

Official Journal

of the European Union

L 219

Volume 50

24 August 2007

English edition

Legislation

Contents

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

REGULATIONS

Commission Regulation (EC) No 986/2007 of 23 August 2007 establishing the standard import values for determining the entry price of certain fruit and vegetables 1

★ **Commission Regulation (EC) No 987/2007 of 22 August 2007 establishing a prohibition of fishing for megrims in EC waters of IIa and IV by vessels flying the flag of Germany 3**

★ **Commission Regulation (EC) No 988/2007 of 22 August 2007 establishing a prohibition of fishing for cod in Norwegian waters of ICES zones I and II by vessels flying the flag of Spain 5**

★ **Commission Regulation (EC) No 989/2007 of 23 August 2007 registering certain names in the Register of protected designations of origin and protected geographical indications (Barèges-Gavarnie (PDO) — Hořické trubičky (PGI)) 7**

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

DECISIONS

Commission

2007/580/EC:

★ **Commission Decision of 24 April 2007 on the State aid scheme implemented by Slovenia in the framework of its legislation on qualified energy producers — Case No C 7/2005 (notified under document number C(2007) 1181) ⁽¹⁾ 9**

2007/581/EC:

★ **Commission Decision of 24 April 2007 on State aid C 26/2006 (ex N 110/2006), temporary defensive mechanism to shipbuilding — Portugal (notified under document number C(2007) 1756) ⁽¹⁾ 25**

⁽¹⁾ Text with EEA relevance

(Continued overleaf)

2007/582/EC:

- ★ **Commission Decision of 10 May 2007 on State aid C 4/2006 (ex N 180/2005) — Portugal — Aid to Djebel** (notified under document number C(2007) 1959) ⁽¹⁾ 30

2007/583/EC:

- ★ **Commission Decision of 21 June 2007 on State aid C 17/2006 (ex N 3/2006), training aid to Autoeuropa — Automóveis Lda, Portugal** (notified under document number C(2007) 3130) ⁽¹⁾ 36

2007/584/EC:

- ★ **Commission Decision of 21 August 2007 amending Decision 2004/558/EC implementing Council Directive 64/432/EEC as regards additional guarantees for intra-Community trade in bovine animals relating to infectious bovine rhinotracheitis and the approval of the eradication programmes presented by certain Member States** (notified under document number C(2007) 3905) ⁽¹⁾ 37



⁽¹⁾ Text with EEA relevance

I

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

REGULATIONS

COMMISSION REGULATION (EC) No 986/2007**of 23 August 2007****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 24 August 2007.

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

Done at Brussels, 23 August 2007.

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 756/2007 (OJ L 172, 30.6.2007, p. 41).

ANNEX

to Commission Regulation of 23 August 2007 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	MK	55,1
	TR	56,2
	XK	48,8
	XS	36,3
	ZZ	49,1
0707 00 05	TR	106,4
	ZZ	106,4
0709 90 70	TR	106,5
	ZZ	106,5
0805 50 10	AR	64,3
	UY	49,5
	ZA	62,2
	ZZ	58,7
0806 10 10	EG	236,6
	TR	99,3
	US	164,8
	ZZ	166,9
0808 10 80	AR	46,1
	BR	77,5
	CL	73,5
	CN	72,8
	NZ	88,2
	US	100,4
	ZA	84,0
	ZZ	77,5
0808 20 50	AR	43,8
	CN	21,3
	TR	121,2
	ZA	89,6
	ZZ	69,0
0809 30 10, 0809 30 90	TR	142,6
	ZZ	142,6
0809 40 05	BA	41,3
	IL	153,7
	TR	78,6
	ZZ	91,2

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

COMMISSION REGULATION (EC) No 987/2007**of 22 August 2007****establishing a prohibition of fishing for megrims in EC waters of IIa and IV by vessels flying the flag of Germany**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the common fisheries policy ⁽¹⁾, and in particular Article 26(4) thereof,

Having regard to Council Regulation (EEC) No 2847/93 of 12 October 1993 establishing a control system applicable to common fisheries policy ⁽²⁾, and in particular Article 21(3) thereof,

Whereas:

- (1) Council Regulation (EC) No 41/2007 of 21 December 2006 fixing for 2007 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks applicable in Community waters and for Community vessels, in waters where catch limitations are required ⁽³⁾, lays down quotas for 2007.
- (2) According to the information received by the Commission, catches of the stock referred to in the Annex to this Regulation by vessels flying the flag of or registered in the Member State referred to therein have exhausted the quota allocated for 2007.

- (3) It is therefore necessary to prohibit fishing for that stock and its retention on board, transhipment and landing,

HAS ADOPTED THIS REGULATION:

*Article 1***Quota exhaustion**

The fishing quota allocated to the Member State referred to in the Annex to this Regulation for the stock referred to therein for 2007 shall be deemed to be exhausted from the date set out in that Annex.

*Article 2***Prohibitions**

Fishing for the stock referred to in the Annex to this Regulation by vessels flying the flag of or registered in the Member State referred to therein shall be prohibited from the date set out in that Annex. It shall be prohibited to retain on board, tranship or land such stock caught by those vessels after that date.

*Article 3***Entry into force**

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

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

Done at Brussels, 22 August 2007.

For the Commission

Fokion FOTIADIS

Director-General for Fisheries and Maritime Affairs

⁽¹⁾ OJ L 358, 31.12.2002, p. 59.

⁽²⁾ OJ L 261, 20.10.1993, p. 1. Regulation as last amended by Regulation (EC) No 1967/2006 (OJ L 409, 30.12.2006, p. 11, corrected by OJ L 36, 8.2.2007, p. 6).

⁽³⁾ OJ L 15, 20.1.2007, p. 1. Regulation as last amended by Commission Regulation (EC) No 898/2007 (OJ L 196, 28.7.2007, p. 22).

ANNEX

No	26
Member State	Germany
Stock	LEZ/2AC4-C
Species	Megrim (<i>Lepidorhombus</i> spp.)
Zone	EC waters of IIa and IV
Date	19 July 2007

COMMISSION REGULATION (EC) No 988/2007**of 22 August 2007****establishing a prohibition of fishing for cod in Norwegian waters of ICES zones I and II by vessels flying the flag of Spain**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the common fisheries policy ⁽¹⁾, and in particular Article 26(4) thereof,

Having regard to Council Regulation (EEC) No 2847/93 of 12 October 1993 establishing a control system applicable to common fisheries policy ⁽²⁾, and in particular Article 21(3) thereof,

Whereas:

- (1) Council Regulation (EC) No 41/2007 of 21 December 2006 fixing for 2007 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks applicable in Community waters and for Community vessels, in waters where catch limitations are required ⁽³⁾, lays down quotas for 2007.
- (2) According to the information received by the Commission, catches of the stock referred to in the Annex to this Regulation by vessels flying the flag of or registered in the Member State referred to therein have exhausted the quota allocated for 2007.

- (3) It is therefore necessary to prohibit fishing for that stock and its retention on board, transhipment and landing,

HAS ADOPTED THIS REGULATION:

*Article 1***Quota exhaustion**

The fishing quota allocated to the Member State referred to in the Annex to this Regulation for the stock referred to therein for 2007 shall be deemed to be exhausted from the date set out in that Annex.

*Article 2***Prohibitions**

Fishing for the stock referred to in the Annex to this Regulation by vessels flying the flag of or registered in the Member State referred to therein shall be prohibited from the date set out in that Annex. It shall be prohibited to retain on board, tranship or land such stock caught by those vessels after that date.

*Article 3***Entry into force**

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

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

Done at Brussels, 22 August 2007.

For the Commission

Fokion FOTIADIS

Director-General for Fisheries and Maritime Affairs

⁽¹⁾ OJ L 358, 31.12.2002, p. 59.

⁽²⁾ OJ L 261, 20.10.1993, p. 1. Regulation as last amended by Regulation (EC) No 1967/2006 (OJ L 409, 30.12.2006, p. 11, corrected by OJ L 36, 8.2.2007, p. 6).

⁽³⁾ OJ L 15, 20.1.2007, p. 1. Regulation as last amended by Commission Regulation (EC) No 898/2007 (OJ L 196, 28.7.2007, p. 22).

ANNEX

No	25
Member State	Spain
Stock	COD/1N2AB.
Species	Cod (<i>Gadus morhua</i>)
Zone	Norwegian waters of ICES zones I and II
Date	20 July 2007

COMMISSION REGULATION (EC) No 989/2007**of 23 August 2007****registering certain names in the Register of protected designations of origin and protected geographical indications (Barèges-Gavarnie (PDO) — Hořické trubičky (PGI))**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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

Whereas:

- (1) In accordance with the first subparagraph of Article 6(2) and pursuant to Article 17(2) of Regulation (EC) No 510/2006, France's application to register the name 'Barèges-Gavarnie' and the Czech Republic's application

to register the name 'Hořické trubičky' were published in the *Official Journal of the European Union* ⁽²⁾.

- (2) As no objection under Article 7 of Regulation (EC) No 510/2006 was sent to the Commission, these names should be registered,

HAS ADOPTED THIS REGULATION:

Article 1

The names in the Annex to this Regulation are hereby registered.

Article 2

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

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

Done at Brussels, 23 August 2007.

For the Commission

Mariann FISCHER BOEL

Member of the Commission

⁽¹⁾ OJ L 93, 31.3.2006, p. 12. Regulation amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

⁽²⁾ OJ C 279, 17.11.2006, p. 9 (Barèges-Gavarnie); OJ C 280, 18.11.2006, p. 10 (Hořické trubičky).

ANNEX

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

Class 1.3. — Cheeses

FRANCE

Barèges-Gavarnie (PDO)

2. Foodstuffs referred to in Annex I to the Regulation

Class 2.4. — Bread, pastry, cakes, confectionery, biscuits and other baker's wares

CZECH REPUBLIC

Hořické trubičky (PGI)

II

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

DECISIONS

COMMISSION

COMMISSION DECISION

of 24 April 2007

on the State aid scheme implemented by Slovenia in the framework of its legislation on qualified energy producers — Case No C 7/2005

(notified under document number C(2007) 1181)

(Only the Slovenian version is authentic)

(Text with EEA relevance)

(2007/580/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 ⁽¹⁾,

Whereas:

1. PROCEDURE

- (1) By letter registered as received by the Commission on 1 October 2003, Slovenia submitted the 'Programme for recovery of stranded costs in electricity generation

plants in the Republic of Slovenia' under the interim procedure referred to in Annex IV, paragraph 3, subparagraph 1(c) to the Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia to the European Union. This notification was registered under State aid case number SI 7/03.

- (2) In the course of the exchange of letters that followed, it appeared that two power plants mentioned in the background description of the notified measure benefited from another state support scheme. This other State aid scheme (hereinafter 'the scheme') was registered as received on 6 December 2004 by the Commission under State aid case number NN 80/04.

- (3) Based on the information at its disposal, the Commission had doubts as to the compatibility of certain parts of the scheme with the common market. Thus, on 2 February 2005, it adopted a decision to open a formal investigation under Article 88(2) of the EC Treaty (hereinafter 'the decision to open proceedings') and called on Slovenia to submit its comments. The decision to open proceedings was published on 15 March 2005 in the *Official Journal of the European Union* ⁽²⁾. All interested parties were invited to submit their comments within one month of the date of publication.

⁽¹⁾ OJ C 46, 22.2.2005, p. 3.

⁽²⁾ OJ C 63, 15.3.2005, p. 2.

- (4) By letter dated 11 March 2005, registered as received on 14 March 2005, Slovenia submitted its comments with regard to the doubts raised in the decision to open proceedings. On 25 April 2005, 11 July 2005, 23 November 2005 and 22 June 2006 the Commission sent further questions to Slovenia, which were answered respectively by letters dated 14 June 2005, registered as received by the Commission on the same day, 20 September 2005, registered as received by the Commission on the same day, 31 January 2006, registered as received by the Commission on the same day and 7 July 2006, registered as received by the Commission on 14 July 2006.
- (5) The Commission did not receive any comments from other interested parties.
- (6) A technical meeting between the Commission and the Slovenian authorities was held on 25 October 2006 and as a result Slovenia provided the Commission with additional information by letter dated 23 November 2006, registered as received by the Commission on 24 November 2006.
2. DESCRIPTION OF THE SCHEME
- (7) The scheme was introduced in 2001 in order to support the generation of electricity from renewable sources and combined heat and power generation in Slovenia and to secure a reliable supply of energy from indigenous sources.
- (8) In order to benefit from the scheme, a generator must be designated as a 'qualified producer' by the Ministry of Environment, Spatial Planning and Energy ⁽¹⁾.
- (9) The status of qualified producer can be attributed to three types of electricity generators:
- (i) power stations generating electricity from renewable sources of energy, except hydro power plants of more than 10 MW capacity;
 - (ii) generators using combined heat and power production with an above-average efficiency, except
- municipal heating stations of more than 10 MW capacity and industrial heating stations of more than 1 MW capacity;
- (iii) the Trbovlje Thermoelectric Power Station (hereinafter 'the Trbovlje plant'), for that part of its production that uses up to 15 % of the domestic primary energy necessary to cover the consumption of electricity in Slovenia.
- (10) In 2003, qualified producers had a share of approximately 11,2 % of the electricity generation market in Slovenia. After excluding the Trbovlje plant and the combined heat and power station at Ljubljana, this share drops to around 2,7 %.
- (11) Qualified producers have the right to have their whole production purchased by the network operator to which they are connected, at a price that is fixed and adjusted every year by the State. This price is higher than the market price. Qualified producers can also choose to sell their electricity directly on the market, in which case they are entitled to receive from the State a premium payment equal to the difference between the revenues they would have received should they have chosen to sell their electricity to their network operator and the revenue they received from the market.
- (12) Network operators recover the losses they incur from the purchase obligation through payments from a fund established by law. Monies from the fund are also used to pay the premiums to qualified producers which choose to sell their electricity on the market. The fund is fed by the proceeds of a parafiscal levy on the consumption of electricity which is imposed on all electricity consumers in Slovenia.
3. DOUBTS EXPRESSED IN THE DECISION TO OPEN PROCEEDINGS
- (13) After the analysis of information at its disposal, the Commission came to the preliminary conclusion that the support was State aid within the meaning of Article 87(1) of the EC Treaty since it met the four cumulative criteria of the relevant definition.
- (14) The Commission also doubted whether the scheme could be considered compatible with the common market.

⁽¹⁾ Ordinance relating to the conditions for obtaining the status of qualified producer of electricity (Official Gazette of Slovenia Nos 29/01 and 99/01).

(15) Firstly, the Commission analysed the aid in the light of the Community guidelines on State aid for environmental protection ⁽¹⁾ (hereinafter 'the environmental guidelines'). This analysis led to doubts as to the compatibility of the aid with the environmental guidelines, in particular as regards the definition of producers using renewable energy and efficient combined heat and power generation, and as regards the level of the aid as compared to the real excess costs borne by the producers.

(16) Secondly, it analysed the aid in the light of the Commission Communication relating to the methodology for analysing State aid linked to stranded costs ⁽²⁾ (hereinafter 'the methodology'). This analysis led to doubts as to the compatibility of the scheme with the methodology. In particular, the Commission was not in a position to conclude that the aid had been calculated in a way that was sufficiently precise to enable the power plant by power plant calculation that is necessary under this methodology.

(17) Thirdly, it analysed the aid as compensation for charges linked to services of general economic interest. This analysis led to doubts as to the compatibility of the aid since, for most of the beneficiaries, the Commission was not in a position to define a sufficiently precise service of general economic interest with which they would have been entrusted and, for the only beneficiary for which this service could have been precisely defined, it was not in a position to assess the proportionality of the compensation.

(18) The Commission also had doubts whether the aid, which is financed via a parafiscal levy imposed on electricity consumers, is compatible with Articles 25 and 90 of the EC Treaty.

4. COMMENTS FROM OTHER INTERESTED PARTIES

(19) Following the decision to open proceedings the Commission did not receive any comments from other interested parties.

⁽¹⁾ OJ C 37, 3.2.2001, p. 3.

⁽²⁾ Adopted by the Commission on 26.7.2001. Available on the Commission's Competition Directorate-General's website at the following address: http://ec.europa.eu/comm/competition/state_aid/legislation/stranded_costs_en.pdf
Communicated to Member States by letter ref. SG(2001) D/290869 of 6.8.2001.

5. INITIAL COMMENTS OF THE MEMBER STATE

(20) By letter dated 11 March 2005, registered as received on 14 March 2005, Slovenia submitted its comments with regard to the doubts raised in the decision to open proceedings. These comments referred only to the problem of the definition of State aid and the notion of a parafiscal levy.

5.1. Existence of State aid

(21) Slovenia pointed out that the Slovenian distribution companies are not 100 % State-owned. Slovenia states that, in fact, the ownership of the operators is divided between the State (approximately 80 %) and private investment funds and others (approximately 20 %). Moreover, for the purposes of the purchase obligation scheme, Slovenian legislation draws no distinction between State-owned and privately owned operators. The Energy Act ⁽³⁾ imposes no condition that the operator must be State-owned and allows operators to be privately or State-owned.

(22) In Slovenia's opinion, the fact that a particular entity involved in the purchase obligation scheme is State-owned does not mean that, on those grounds alone, this constitutes State aid. Reference was made to the judgment by the European Court of Justice of 13 March 2001 in Case C-379/98.

(23) Furthermore, Slovenia argues that the system of purchasing electricity from qualified producers, as laid down by Slovenian regulations, is very similar to other schemes examined by the Commission, e.g. in cases NN 27/2000 and NN 68/2000 ⁽⁴⁾, where the Commission concluded that no State aid was involved. According to Slovenia, in the decisions on those two cases, the Commission found that, since the obligation applied to both numerous private and some public network operators, the laws — or rather the cases in question — could not be deemed to involve state resources.

(24) In view of the above considerations and taking into account the system as it stands, Slovenia considered that, in so far as the funds do not by their nature come from state resources, the question of the ownership of the entities involved cannot on its own alter that nature.

⁽³⁾ Official Gazette of Slovenia Nos 79/1999, 51/2004.

⁽⁴⁾ OJ C 164, 10.7.2002, p. 3, for both cases.

- (25) Furthermore, according to Slovenia, mandatory contributions received by a public undertaking do not constitute State aid where the undertaking in question does not have the right to dispose freely of those funds. In the case of the purchase obligation, the source of financing of the scheme is the fee for network use paid by all electricity users, part of which is collected by the network operators in separate accounts for a pre-determined purpose.

5.2. Parafiscal levy

- (26) Slovenia pointed out that the purchase obligation scheme is financed from part of the fee for network use paid by all electricity users under identical conditions that are known in advance. The components of the fee for network use are determined by the Energy Agency (energy market regulator) and the Government. Differences in price are covered by a mechanism whereby the network operators buy electricity at a fixed price and sell it at the market price. Any loss they incur as a result is covered from part of the fee for network use. So operators under the purchase obligation receive funds not from the State, but from part of the fee for network use.

- (27) The operators have to allocate these funds to a special account. The funds also serve as a source for paying the additional premium where qualified producers sell part of their electricity independently or through an intermediary.

- (28) Slovenia claimed that the scheme incorporates neither a state fund nor any other sort of fund through which the resources are transited. The resources to fund the scheme cannot be perceived as stemming from a parafiscal levy as they do not stem from the State budget and are not attributable to the State.

6. FURTHER INFORMATION SUBMITTED BY SLOVENIA

- (29) By further correspondence with the Commission, Slovenia submitted additional information and commitments on the scheme.

Renewables

- (30) Slovenia provided new information detailing the environmental protection objectives of the scheme. First of all,

the scheme was designed to contribute to the general environmental policy objectives:

- (i) more efficient energy use;

- (ii) increasing the proportion of renewable energy sources in the primary energy balance of the Community from 8,8 % in 2001 to 12 % by 2010.

- (31) The stated objectives include targets for co-generation and for renewable sources, both of which fall under the electricity purchase scheme. These objectives are consistent with the targets set for Slovenia *inter alia* by Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market ⁽¹⁾. Directive 2001/77/EC sets indicative targets for individual Member States. For Slovenia, the objective is a share of electricity consumption coming from renewables of 32,6 % by 2010.

- (32) The total number of power plants from which electricity is purchased under the scheme is 434, of which 430 are connected to the distribution network and four to the transmission network. More than 90 % of the power plants connected to the distribution network are hydro-electric plants, the remainder being biomass power plants, solar plants and CHP plants.

- (33) The scheme has been in force since the Decree on the rules for determining prices and purchasing of electricity from qualified electricity producers ⁽²⁾ entered into force on 4 April 2002.

- (34) The electricity purchase agreements currently in force between qualified power plants and network or system operators have been concluded for a period of 10 years.

- (35) Slovenia explained that, according to Article 4 of the 1999 Energy Act, renewable sources of energy are defined as provided for in Directive 2001/77/EC.

⁽¹⁾ OJ L 283, 27.10.2001, p. 33.

⁽²⁾ Official Gazette of Slovenia No 25/02.

- (36) The main aim of the scheme is to ensure appropriate economic conditions for the development and implementation of new qualified power plant projects. A cost analysis of individual qualified power plants (with regard to primary energy source and size) has been used to work out purchase prices for individual types of qualified power plants that would guarantee at least the minimum return required for making new investments. The amount of aid or premium is determined as the difference between the uniform annual purchase price and the average market price of electricity. If the market price increases, the premiums are reduced accordingly.
- (37) The table below compares production costs of the qualified producers per power plant technology and size categories with the premium offered by the scheme. The table assumes an average market price of 8 SIT/kWh. This value is for reference only since, if market prices increase, premiums are decreased accordingly.
- (38) In all cases, production costs are higher than both the average market price and the guaranteed uniform purchase price under the qualified producers' scheme.

Table 1

Comparison of production costs of qualified power plants with the purchase price under the scheme

Type of qualified power plant (QPP) by primary energy source		Power	Production costs	Difference	Premium
	Size	[kW]	[SIT/kWh]	[SIT/kWh]	[SIT/kWh]
Hydroelectric plants	up to 1 MW	100	15,53	7,53	6,75
	from 1 MW to 10 MW	3 000	14,33	6,33	6,23
Biomass plants	up to 1 MW	600	24,80	16,80	8,69
	over 1 MW	1 500	18,18	10,18	8,17
Wind plants	up to 1 MW	100	23,28	15,28	6,55
	over 1 MW	20 000	15,49	7,49	6,05
Geothermal plants		3 000	14,59	6,59	6,05
Solar plants	up to 36 kW	36	175,26	167,26	81,67
	over 36 kW	100	122,58	114,58	7,46
Other QPPs (biogas)		120	30,39	22,39	20,97
QPPs or thermal plants using municipal waste	up to 1 MW	100	13,97	5,97	4,74
	from 1 MW to 10 MW	3 000	12,08	4,08	3,87
CHP thermal plants for district heating	up to 1 MW	700	16,54	8,54	5,9
	from 1 MW to 10 MW	3 000	14,56	6,56	5,38
CHP industrial thermal plants	up to 1 MW	700	14,95	6,95	4,83

N.B. Assuming a market price of SIT 8/kWh.

- (39) On the basis of a cost analysis and an economic calculation for categories of qualified power plant units, as shown in the table below, it emerges that the net present value (NPV) of the purchase prices applied under the scheme does not exceed the NPV of all investment costs at any of the qualified power plants.

Table 2

Comparison of NPV of purchase prices with investment costs of individual qualified power plants

Type of qualified power plant (QPP) by primary energy source		Capacity	Projected annual sales	Specific investment costs	Investment	Annual premium	Premium — investment costs (NPV)
	Size	[kW]	[MWh]	[SIT/kW]	[SIT million]	[SIT million/a]	[SIT million]
Hydroelectric plants	up to 1 MW	100	456	480 000	48	2,9	– 21,0
	from 1 MW to 10 MW	3 000	10 656	380 000	1 140	63,1	– 549,1
Biomass plants	up to 1 MW	600	2 725	990 000	594	22,5	– 369,3
	over 1 MW	1 500	6 813	660 000	990	52,9	– 492,1
Wind plants	up to 1 MW	100	187	341 000	34	1,2	– 22,2
	over 1 MW	20 000	40 800	253 000	5 060	234,5	– 2 802,2
Geothermal plants		3 000	20 736	715 000	2 145	119,2	– 1 029,1
Solar plants	up to 36 kW	36	34	1 430 000	52	2,7	– 26,2
	over 36 kW	100	116	1 210 000	121	0,8	– 105,4
Other QPPs (biogas)		120	628	913 000	110	12,5	– 1,0
QPPs or thermal plants using municipal waste	up to 1 MW	100	624	319 000	32	2,8	– 7,0
	from 1 MW to 10 MW	3 000	19 728	286 000	858	72,5	– 212,0
CHP thermal plants for district heating	up to 1 MW	700	2 496	198 000	139	16,1	– 16,0
	from 1 MW to 10 MW	3 000	10 698	165 000	495	63,0	– 19,3
CHP industrial thermal plants	up to 1 MW	700	3 135	187 000	131	2,5	– 5,0

N.B. Applying a discount rate of 8 %, a period of 15 years and a decrease in the purchase price or premium of 5 % after five years and 10 % after ten years, in accordance with the Decree on purchasing.

- (40) The premiums for individual qualified power plants also include the return on capital prescribed by Slovenian legislation — this amounts to a minimum discount rate of 8 % on investments from public funds. Non-adjustment of purchase prices and premiums has meant that the current return for all qualified power plants using renewable energy sources is lower than 8 %, as shown in the table below. For solar plants the premium allows no return on capital (negative return), particularly in the case of small and medium-sized plants.

Table 3

Return on capital for individual qualified power plants

Type of qualified power plant (QPP) by primary energy source		Power	Premium	Return on capital included in premium
	Size	[kW]	[SIT/kWh]	
Hydroelectric plants	up to 1 MW	100	6,75	6,95 %
	from 1 MW to 10 MW	3 000	6,23	7,90 %
Biomass plants	up to 1 MW	600	8,69	2,30 %
	over 1 MW	1 500	8,17	6,00 %
Wind plants	up to 1 MW	100	6,55	0,40 %
	over 1 MW	20 000	6,05	6,35 %
Geothermal plants		3 000	6,05	7,30 %
Solar plants	up to 36 kW	36	81,67	– 1,4 %
	over 36 kW	100	7,46	– 15,0 %
Other QPPs (biogas)		120	20,97	6,80 %
QPPs or thermal plants using municipal waste	up to 1 MW	100	4,74	4,40 %
	from 1 MW to 10 MW	3 000	3,87	7,30 %
CHP thermal plants for district heating	up to 1 MW	700	5,9	0,49 %
	from 1 MW to 10 MW	3 000	5,38	4,20 %
CHP industrial thermal plants	up to 1 MW	700	4,83	– 0,1 %

N.B.: Return on capital calculated on investments in QPPs (see Table 2) at the current value of premiums.

Combined heat and power generation

- (41) Slovenia explains that new CHP units are equipped mainly with gas turbines, which, during operation, attain an electrical efficiency of between 37 % and 40 % and an overall efficiency of over 80 %. New smaller turbines attain an electrical efficiency of over 30 % and again an overall efficiency of over 80 %. Given that the average electrical efficiency of conventional thermal power plants in Slovenia is around 31 %, this shows the large primary energy savings (between 15 % and 25 %) made by generating electricity in co-generation units and making beneficial use of heat.
- (42) The operating efficiency of qualified CHP plants are fixed such as to comply with the efficiency criteria of Directive 2004/8/EC of the European Parliament and of the Council of 11 February 2004 on the promotion of cogeneration based on a useful heat demand in the internal energy market and amending Directive 92/42/EEC ⁽¹⁾.
- (43) Slovenia demonstrated that electricity production costs in qualified CHP plants is in all cases higher than the scheme purchase price, that the NPV of premiums is below investment costs and that the return on investment is below 4,20 % (see last three lines of all tables above). The calculations take into account gains from the use of heat.

⁽¹⁾ OJ L 52, 21.2.2004, p. 50.

Security of supply

- (44) Slovenia has put in place a service of general economic interest in the field of security of electricity supply. In accordance with Article 11(4) of Directive 2003/54/EC, this service of general economic interest is based on the generation of electricity using domestic sources of fossil fuel. For this purpose, 600 000 tonnes a year of Slovenian brown coal is used for electricity generation. Brown coal is the only source of fossil fuel available in Slovenia. Since brown coal is used to the best effect at one of the units of Trbovlje (TET2, which is located near a brown coal mine), it falls to Trbovlje to meet this commitment. It was decided that this amount of electricity may be purchased through the guaranteed purchase system.
- (45) The corresponding electricity is purchased at a price verified each year by the authorities, and corresponding to electricity production costs in Trbovlje. No profit element is included in the purchase price.
- (46) Slovenia provided the following table estimating the amount of support for the company in past years:

Table 4

Estimated amount of support

	7-12.2001	2002	2003	2004
Quantity (GWh)	254,3	562,2	563,4	563,0
Purchase price (SIT/kWh)	17,00	15,36	15,34	16,59
Cost of purchase (SIT thousand)	4 323 943	8 636 245	8 644 855	9 339 836
Sales price (SIT/kWh)	7,13	5,97	7,60	7,71
Cost of energy sold (SIT thousand)	1 813 111	3 357 073	4 281 840	4 340 040
Amount of aid (SIT thousand)	2 510 832	5 279 172	4 363 015	4 999 795
Level of aid (SIT/kWh)	9,87	9,39	7,74	8,88

- (47) The use of domestic brown coal is in principle also possible at the Šoštanj power plant, which has five units, two of which are more recent and equipped with flue-gas cleaning equipment and three of which are older and have no cleaning equipment. These units burn coal from a nearby colliery and, under certain conditions, could also burn brown coal. The two newer units are fully employed in burning lignite from the nearby colliery. Roughly speaking, the capacity of that colliery satisfies those two units. Burning brown coal would be possible only in the three older units, which are not used to full capacity and still have some operating reserves. However, this option raises the following difficulties:
- (i) transport by rail of brown coal to Šoštanj would cost around EUR 5/t; given the planned brown coal production in the national energy balance (600 000 t/year), this would amount to EUR 3 million a year.
 - (ii) burning the coal would increase SO₂ emissions by 30 000 t/year, as units 1, 2 and 3 at Šoštanj do not have flue-gas cleaning equipment and brown coal from Slovenia contains between 2,2 % and 2,5 % sulphur;
 - (iii) since units 1, 2 and 3 at Šoštanj have a considerably lower thermodynamic efficiency than Trbovlje, burning the same amount of brown coal for electricity generation in the three units at Šoštanj instead of at Trbovlje would increase CO₂ emissions by around 15 %.
- For the above reasons it can be seen that burning brown coal in the units at Šoštanj cannot be justified from an economic point of view.

- (48) The only other possibility for burning brown coal is at the Ljubljana thermal power and heat plant (TE-TOL), which used domestic brown coal as its main energy source until 2000. Since the units at TE-TOL do not have in-built flue-gas cleaning equipment, they can no longer burn brown coal from Slovenia because it contains between 2,2 and 2,5 % sulphur. TE-TOL stopped burning domestic brown coal for that reason and now burns only imported Indonesian coal, which has a considerably lower sulphur content (< 0,5 %), so that the plant does not need flue-gas desulphurisation equipment. Fitting TE-TOL units with flue-gas cleaning equipment would be uneconomic.
- (49) Slovenia undertook to ensure that no more than 15 % of the overall primary energy necessary to produce the energy consumed in Slovenia in any calendar year receives State support for security of supply.

Overlap

- (50) The purchase obligation scheme provides for only part of the qualified producer's depreciation costs to be covered.
- (51) The Rules on the allocation of funds for the promotion of the exploitation of renewable energy resources, efficient energy use and CHP ⁽¹⁾ allowed investment aid for power plants using renewable sources and CHP plants. However, investment aid for such plants has been abolished under the new Rules on the allocation of funds for the promotion of efficient use of energy and utilisation of energy resources ⁽²⁾. Exceptions have been made for power plants not connected to the public grid that do not benefit from the scheme, and for plants with a capacity of up to 10 MW that employ renewable sources of energy and use new or obsolete technology in which, because of the high cost price of generating electricity, the purchase price of electricity is not high enough to ensure the profitability of the investment. The type of technology eligible for the granting of incentives is determined in periodic calls for tenders.
- (52) To prevent excessive aid overlap, Article 14 of the Decree on the rules for determining prices and purchasing of electricity from qualified electricity producers states

that, where a qualified producer has received any subsidy for the construction of a power plant, the guaranteed purchase price is reduced proportionately.

- (53) Pursuant to that Article, a qualified electricity producer must, on signing an agreement for the purchase of electricity with the operator of the network to which it is connected, declare the amount of any subsidy it has received for the construction of power plants. The declared amount is used as a basis for calculating the reductions in the guaranteed purchase price. On the basis of the above provisions, the guaranteed purchase price for power plants (depending on the type of plant and the rated power) is reduced by 5 % for each 10 % of State aid received compared with the amount of investment in the power plant.
- (54) The provisions of the Decree are based on the premise that the full guaranteed price for electricity from qualified producers covers the fixed costs and variable costs. The average ratio between fixed and variable costs is assumed to be 50:50.
- (55) Slovenia has undertaken to refine the reduction rule in order to adapt it more precisely to the breakdown between fixed and variable costs depending on technologies.

Commitments of the Member State

- (56) Slovenia undertook to prepare amendments to the regulations on electricity from renewable energy sources and CHP in order to change the current financing system of the scheme. These amendments will be introduced in order to make the support scheme compatible with Articles 25 and 90 of the EC Treaty:
- (i) the mode of collection of the support funds will be changed to lump-sum payments on connection, irrespective of the amount and source of the electricity consumed. When determining the amount of the lump sum payment, account will be taken of the power of the connection (fuse rating) and the voltage level at which a particular consumer and consumer group is connected;

⁽¹⁾ Official Gazette of Slovenia No 74/01.

⁽²⁾ Official Gazette of Slovenia No 49/03.

(ii) for the period from Slovenia's accession to the Union until the time when the new mode of collection of funds is put in place, Slovenia will ensure that importers of green electricity can apply for reimbursement of the levy financing the aid to renewables in the scheme, provided that they can prove that their imports are indeed of green origin. The conditions on documentation to prove the green origin of imported electricity are primarily based on the Community system of guarantees of origin. Where necessary, in order to prevent artificially high declarations against which the Community system of guarantees of origin does not afford sufficient protection, limits will be set on the amounts to be reimbursed per distributor. A similar system will be put in place for CHP electricity, based on the Community system of guarantees of origin for CHP.

7. ASSESSMENT

7.1. Existing Community Directives concerning electricity generation

- (57) Electricity generation is subject to the provisions of several Community Directives, including in particular Directives 2003/54/EC, 2001/77/EC and 2004/8/EC.
- (58) Article 3(2) of Directive 2003/54/EC provides as follows: 'Having full regard to the relevant provisions of the Treaty, in particular Article 86, Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency and climate protection.'
- (59) Article 11(4) of Directive 2003/54/EC reads: 'A Member State may, for reasons of security of supply, direct that priority be given to the dispatch of generating installations using indigenous primary energy fuel sources, to an extent not exceeding in any calendar year 15 % of the overall primary energy necessary to produce the electricity consumed in the Member State concerned.'
- (60) Directive 2001/77/EC sets out national indicative targets for the consumption of electricity from renewable energy sources. Article 3 of that Directive provides as follows:

'1. Member States shall take appropriate steps to encourage greater consumption of electricity produced

from renewable energy sources in conformity with the national indicative targets referred to in paragraph 2. These steps must be in proportion to the objective to be attained.

2. Not later than 27 October 2002 and every five years thereafter, Member States shall adopt and publish a report setting national indicative targets for future consumption of electricity produced from renewable energy sources in terms of a percentage of electricity consumption for the next ten years. The report shall also outline the measures taken or planned, at national level, to achieve these national indicative targets. To set these targets until the year 2010, the Member States shall:

— take account of the reference values in the Annex,

— ensure that the targets are compatible with any national commitments accepted in the context of the climate change commitments accepted by the Community pursuant to the Kyoto Protocol to the United Nations Framework Convention on Climate Change.'

- (61) The Annex to Directive 2001/77/EC, as amended by the Act of Accession, stipulates a national target of 33,6 % for Slovenia.

7.2. Assessment of the support for green electricity and combined heat and power producers

7.2.1. Existence of aid within the meaning of Article 87(1) of the EC Treaty

- (62) For a measure to be State aid within the meaning of Article 87(1) of the EC Treaty, it must give a competitive advantage in a specific way, it must affect or threaten to affect competition and trade between Member States, and it must involve state resources.
- (63) It is clear that the scheme is specific, as it targets only certain power plants. It is also evident that it confers an advantage to those power plants, as the very purpose of the system is to allow such plants to sell their electricity at a price which is higher than the market price.

- (64) Electricity is exchanged between Member States. Directive 2003/54/EC completes the creation of an internal market in electricity that was initiated by Directive 96/92/EC. Slovenia's network is connected in particular with those of Austria and Italy. Slovenia exchanges electricity with its neighbours. For instance, in 2004 Slovenia imported 6 314 GWh of electricity and exported 7 094 GWh ⁽¹⁾. The measure therefore has an impact on trade between Member States.
- (65) The Commission also notes that Slovenia did not question the fulfilment of any of the three criteria above.
- (66) On the fourth criterion, the involvement of state resources, the Commission does not concur with Slovenia's argument that the system is equivalent to the one examined by the Court of Justice in the *PreussenElektra* case.
- (67) The two systems differ in their financing mechanisms. In *PreussenElektra*, the feed-in tariff was financed directly from private electricity supply undertakings, which had to purchase electricity at a price above the market price from renewable electricity producers. In the present case, the costs created through the feed-in tariff are financed through a parafiscal levy.
- (68) In this respect, the Commission takes note of the fact that the scheme is financed via the proceeds of a levy which is imposed by the State. The proceeds of the levy are then transferred to an account managed by the public authorities, unlike in the *PreussenElektra* case. The public authorities allocate the resources in the account according to a distribution scheme determined by the law.
- (69) The constant practice of the Commission is to consider that the proceeds of such levies are state resources ⁽²⁾. This practice is in line with the Court's case law, according to which the proceeds of levies imposed by the State, transferred to funds designated by the State and used for the purpose of advantaging certain companies, are deemed to be state resources. (See for instance the Court's decisions in Cases C-173/73 ⁽³⁾ and C 78/79 ⁽⁴⁾.)
- (70) In its judgment in *Pearle* ⁽⁵⁾, the Court declared that the proceeds of a parafiscal levy imposed on its members by a publicly controlled board could not be viewed as state resources. The levy was decided by the professional board in the optics sector and imposed on all of its members. It was used for the purpose of financing advertising campaigns for the benefit of the sector, that is, of the contributors themselves.
- (71) The Court ruled that the measure did not constitute State aid because the decision to set up the levy was not attributable to the State and the proceeds of the levy were not state resources.
- (72) Unlike in the system studied by the Court, the responsibility of the State is very clear in the case under consideration here, since the State creates the levy itself by a law.
- (73) As regards the origin of the funds, the Commission notes that it is different from the origin of the funds involved in the aforementioned judgment, since the monies are collected not from contributions by the undertakings that benefit from the measure, but from all customers that purchase electricity, whether they be beneficiaries of the scheme or their competitors. Such a mechanism could not be achieved by an association of undertakings like the one that was considered in the Court's judgment. This reveals the very fiscal nature of the scheme, which is made possible only by the powers of the State.
- (74) The Commission considers that this difference is enough for it to conclude that State aid exists in the case in question.
- (75) The aid scheme was put in place before Slovenia's accession to the European Union. The primary legal basis for the scheme is the 1999 Energy Act. The definition of qualified producers benefiting from the scheme was set out in 2001 by the Ordinance relating to the conditions for obtaining the status of qualified producer of electricity ⁽⁶⁾.

7.2.2. Legality of the aid

⁽¹⁾ Source: International Energy Agency. http://www.iea.org/Textbase/stats/electricitydata.asp?COUNTRY_CODE=SI

⁽²⁾ See for instance Case N 161/04 — Portugal (OJ C 250, 8.10.2005, p. 9).

⁽³⁾ Judgment of 2.7.1974 in case C 173/73, *Italy v Commission*.

⁽⁴⁾ Judgment of 22.3.1997 in case C-78/79, *Steinike v Federal Republic of Germany*.

⁽⁵⁾ Judgment of Court of Justice of 15.7.2004 in case C-345/02.

⁽⁶⁾ Official Gazette of Slovenia, Nos 29/01 and 99/01.

(76) The State's financial exposure due to the scheme was not fixed at the time of accession. The scheme does not have a limited or predefined number of beneficiaries. Any power plant that meets the technical requirements laid out in the aforementioned Ordinance can receive the aid. This includes in particular any new qualified power plant connected to the network after the accession of Slovenia. Even for each individual aid measure granted under the scheme, the State's exposure cannot be known in advance, because it depends on the difference between purchase price fixed by the State for the plant and the average market price, which fluctuates in an unforeseeable manner. Slovenia has underlined that the actual burden of the scheme for the State can only be known *ex post* at the end of each year in which the scheme is applied.

(77) In view of the above, the Commission considers that the scheme is still applicable after Slovenia's accession to the European Union.

(78) The Commission notes that the above line of reasoning was already laid out in the decision to open proceedings and that Slovenia did not contest it in its comments.

(79) The Act of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia to the European Union (hereinafter 'Act of Accession') lists the categories of aid which, upon accession, are regarded as existing aid within the meaning of Article 88(1) of the EC Treaty:

— aid measures put into effect before 10 December 1994. The scheme was put into effect in 2001 and therefore does not fall within this category;

— aid measures listed in the Appendix to Annex IV to the Act of Accession. The scheme is not part of this list and therefore does not fall within this category;

— aid measures which, after a specific procedure usually known as 'the interim procedure', have not been objected to by the Commission.

All aid still applicable after the date of accession and which does not fulfil the conditions set out above is

considered as new aid upon accession for the purpose of the application of Article 88(3) of the EC Treaty.

(80) The scheme falls into none of the three categories listed above. Therefore, it must be regarded as new aid upon accession for the purpose of the application of Article 88(3) of the EC Treaty. This aid was not notified to the Commission and hence constitutes unlawful aid within the meaning of Article 1(f) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽¹⁾.

7.2.3. *Compatibility of the aid with the EC Treaty*

(81) The Commission notes that the scheme consists of three parts as it provides aid for three different groups of beneficiaries. In the case of the first two groups, namely green electricity producers and efficient cogeneration plants, Slovenia's objective is environmental protection. The aid provided for the third group of beneficiaries, namely the Trbovlje power plant, is earmarked for maintaining a certain level of security of electricity supply.

(82) Taking into account the different objectives of the measures, the different parts of the scheme will be assessed separately.

Compatibility with the environmental guidelines of the aid to green electricity producers

(83) The Commission assessed the compliance of the support mechanism for green electricity producers' plants in the light of the environmental guidelines, particularly points 58 *et seq.* thereof, and finds as follows.

(84) The Commission notes that the definition of renewable sources of energy in the scheme is in line with the definition of Directive 2001/77/EC. Therefore, the scheme is in compliance with point 6, eighth subparagraph, of the environmental guidelines and points 58 *et seq.* can be applied.

⁽¹⁾ OJ L 83, 27.3.1999, p. 1.

- (85) As stated in point 59, 1st subparagraph, of the environmental guidelines, Member States may compensate for the difference between the production cost of renewable energy and the market price of the form of power concerned. Thus, such compensation can relate only to the extra production costs for environmentally friendly electricity production as compared to the production costs for energy based on conventional energy sources. Any support must however only cover plant depreciation and, if Member States can show that this is indispensable, a fair return on capital.
- (86) Slovenia calculated the compensation in form of fixed tariffs (feed-in tariffs) for the energy supported, as described above. The law sets out objective methods of calculating the levels of aid. According to the information mentioned above, the support will not exceed the depreciation plus a fair return on capital. The aid will be granted only over a period of 10 years, as that is the duration of the agreements signed between the network operators and green electricity producers. This period is below the typical 15-year depreciation period for such plants. The Commission notes positively that in all cases the cost production price of a qualified power plant is higher than both the average market price and the guaranteed purchase price. Thus, the difference between the market price and production costs of green electricity is higher than the premium for all power plants.
- (87) Furthermore, point 59, 2nd subparagraph, of the environmental guidelines stipulates that, in determining the amount of operating aid, account should be taken of any investment aid granted to the firm in question in respect of the new plant. Following the decision to open proceedings, Slovenia informed the Commission that only a limited number of renewable electricity producers benefited from investment aid in addition to the operating aid in question. Slovenia implemented legislation obliging beneficiaries of investment aid to declare the amount of aid granted before feeding their electricity to the network at fixed prices.
- (88) When investment aid has been granted, the feed-in price is reduced. The reduction is proportionate to half of the investment aid granted. Although that fixed proportion may in theory result in the possibility of overcompensation for technologies with small operating costs, Slovenia has demonstrated that, in practice, in the very rare cases where investment aid has been combined with the aid scheme in the past, no overcompensation has taken place. This is due to the fact that for the time being Slovenia does not have renewable power plants with low operating costs, such as wind plants.
- (89) For the future application of the scheme, Slovenia has undertaken to adapt where necessary the proportionate reduction in such a way that no overcompensation takes place in compliance with point 59, 2nd subparagraph, of the environmental guidelines.
- (90) So, in the Commission's view, Slovenia has demonstrated that the support granted under the measure will not exceed the extra production costs of the renewable energy sources supported by the measure. Accordingly, the measure is compatible with points 58 *et seq.* of the environmental aid guidelines.
- Compatibility with the environmental guidelines of the aid to combined heat and power producers*
- (91) The Commission assessed the compliance of the support mechanism for efficient cogeneration plants with the environmental guidelines, particularly points 66 and 67 thereof, and finds as follows.
- (92) First of all, the Commission notes that, in compliance with point 66 of the environmental guidelines, the operating efficiency of the CHP units benefiting from the scheme exceeds the reference values set out in Directive 2004/8/EC. Slovenia will update the reference values in accordance with the Directive. The combined heat and power plants covered by the scheme therefore fulfil the eligibility requirements set out in point 31 of the environmental guidelines.
- (93) As is evident from the information submitted by Slovenia, the average cost of producing electricity in CHP plants is in all cases higher than the guaranteed purchase price⁽¹⁾. The calculations also take into account revenue from the production and sale of heat. The Commission therefore takes the view that the amount of aid is calculated in accordance with point 66 of the environmental guidelines.
- (94) Slovenia informed the Commission that the aid for CHP plants is granted under the same rules as for the green electricity producers. As these rules were proved to be compatible with the environmental guidelines, the Commission finds that, consequently, the scheme component providing aid for the CHP plants is compatible with point 66 of the environmental guidelines.

⁽¹⁾ See last three lines of the tables above.

Compliance with Articles 25 and 90 EC of the financing mechanism of the aid to green and combined heat and power producers.

- (95) The Commission notes that the imposing of a levy on both domestically produced and imported green electricity to the benefit of domestically produced green electricity may have led in the past to discrimination against imported green electricity. However, Slovenia has undertaken to introduce the possibility of reimbursing the levy on imported green electricity. The Commission notes that the reimbursement will be based primarily on the Community system of guarantees of origin. By applying additional requirements, the Member State will protect the system against artificially high import declarations. In assessing the proportionality of the requirements, the Commission considered the risk of artificial declarations and the small size of the Slovenian market in which such artificial declarations could have a significant impact on the system of support. The Commission therefore considers that Slovenia has undertaken to establish an appropriate instrument to remedy any discrimination which may have occurred in the past.

- (96) The Commission notes that Slovenia has undertaken to implement the new financing mechanism based on a connection fee which will be independent from the actual consumption of domestically produced or imported green electricity. This new mechanism will not discriminate against imported green electricity.

Conclusion on aid to green electricity and combined heat and power producers

- (97) In view of the above, the aid to both green electricity plants and combined heat and power plants fulfils the criteria of the environmental guidelines. Since this is sufficient to declare the aid compatible with the common market, the Commission sees no need to analyse whether the aid could be declared compatible in the light of other provisions, even though it considered those provisions in its decision to open proceedings.

7.3. Assessment of the support to the Trbovlje power plant

- (98) Slovenia considers the support to the Trbovlje power plant as compensation for the costs of a service of general economic interest in the field of security of electricity supply.

- (99) Compensation for the costs of a service of general economic interest may benefit from an exception to

the principle of the prohibition of State aid. In certain cases, such compensation may not even be State aid within the meaning of Article 87(1) of the EC Treaty. In its judgment in Case C-280/00 ⁽¹⁾ (hereinafter 'the *Altmark* judgment'), the Court of Justice set four conditions for state support aimed at compensating for costs of a service of general economic interest not to be State aid within the meaning of Article 87(1) of the EC Treaty.

- (100) The Commission analysed the support to Trbovlje in the light of these four conditions.

- (101) **First condition:** 'the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined'.

- (102) The Commission notes that Slovenian law entrusts the Trbovlje plant with a security of supply obligation, making a direct reference to Directive 2003/54/EC, and in particular its Articles 3(2) and 11(4), cited above.

- (103) The Commission has already found in several decisions that Article 11(4) of Directive 2003/54/EC, read in conjunction with Article 3(2) of the same Directive, could be interpreted as providing the basis for public service obligations in the field of security of supply ⁽²⁾. The Article mentions a maximum of 15 % of the overall primary energy necessary to produce the electricity consumed in the Member State concerned. Slovenia undertook to restrict the scope of the support to the Trbovlje plant so that this limit is respected, even taking into account support granted for the same purpose outside the scheme under review in this decision. The obligation is also limited in time to 2009.

- (104) The Commission therefore considers that the first condition is fulfilled.

- (105) **Second condition:** 'parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner'.

⁽¹⁾ Judgment of the Court of Justice dated 24.7.2003 in case C-280/2000, *Altmark trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*.

⁽²⁾ See Commission Decisions in Cases N 34/99 (OJ C 5, 8.1.2002, p. 2), NN 49/99 (OJ C 268, 22.9.2001, p. 7), and N 6/A/2001 (OJ C 77, 28.3.2002, p. 26).

- (106) In the case under consideration the support takes the form of a fixed purchase price. Every year, the Government issues a published decision fixing the amount of electricity covered by the purchase obligation, and the purchase price for this electricity. The price-fixing follows a transparent methodology with a list of eligible costs, which cover only the plant's generation costs.
- (107) The Commission therefore considers that the second condition is fulfilled.
- (108) **Third condition:** 'the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations'.
- (109) The purchase price is established with a view to covering no more than the cost of generating the expected amount of electricity. It does not include any profit element.
- (110) The Commission therefore considers that the third condition is fulfilled.
- (111) **Fourth condition:** 'where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations'.
- (112) The Trbovlje plant was not chosen on the basis of a public procurement procedure. However, the Commission notes that Slovenia has demonstrated that, in the case in question, the choice of Trbovlje was the one that led to providing the service of general economic interest at the least cost to the community, having regard to the specific factual and legal constraints prevailing in this case. In the present case the public service obligation consists in ensuring national security of supply up to 2009 by using indigenous primary energy fuel sources, to an extent not exceeding in any calendar year 15 % of the overall primary energy necessary to produce the electricity consumed in Slovenia.
- (113) In the current situation, no more than two power plants in Slovenia could in any event have fulfilled the public service obligation in question in their current state. These are the Šoštanj plant and the Trbovlje plant.
- (114) Other plants would require the construction of expensive flue-gas cleaning equipment to be able to use it, which would make this option uneconomic. The two units of the Šoštanj plant that can use domestic fuel are already used to their maximum capacity using domestic lignite. It would not be economical to increase their maximum domestic fuel-burning capacity, as this would require an extension of the plant or the upgrading of some of its units with flue-gas cleaning equipment. The output of these two units is taken into account by the Slovenian authorities when calculating the 15 % limit referred to in paragraph 112. Therefore, only the Trbovlje plant was in a position to meet the public service obligation in this case. The support to Trbovlje covers only the share of the 15 % which cannot be covered by the Šoštanj plant.
- (115) Slovenia has therefore used the most economically efficient way to achieve the public service obligation which consists in producing electricity with domestic fuel. Considering also that the compensation for the public service obligation does not include any profit element, the Commission concludes that the public service obligation is fulfilled at the least cost for the community. A public tendering procedure would not have delivered a cheaper solution. Indeed, in the short term (up to 2009) upgrading existing plants or building new, more efficient ones (supposing this would be possible) would have required high investment costs and any bidder would have demanded compensation including at least a reasonable profit by way of return on the invested capital. The result would therefore have been an increase in the amount of compensation to be granted to the operator entrusted with the SGEI obligation.
- (116) Furthermore, the Commission notes that there is no indication that the Trbovlje plant is not operated as a well-run typical undertaking or is run in a particularly inefficient way. The Commission notes that the company already restructured its activities at the time of the economic transition in Slovenia, in particular by closing down its older and less efficient units, which were outdated, and reducing its staff. It is also noted that in any event the remuneration for the public service obligation does not include any profits.

- (117) Finally, the Commission notes that the Trbovlje plant will not be in a position to use the effect of the new round of the Emission Trading System (ETS) for 2008-2012 to generate additional revenue or profit as a result of its specific public service obligation compared to what any otherwise comparable undertaking would be able to realise. Indeed, the State imposes on Trbovlje a public service obligation to generate electricity. Unlike plants that freely sell their electricity on the market, Trbovlje will therefore not have the alternative of ceasing to generate electricity and selling on the CO₂ market the necessary allowances it received for free without having to buy an equivalent number of allowances in order to fulfil its surrender obligations. This is without prejudice to the plant improving efficiency in line with the incentive structure created by the ETS and thereby freeing spare allowances which it could sell while respecting its public service obligation to generate a certain amount of electricity.
- (118) The above reasoning is based on the premise that, at present, lignite is the most economical source of domestic fuel for the generation of electricity in Slovenia. The Commission considers that, at present, and for the short-term future, this is the case.
- (119) However, the Commission also notes that certain electricity generation technologies using renewable sources of domestic fuel already now have generation costs that are not very far above lignite generation costs. This is the case for large biomass plants, for which, according to Slovenia, the generation costs are on average 18,18 SIT/MWh, which is slightly more than 10 % above the costs of Trbovlje.
- (120) The Commission therefore notes that the reasoning in the present Decision is based on the particular factual background of the present case and in particular the fact that the obligation imposed on the Trbovlje plant will end in 2009. In the longer run, when the costs of renewables have decreased and their total capacity has increased, the situation may be different.
- (121) Furthermore, the Commission takes into account that this particular public service obligation has been entrusted on the basis of a Community instrument — Directive 2003/54/EC. The special nature of this public service obligation — ensuring national security of supply — may be construed as limiting its scope, by definition, to the national boundaries within which the provider was to be entrusted.

- (122) The Commission therefore considers that the method used by Slovenia to fix the amount of compensation granted to the Trbovlje plant ensures that the SGEI is provided with the least cost to the community up to 2009. In the specific legal and factual circumstances of the case, the compensation does not appear to exceed what a typical, well run undertaking would have requested in order to carry it out. Therefore the Commission considers that the fourth condition is fulfilled, bearing in mind that the public service obligation ends at the end 2009. This limitation in time will also leave scope for Slovenia to consider whether, as of 2010, it will switch to 'clean coal' technologies for the use of lignite or convert to biomass or other less polluting fuel, in line with the European Union's energy policy ⁽¹⁾.
- (123) In view of the above, the Commission concludes that the support to the Trbovlje power plant in the above specific circumstances fulfils the four conditions of the Altmark judgment and does not constitute aid within the meaning of Article 87(1) of the EC Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The aid granted to qualified electricity producers using renewable sources of primary energy as defined in the Slovenian Energy Act is compatible with Article 87(3)(c) of the EC Treaty.

Article 2

The aid granted to qualified electricity producers using combined heat and power plants as defined in the Slovenian Energy Act is compatible with Article 87(3)(c) of the EC Treaty.

Article 3

The support granted to the Trbovlje power plant as defined in the Slovenian Energy Act does not constitute State aid within the meaning of Article 87(1) of the EC Treaty.

Article 4

The present Decision is addressed to the Republic of Slovenia.

Done at Brussels, 24 April 2007.

For the Commission

Neelie KROES

Member of the Commission

⁽¹⁾ See Energy package of January 2007, and in particular COM(2006) 843 final.

COMMISSION DECISION

of 24 April 2007

on State aid C 26/2006 (ex N 110/2006), temporary defensive mechanism to shipbuilding — Portugal

(notified under document number C(2007) 1756)

(Only the Portuguese version is authentic)

(Text with EEA relevance)

(2007/581/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 those provisions⁽¹⁾ and having regard to their comments,

Whereas:

I. PROCEDURE

- (1) By letter dated 7 February 2006 (registered on 10 February 2006), Portugal notified the Commission of its intention to grant operating aid to Estaleiros Navais de Viana do Castelo SA (ENVC). By letter dated 13 March 2006, the Commission requested further clarifications, which Portugal provided by e-mail dated 28 April 2006.
- (2) By letter dated 23 June 2006, the Commission informed Portugal that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid.
- (3) By letter dated 25 July 2006 (registered on 26 July 2006), the Portuguese authorities presented their comments in the context of the abovementioned procedure.
- (4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽²⁾. The Commission called on interested Parties to submit their comments. There were no comments from third Parties.

II. DETAILED DESCRIPTION OF THE AID MEASURE

- (5) The aid is intended for Estaleiros Navais de Viana do Castelo SA (ENVC), a Portuguese shipyard currently employing some 1 000 people.

- (6) On 14 November 2003, ENVC signed a contract with a French ship owner, Fouquet Sacops SA, for the delivery of a chemical and oil tanker (hull No 227), for the contract price of EUR 22 900 000. The vessel was delivered on 26 April 2005.

- (7) Portugal proposes to grant ENVC aid for this contract in the form of a grant of EUR 1 461 702 on the basis of Council Regulation (EC) No 1177/2002 concerning a temporary defensive mechanism to shipbuilding⁽³⁾, as amended by Council Regulation (EC) No 502/2004⁽⁴⁾ (the TDM Regulation). The TDM Regulation entered into force on 3 July 2002 and expired on 31 March 2005; therefore, it was no longer in force at the time Portugal notified the aid.

- (8) Portugal claims that the contract is nonetheless eligible for aid under the TDM Regulation, on the following grounds.

- (9) Article 4 of the TDM Regulation states that 'This Regulation shall be applied to final contracts signed from the entry into force of this Regulation until its expiry ...'. Portugal states in this respect that the contract in question was signed on 14 November 2003, i.e. while the TDM Regulation was still in force, and therefore remains eligible for aid.

- (10) Portugal further argues that the contract in question was the subject of lower price offers by Korean shipyards, thus fulfilling the conditions of Article 2 of the TDM Regulation and that the aid is thus justified to counter unfair competition from Korean shipyards.

III. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (11) The Commission, in its decision to initiate the formal investigation procedure in the present case, stated that it had doubts about the compatibility of the aid with the common market based on the TDM Regulation for the following reasons.

⁽¹⁾ OJ C 223, 16.9.2006, p. 4.⁽²⁾ See footnote 1 above.⁽³⁾ OJ L 172, 2.7.2002, p. 1.⁽⁴⁾ OJ L 81, 19.3.2004, p. 6.

- (12) First, the Commission had doubts concerning the incentive effect of the aid. The Commission noted, in this respect, that Portugal had not provided evidence that, at the time ENVC signed the contract, there were any public assurances that the shipyard would obtain the aid. On the contrary, Portugal did not have a TDM scheme in place. In addition, according to the information available, the decision by the Portuguese authorities to grant aid to ENVC (conditional on approval by the Commission) was taken only on 28 December 2005, i.e. long after the contract had been signed and the ship delivered. It thus appeared that ENVC had not been induced by State aid to sign the contract, given that the aid was not available at the time the project was concluded.
- (13) Second, the Commission questioned the legal basis for approving the aid. The Commission pointed out that the TDM Regulation had expired on 31 March 2005 and was therefore no longer in force at the time Portugal notified the aid. Although the TDM Regulation applied to contracts signed during its period of application, it was doubtful that the Commission could still assess the notified measure on the basis of an instrument that was no longer part of EU law.
- (14) In addition, the Commission noted that Korea had challenged the compatibility of the TDM Regulation with WTO rules. On 22 April 2005, a WTO Panel had issued its report concluding that the TDM Regulation and several national TDM schemes existing at the time when Korea initiated the WTO dispute were in breach of Article 23.1 of the Understanding on rules and procedures governing the settlement of disputes (DSU) ⁽⁵⁾. On 20 June 2005, the WTO Dispute Settlement Body (DSB) had adopted the Panel report including its recommendation that the Community bring the TDM Regulation and the national TDM schemes into conformity with its obligations under the WTO Agreements ⁽⁶⁾. On 20 July 2005, the Community had informed the DSB that it had already complied with the DSB ruling and recommendations since the TDM Regulation had expired on 31 March 2005 and Member States could no longer grant operating aid under it.
- (15) Authorising the proposed aid would be tantamount to continuing to apply the TDM Regulation in breach of the Community's obligation to comply with the DSB ruling. The Commission, therefore, did not consider at that stage that the aid could be in conformity with the Community's international obligations.
- (16) Third, concerning the aid intensity, the Commission noted that the aid amount appeared to be in excess of 6 % of the contract value and thus contrary to the

maximum aid intensity allowed by Article 2(3) of the TDM Regulation.

IV. COMMENTS SUBMITTED BY PORTUGAL

- (17) Portugal noted that the aid amount referred to by the Commission in the decision to initiate the formal investigation procedure (EUR 1 401 702) ⁽⁷⁾ did not correspond to the notified aid amount (EUR 1 461 702).
- (18) Concerning the intensity of the aid, Portugal noted that, according to the TDM Regulation, the maximum aid intensity was 6 % of the contract value before aid (as opposed to 6 % of the contract value mentioned in the Commission's decision to initiate the formal investigation procedure ⁽⁸⁾) and that on this basis the aid intensity complied with the TDM Regulation.
- (19) More generally, Portugal noted that the objective of the TDM Regulation was to counter unfair competition from Korea and that all shipyards in the EU were subject to the same conditions for obtaining aid under the Regulation. In Portugal's view, the aid did not therefore affect trade in the common market and for this reason it was doubtful that it could qualify as State aid under Article 87(1) of the EC Treaty.
- (20) Concerning the incentive effect, Portugal provided new evidence showing that the shipyard had requested the aid on 25 September 2003, i.e. prior to signing the contract. In this context, Portugal submitted a copy of the letter from the Portuguese authorities to the shipyard dated 26 September 2003, in which the Portuguese authorities acknowledged receipt of the request for aid and reminded the shipyard that the aid was conditional on approval by the Commission. According to Portugal, this letter was indicative of the Portuguese authorities willingness to grant the aid, provided all legal conditions were met.
- (21) Portugal further argued that, based on previous practice, there was an understanding that requests for aid by the shipbuilding industry would be supported by Portugal provided there was a legal basis for doing so (in this case, the TDM Regulation). The fact that the aid had been formally approved by Portugal only in December 2005 was due to internal administrative delays. However, this did not detract from the fact that the shipyard had expectations of receiving the aid, based on the above considerations (see recital 20) and on the general policy of the Portuguese authorities in this respect. The shipyard had evidence that lower prices had been offered by Korean shipyards in relation to the contract and accepted the contract on the assumption that it would receive the aid from the Portuguese authorities.

⁽⁵⁾ See EC — Measures affecting trade in commercial vessels, WT/DS301/R, paragraphs 7.184-7.222 and 8.1(d).

⁽⁶⁾ See WTO document WT/DS301/6.

⁽⁷⁾ Paragraphs 4 and 21 of that decision.

⁽⁸⁾ Paragraphs 10 and 21 of that decision.

- (22) Concerning the legal basis for approving the aid, Portugal reiterated its comments in the notification to the effect that the TDM Regulation was the appropriate basis for approving the aid because the contract had been signed while the TDM Regulation was still in force and, indeed, prior to the TDM Regulation being condemned by the DSB. Portugal noted that the situation was therefore no different from that of aid measures granted by other Member States (under TDM schemes) for contracts signed while the TDM Regulation was still in force. It was the moment when the contracts were signed that determined the eligibility of the contracts for aid, and not the moment when the aid was notified or granted. Portugal also noted that none of the beneficiary shipyards had been requested to reimburse the aid following the WTO panel report. Failing to improve the aid to ENVC would, thus, be contrary to the general principle of equal treatment.

V. ASSESSMENT

- (23) According to Article 87(1) of the EC Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it affects trade between Member States, is incompatible with the common market.
- (24) The Commission considers that the proposed measure constitutes State aid within the meaning of Article 87(1) of the EC Treaty: it takes the form of a grant financed by State resources; even if the TDM Regulation applied in all Member States, as argued by Portugal, the measure is selective as it is limited to ENVC; this selective grant is likely to distort competition by providing ENVC with an advantage over other competitors not receiving aid. Finally, shipbuilding is an economic activity involving extensive trade between Member States. As such, the measure affects trade between Member States.
- (25) The Commission thus confirms that the notified aid measure falls within the scope of Article 87(1) of the EC Treaty.

Compatibility with the common market

The aid amount and aid intensity

- (26) Following the comments submitted by Portugal, the Commission confirms that the notified aid amount is EUR 1 461 702. On the basis of Article 2(3) of the TDM Regulation, the maximum aid intensity allowed is

6 % of the contract value before aid ⁽⁹⁾. The Commission concludes that the notified aid conforms to the maximum aid intensity allowed by the TDM Regulation.

The incentive effect

- (27) As a general principle, State aid may be considered compatible with the common market only if it is necessary to induce the recipient firm to act in a manner which assists attainment of the objectives envisaged by the relevant derogation ⁽¹⁰⁾.
- (28) The Commission notes in this respect that the objective of the TDM Regulation was to 'effectively enable Community shipyards to overcome unfair competition from Korea' (see recital 6). Direct aid up to 6 % of the contract value before aid could thus be authorised provided there had been competition for the same contract from a shipyard in Korea offering a lower price (Article 2).
- (29) The new evidence supplied by Portugal shows that the aid was requested by the shipyard prior to signing the contract. In addition, Portugal provided a copy of a letter from the relevant Portuguese authorities (Directorate-General for Industry) to ENVC, dated 26 September 2003, acknowledging receipt of the request for aid, requesting evidence of compliance with Article 2(1) of the TDM Regulation (i.e. evidence that there was competition for the contract from a Korean shipyard offering a lower price – this evidence was subsequently submitted by the shipyard) and reminding the shipyard that the granting of aid was subject to prior notification to and approval by the Commission. The Commission considers that the above facts were indicative of the willingness of the Portuguese authorities to grant the aid, provided all conditions were met. As the conditions for eligibility appeared to be met in this case, these facts were bound to create expectations on the part of the shipyard that it would receive the aid ⁽¹¹⁾. On this basis, the Commission's doubts about the incentive effect of the aid are allayed.

⁽⁹⁾ Article 1(f) of Regulation (EC) No 1540/98 (OJ L 202, 18.7.1998, p. 3), to which Article 2(6) of the TDM Regulation refers, states that 'contract value before aid shall mean the price laid down in the contract plus any aid granted directly to the yard'. On this basis, the aid amount (EUR 1 461 702) corresponds to 6 % of the 'contract value before aid' (EUR 22 900 000 + EUR 1 461 702) and complies with the maximum intensity allowed.

⁽¹⁰⁾ See judgment in Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, paragraphs 16 and 17.

⁽¹¹⁾ See, by analogy, Article 38 of the Guidelines on National Regional Aid for 2007-13: 'aid may only be granted ... if the beneficiary has submitted an application for aid and the authority responsible for administering the scheme has subsequently confirmed in writing that subject to detailed verification, the project in principle meets the conditions of eligibility (...) before the start of the work on the project'. In the case of aid subject to individual notification to and approval by the Commission, confirmation of eligibility must be made conditional on the Commission decision approving the aid (OJ C 54, 4.3.2006, p. 13).

The legal basis

- (30) In the decision to initiate the formal investigation procedure, the Commission noted that the TDM Regulation had expired on 31 March 2005 and was therefore no longer in force at the time when Portugal notified the aid. Although the TDM Regulation applied to contracts signed during its period of application, it was doubtful that the Commission could still assess the notified measure on the basis of an instrument that was no longer part of EU law.
- (31) The comments submitted by Portugal following the decision to initiate the formal investigation procedure have not allayed the Commission's doubts on this issue.
- (32) The Commission notes that, with regard to notified aid, its practice is to base its assessment on the laws in force at the time of the assessment⁽¹²⁾, unless otherwise specified in the law in force itself. Portugal internally approved the aid (subject to approval by the Commission) and notified it to the Commission long after the TDM Regulation had expired.
- (33) Portugal maintains, in this respect, that the TDM Regulation is applicable to the contract in question based on Article 4 of the Regulation, which states that 'This Regulation shall be applied to final contracts signed from the entry into force of this Regulation until its expiry ...'. Portugal argues that the contract was signed on 14 November 2003, i.e. while the TDM Regulation was still in force, and therefore remains eligible for aid.
- (34) However, the Commission considers that Article 4 as quoted above does not define the application in time of the TDM Regulation. Rather, the temporal application of the Regulation is defined in Article 5⁽¹³⁾, which states that it 'shall expire on 31 March 2005'.
- (35) In contrast, Article 4 establishes additional conditions for the compatibility of the aid. This is also confirmed by the second part of Article 4, which provides that the TDM Regulation shall not apply to 'final contracts signed before the Community gives notice in the *Official Journal of the European Communities* that it has initiated dispute settlement proceedings against Korea (...) and final contracts signed one month or more after the Commission gives notice in the *Official Journal of the European Communities* that these dispute settlement proceedings are resolved or suspended'.
- (36) From the above, it is clear that the TDM Regulation was only to be applied as long as there was a pending dispute with Korea⁽¹⁴⁾ and in any event, no later than 31 March 2005.
- (37) This interpretation is supported by the very objective of the TDM Regulation: it was designed 'as an exceptional and temporary measure, in order to assist Community shipyards in those segments that have suffered adverse effects in the form of material injury and serious prejudice caused by unfair Korean competition, ... [and was to apply] for limited market segments and for a short period only'⁽¹⁵⁾ (recital 3).
- (38) The fact that the Council did not renew this Regulation following its expiry is a clear indication that it did not intend to continue to authorise the Commission to approve aid under the TDM Regulation. This is compatible with the fact that the Community informed the DSB that the Member States could no longer grant operating aid under the Regulation.
- (39) The Commission notes, in this context, that the interpretation of the TDM Regulation must also be seen in the light of the Community's international obligations. According to the settled case law of the Court of Justice, Community legislation must, as far as possible, be interpreted in a manner that is consistent with international law, including the EC's WTO obligations⁽¹⁶⁾.
- (40) The Panel report and the DSB ruling adopting that report condemned the TDM Regulation *per se* for being in breach of WTO rules and required the Community to stop applying the TDM Regulation. The obligation of the Community to implement the DSB ruling also covers future decisions to grant new aid in application of the TDM Regulation⁽¹⁷⁾. The Community, by informing the DSB that it had already complied with the DSB ruling and recommendations given that the TDM Regulation had expired on 31 March 2005 and Member States could no longer grant operating aid under it, undertook not to authorise new aid under the Regulation. Accordingly, approving the present aid would result in a breach of the Community's international commitments.

⁽¹²⁾ See case N 122/2005 'Unless otherwise specified, the Commission applies to notified projects the rules in force at the time of assessment of their compatibility'.

⁽¹³⁾ As amended by Council Regulation (EC) No 502/2004.

⁽¹⁴⁾ Recital 7 confirms this assessment: 'the temporary defensive mechanism should only be authorised after the Community initiates dispute settlement proceedings against Korea (...) and may no longer be authorised if these dispute settlement proceedings are resolved or suspended (...)'.
⁽¹⁵⁾ Our underlining.
⁽¹⁶⁾ Case C-53/96 *Hermès International v FHT Marketing Choice BV* [1998] ECR I-3603, paragraph 28; Case C-76/00 P, *Petrofina SA and Repubbica SA v Council of the European Union* [2003] ECR I-79, paragraph 57.

⁽¹⁷⁾ See EC — *Measures affecting trade in commercial vessels*, WT/DS301/R, paragraph 7.21.

(41) Finally, it should also be noted that Portugal did not submit its notification within a reasonable time. Portugal notified the measure only on 7 January 2006, i.e. about 27 months after the shipyard had filed the application for aid, 10 months after the TDM Regulation had expired and 6 months after the Community had informed the DSB that the Member States could no longer grant operating aid under the TDM Regulation. Given the exceptional and temporary nature of the Regulation, as well as the EC's WTO commitments, of which Portugal was aware, Portugal could not expect the mechanism to continue being applied beyond the date of its expiry.

(42) The Commission further notes that even if ENVC had expectations of receiving the aid, this did not entitle the shipyard to receive the aid, which was dependent not only on approval by Portugal but also on notification to and approval by the Commission.

(43) Similarly, and contrary to Portugal's argument, the principle of equal treatment is not in question in the present case. Shipyards in Member States which had a TDM scheme in place were entitled to receive aid on the basis of schemes that were approved by the Commission before 30 March 2005, but the Commission has taken no further decisions approving new aid under the TDM Regulation since that date. Also, the Commission notes that pursuant to the DSB ruling, the obligation to no longer grant new aid under the TDM Regulation applies both to aid under approved schemes as well as to ad hoc aid, thus making no distinction between aid to shipyards covered by a scheme or, as in the case at hand, ad hoc aid outside of a scheme (see paragraph 14 above: the DSB ruling recommended that the Community bring not only the TDM Regulation but also the national TDM

schemes into conformity with its obligations under the WTO Agreements).

(44) On the basis of the above, the Commission concludes that the notified aid cannot be approved under the TDM Regulation. Since no other exemption clause under Article 87(2) or (3) of the EC Treaty applies, the aid is thus incompatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The notified aid of EUR 1 461 702 that Portugal planned to grant to Estaleiros Navais de Viana do Castelo SA in relation to a contract signed by the latter cannot be authorised under Council Regulation (EC) No 1177/2002 concerning a temporary defensive mechanism to shipbuilding, as amended by Council Regulation (EC) No 502/2004, and is therefore incompatible with the common market. The aid must not be implemented.

Article 2

This Decision is addressed to Portugal.

Done at Brussels, 24 April 2007.

For the Commission

Neelie KROES

Member of the Commission

COMMISSION DECISION

of 10 May 2007

on State aid C 4/2006 (ex N 180/2005) — Portugal — Aid to Djebel

(notified under document number C(2007) 1959)

(Only the Portuguese text is authentic)

(Text with EEA relevance)

(2007/582/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 those provisions⁽¹⁾ and having regard to their comments,

Whereas:

I. PROCEDURE

(1) By letter of 5 April 2005 (sent via their Permanent Representation), registered as received by the Commission on 7 April, the Portuguese authorities notified the Commission of their intention to grant aid to Djebel — S.G.P.S., S.A. (hereinafter Djebel) in order to help finance an investment by the company in Brazil. At the Commission's request, Portugal submitted additional information by letters of 25 July, 26 September and 23 December 2005 (sent via their Permanent Representation), registered as received by the Commission on 27 July and 28 September 2005 and 3 January 2006.

(2) By letter of 22 February 2006, the Commission informed Portugal that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid.

(3) By letter of 31 March 2006 (registered as received on 4 April), the Portuguese authorities presented their comments in the context of the abovementioned procedure.

(4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union*⁽²⁾. The Commission called on interested parties to submit their comments. There were no comments from third parties.

II. DETAILED DESCRIPTION OF THE AID

The companies involved

(5) Djebel is a company located in Madeira, Portugal.

(6) The company is part of the Pestana Group, which is the main hotel group in Portugal and is not covered by the definition of an SME. It does not comply with the Commission Recommendation of 3 April 1996 concerning the definition of small and medium-sized enterprises⁽³⁾ or autonomy criteria set out in Article 3 of the Annex to the Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises⁽⁴⁾. It is therefore a large company.

(7) Djebel manages a holding company in Brazil that invests in and manages hotels and tourist activities.

(8) The Pestana Group had already acquired a hotel in Mozambique before 1999 and has acquired a further four hotels in Brazil in addition to the one covered by the present notification.

The project

(9) The project consists in the acquisition by Djebel of shares in the capital of RASH — Administração de Hotéis de Turismo, Lda, a Brazilian company whose only asset is the Hotel Rio Atlântico, located in Rio de Janeiro, Brazil.

(10) The capital of RASH was acquired in October 1999 and the hotel was already fully operational at the time of the acquisition.

⁽¹⁾ OJ C 91, 19.4.2006, p. 25.

⁽²⁾ See footnote 1.

⁽³⁾ OJ L 107, 30.4.1996.

⁽⁴⁾ OJ L 124, 20.5.2003.

The aid

- (11) The cost of acquiring the shares of RASH amounted to EUR 14 720 474.
- (12) Portugal intends to grant a soft loan of EUR 3 680 119, corresponding to 25 % of the eligible costs, for the abovementioned project. The amount of aid is EUR 574 466, giving a net aid intensity of 3,90 %.
- (13) An additional amount would be granted by the State to Djebel to cover the costs related to studies and technical assistance, financial guarantees and legal assistance under the *de minimis* Regulation ⁽⁵⁾.
- (14) The present aid scheme was notified under Portuguese aid scheme N 667/1999, approved by the Commission on 8 August 2000 ⁽⁶⁾. That scheme, which ran from 2000 to 2006, was designed to promote modern and competitive entrepreneurial strategies. Under it aid for foreign direct investment projects by large companies had to be individually notified to the Commission.
- (15) On 24 May 1999 Djebel submitted a proposal to F. Turismo — Capital de Risco, SA (FCR), which is a risk capital fund owned by public and private companies, concerning its participation in the planned project. According to the Portuguese authorities, interventions by this fund do not contain elements of State aid within the meaning of Article 87 of the EC Treaty.
- (16) The formal application for aid under State aid scheme N 667/1999 was submitted on 31 January 2001. Portugal explained that the document presented to FCR in 1999 constituted the original aid application and that the project was subsequently carried out on the assumption that it would be eligible for aid under the relevant Portuguese law. Owing to internal delays, the Portuguese authorities notified the aid only in April 2005.

III. GROUNDS FOR INITIATING THE PROCEDURE

- (17) The Commission, in its decision to initiate the procedure in respect of the present case, stated that it would

examine the measure in the light of the derogation under Article 87(3)(c) of the EC Treaty in order to determine whether the aid could be considered to facilitate the development of a certain economic activity without adversely affecting trading conditions to an extent contrary to the common interest.

- (18) The Commission also stated that it would examine the measure on the basis of criteria normally used for assessing aid to large companies for foreign direct investment (FDI) projects ⁽⁷⁾. In these cases it normally weighs the benefits of the measure, in terms of contributing to the international competitiveness of the EU industry concerned, against possible negative effects in the Community, such as the risks of relocation and any adverse impact on employment.
- (19) The Commission also takes into account the necessity of the aid by reference to the risks associated with the project in the country concerned as well as to the deficiencies of the company, such as those faced by SMEs. One other criterion relates to a possible positive regional impact. Lastly, the Commission excludes any aid to export-related activities.
- (20) In this connection, the Commission questioned what the impact would be of the project on the tourism sector in Portugal (and thus in the European Union) and whether or not it would affect trading conditions in the European Union to an extent contrary to the common interest.
- (21) The Commission was also doubtful whether the aid was necessary and/or provided any incentive for the applicant to carry out the investment since the project had been completed even before Djebel formally applied for State aid. It requested Portugal to submit comments and provide any information that might help in the assessment of the case.

IV. COMMENTS SUBMITTED BY THE PORTUGUESE AUTHORITIES

- (22) Portugal considered that the necessity of the aid was justified by the fact that the acquisition of RASH constituted the first foreign direct investment project in Brazil by the Pestana Group. This is a group whose activity was focused virtually in its entirety on the Portuguese market. Portugal stated that the challenge of international expansion into Brazil, a high-risk country but also one with a high development potential and with close historical and cultural links with Portugal, became a decisive issue for the Pestana Group's development.

⁽⁵⁾ Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid (OJ L 10, 13.1.2001, p. 30) and Commission Regulation (EC) No 1998/2006 (OJ L 379, 28.12.2006), which deals with the same subject.

⁽⁶⁾ By letter SG(2000) D/106085 (OJ C 266, 16.9.2000, p. 4).

⁽⁷⁾ See Cases C 77/97, *Austrian LiftGmbH-Doppelmayr* (OJ L 142, 5.6.1999, p. 32) and C 47/02, *Vila Galé-Cintra* (OJ L 61, 27.2.2004, p. 76).

- (23) Portugal pointed out to the Commission that the request for aid from the company was drawn up on 24 May 1999 and was submitted to F. Turismo — Capital de Risco SA, a company managing the risk capital fund FCR F. Turismo. The notified request constituted a second phase in the assessment of the project. It should, therefore, be evaluated in the light of the circumstances prevailing at the time, namely in May 1999.
- (24) In this context and according to the Portuguese authorities, the fact that the investment was carried out without the aid shows that the promoter was confident about obtaining the aid and that it had to seize this business opportunity. The Portuguese authorities argued that the beneficiary should not be penalised because it took longer to present the application than to carry out the investment. They also referred to the handicaps and exceptional risks of the operation, such as the high volatility of the Brazilian real and the fact that this is the company's first investment in Brazil.
- (25) Portugal took the view that this investment in Brazil contributed to improving the competitiveness of the Pestana Group and reinforcing its standing in the global tourism sector, thanks in particular to the enhanced recognition of the 'Pestana Hotels and Resorts' brand, with the accompanying enhanced visibility of Portugal as a destination.
- (26) Moreover, the Group's experience in Mozambique is not remotely comparable to its experience of internationalisation in Brazil, given the different characteristics of the two markets. Whereas the Mozambique market, despite its high potential, is still only in an embryonic phase of development, Brazil is an open market with a high level of competition and one which presents a far more challenging prospect than Mozambique. In terms of the Pestana Group's current process of internationalisation, its experience in Mozambique did nothing to attenuate the high risk and anxiety associated with this operation.
- (27) Lastly, the Portuguese authorities claimed that the aid would have a limited effect on trading conditions in the European Union, notably because:
- the amount of the aid is only EUR 574 466, representing 3,9 % of the eligible investment;
 - the Pestana Group has a market share of only 2 % in Portugal, which is negligible in European terms;
 - the Brazilian market has around 10 000 hotels, of which some 7 % are owned by foreign companies;
 - Brazil is a competitive market but one with a very low level of concentration;
 - the company's European competitors operating in Brazil already have very high market shares, led by the French group ACCOR, with 108 hotels, and followed by the Spanish Sol Melia group, with 23;
 - in view of the dimension of the Brazilian market, the project is not of a sufficient size to produce any appreciable increase in local supply or to affect the positions of European companies already operating in Brazil.
- Portugal concluded that there was no possibility that the investment concerned, which involved the purchase of only one hotel, could have any significant impact on trading conditions in the European Union and that there was even less possibility that such an impact could be contrary to the common interest.
- (28) There were no comments from third parties.

V. ASSESSMENT

Presence of aid within the meaning of Article 87(1) of the EC Treaty

- (29) Under Article 87(1) of the EC Treaty, 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market'.
- (30) The Commission, in its decision of 22 February 2006, concluded that the aid fell within the scope of Article 87(1) of the EC Treaty for the following reasons:
- Under the notified measure, a large enterprise will receive funds for investing in the tourism sector in Brazil as part of an internationalisation strategy. This measure amounts to preferential treatment of the beneficiary firm, gives it an advantage or an incentive compared with other firms and thereby distorts or threatens to distort competition.
 - Aid will be granted to a firm in the EU tourism market, where there is or could be trade between Member States or on which firms from other Member States might wish to participate. The measure could therefore affect trade between Member States.
 - The measure is funded through State resources.

(31) The Commission considers that the arguments adduced by Portugal (see paragraph 27) are insufficient to modify these conclusions for the following reasons:

- The Pestana Group was the leading Portuguese hotel group, a position which it still holds today, and it owned some 15 hotels in Portugal at the time of the request for aid. It is clearly advantageous for the national tourism sector as a whole to have one of the most important Portuguese brands represented in South America. The international scale of 'Pestana Hotels and Restaurants' gave the Group enhanced visibility, boosted its negotiating power and strengthened its business activity in the hotel sector. These factors helped to increase its size and to enhance its capacity for investing in the Portuguese market.
- Since the start of its process of internationalisation, the Pestana Group has made a number of investments in Portugal, namely (i) the construction of three new hotels, (ii) the take-up of the management of the Pousadas de Portugal network, (iii) the purchase of a two other inefficient hotel companies and subsequent modernisation of their hotels, and (iv) the development of sizeable tourist projects, such as the Cidade da Criança in the Autonomous Region of Madeira.
- In view of the size of the Pestana Group, a significant increase in the number of jobs created in Portugal would not be the only consequence of buying a hotel in Brazil. Such an increase has indeed already taken place, but primarily as a result of the various abovementioned investments which the Group recently made in Portugal and which are largely due to the momentum generated by its process of internationalisation. In 1999 the Group had a total workforce of only 1 800, whereas by 2005, only six years later, the figure already exceeded 3 500.
- By helping with the acquisition of a hotel as part of the internationalisation initiative of a Portuguese company in Brazil, the notified measure favours a certain undertaking or the production of certain goods. The Commission considers that aid granted to undertakings of the European Union for foreign direct investment is comparable to aid granted to undertakings that export almost all of their production outside the Community. In such cases, given the interdependence between the markets on which Community undertakings operate, it cannot be excluded that aid may distort competition within the Community⁽⁸⁾.

⁽⁸⁾ See Judgment by the European Court of Justice in Case C-142/87, *Tubemeuse* [1990] ECR I-959, paragraph 35.

Compatibility of the aid with the EC Treaty

Incentive effect

- (32) The Commission indicated that it would assess the compatibility of the aid with the EC Treaty in the light of the derogation under Article 87(3)(c) of the Treaty, which authorises aid 'to facilitate the development of certain economic activities' where such aid does not adversely affect trading conditions to an extent contrary to the common interest. The Commission also indicated that it would take into account certain criteria which it had applied in previous cases of aid to large companies for outward foreign direct investment projects (see paragraph 18) with a view to striking a balance between the benefits of the measure, in terms of contributing to the international competitiveness of the EU industry concerned (e.g. whether the aid is necessary by reference to the risks associated with the project in the country of investment), and its possible negative effects on the EU market⁽⁹⁾.
- (33) The Commission noted in this context that, as regards the incentive effect of the aid, there appeared to be some indications that the aid did not meet this criterion. In addition, it had doubts as to the impact of the measure on the common market. This included, *inter alia*, the necessity of the aid given the risks associated with the project in the country concerned as well as the deficiencies of the company (similar to those that may be faced by SMEs).
- (34) As a general principle of State aid legislation, in order for aid to be compatible with the common market, it must be demonstrated that the aid leads to an additional activity by the beneficiary which would not be carried out without the aid. Otherwise, the aid would simply distort competition without having any positive counter-effect.
- (35) The Commission doubted already in the decision to initiate the procedure in the present case that the aid was necessary for Djebel to carry out this investment.
- (36) In its decision of 22 February 2006, the Commission emphasised that the notified project was not the first internationalisation project of the Pestana Group, of which Djebel forms part. The Group was already active in Mozambique and it was therefore doubtful whether the aid was needed in order to carry out the first internationalisation experience of the Pestana Group in Brazil⁽¹⁰⁾.

⁽⁹⁾ See Cases C 41/04, *Orfama* (Decision of 7 March 2007) and C 36/04, *Cordex* (Decision of 21 February 2007).

⁽¹⁰⁾ See Case C 47/02, *Vila Galé-Cintra*, which involved a first internationalisation experience.

- (37) Moreover, Djebel is owned by the major hotel group in Portugal. From 1999, the firm has expanded its activity in Brazil, where it currently has nine hotels and is among the ten largest hotel chains. This seems to indicate that the investment would have gone ahead even without the prospect of obtaining the aid. Moreover, an aid granted now for an investment that took place over seven years ago is unlikely to have any practical link with the investment anymore.
- (38) In order for aid to have an incentive effect, it must also be established that a request for support was introduced before the investment started.
- (39) The Commission points out that the investment took place in October 1999, more than one year before the beneficiary formally applied for aid under State aid scheme N 667/1999 (on 31 January 2001) and so did not comply with the 'incentive effect' criterion normally required by the Community rules on national regional aid ⁽¹¹⁾.
- (40) The Portuguese authorities argued that the proposal for the participation of FCR in the investment, which took place on 24 May 1999 (prior to the investment), is sufficient proof that this criterion is met. The Commission does not consider that such a proposal for the participation of a risk capital firm in the investment can, on its own, be considered to constitute an application for State aid capable of justifying its incentive effect.
- (41) The Commission also stresses that the investment took place around five and a half years before the notification was submitted to it by the Portuguese authorities.
- (42) On the basis of the above, the Commission concludes that there is no evidence that the aid proposed by Portugal was necessary to compensate for any specific risks associated with the project. Thus, it considers that the aid was not necessary in order for the Pestana Group to carry out the investment in Brazil and to trigger that investment. In its view, the aid has no incentive effect.
- (43) The Commission has also maintained in previous cases that aid for foreign direct investment is likely to strengthen the beneficiary's overall financial and strategic position and thus affect its relative position relative to competitors on the EU market ⁽¹²⁾.
- (44) The Commission stresses that the Pestana Group increased its commercial activity in the hotel sector following the investment in question, which was not its first investment abroad. According to the information provided by the Portuguese authorities, even though it did not benefit from the aid, the investment in Brazil helped to strengthen the competitiveness of the Pestana Group and its visibility in the general tourism market, thanks in particular to the projection of the 'Pestana Hotels and Resorts' brand.
- (45) Lastly, the Commission notes that, even if the investment by Djebel had had a positive impact in Portugal, this cannot, in principle, be attributed to the aid since, as explained above, it has no incentive effect in this case as the project was concluded prior to Djebel's requesting the aid and was not necessary to carry out the investment.
- (46) When assessing the compatibility of aid, the Commission takes a close look at the balance between its positive and negative effects and determines whether its beneficial effects for the Community outweigh its negative effects on competition and trade on the Community market. On the basis of the above, it has no reason to believe that the granting of aid to Djebel in respect of its investment in Brazil would help to improve the competitiveness of the European industry or would have a positive effect on the EU regions concerned. On the contrary, the aid would strengthen the position of the beneficiary to the detriment of its competitors receiving State aid in a market that is characterised by intensive competition. Therefore, the Commission considers that the aid would not have any positive effects for the Community that could outweigh its negative effects on competition.

VI. CONCLUSION

- (47) The Commission concludes that Portugal has failed to demonstrate that, without the aid, Djebel would not have carried out the project concerned. The aid would thus simply have a distorting effect on competition in the common market without contributing to any additional activity on the part of the beneficiary. On this basis, the aid cannot be considered to facilitate the development of an economic activity within the meaning of Article 87(3)(c) and is thus incompatible with the common market.
- (48) Given the above, the Commission does not consider it necessary to assess other aspects that cast doubts on the compatibility of the aid expressed in its Decision of 22 February 2006,

⁽¹¹⁾ See point 4.2 of the Guidelines on national regional aid, which states that an application for aid must be submitted before work on the project is started in order to ensure that the required incentive effect exists (OJ C 74, 10.3.1998, p. 13).

⁽¹²⁾ See Case C 77/97, *Austrian Lift GmbH-Doppelmayr* (OJ L 142, 5.6.1999, p. 32).

HAS ADOPTED THIS DECISION:

Article 2

This Decision is addressed to the Portuguese Republic.

Article 1

Done at Brussels, 10 May 2007.

The notified soft loan of EUR 3 680 119 proposed by Portugal to Djebel for its investment in Brazil is incompatible with the common market since it does not meet the criteria set out in Article 87(3)(c) of the EC Treaty and must not be therefore be granted.

For the Commission
Neelie KROES
Member of the Commission

COMMISSION DECISION

of 21 June 2007

on State aid C 17/2006 (ex N 3/2006), training aid to Autoeuropa — Automóveis Lda, Portugal

(notified under document number C(2007) 3130)

(Only the Portuguese version is authentic)

(Text with EEA relevance)

(2007/583/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 those provisions⁽¹⁾ and having regard to their comments,

Whereas:

I. PROCEDURE

- (1) By letter of 27 December 2005 (registered as received on 4 January 2006), Portugal notified the Commission of its intention to grant aid amounting to EUR 3 552 423 to Autoeuropa — Automóveis Lda (Autoeuropa) in connection with a training project that the company wished to implement. The Commission requested further information by letter of 31 January 2006, to which Portugal replied by letter dated 9 March 2006 (registered as received on 23 March 2006).
- (2) By letter of 16 May 2006, the Commission informed Portugal that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid. The Portuguese authorities presented their comments in accordance with this procedure by letter of 31 August 2006.
- (3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union*⁽²⁾. The Commission called on interested parties to submit their comments.
- (4) The Commission received comments from interested parties. It forwarded them to Portugal, which was given the opportunity to react; its comments were received by letter of 13 November 2006. The Commission requested further information from Portugal by letter of 2 February 2007.

II. WITHDRAWAL OF THE NOTIFICATION

- (5) By letter of 4 May 2007, Portugal informed the Commission that the notified aid would no longer be implemented given that Autoeuropa had modified its training project and that the notification thus no longer served any purpose.
- (6) The Commission notes that, according to Article 8 of Council Regulation (EC) No 659/1999⁽³⁾, the Member State concerned may withdraw the notification in due time before the Commission has taken a decision on the aid. According to Article 8(2), in cases where the Commission has initiated the formal investigation procedure, the Commission must close the procedure.
- (7) Consequently, the Commission has decided to close the formal investigation procedure under Article 88(2) of the EC Treaty in respect of the relevant aid, given that Portugal has withdrawn its notification,

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 88(2) of the EC Treaty and in view of the fact that Portugal has withdrawn its notification, the Commission hereby closes the formal investigation procedure in respect of the training aid that Portugal intended to grant to Autoeuropa — Automóveis Lda.

Article 2

This Decision is addressed to the Portuguese Republic.

Done at Brussels, 21 June 2007.

For the Commission

Neelie KROES

Member of the Commission

⁽¹⁾ OJ C 177, 29.7.2006, p. 25.

⁽²⁾ See footnote 1.

⁽³⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

COMMISSION DECISION

of 21 August 2007

amending Decision 2004/558/EC implementing Council Directive 64/432/EEC as regards additional guarantees for intra-Community trade in bovine animals relating to infectious bovine rhinotracheitis and the approval of the eradication programmes presented by certain Member States

(notified under document number C(2007) 3905)

(Text with EEA relevance)

(2007/584/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Directive 64/432/EEC of 26 June 1964 on animal health problems affecting intra-Community trade in bovine animals and swine⁽¹⁾, and in particular Articles 9(2) and 10(2) thereof,

Whereas:

- (1) Article 9 of Directive 64/432/EEC provides that a Member State, which has a compulsory national control programme for one of the contagious diseases listed in Annex E(II) to that Directive, may submit its programme to the Commission for approval. That Article also provides for the definition of the additional guarantees which may be required in intra-Community trade.
- (2) In addition, Article 10 of Directive 64/432/EEC provides that where a Member State considers that its territory or part thereof is free from one of the diseases listed in Annex E(II) to that Directive, it is to present appropriate supporting documentation to the Commission. That Article also provides for the definition of the additional guarantees which may be required in intra-Community trade.
- (3) Commission Decision 2004/558/EC of 15 July 2004 implementing Council Directive 64/432/EEC as regards additional guarantees for intra-Community trade in bovine animals relating to infectious bovine rhinotracheitis and the approval of the eradication programmes presented by certain Member States⁽²⁾ approves the programmes for the control and eradication of the infection with the bovine herpesvirus type 1 ('BHV1') presented by the Member States listed in Annex I to that Decision for the regions listed in that Annex, and for which additional guarantees for BHV1 apply in accordance with Article 9 of Directive 64/432/EEC.

(4) In addition, Annex II to Decision 2004/558/EC lists the regions of the Member States that are considered free of BHV1 infection and for which additional guarantees apply in accordance with Article 10 of Directive 64/432/EEC. Annex III to Decision 2004/558/EC defines BHV1-free holdings.

(5) At present, all regions of Germany are listed in Annex I to Decision 2004/558/EC. Germany has now submitted documentation in support of its application to declare a part of its territory free of BHV1 infection and provided rules for the national movement of bovine animals within and into this part of its territory. Accordingly, Germany has requested the application of the additional guarantees, in accordance with Article 10 of Directive 64/432/EEC, for the administrative units of Regierungsbezirke Oberpfalz and Oberfranken in the federal state of Bavaria.

(6) Following the evaluation of the application submitted by Germany, it is appropriate that those two BHV1-free administrative units in Germany be listed in Annex II to Decision 2004/558/EC and to extend the application of the additional guarantees established in accordance with Article 10 of Directive 64/432/EEC to them. Annexes I and II to Decision 2004/558/EC should therefore be amended accordingly.

(7) Italy has submitted the programmes for eradicating BHV1 infection in the Autonomous Region of Friuli Venezia Giulia and in the Autonomous Province of Trento. Those programmes comply with the criteria set out in Article 9(1) of Directive 64/432/EEC. Those programmes also provide for rules for the national movement of bovine animals within and into those regions which are equivalent to those previously implemented in the Province of Bolzano in Italy, which were successful in eradicating the disease in that Province.

(8) The programmes presented by Italy for those two Regions, and the additional guarantees presented in accordance with Article 9 of Directive 64/432/EEC, should be approved. Annex I to Decision 2004/558/EC should therefore be amended accordingly.

⁽¹⁾ OJ L 121, 29.7.1964, p. 1977. Directive as last amended by Directive 2006/104/EC (OJ L 363, 20.12.2006, p. 352).

⁽²⁾ OJ L 249, 23.7.2004, p. 20.

- (9) The European Food Safety Authority has delivered an opinion on the 'Definition of a BoHV-1-free animal and a BoHV-1-free holding, and the procedures to verify and maintain this status' ⁽¹⁾. It is appropriate to take into account certain recommendations of that opinion. Annex III to Decision 2004/558/EC should therefore be amended accordingly.

- (10) In the interests of clarity of Community legislation, Annexes I, II and III to Decision 2004/558/EC should be replaced by the text in the Annex to this Decision.

- (11) 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

Annexes I, II and III to Decision 2004/558/EC are replaced by the text in the Annex to this Decision.

Article 2

This Decision is addressed to the Member States.

Done at Brussels, 21 August 2007.

For the Commission

Markos KYPRIANOU

Member of the Commission

⁽¹⁾ http://www.efsa.europa.eu/en/science/ahaw/ahaw_opinions/1348.html

ANNEX

'ANNEX I

Member States	Regions of Member States to which the additional guarantees for infectious bovine rhinotracheitis apply in accordance with Article 9 of Directive 64/432/EEC
Germany	All regions, except Regierungsbezirke Oberpfalz and Oberfranken in the federal state of Bavaria
Italy	The Autonomous Region of Friuli Venezia Giulia The Autonomous Province of Trento

ANNEX II

Member States	Regions of Member States to which the additional guarantees for infectious bovine rhinotracheitis apply in accordance with Article 10 of Directive 64/432/EEC
Denmark	All regions
Germany	Regierungsbezirke Oberpfalz and Oberfranken in the federal state of Bavaria
Italy	Province of Bolzano
Austria	All regions
Finland	All regions
Sweden	All regions

ANNEX III

BHV1-free holding

1. A holding keeping bovine animals shall be considered free of BHV1 infection if it complies with the conditions set out in this Annex.
 - 1.1. No suspicion of BHV1 infection has been recorded for the holding during the previous six months and all bovine animals on the holding are free from clinical symptoms indicative of BHV1 infection.

The holding and any non-adjacent pastures or premises, independently of ownership, that form part of the holding as an epidemiological entity, must be effectively separated from any pasture or premises of lesser BHV1-status, either by natural or physical barriers that effectively prevent direct contact between animals of different health status.

- 1.2. Only bovine animals from holdings situated in Member States or regions thereof listed in Annex II or from BHV1-free holdings have been introduced and none of the bovine animals on the holding have been in contact with bovine animals other than those coming from holdings situated in Member States or regions thereof listed in Annex II or from BHV1-free holdings.
- 1.3. Female bovine animals are only inseminated with bovine semen produced in accordance with Directive 88/407/EEC, or have been serviced by bulls from holdings situated in Member States or regions thereof listed in Annex II to this Decision or from BHV1-free holdings.

- 1.4. At least one of the following control regimes is applied on the holding:
 - 1.4.1. a serological investigation for antibodies against BHV1 has been carried out with negative results in each case on at least two samples of blood, taken with an interval of five to seven months from all female bovine animals older than nine months of age, and from all male bovine animals older than nine months of age which are used or intended for breeding purposes;
 - 1.4.2. a serological investigation for antibodies against BHV1 has been carried out with negative results in each case on at least:
 - two samples of milk taken with an interval of five to seven months from all lactating female bovine animals, either individually or in a pool of milk samples taken from not more than five animals; and
 - two samples of blood, taken with an interval of five to seven months from all non-lactating female bovine animals older than nine months of age, and from all male bovine animals older than nine months of age which are used or intended for breeding purposes;
 - 1.4.3. in the case of dairy farms on which at least 30 % of the bovine animals are lactating female bovine animals, a serological investigation for antibodies against BHV1 has been carried out with negative results in each case on at least:
 - three milk samples collected with an interval of at least three months from a bulk of milk of not more than 50 lactating female bovine animals, depending on the specification of the test employed; and
 - one individual sample of blood, taken from all non-lactating female bovine animals older than nine months of age, and from all male bovine animals older than nine months of age which are used or intended for breeding purposes;
 - 1.4.4. all bovine animals on the holding originate either from holdings situated in Member States or regions thereof listed in Annex II or from BHV1- free holdings.
2. The BHV1-free status of a holding keeping bovine animals shall be retained if:
 - 2.1. the conditions in points 1.1 to 1.4 continue to apply, and
 - 2.2. at least one of the following control regimes is applied on the holding within a 12-month period:
 - 2.2.1. a serological investigation for antibodies against BHV1 has been carried out with negative results in each case on at least one individual sample of blood taken from all bovine animals older than 24 months of age;
 - 2.2.2. a serological investigation for antibodies against BHV1 has been carried out with negative results in each case on at least:
 - one individual sample of milk taken from all lactating female bovine animals, either individually or in a pool of milk samples taken from not more than five animals; and
 - one individual sample of blood taken from all non-lactating female bovine animals older than 24 months of age, and from all male bovine animals older than 24 months of age;
 - 2.2.3. in the case of dairy farms on which at least 30 % of the bovine animals are lactating female bovine animals, a serological investigation for antibodies against BHV1 has been carried out with negative results in each case on at least:
 - two milk samples collected with an interval of three to 12 months from a bulk of milk of not more than 50 lactating female bovine animals, depending on the specification of the test employed; and
 - one individual sample of blood, taken from all non-lactating female bovine animals older than 24 months of age, and from all male bovine animals older than 24 months of age.

3. The BHV1-free status of a holding keeping bovine animals shall be suspended where during the investigations referred to in points 2.2.1 to 2.2.3. an animal has reacted with positive results in a test for antibodies against BHV1.
4. The BHV1-free status of a holding which was suspended in accordance with point 3, shall only be restored after a serological investigation for antibodies against BHV1, commencing not earlier than 30 days after the removal of the seropositive animals, has been carried out with negative result in each case on at least:
 - two samples of milk taken with an interval of at least two months from all lactating female bovine animals, either individually or in a pool of milk samples taken from not more than five animals; and
 - two samples of blood, taken with an interval of at least three months from all non-lactating female bovine animals, and from all male bovine animals.

Note:

- (a) Where reference is made in this Annex to a serological test for the detection of antibodies against BHV1, the principles laid down in Article 2(1)(c) relating to the vaccination status of the tested animals shall apply.
 - (b) The size of the pool of milk samples referred to in this Annex, may be modulated based on documented evidence that the test is under all circumstances of day to day laboratory work sensitive enough to detect a single weak positive reaction in the pool of the modulated size.'
-