS DECISION:

Article 1

The construction products which satisfy all the requirements of the external fire performance characteristics without need for further testing are set out in the Annex.

Article 2

The specific classes to be applied to different construction products, within the external fire performance classification adopted in Decision 2001/671/EC, are set out in the Annex to this Decision.

⁽¹⁾ OJ L 40, 11.2.1989, p. 12. Directive as last amended by Regulation (EC) No 1882/2003 of the European Parliament and the Council (OJ L 284, 31.10.2003, p. 1).

⁽²⁾ OJ C 62, 28.2.1994, p. 1.

⁽³⁾ OJ L 235, 4.9.2001, p. 20.

Article 3

Products shall be considered in relation to their end-use application, where relevant.

Article 4

This Decision is addressed to the Member States.

Done at Brussels, 4 September 2006.

For the Commission

Günter VERHEUGEN

Vice-President

ANNEX

The table set out in this Annex lists the construction products which satisfy all of the requirements for the external fire performance without need for testing.

Table**CLASSES OF EXTERNAL FIRE PERFORMANCE FOR DOUBLE SKIN METAL FACED SANDWICH PANELS FOR ROOFS**

Product ⁽¹⁾	Product detail	Core material with minimum density	Class ⁽²⁾
Steel, stainless steel or aluminium faced sandwich panels for roofs	In accordance with EN 14509 ⁽¹⁾	PUR 35 kg/m ³ or	B _{ROOF} (t1)
		MW (lamellas) 80 kg/m ³ or	B _{ROOF} (t2)
		MW (full width boards) 110 kg/m ³	B _{ROOF} (t3)

⁽¹⁾ Panels with a profiled external metal facing incorporating:

- minimum thickness 0,4 mm for facings of steel and stainless steel;
- minimum thickness 0,9 mm for facings of aluminium;
- at each longitudinal joint between two panels an overlap of the external metal facing extending across the crown and a minimum 15 mm down the opposite face of the crown, or a metal cover cap completely covering the joint crown, or a raised standing metal seam along the joint;
- at each transverse joint between two panels an overlap of the external metal facing of at least 75 mm;
- a protective weather coating comprising a liquid applied PVC paint of maximum nominal dry film thickness 0,200 mm, a PCS of not greater than 8,0 MJ/m² and a maximum dry mass of 300 g/m²; or any thin paint coating less than the above;
- minimum reaction to fire classification of D-s3, d0 without edge protection in accordance with EN 13501-1.

⁽²⁾ Class as provided for in the table of the Annex to Decision 2001/671/EC.

Symbols used: PUR = polyurethane; MW = mineral wool; PVC = polyvinyl chloride; PCS = gross calorific potential.

COMMISSION DECISION
of 5 September 2006
on emergency measures regarding the non-authorised genetically modified organism 'LL RICE 601'
in rice products

(notified under document number C(2006) 3932)

(Text with EEA relevance)

(2006/601/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety⁽¹⁾, and in particular Article 53(2), second subparagraph, thereof,

Whereas:

(1) Article 4(2) and Article 16(2) of Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed provide that no genetically modified food or feed⁽²⁾ is to be placed on the Community market unless it is covered by an authorisation granted in accordance with that Regulation. Article 4(3) and Article 16(3) of the same Regulation lay down that no genetically modified food and feed may be authorised unless it has been adequately and sufficiently demonstrated that it does not have adverse effects on human health, animal health or the environment, that it does not mislead the consumer or the user, and that it does not differ from the food or feed it is intended to replace to such an extent that its normal consumption would be nutritionally disadvantageous for humans or animals.

(2) On 18 August 2006, the authorities of the United States of America informed the Commission that rice products contaminated with the genetically modified rice 'LL RICE 601' ('the contaminated products'), which have not been authorised for placing on the market in the Community, had been found in rice samples taken on the US market from commercial long-grain rice from the 2005 crop. The contamination of products was reported to the US authorities on 31 July 2006 by Bayer Crop Science, which is the company that developed the genetically modified rice 'LL RICE 601'. The US authorities later informed the Commission that it is still not known to what extent the supply chain has been contaminated and

that information on possible contamination of exports to the Community cannot be given at present. In addition, they informed the Commission that those products had not been authorised for placing on the market in the United States either.

(3) Without prejudice to the control obligations of the Member States, the measures to be adopted further to the likely imports of contaminated products should form a comprehensive and common approach allowing rapid and effective action to be taken and avoiding disparities between the treatment of the situation by the various Member States.

(4) Article 53 of Regulation (EC) No 178/2002 provides for the possibility to adopt appropriate Community emergency measures for food and feed imported from a third country in order to protect human health, animal health or the environment, where the risk cannot be contained satisfactorily by means of measures taken by the Member States concerned.

(5) Since genetically modified rice 'LL RICE 601' is not authorised under Community legislation and in view of the presumption of risk on products not authorised according to Regulation (EC) No 1829/2003, which takes into account the precautionary principle laid down in Article 7 of Regulation (EC) No 178/2002, it is appropriate to take emergency measures to prevent the placing on the market in the Community of the contaminated products.

(6) According to the general requirements laid down in Regulation (EC) No 178/2002, food and feed business operators have primary legal responsibility for ensuring that foods or feeds within the businesses under their control satisfy the requirements of food law and for verifying that such requirements are met. It is, therefore, the operators responsible for first placing food and feed on the market who should be under the duty to prove that they do not contain the contaminated products. To this end, the measures provided for in this Decision should require that consignments of specific products originating from the United States may be placed on the market only if an analytical report demonstrating that the products are not contaminated with 'LL RICE 601' is provided. The analytical report should be issued by an accredited laboratory conforming to internationally recognised standards.

⁽¹⁾ OJ L 31, 1.2.2002, p. 1. Regulation as last amended by Commission Regulation (EC) No 575/2006 (OJ L 100, 8.4.2006, p. 3).

⁽²⁾ OJ L 268, 18.10.2003, p. 1.

- (7) In order to facilitate controls, all genetically modified food and feed placed on the market should be subject to a validated method of detection. Bayer Crop Science has been requested to provide methods for detection of 'LL RICE 601' as well as control samples. It has made available two methods which have been validated by the Grain Inspection, Packers and Stockyards Administration (GIPSA) of the US Department of Agriculture, in collaboration with the Community reference laboratory referred to in Article 32 of Regulation (EC) No 1829/2003.
- (8) The measures provided for in this Decision must be proportionate and no more restrictive of trade than is required and should therefore cover only products considered likely to be contaminated with 'LL RICE 601', which according to the information received, are imported from the United States into the Community.
- (9) Despite requests made by the Commission, the US authorities have been unable to provide any guarantee that rice products imported from the United States will not contain 'LL RICE 601'.
- (10) With regard to feed products or other food products not covered by the measures provided for in this Decision, Member States should monitor whether such products have been contaminated by 'LL RICE 601'. On the basis of the information provided by Member States, the Commission will consider the need for any additional appropriate measures.
- (11) Commission Decision 2006/578/EC of 23 August 2006 on emergency measures regarding the non-authorised genetically modified organism LL RICE 601 in rice products⁽¹⁾ was adopted to ban provisionally the placing on the market of contaminated products.
- (12) Those provisional measures should be confirmed.
- (13) It is therefore appropriate to repeal and replace Decision 2006/578/EC.
- (14) The measures provided for in this Decision should be reviewed within six months in order to assess whether they are still necessary,
- (15) The measures provided for in this Decision are in accordance with the opinion of the Standing Committee on the Food Chain and Animal Health,

HAS ADOPTED THIS DECISION:

Article 1

Scope

This Decision applies to the following products originating from the United States of America:

Product	CN Code
husked (brown) rice Parboiled Long A	1006 20 15
husked (brown) rice Parboiled Long B	1006 20 17
husked (brown) rice Long A	1006 20 96
husked (brown) rice Long B	1006 20 98
semi-milled Parboiled rice Long A	1006 30 25
semi-milled Parboiled rice Long B	1006 30 27
semi-milled rice Long A	1006 30 46
semi-milled rice Long B	1006 30 48
wholly milled Parboiled rice Long A	1006 30 65
wholly milled Parboiled rice Long B	1006 30 67
wholly milled rice Long A	1006 30 96
wholly milled rice Long B	1006 30 98
broken rice (unless it is certified free of Long-grain origin)	1006 40 00

Article 2

Conditions for first placing on the market

Member States shall allow the first placing on the market of the products referred to in Article 1 only where an original analytical report based on a suitable and validated method for detection of genetically modified rice 'LL RICE 601' and issued by an accredited laboratory accompanying the consignment demonstrates that the product does not contain genetically modified rice 'LL RICE 601'.

If a consignment of products referred to in Article 1 is split, a certified copy of the analytical report shall accompany each part of the split consignment.

⁽¹⁾ OJ L 230, 24.8.2006, p. 8.

In the absence of an analytical report as referred to in paragraph 1, the operator established in the Community who is responsible for the first placing on the market of the product shall have the products referred to in Article 1 tested to demonstrate that they do not contain genetically modified rice 'LL RICE 601'. Pending availability of the analytical report, the consignment shall not be placed on the market of the Community.

Member States shall inform the Commission of positive (unfavourable) results through the Rapid Alert System for food and feed.

Article 3

Other control measures

Member States shall take appropriate measures, including random sampling and analysis, concerning the products referred to in Article 1 already on the market in order to verify the absence of genetically modified rice 'LL RICE 601'. They shall inform the Commission of positive (unfavourable) results through the Rapid Alert System for food and feed.

Article 4

Contaminated consignments

Member States shall take the necessary measures to ensure that the products referred to in Article 1 that are found to contain genetically modified rice 'LL RICE 601' are not placed on the market.

Article 5

Recovery of costs

Member States shall ensure that the costs incurred in the implementation of Articles 2 and 4 are borne by the operators responsible for the first placing on the market.

Article 6

Review of the measures

The measures provided for in this Decision shall be reviewed by 28 February 2007 at the latest.

Article 7

Repeal

Decision 2006/578/EC is repealed.

Article 8

Addressees

This Decision is addressed to the Member States.

Done at Brussels, 5 September 2006.

For the Commission

Markos KYPRIANOU

Member of the Commission