

# Official Journal

## of the European Union

L 46

English edition

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Volume 51

21 February 2008

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## I

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

## REGULATIONS

## COUNCIL REGULATION (EC) No 146/2008

of 14 February 2008

**amending Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and Regulation (EC) No 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD)**

THE COUNCIL OF THE EUROPEAN UNION,

that the farmer remedies the findings of non-compliance concerned are taken by the competent national authority.

Having regard to the Treaty establishing the European Community, and in particular the third subparagraph of Article 37(2) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament <sup>(1)</sup>,

Whereas:

- (1) Experience has shown the need to provide for a measure of tolerance for minor cases of non-compliance with the cross compliance requirements where the severity, extent and permanence of such non-compliance would not justify an immediate reduction of the direct payments to be granted. Such a measure of tolerance should nonetheless include an appropriate follow-up by the competent national authority until the non-compliance has been remedied. Moreover, applying reductions to very low initial amounts of direct payments may prove burdensome in comparison to any deterrent effect to be gained. As a consequence, a suitable threshold should be defined, below which Member States may decide not to apply any reduction, provided that the actions to ensure

- (2) Article 44(3) of Council Regulation (EC) No 1782/2003 <sup>(2)</sup> provides that farmers must keep the parcels corresponding to the eligible hectare at their disposal for a period of at least 10 months. Experience has shown that this condition risks constraining the functioning of the land market and creates significant administrative work for the farmers and administrative services involved. Nonetheless, in order to ensure that double claims are not made for the same land, a date should be fixed on which the parcels should be at the farmer's disposal. It would be appropriate for Member States to determine that date which should be no later than the date fixed for amendment of the aid application. The same rule should also be applied for the Member States applying the single area payment scheme.

- (3) As a consequence of the reduction of the period during which the farmer shall keep at his disposal the parcels corresponding to the eligible hectare to a single day for both the single payment scheme and the single area payment scheme, the rules on liability under cross compliance, in particular in the case of transfer of land during the calendar year concerned, should be clarified. It should therefore be made clear that the farmer who submits an aid application should be held liable towards the competent authority with regard to any failure to fulfil the cross compliance requirements in the calendar year concerned for all agricultural land declared in the aid application. This should not preclude private law arrangements between the farmer concerned and the person to whom or from whom the agricultural land was transferred.

<sup>(1)</sup> Opinion of 11 December 2007 (not yet published in the Official Journal).

<sup>(2)</sup> OJ L 270, 21.10.2003, p. 1. Regulation as last amended by Regulation (EC) No 1276/2007 (OJ L 284, 30.10.2007, p. 11).

- (4) Article 71h of Regulation (EC) No 1782/2003 provides that, in the framework of the single payment scheme, the new Member States within the meaning of Article 2(g) of that Regulation may fix different per unit values of entitlements to be allocated for hectares of grassland or permanent pasture and for any other eligible hectares as identified on 30 June 2003 or on 30 June 2005 in the case of Bulgaria and Romania. The new Member States have established an identification system for agricultural parcels in compliance with Article 20 of that Regulation. However, due to technical difficulties when switching over to that identification system, the features of certain parcels as existing in 2003 may not have been accurately reflected. In order to allow for the smooth implementation of the possibility to fix different per unit values, the date for identifying the parcels should be adjusted to 30 June 2006. However for Bulgaria and Romania the date for identifying the parcels should be 1 January 2008. Article 71h of Regulation (EC) No 1782/2003 should be amended accordingly.
- (5) Experience has also shown that the setting-up of the administrative infrastructure needed for the management of the statutory management requirements covered by the cross compliance rules implies considerable administrative work. A three-year phasing-in of the statutory management requirements in the new Member States using the single area payment scheme, similar to the phasing-in period applied in the Community as constituted on 30 April 2004 in accordance with the time schedule set out in Annex III to Regulation (EC) No 1782/2003, would ease the process of introduction of the statutory management requirements and their smooth implementation. This phasing-in period should be possible even if the new Member State decides to fully apply the direct payments before the last possible date for applying the single area payment scheme. Article 143b(6) of Regulation (EC) No 1782/2003 and Article 51(3) of Council Regulation (EC) No 1698/2005<sup>(1)</sup> should be amended accordingly.
- (6) Article 143b(10) and (11) of Regulation (EC) No 1782/2003 lay down the rules governing the passage of new Member States using the single area payment scheme to the application of the single payment system. According to these rules the decision of a new Member State to implement the single payment scheme is subject to the prior authorisation of the Commission on the basis of an assessment of the state of preparedness of the new Member State concerned. This prior authorisation is no longer necessary since almost all direct payments are decoupled and since both the single area payment scheme and the single payment scheme are decoupled and are area-based payments sharing most of the elements of the integrated system, in particular the land parcel identification system. Those provisions should therefore be deleted. Deletion of paragraphs 10 and 11 of Article 143b implies a consequential amendment to Article 143b(9). That provision should therefore also be amended.
- (7) Table 2 of Annex XII to Regulation (EC) No 1782/2003 sets out the total amounts of complementary national direct payments to be paid in Cyprus where the single area payment scheme applies up to 2008. Further to the extension of the application of the single area payment scheme by Council Regulation (EC) No 2012/2006<sup>(2)</sup>, it is necessary to set out the total amounts to be paid in Cyprus where the single area payment scheme applies for 2009 and 2010.
- (8) The new Member States having decided to apply the single payment scheme have opted to introduce it from 2007. It is therefore appropriate for the amendment to Article 71h of Regulation (EC) No 1782/2003 to apply to those new Member States from that date.
- (9) A number of the provisions amended by this Regulation, in particular the measure of tolerance for minor cases of non-compliance, the application of reductions below a certain threshold, the fixation of the date at which the farmer shall have the land at his disposal for eligibility under the single payment scheme and the single area payment scheme, as well as the phasing-in period granted to new Member States applying the single area payment scheme in order to fully implement the requirements linked to cross compliance within their territory, would result in rules more favourable for the farmers concerned than the rules currently in force. The retroactive application of such provisions should not infringe the principle of legal certainty of the economic operators concerned. The same applies to the amended provision of Article 71h of Regulation (EC) No 1782/2003. However, the provisions concerning the liability of farmers for non-compliance in case of transfer of land should apply from 1 April 2008 in order to provide sufficient legal certainty for the farmers concerned while ensuring an effective application of these provisions in the year 2008.
- (10) Regulation (EC) No 1782/2003 and Regulation (EC) No 1698/2005 should therefore be amended accordingly.

<sup>(1)</sup> OJ L 277, 21.10.2005, p. 1. Regulation as last amended by Regulation (EC) No 2012/2006 (OJ L 384, 29.12.2006, p. 8).

<sup>(2)</sup> OJ L 384, 29.12.2006, p. 8.

HAS ADOPTED THIS REGULATION:

#### Article 1

Regulation (EC) No 1782/2003 is hereby amended as follows:

1. Article 6 is amended as follows:

(a) paragraph 1 shall be replaced by the following:

‘1. Where the statutory management requirements or good agricultural and environmental conditions are not complied with at any time in a given calendar year (hereinafter “the calendar year concerned”), and the non-compliance in question is the result of an act or omission directly attributable to the farmer who submitted the aid application in the calendar year concerned, the total amount of direct payments to be granted, after application of Articles 10 and 11 to that farmer, shall be reduced or cancelled in accordance with the detailed rules laid down under Article 7.

The first subparagraph shall also apply where, the non-compliance in question is the result of an act or omission directly attributable to the person to whom or from whom the agricultural land was transferred.

For the purposes of application of the first and second subparagraphs for the year 2008, the calendar year shall correspond to the period of 1 April to 31 December 2008.

For the purpose of this paragraph “transfer” means any type of transaction whereby the agricultural land ceases to be at the disposal of the transferor.’;

(b) the following paragraph shall be added:

‘3. Notwithstanding paragraph 1 and in accordance with the conditions laid down in the detailed rules referred to in Article 7(1), Member States may decide not to apply a reduction or exclusion amounting to EUR 100 or less per farmer and per calendar year.

Where a Member State decides to make use of the option provided for in the first subparagraph, in the following year the competent authority shall take the actions required to ensure that the farmer remedies the findings of non-compliance concerned. The finding and the remedial action to be taken shall be notified to the farmer.’;

2. in Article 7, paragraph 2, the following subparagraphs shall be added:

‘In duly justified cases Member States may decide that no reduction shall be applied where, given its severity, extent and permanence, a case of non-compliance is to be considered as minor. Cases of non-compliance which constitute a direct risk to public or animal health shall however not be considered as minor.

Unless the farmer has taken immediate remedial action putting an end to the non-compliance found, the competent authority shall take the actions required that may, where appropriate, be limited to an administrative check, to ensure that the farmer remedies the findings of non-compliance concerned. The finding of minor non-compliance and the remedial action to be taken shall be notified to the farmer.’;

3. in Article 44, paragraph 3, the second sentence shall be replaced by the following:

‘Except in case of *force majeure* or exceptional circumstances, these parcels shall be at the farmer’s disposal on the date fixed by the Member State which shall be no later than the date fixed in that Member State for amendment of the aid application.’;

4. Article 71h shall be replaced by the following:

#### ‘Article 71h

##### **Grassland**

The new Member States may also, according to objective criteria, fix, within the regional ceiling or part of it, different per unit values of entitlements to be allocated to farmers referred to in Article 71f(1), for hectares of grassland as identified on 30 June 2006 and for any other eligible hectare or alternatively for hectares of permanent pasture as identified on 30 June 2006 and for any other eligible hectare.

However for Bulgaria and Romania the date for identification shall be 1 January 2008.’;

5. Article 143b shall be amended as follows:

(a) in paragraph 5, the following subparagraph shall be added:

'Except in case of *force majeure* or exceptional circumstances, the parcels referred to in the first subparagraph shall be at the farmer's disposal on the date fixed by the Member State which shall be no later than the date fixed in that Member State for amendment of the aid application.';

- (b) in paragraph 6, the third subparagraph shall be replaced by the following:

'As from 1 January 2005 and until 31 December 2008 the application of Articles 3, 4, 6, 7 and 9 shall be optional for the new Member States insofar as those provisions relate to statutory management requirements. As from 1 January 2009 a farmer receiving payments under the single area payment scheme in those Member States shall respect the statutory management requirements referred to in Annex III according to the following timetable:

- (a) requirements referred to in point A of Annex III shall apply from 1 January 2009;
- (b) requirements referred to in point B of Annex III shall apply from 1 January 2011;
- (c) requirements referred to in point C of Annex III shall apply from 1 January 2011.

However, for Bulgaria and Romania, the application of Articles 3, 4, 6, 7 and 9 shall be optional until 31 December 2011 insofar as those provisions relate to statutory management requirements. As from 1 January 2012 a farmer receiving payments under the single area payment scheme in those Member States shall respect the statutory management requirements referred to in Annex III according to the following timetable:

- (a) requirements referred to in point A of Annex III shall apply from 1 January 2012;

- (b) requirements referred to in point B of Annex III shall apply from 1 January 2014;

- (c) requirements referred to in point C of Annex III shall apply from 1 January 2014.

The new Member States may also apply the option provided for in the third subparagraph where they decide to terminate the application of the single area payment scheme before the end of the period of application provided for in paragraph 9.;

- (c) in paragraph 9, the first sentence shall be replaced by the following:

'For any new Member State the single area payment scheme shall be available for a period of application until the end of 2010.';

- (d) paragraphs 10 and 11 shall be deleted;

6. Annex XII shall be amended in accordance with the Annex to this Regulation.

#### Article 2

In Article 51, paragraph 3, of Regulation (EC) No 1698/2005, the second subparagraph shall be replaced by the following:

'The derogation provided for in the first subparagraph shall apply until 31 December 2008. As from 1 January 2009 a farmer receiving payments under the single area payment scheme shall respect the statutory management requirements referred to in Annex III to Regulation (EC) No 1782/2003 according to the following timetable:

- (a) requirements referred to in point A of Annex III shall apply from 1 January 2009;

(b) requirements referred to in point B of Annex III shall apply from 1 January 2011;

(c) requirements referred to in point C of Annex III shall apply from 1 January 2011.

However, for Bulgaria and Romania, the application of Articles 3, 4, 6, 7 and 9 of Regulation (EC) No 1782/2003 shall be optional until 31 December 2011 insofar as those provisions relate to statutory management requirements. As from 1 January 2012 a farmer receiving payments under the single area payment scheme shall respect the statutory management requirements referred to in Annex III to Regulation (EC) No 1782/2003 according to the following timetable:

(a) requirements referred to in point A of Annex III shall apply from 1 January 2012;

(b) requirements referred to in point B of Annex III shall apply from 1 January 2014;

(c) requirements referred to in point C of Annex III shall apply from 1 January 2014.

The new Member States may also apply the option provided for in the second subparagraph where they decide to terminate the application of the single area payment scheme before the end of the period of application provided for in Article 143b(9) of Regulation (EC) No 1782/2003.'

#### *Article 3*

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

It shall apply as from 1 January 2008 with the following exceptions:

(a) Article 1(1)(a) shall apply as of 1 April 2008;

(b) Article 1(4) shall apply as from 1 January 2007.

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

Done at Brussels, 14 February 2008.

*For the Council*

*The President*

M. ZVER

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## ANNEX

In Table 2 of Annex XII to Regulation (EC) No 1782/2003 the two following columns are added:

| '2009      | 2010        |
|------------|-------------|
| 0          | 0           |
| 1 795 543  | 1 572 955   |
| 0          | 0           |
| 3 456 448  | 3 438 488   |
| 4 608 945  | 4 608 945   |
| 10 724 282 | 10 670 282  |
| 5 547 000  | 5 115 000   |
| 156 332    | 149 600     |
| 4 323 820  | 4 312 300   |
| 1 038 575  | 1 035 875   |
| 31 650 945 | 30 903 405' |

**COMMISSION REGULATION (EC) No 147/2008**  
**of 20 February 2008**  
**establishing the standard import values for determining the entry price of certain fruit and vegetables**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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

Whereas:

- (1) Regulation (EC) No 1580/2007 lays down, pursuant to the outcome of the Uruguay Round multilateral trade negotiations, the criteria whereby the Commission fixes

the standard values for imports from third countries, in respect of the products and periods stipulated in the Annex thereto.

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

HAS ADOPTED THIS REGULATION:

*Article 1*

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

*Article 2*

This Regulation shall enter into force on 21 February 2008.

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

Done at Brussels, 20 February 2008.

*For the Commission*

Jean-Luc DEMARTY

*Director-General for Agriculture and  
Rural Development*

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<sup>(1)</sup> OJ L 350, 31.12.2007, p. 1.

## ANNEX

to Commission Regulation of 20 February 2008 establishing the standard import values for determining the entry price of certain fruit and vegetables

(EUR/100 kg)

| CN code                                           | Third country code <sup>(1)</sup> | Standard import value |
|---------------------------------------------------|-----------------------------------|-----------------------|
| 0702 00 00                                        | IL                                | 53,3                  |
|                                                   | JO                                | 69,6                  |
|                                                   | MA                                | 45,2                  |
|                                                   | TN                                | 115,9                 |
|                                                   | TR                                | 84,2                  |
|                                                   | ZZ                                | 73,6                  |
| 0707 00 05                                        | JO                                | 190,5                 |
|                                                   | MA                                | 150,4                 |
|                                                   | TR                                | 181,9                 |
|                                                   | ZZ                                | 174,3                 |
| 0709 90 70                                        | MA                                | 49,7                  |
|                                                   | TR                                | 115,6                 |
|                                                   | ZZ                                | 82,7                  |
| 0709 90 80                                        | EG                                | 111,9                 |
|                                                   | ZZ                                | 111,9                 |
| 0805 10 20                                        | EG                                | 52,6                  |
|                                                   | IL                                | 54,8                  |
|                                                   | MA                                | 57,4                  |
|                                                   | TN                                | 48,4                  |
|                                                   | TR                                | 85,6                  |
|                                                   | ZZ                                | 59,8                  |
| 0805 20 10                                        | IL                                | 110,6                 |
|                                                   | MA                                | 111,4                 |
|                                                   | ZZ                                | 111,0                 |
| 0805 20 30, 0805 20 50, 0805 20 70,<br>0805 20 90 | CN                                | 42,0                  |
|                                                   | EG                                | 82,4                  |
|                                                   | IL                                | 76,7                  |
|                                                   | JM                                | 114,0                 |
|                                                   | MA                                | 117,2                 |
|                                                   | PK                                | 65,4                  |
|                                                   | TR                                | 77,5                  |
|                                                   | ZZ                                | 82,2                  |
| 0805 50 10                                        | EG                                | 107,9                 |
|                                                   | IL                                | 107,6                 |
|                                                   | MA                                | 114,0                 |
|                                                   | TR                                | 116,6                 |
|                                                   | ZZ                                | 111,5                 |
| 0808 10 80                                        | AR                                | 96,3                  |
|                                                   | CA                                | 88,1                  |
|                                                   | CL                                | 60,8                  |
|                                                   | CN                                | 83,1                  |
|                                                   | MK                                | 37,5                  |
|                                                   | US                                | 126,4                 |
|                                                   | ZZ                                | 82,0                  |
| 0808 20 50                                        | AR                                | 89,6                  |
|                                                   | CN                                | 92,4                  |
|                                                   | US                                | 122,2                 |
|                                                   | ZA                                | 85,7                  |
|                                                   | ZZ                                | 97,5                  |

<sup>(1)</sup> 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 148/2008****of 20 February 2008****amending Regulations (EC) No 900/2007 and 1060/2007 in order to clarify the status of the destinations excluded from the refunds on export of sugar**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

(3) Regulations (EC) No 900/2007 and 1060/2007 should therefore be amended accordingly.

Having regard to the Treaty establishing the European Community,

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

Having regard to Council Regulation (EC) No 318/2006 of 20 February 2006 on the common organisation of the markets in the sugar sector<sup>(1)</sup>, and in particular Articles 40(1)(g) and 40(2)(d) thereof,

HAS ADOPTED THIS REGULATION:

*Article 1*

Whereas:

In Article 1 of Regulation (EC) No 900/2007, paragraph 1 is replaced by the following:

(1) Article 1 of Commission Regulation (EC) No 900/2007 of 27 July 2007 on a standing invitation to tender to determine refunds on exports of white sugar until the end of the 2007/2008 marketing year<sup>(2)</sup> and Article 1 of Commission Regulation (EC) No 1060/2007 of 14 September 2007 opening a standing invitation to tender for the resale for export of sugar held by the intervention agencies of Belgium, the Czech Republic, Ireland, Spain, Italy, Hungary, Slovakia and Sweden<sup>(3)</sup> open respective standing invitations to tender for all destinations excluding Andorra, Gibraltar, Ceuta, Melilla, the Holy See (Vatican City State), Liechtenstein, Communes of Livigno and Campione d'Italia, Heligoland, Greenland, Faeroe Islands, the areas of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control, Albania, Croatia, Bosnia and Herzegovina, Serbia<sup>(4)</sup>, Montenegro and the former Yugoslav Republic of Macedonia.

'1. A standing invitation to tender shall be opened in order to determine export refunds on white sugar covered by CN code 1701 99 10 for all destinations excluding:

- (a) third countries: Andorra, Liechtenstein, the Holy See (Vatican City State), Croatia, Bosnia and Herzegovina, Serbia (\*), Montenegro, Albania and the former Yugoslav Republic of Macedonia;
- (b) territories of EU Member States not forming part of the customs territory of the Community: the Faeroe Islands, Greenland, Heligoland, Ceuta, Melilla, the communes of Livigno and Campione d'Italia, and the areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control;

(2) To avoid misinterpretation of the status of the excluded destinations, it is appropriate to distinguish between third countries, territories of EU Member States not forming part of the customs territory of the Community and European territories for whose external relations a Member State is responsible not forming part of the customs territory of the Community.

- (c) European territories for whose external relations a Member State is responsible not forming part of the customs territory of the Community: Gibraltar.

During the period of validity of this standing invitation referred to in the first subparagraph, partial invitations to tender shall be issued.

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

<sup>(2)</sup> OJ L 196, 28.7.2007, p. 26. Regulation as last amended by Regulation (EC) No 1298/2007 (OJ L 289, 7.11.2007, p. 3).

<sup>(3)</sup> OJ L 242, 15.9.2007, p. 8. Regulation as amended by Regulation (EC) No 1476/2007 (OJ L 329, 14.12.2007, p. 17).

<sup>(4)</sup> Including Kosovo, under the auspices of the United Nations, pursuant to UN Security Council Resolution 1244 of 10 June 1999.

(\*) Including Kosovo, under the auspices of the United Nations, pursuant to UN Security Council Resolution 1244 of 10 June 1999.'

*Article 2*

In Article 1 of Regulation (EC) No 1060/2007, the third subparagraph is replaced by the following:

The destinations referred to in the first subparagraph shall be:

- (a) third countries: Andorra, Liechtenstein, the Holy See (Vatican City State), Croatia, Bosnia and Herzegovina, Serbia (\*), Montenegro, Albania and the former Yugoslav Republic of Macedonia;
- (b) territories of EU Member States not forming part of the customs territory of the Community: the Faeroe Islands, Greenland, Heligoland, Ceuta, Melilla, the communes of

Livigno and Campione d'Italia, and the areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control;

- (c) European territories for whose external relations a Member State is responsible not forming part of the customs territory of the Community: Gibraltar.

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(\*) Including Kosovo, under the auspices of the United Nations, pursuant to UN Security Council Resolution 1244 of 10 June 1999.'

*Article 3*

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

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

Done at Brussels, 20 February 2008.

*For the Commission*

Mariann FISCHER BOEL

*Member of the Commission*

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## DIRECTIVES

**COUNCIL DIRECTIVE 2008/7/EC**  
**of 12 February 2008**  
**concerning indirect taxes on the raising of capital**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 93 and 94 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament <sup>(1)</sup>,

Having regard to the opinion of the European Economic and Social Committee <sup>(2)</sup>,

Whereas:

- (1) Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital <sup>(3)</sup> has been substantially amended several times <sup>(4)</sup>. Since further amendments are to be made, it should be recast in the interests of clarity.
- (2) The indirect taxes on the raising of capital, namely the capital duty (the duty chargeable on contributions of capital to companies and firms), the stamp duty on securities, and duty on restructuring operations, regardless of whether those operations involve an increase in capital, give rise to discrimination, double taxation and disparities which interfere with the free movement of capital. The same applies as regards other indirect taxes with the same characteristics as capital duty and the stamp duty on securities.
- (3) Consequently, it is in the interests of the internal market to harmonise the legislation on indirect taxes on the raising of capital in order to eliminate, as far as possible, factors which may distort conditions of competition or hinder the free movement of capital.
- (4) The economic effects of capital duty are detrimental to the regrouping and development of undertakings. Such effects are particularly harmful in the present economic

situation in which there is a paramount need for priority to be given to stimulating investment.

- (5) The best solution for attaining these objectives would be to abolish capital duty.
- (6) However, the losses of revenue which would result from the immediate application of such a measure are unacceptable for Member States which currently apply capital duty. Those Member States should therefore have the opportunity to continue to subject to capital duty all or part of the transactions concerned, it being understood that a single rate of tax must be charged within one and the same Member State. Once a Member State has chosen not to levy capital duty on all or part of the transactions under this Directive, it should not be possible for it to reintroduce such duties.
- (7) It is inherent in the concept of an internal market that a duty on the raising of capital within the internal market by a company or firm should not be charged more than once. Accordingly, if the Member State to which the taxing right is attributed does not levy capital duty on certain or all transactions covered by this Directive, no other Member State is to exercise a taxing right in respect of those transactions.
- (8) It is appropriate to maintain strict conditions for situations where Member States continue to levy capital duty, in particular as regards exemptions and reductions.
- (9) Apart from capital duty, no indirect taxes on the raising of capital should be levied. In particular, no stamp duty should be levied on securities, regardless of the origin of such securities, and regardless of whether they represent a company's own capital or its loan capital.
- (10) The list of capital companies set out in Directive 69/335/EEC is incomplete and should therefore be adapted.

<sup>(1)</sup> Opinion of the European Parliament of 12 December 2007 (not yet published in the Official Journal).

<sup>(2)</sup> OJ C 126, 7.6.2007, p. 6.

<sup>(3)</sup> OJ L 249, 3.10.1969, p. 25. Directive as last amended by Directive 2006/98/EC (OJ L 363, 20.12.2006, p. 129).

<sup>(4)</sup> See Annex II, Part A.

- (11) Since the objectives of this Directive cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (12) The obligation to transpose this Directive into national law should be confined to those provisions which represent a substantive change as compared with the earlier Directives. The obligation to transpose the provisions which are unchanged arises under the earlier Directives.
- (13) This Directive should be without prejudice to the obligations of the Member States relating to the time limits for transposition into national law of the Directives set out in Annex II, Part B.
- (14) In view of the detrimental effects of capital duty, the Commission should report every three years on the operation of this Directive with a view to abolishing this duty,

HAS ADOPTED THIS DIRECTIVE:

## CHAPTER I

### SUBJECT MATTER AND SCOPE

#### Article 1

##### Subject matter

This Directive regulates the levying of indirect taxes in respect of the following:

- (a) contributions of capital to capital companies;
- (b) restructuring operations involving capital companies;
- (c) the issue of certain securities and debentures.

#### Article 2

##### Capital company

1. For the purposes of this Directive 'capital company' means:

- (a) any company which takes one of the forms listed in Annex I;

- (b) any company, firm, association or legal person the shares in whose capital or assets can be dealt in on a stock exchange;
- (c) any company, firm, association or legal person operating for profit, whose members have the right to dispose of their shares to third parties without prior authorisation and are only responsible for the debts of the company, firm, association or legal person to the extent of their shares.

2. For the purposes of this Directive, any other company, firm, association or legal person operating for profit shall be deemed to be a capital company.

#### Article 3

##### Contributions of capital

For the purposes of this Directive and subject to Article 4, the following transactions shall be considered to be 'contributions of capital':

- (a) the formation of a capital company;
- (b) the conversion into a capital company of a company, firm, association or legal person which is not a capital company;
- (c) an increase in the capital of a capital company by contribution of assets of any kind;
- (d) an increase in the assets of a capital company by contribution of assets of any kind, in consideration not of shares in the capital or assets of the company, but of rights of the same kind as those of members, such as voting rights, a share in the profits or a share in the surplus upon liquidation;
- (e) the transfer from a third country to a Member State of the centre of effective management of a capital company whose registered office is in a third country;
- (f) the transfer from a third country to a Member State of the registered office of a capital company whose centre of effective management is in a third country;
- (g) an increase in the capital of a capital company by capitalisation of profits or of permanent or temporary reserves;
- (h) an increase in the assets of a capital company through the provision of services by a member which does not entail an increase in the company's capital, but which does result in a variation in the rights in the company or which may increase the value of the company's shares;
- (i) a loan taken up by a capital company, if the creditor is entitled to a share in the profits of the company;

- (j) a loan taken up by a capital company with a member or a member's spouse or child, or a loan taken up with a third party, if it is guaranteed by a member, on condition that such loans have the same function as an increase in the company's capital.

#### Article 4

##### Restructuring operations

1. For the purposes of this Directive, the following restructuring operations shall not be considered to be contributions of capital:

- (a) the transfer by one or more capital companies of all their assets and liabilities, or one or more branches of activity to one or more capital companies which are in the process of being formed or which are already in existence, provided that the consideration for the transfer consists at least in part of securities representing the capital of the acquiring company;
- (b) the acquisition, by a capital company which is in the process of being formed or which is already in existence, of shares representing a majority of the voting rights of another capital company, provided that the consideration for the shares acquired consists at least in part of securities representing the capital of the former company. Where the majority of the voting rights is reached by means of two or more transactions, only the transaction whereby the majority of voting rights is reached and any subsequent transactions shall be regarded as restructuring operations.

2. Restructuring operations shall also include the transfer to a capital company of all assets and liabilities of another capital company which is wholly owned by the former company.

#### CHAPTER II

##### GENERAL PROVISIONS

#### Article 5

##### Transactions not subject to indirect tax

1. Member States shall not subject capital companies to any form of indirect tax whatsoever in respect of the following:

- (a) contributions of capital;
- (b) loans, or the provision of services, occurring as part of contributions of capital;
- (c) registration or any other formality required before the commencement of business to which a capital company may be subject by reason of its legal form;

- (d) alteration of the constituent instrument or regulations of a capital company, and in particular the following:

- (i) the conversion of a capital company into a different type of capital company;
- (ii) the transfer from a Member State to another Member State of the centre of effective management or of the registered office of a capital company;

- (iii) a change in the objects of a capital company;

- (iv) the extension of the period of existence of a capital company;

- (e) the restructuring operations referred to in Article 4.

2. Member States shall not subject the following to any form of indirect tax whatsoever:

- (a) the creation, issue, admission to quotation on a stock exchange, making available on the market or dealing in stocks, shares or other securities of the same type, or of the certificates representing such securities, by whomsoever issued;
- (b) loans, including government bonds, raised by the issue of debentures or other negotiable securities, by whomsoever issued, or any formalities relating thereto, or the creation, issue, admission to quotation on a stock exchange, making available on the market or dealing in such debentures or other negotiable securities.

#### Article 6

##### Duties and value added tax

1. Notwithstanding Article 5, Member States may charge the following duties and taxes:

- (a) duties on the transfer of securities, whether charged at a flat rate or not;
- (b) transfer duties, including land registration taxes, on the transfer, to a capital company, of businesses or immovable property situated within their territory;
- (c) transfer duties on assets of any kind transferred to a capital company, insofar as such property is transferred for a consideration other than shares in the company;
- (d) duties on the creation, registration or discharge of mortgages or other charges on land or other property;

(e) duties in the form of fees or dues;

(f) value added tax.

2. The amount charged by way of the duties and taxes listed in points (b) to (e) of paragraph 1 shall not vary according to whether or not the centre of effective management or the registered office of the capital company is situated within the territory of the Member State charging the duties or taxes. Those amounts may not exceed those of duties or taxes applicable to like transactions which take place within the Member State charging them.

#### CHAPTER III

#### SPECIAL PROVISIONS

##### Article 7

##### **Levying of capital duty in certain Member States**

1. Notwithstanding Article 5(1)(a), a Member State which as at 1 January 2006 charged a duty on contributions of capital to capital companies, hereinafter 'capital duty', may continue to do so provided that it complies with Articles 8 to 14.

2. If, at any time after 1 January 2006, a Member State discontinues the charging of capital duty, it may not reintroduce it.

3. If, at any time after 1 January 2006, a Member State discontinues the charging of capital duty on the contributions of capital referred to in Article 3(g) to (j), it may not reintroduce capital duty on such contributions of capital, notwithstanding Article 10(2).

4. If, at any time after 1 January 2006, a Member State discontinues the charging of capital duty on the supplying of fixed or working capital to a branch, it may not reintroduce duty on the contributions of capital concerned, notwithstanding Article 10(4).

5. If, at any time after 1 January 2006, a Member State allows exemptions under Article 13, it may not subsequently charge capital duty on the contributions of capital concerned.

##### Article 8

##### **Rate of capital duty**

1. Capital duty shall be charged at a single rate.

2. The rate of capital duty applied by a Member State may not exceed the rate applied by that Member State on 1 January 2006.

Where, after that date, the Member State reduces the rate applied, it may not reintroduce a higher rate.

3. The rate of capital duty may not in any event exceed 1 %.

##### Article 9

##### **Exclusion of certain entities from the scope of application**

Member States may for the purposes of levying capital duty choose not to regard as capital companies the entities referred to in Article 2(2).

##### Article 10

##### **Transactions subject to capital duty and distribution of taxing rights**

1. Where, pursuant to Article 7(1), a Member State continues to charge capital duty, it shall subject to capital duty the contributions of capital referred to in Article 3(a) to (d), if the centre of effective management of the capital company is situated in that Member State at the time when the contribution of capital is made.

It shall also subject to capital duty the contributions of capital referred to in Article 3(e) and (f).

2. Where a Member State continues to charge capital duty, it may do so on the contributions of capital referred to in Article 3(g) to (j), if the centre of effective management of the capital company is situated in that Member State at the time when the contribution of capital is made.

3. Where the centre of effective management of a capital company is situated in a third country and its registered office is situated in a Member State which continues to charge capital duty, contributions of capital shall be subject to capital duty in that Member State.

4. Where the registered office and the centre of effective management of a capital company are situated in a third country, the supply of fixed or working capital to a branch situated in a Member State which continues to charge capital duty may be subject to capital duty in that Member State.

##### Article 11

##### **Basis of assessment for capital duty**

1. In the case of contributions of capital as referred to in Article 3(a), (c) and (d), the basis of assessment for capital duty shall be the actual value of assets of any kind contributed or to be contributed by the members, after the deduction of liabilities assumed and of expenses borne by the company as a result of each contribution.

The charging of capital duty may be postponed until the contributions have been effected.

2. In the case of contributions of capital as referred to in Article 3(b), (e) and (f), the basis of assessment for capital duty shall be the actual value of the assets of any kind belonging to the company at the time of the conversion or transfer, after the deduction of liabilities and expenses for which the company is responsible at that time.

3. In the case of contributions of capital as referred to in Article 3(g), the basis of assessment for capital duty shall be the nominal amount of the increase.

4. In the case of contributions of capital as referred to in Article 3(h), the basis of assessment for capital duty shall be the actual value of the services provided, after deduction of the liabilities assumed and the expenses borne by the company as a result of the provision of such services.

5. In the case of contributions of capital as referred to in Article 3(i) and (j), the basis of assessment for capital duty shall be the nominal amount of the loan taken up.

6. In the cases referred to in paragraphs 1 and 2, the actual value of the shares in the company allotted or belonging to each member may be used as the basis of assessment for capital duty, except where contributions are made only in cash.

The amount on which duty is charged shall in no circumstances be less than the nominal amount of the shares in the company allotted or belonging to each member.

#### Article 12

##### **Exclusion from the basis of assessment for capital duty**

1. In the case of an increase in capital, the basis of assessment for capital duty shall not include the following:

- (a) the amount of the assets belonging to the capital company which are allocated to the increase in capital and which have already been subjected to capital duty;
- (b) the amount of the loans taken up by the capital company which are converted into shares in the company and which have already been subjected to capital duty.

2. A Member State may exclude from the basis of assessment for capital duty the amount of the capital contributed by a member with unlimited liability for the obligations of a

capital company as well as the share of such a member in the company's assets.

Where a Member State exercises that power, any transaction as a result of which the liability of a member is limited to his share in the company's capital, in particular when the limitation of liability results from the conversion of a capital company into a different type of capital company, shall be subject to capital duty.

Capital duty shall be charged in all such cases on the value of the share in the company's assets belonging to members with unlimited liability for the company's obligations.

3. In the case of a contribution of capital as referred to in Article 3(c), following a reduction in the company's capital as a result of losses sustained, that part of the contribution of capital which corresponds to the reduction in capital may be excluded from the basis of assessment, provided that the contribution of capital occurs within four years of the reduction in capital.

#### Article 13

##### **Exemption of contributions of capital to certain capital companies**

Member States may exempt from capital duty contributions of capital made to the following:

- (a) capital companies which supply public services, such as public transport undertakings, port authorities or undertakings supplying water, gas or electricity, in cases where the State or regional or local authorities own at least half of the company's capital;
- (b) capital companies which, in accordance with their regulations and in fact, pursue exclusively and directly cultural, social, relief or educational objectives.

Member States which exempt such contributions of capital from capital duty shall also apply the exemption to the supply of fixed or working capital to a branch within its territory as referred to in Article 10(4).

#### Article 14

##### **Derogation procedure**

Certain types of contributions of capital or of capital companies may be the subject of exemptions or reductions in rates in order to achieve fairness in taxation, or for social considerations, or to enable a Member State to deal with special situations.

The Member State which proposes to take such a measure shall refer the matter to the Commission in good time, having regard to the application of Article 97 of the Treaty.

#### CHAPTER IV

#### FINAL PROVISIONS

##### Article 15

##### Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 3, 4, 5, 7, 8, 12, 13 and 14 by 31 December 2008 at the latest. They shall forthwith communicate to the Commission the texts of those provisions and a correlation table between those provisions and this Directive.

When they are adopted by Member States, these measures shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. They shall also include a statement that references in existing laws, regulations and administrative provisions to the directives repealed by this Directive shall be construed as references to this Directive. The methods of making such reference and how that statement is to be formulated shall be laid down by Member States.

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

##### Article 16

##### Repeal

Directive 69/355/EEC, as amended by the Directives listed in Part A of Annex II, is repealed with effect from 1 January 2009, without prejudice to the obligations of the Member States

relating to the time limits for transposition into national law of the Directives set out in Part B of Annex II.

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

##### Article 17

##### Review

The Commission shall report to the Council every three years on the operation of this Directive notably with the view to abolish capital duty. In order to assist the Commission with the review, Member States shall provide the Commission with information in respect of the revenue from capital duty.

##### Article 18

##### Entry into force

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

Articles 1, 2, 6, 9, 10 and 11 shall apply from 1 January 2009.

##### Article 19

##### Addressees

This Directive is addressed to the Member States.

Done at Brussels, 12 February 2008.

For the Council

The President

A. BAJUK

## ANNEX I

## LIST OF COMPANIES REFERRED TO IN ARTICLE 2(1)(A)

- (1) Companies incorporated under Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) <sup>(1)</sup>
- (2) companies under Belgian law known as:
  - (i) société anonyme/naamloze vennootschap
  - (ii) société en commandite par actions/commanditaire vennootschap op aandelen
  - (iii) société privée à responsabilité limitée/besloten vennootschap met beperkte aansprakelijkheid
- (3) companies under Bulgarian law known as:
  - (i) 'Акционерно дружество'
  - (ii) 'Командитно дружество с акции'
  - (iii) 'Дружество с ограничена отговорност'
- (4) companies under Czech law known as:
  - (i) akciová společnost
  - (ii) komanditní společnost
  - (iii) společnost s ručením omezeným
- (5) companies under Danish law known as:
  - (i) aktieselskab
  - (ii) kommandit-aktieselskab
- (6) companies under German law known as:
  - (i) Aktiengesellschaft
  - (ii) Kommanditgesellschaft auf Aktien
  - (iii) Gesellschaft mit beschränkter Haftung
- (7) companies under Estonian law known as:
  - (i) täisühing
  - (ii) usaldusühing
  - (iii) osaühing
  - (iv) aktsiaselts
  - (v) tulundusühistu
- (8) companies under Irish law known as: companies incorporated with limited liability
- (9) companies under Greek law known as:
  - (i) Ανώνυμος Εταιρία
  - (ii) Ετερόρρυθμος κατά μετοχάς Εταιρία
  - (iii) Εταιρία Περιορισμένης Ευθύνης
- (10) companies under Spanish law known as:
  - (i) sociedad anónima
  - (ii) sociedad comanditaria por acciones
  - (iii) sociedad de responsabilidad limitada

<sup>(1)</sup> OJ L 294, 10.11.2001, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

- (11) companies under French law known as:
- (i) société anonyme
  - (ii) société en commandite par actions
  - (iii) société à responsabilité limitée
- (12) companies under Italian law known as:
- (i) società per azioni
  - (ii) società in accomandita per azioni
  - (iii) società a responsabilità limitata
- (13) companies under Cypriot law known as: εταιρείες περιορισμένης ευθύνης
- (14) companies under Latvian law known as: kapitālsabiedrība
- (15) companies under Lithuanian law known as:
- (i) akcinė bendrovė
  - (ii) uždaroji akcinė bendrovė
- (16) companies under Luxembourg law known as:
- (i) société anonyme
  - (ii) société en commandite par actions
  - (iii) société à responsabilité limitée
- (17) companies under Hungarian law known as:
- (i) részvénytársaság
  - (ii) korlátolt felelősségű társaság
- (18) companies under Maltese law known as:
- (i) Kumpaniji ta' Responsabilità Limitata
  - (ii) Soċjetajiet in akkomandita li l-kapital tagħhom jkun maqsum f'azzjonijiet
- (19) companies under Dutch law known as:
- (i) naamloze vennootschap
  - (ii) besloten vennootschap met beperkte aansprakelijkheid
  - (iii) open commanditaire vennootschap
- (20) companies under Austrian law known as:
- (i) Aktiengesellschaft
  - (ii) Gesellschaft mit beschränkter Haftung
- (21) companies under Polish law known as:
- (i) spółka akcyjna
  - (ii) spółka z ograniczoną odpowiedzialnością
- (22) companies under Portuguese law known as:
- (i) sociedade anónima
  - (ii) sociedade em comandita por acções
  - (iii) sociedade por quotas

(23) companies under Romanian law known as:

- (i) 'societăți în nume colectiv'
- (ii) 'societăți în comandită simplă'
- (iii) 'societăți pe acțiuni'
- (iv) 'societăți în comandită pe acțiuni'
- (v) 'societăți cu răspundere limitată'

(24) companies under Slovenian law known as:

- (i) delniška družba
- (ii) komanditna delniška družba
- (iii) družba z omejeno odgovornostjo

(25) companies under Slovak law known as:

- (i) akciová spoločnosť
- (ii) spoločnosť s ručením obmedzeným
- (iii) komanditná spoločnosť

(26) companies under Finnish law known as:

- (i) osakeyhtiö – aktiebolag
- (ii) osuuskunta – andelslag
- (iii) säästöpankki – sparbank
- (iv) vakuutusyhtiö – försäkringsbolag

(27) companies under Swedish law known as:

- (i) aktiebolag
- (ii) försäkringsaktiebolag

(28) companies under the law of the United Kingdom known as: companies incorporated with limited liability.

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## ANNEX II

## PART A

**Repealed Directive with list of its successive amendments**

(referred to in Article 16(1))

|                                                    |                                 |
|----------------------------------------------------|---------------------------------|
| Council Directive 69/335/EEC                       | (OJ L 249, 3.10.1969, p. 25).   |
| Point VI.1 of Annex I to 1972 Act of Accession     | (OJ L 73, 27.3.1972, p. 93).    |
| Council Directive 73/79/EEC                        | (OJ L 103, 18.4.1973, p. 13).   |
| Council Directive 73/80/EEC                        | (OJ L 103, 18.4.1973, p. 15).   |
| Council Directive 74/553/EEC                       | (OJ L 303, 13.11.1974, p. 9).   |
| Point VI.1 of Annex I to 1979 Act of Accession     | (OJ L 291, 19.11.1979, p. 95).  |
| Council Directive 85/303/EEC                       | (OJ L 156, 15.6.1985, p. 23).   |
| Point V.1 of Annex I to 1985 Act of Accession      | (OJ L 302, 15.11.1985, p. 167). |
| Point XI.B.I.1 of Annex I to 1994 Act of Accession | (OJ C 241, 29.8.1994, p. 196).  |
| Point 9.1 of Annex II to 2003 Act of Accession     | (OJ L 236, 23.9.2003, p. 555).  |

## PART B

**List of time limits for transposition into national law**

(referred to in Article 16(1))

| Directive                    | Time-limits for transposition |
|------------------------------|-------------------------------|
| Council Directive 69/335/EEC | 1 January 1972                |
| Council Directive 73/79/EEC  | —                             |
| Council Directive 73/80/EEC  | —                             |
| Council Directive 74/553/EEC | —                             |
| Council Directive 85/303/EEC | 1 January 1986                |

## ANNEX III

## Correlation Table

| Directive 69/335/EEC                         | This Directive                                       |
|----------------------------------------------|------------------------------------------------------|
| Article 1                                    | Article 7                                            |
| —                                            | Article 1                                            |
| Article 2(1)                                 | Article 10(1), first subparagraph, and Article 10(2) |
| Article 2(2)                                 | Article 10(3)                                        |
| Article 2(3)                                 | Article 10(4)                                        |
| Article 3(1), introductory words             | Article 2(1), introductory words                     |
| Article 3(1)(a)                              | Article 2(1)(a) and Annex I                          |
| Article 3(1)(b)                              | Article 2(1)(b)                                      |
| Article 3(1)(c)                              | Article 2(1)(c)                                      |
| Article 3(2), first sentence                 | Article 2(2)                                         |
| Article 3(2), second sentence                | Article 9                                            |
| Article 4(1)(a)-(f)                          | Article 3(a)-(f) and Article 10(1)                   |
| Article 4(1)(g) and (h)                      | Article 5(1)(d)(ii)                                  |
| Article 4(2), first subparagraph             | Article 3(g)-(j), Article 7(3) and Article 10(2)     |
| Article 4(2), second subparagraph            | —                                                    |
| Article 4(3)                                 | Article 5(1)(d)                                      |
| Article 5(1)(a)                              | Article 11(1)                                        |
| Article 5(1)(b)                              | Article 11(2)                                        |
| Article 5(1)(c)                              | Article 11(3)                                        |
| Article 5(1)(d)                              | Article 11(4)                                        |
| Article 5(1)(e)                              | Article 11(5)                                        |
| Article 5(2)                                 | Article 11(6)                                        |
| Article 5(3)                                 | Article 12(1)                                        |
| Article 6(1)                                 | Article 12(2), first subparagraph                    |
| Article 6(2)                                 | Article 12(2), second and third subparagraphs        |
| Article 7(1), first and second subparagraphs | Article 4, Article 5(1)(e)                           |
| Repealed Article 7(1)(b)                     | Article 4(a)                                         |
| Repealed Article 7(1)(bb)                    | Article 4(b)                                         |
| Article 7(1), third subparagraph             | —                                                    |
| Article 7(2)                                 | Articles 7 and 8                                     |
| Article 7(3)                                 | Article 12(3)                                        |
| Article 8                                    | Article 7(5) and Article 13, first subparagraph      |
| —                                            | Article 13, second subparagraph                      |
| Article 9                                    | Article 14                                           |
| Article 10                                   | Article 5(1)(a)-(c)                                  |
| Article 11                                   | Article 5(2)                                         |
| Article 12                                   | Article 6                                            |
| Article 13                                   | Article 15(1)                                        |

| Directive 69/335/EEC | This Directive |
|----------------------|----------------|
| Article 14           | Article 15(2)  |
| —                    | Article 16     |
| —                    | Article 17     |
| Article 15           | Article 18     |
| Article 3(1)(a)      | Annex I        |
| —                    | Annex II       |
| —                    | Annex III      |

## II

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

## DECISIONS

## COUNCIL

## COUNCIL DECISION

of 28 January 2008

**concerning the conclusion of the Agreement on maritime transport between the European Community and its Member States, of the one part, and the Government of the People's Republic of China, of the other part**

(2008/143/EC)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 80(2) thereof in conjunction with the first sentence of the first subparagraph of Article 300(2) and the first subparagraph of Article 300(3) thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Parliament <sup>(1)</sup>,

Whereas:

(1) On 12 February 1998 the Council authorised the Commission to open negotiations for an Agreement on maritime transport between the European Community and its Member States, of the one part, and the Government of the People's Republic of China, of the other part (hereinafter the Agreement), and laid down negotiating directives for this purpose.

(2) These negotiations have been successful and the Agreement was initialled by the Commission on 12 December 2001.

(3) The Agreement was signed in Brussels on 6 December 2002, subject to its subsequent conclusion.

(4) A Protocol amending the Agreement to take account of the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union was signed in Beijing on 5 September 2005.

(5) In accordance with Article 6(2) of the 2005 Act of Accession, Bulgaria and Romania are to accede to the Agreement by way of a protocol between the Council and the People's Republic of China.

(6) The necessary constitutional and institutional procedures have been completed and the Agreement should therefore be approved,

HAS DECIDED AS FOLLOWS:

*Article 1*

The Agreement on maritime transport between the European Community and its Member States, of the one part, and the Government of the People's Republic of China, of the other part, is hereby approved on behalf of the Community.

The text of the Agreement <sup>(2)</sup> is attached to this Decision.

<sup>(1)</sup> Opinion delivered on 2 September 2003 (OJ C 76 E, 25.3.2004, p. 102).

<sup>(2)</sup> See page 25 of this Official Journal.

*Article 2*

The President of the Council shall, on behalf of the European Community and its Member States, give the notification provided for in Article 15(2) of the Agreement.

Done at Brussels, 28 January 2008.

*For the Council*

*The President*

D. RUPEL

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**AGREEMENT**

**on maritime transport between the European Community and its Member States, of the one part,  
and the government of the People's Republic of China, of the other part**

THE KINGDOM OF BELGIUM,

THE KINGDOM OF DENMARK,

THE FEDERAL REPUBLIC OF GERMANY,

THE HELLENIC REPUBLIC,

THE KINGDOM OF SPAIN,

THE FRENCH REPUBLIC,

IRELAND,

THE ITALIAN REPUBLIC,

THE GRAND DUCHY OF LUXEMBOURG,

THE KINGDOM OF THE NETHERLANDS,

THE REPUBLIC OF AUSTRIA,

THE PORTUGUESE REPUBLIC,

THE REPUBLIC OF FINLAND,

THE KINGDOM OF SWEDEN,

THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND,

Parties to the Treaty establishing the European Community, hereinafter referred to as 'Member States of the Community',  
and

THE EUROPEAN COMMUNITY,

hereinafter referred to as 'the Community',

of the one part, and

THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA,

hereinafter referred to as 'China',

of the other part,

TAKING INTO ACCOUNT the Trade and Economic Cooperation Agreement between the European Economic Community and the People's Republic of China of May 1985;

TAKING INTO ACCOUNT the importance of the maritime relations existing between the Community and its Member States and China;

BELIEVING that cooperation in the international maritime field between the Parties will be beneficial for the development of the trade and economic relations between China and the Community and its Member States;

WILLING to further strengthen and consolidate the relations, on the basis of equality and mutual benefit, in the field of international maritime transport;

RECOGNISING the importance of maritime transport services and wishing to promote even further multimodal transport involving a sea leg in order to increase efficiencies in the transport chain;

RECOGNISING the importance of further developing a flexible and market-oriented approach and the benefits to economic operators of both Parties of controlling and operating their own international cargo transport services in the context of an efficient international maritime transport system;

TAKING INTO ACCOUNT the existing bilateral maritime agreements between the Member States of the Community and China;

SUPPORTING multilateral negotiations on maritime transport services in the World Trade Organisation;

HAVE DECIDED to conclude this Agreement and to this end have designated their plenipotentiaries:

THE KINGDOM OF BELGIUM:

Isabelle DURANT

Deputy Prime Minister and Minister for Mobility and Transport

THE KINGDOM OF DENMARK:

Bendt BENDTSEN

Minister for Economic Affairs, Trade and Industry

THE FEDERAL REPUBLIC OF GERMANY:

Manfred STOLPE

Federal Minister for Transport, Building and Housing

Wilhelm SCHÖNFELDER

Ambassador, Permanent Representative of the Federal Republic of Germany

THE HELLENIC REPUBLIC:

Georgios ANOMERITIS

Minister for Mercantile Marine

THE KINGDOM OF SPAIN:

Francisco ÁLVAREZ-CASCOS FERNÁNDEZ

Minister for Internal Development

THE FRENCH REPUBLIC:

Pierre SELLAL

Ambassador, Permanent Representative of the French Republic

## IRELAND:

Peter GUNNING

Deputy Permanent Representative of Ireland

## THE ITALIAN REPUBLIC:

Pietro LUNARDI

Minister for Infrastructure and Transport

## THE GRAND DUCHY OF LUXEMBOURG:

Henri GRETHEN

Minister for Economic Affairs, Minister for Transport

## THE KINGDOM OF THE NETHERLANDS:

Roelf Hendrik de BOER

Minister for Transport, Communications and Public Works

## THE REPUBLIC OF AUSTRIA:

Mathias REICHHOLD

Federal Minister for Transport, Innovation and Technology

## THE PORTUGUESE REPUBLIC:

Luís Francisco VALENTE DE OLIVEIRA

Minister for Public Works, Transport and Housing

## THE REPUBLIC OF FINLAND:

Kimmo SASI

Minister for Transport and Communications

## THE KINGDOM OF SWEDEN:

Ulrica MESSING

Minister of Communications

## THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND:

David JAMIESON

Parliamentary Under-Secretary of State for Transport

## THE EUROPEAN COMMUNITY:

Bendt BENDTSEN

Minister for Economic Affairs, Trade and Industry of the Kingdom of Denmark

President-in-Office of the Council of the European Union

Loyola de PALACIO

Vice-President of the Commission of the European Communities

## THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA:

Chunxian ZHANG

Minister for Communications of the People's Republic of China

WHO, having exchanged their full powers, found in good and due form,

HAVE AGREED AS FOLLOWS:

#### Article 1

##### Aim

This Agreement is aimed at improving the conditions under which maritime cargo transport operations are carried out to and from China, to and from the Community, as well as to and from the Community and China on the one hand and third countries on the other, for the benefit of economic operators of the Parties. It is based on the principles of freedom to provide maritime transport services, free access to cargoes and cross trades, unrestricted access to, and non-discriminatory treatment in, the use of ports and auxiliary services as well as regarding commercial presence. It covers all aspects of door-to-door services.

#### Article 2

##### Scope

1. This Agreement applies to the international maritime cargo transport and logistic services, including multimodal operations involving a sea leg, between the ports of China and of the Member States of the Community as well as to the international maritime cargo transport between the ports of the Member States of the Community. It also applies to cross trades and to the movement of equipment such as empty containers, not being carried as cargo against payment, between ports of China or between ports of a Member State of the Community.

If vessels of one Party sail from one port of the other Party to another or from one port of a Member State of the Community to another to load cargo for foreign countries or discharge cargo from abroad, it shall be regarded as a part of the international maritime transport.

This Agreement shall not apply to domestic transport purely between the ports of China or between the ports of any particular Member State of the Community.

2. This Agreement shall not affect the application of the bilateral maritime agreements concluded between China and the Member States of the Community for issues falling outside the scope of this Agreement.

3. This Agreement shall not affect the right of vessels of third parties to engage in cargo and passenger transport between the ports of the Parties or between the ports of either Party and a third party.

#### Article 3

##### Definitions

For the purpose of this Agreement:

- (a) 'international maritime cargo transport and logistic services' cover the supply of services of international maritime transport of cargo, and the related cargo handling, storage and warehousing services, customs clearance services, container station and depot services, port and inland located, shipping agency services and freight forwarding services;
- (b) 'multimodal transport operations' is the carriage of goods using more than one mode of transport including a sea-leg under a single document;
- (c) 'shipping agency services' means activities consisting in representing, within a given geographic area, as an agent, the business interests of one or more shipping lines or shipping companies, for the following purposes:
  - marketing and sales of maritime transport and related services, from quotation to invoicing, and issuance of bills of lading on behalf of the companies, contracting of the necessary related services, preparation of documentation, and provision of business information,
  - acting on behalf of the companies organising the call of the ship or taking over cargoes when required;
- (d) 'freight forwarding services' means the activity consisting of organising and monitoring shipment operations on behalf of shippers, through contracting related services, preparation of documentation and provision of business information;
- (e) 'shipping company' means a company which meets the following conditions:
  - (i) being constituted in accordance with the public or private laws of China, or the Community or a Member State of the Community;
  - (ii) having its registered office or central administration or principal place of business in China or the Community respectively;
  - (iii) engaging in international shipping service with its owned or operated vessels.

Shipping companies established outside the Community or China and controlled by nationals of a Member State of the Community or of China respectively, shall also be beneficiaries of the provisions of this Agreement, if their vessels are registered in that Member State or in China in accordance with their legislation;

- (f) 'subsidiary' means a company owned by a shipping company and having legal personality;
- (g) 'branch office' means a place of business owned by a shipping company and not having legal personality;
- (h) 'representative office' means a representative office of a shipping company of one Party established in the other Party;
- (i) 'vessel' means any merchant ship registered in accordance with the laws of China, or the Community or its Member States in the vessel registration office of either Party under the national flag of that Party and engaged in international maritime transport, including vessels flying the flag of a third country but owned or operated by a shipping company of China or a Member State of the Community. However, this term does not include warships and any other non-commercial ships.

#### Article 4

##### Supply of services

1. Each Party shall continue to grant non discriminatory treatment to vessels flying the flag of the other Party or operated by nationals or companies of the other Party, as compared to the treatment accorded to its own vessels, with regard to access to ports, the use of infrastructure and auxiliary maritime services of those ports, as well as related fees and charges, customs formalities and assignment of berths and facilities for loading and unloading.
2. The Parties undertake to apply effectively the principle of unrestricted access to the international maritime market and traffic on a non-discriminatory and commercial basis.
3. In applying the principles of paragraphs 1 and 2, the Parties shall:
  - (a) not introduce cargo sharing clauses in future agreements with third countries concerning maritime transport

services and terminate such provisions in the case they exist in previous bilateral agreements within a reasonable period of time;

- (b) abolish, upon entry into force of this Agreement, all unilateral administrative, technical, or other measures, which could constitute an indirect restriction and have discriminatory effects on the free supply of services in international maritime transport;
- (c) abstain from implementing on entry into force of this Agreement administrative, technical or legislative measures which could have the effect of discriminating against nationals or companies of the other Party in the supply of services in international maritime transport.

4. One Party shall allow shipping companies of the other Party to have access to and use of, on a non-discriminatory basis and on agreed terms between the companies concerned, feeder services provided by shipping companies registered in the former Party for the international cargo between the ports of China or between the ports of a Member State of the Community.

#### Article 5

##### Commercial presence

In respect of activities for the provision of international maritime cargo transport and logistic services, including door-to-door multimodal transport operations, each Party shall permit the shipping companies of the other Party, to establish wholly owned or jointly-invested subsidiaries, branch or representative offices and, as regards subsidiaries and branch offices to engage in economic activities, in accordance with its laws and regulations. Such activities include, but are not limited to:

1. cargo soliciting and booking of space;
2. making, confirming, handling and issuing of the bill of lading, including the commonly accepted through bill of lading in the international maritime transport; preparation of documentation concerning transport documents and customs documents;
3. fixing, collecting and remitting freight and other charges incurred on the basis of the service contracts or tariff rates;
4. negotiating and signing service contracts;

5. signing contracts for trucking, railway transport, cargo dealing and other related auxiliary services;
6. quoting and publishing tariff rates;
7. engaging in marketing activities related to their service;
8. owning the equipment necessary for the economic activities;
9. provision of business information by any means, including computerised information systems and electronic data interchange, subject to any non-discriminatory restrictions concerning telecommunications;
10. setting up joint ventures with any locally established shipping agency to engage in agency-related businesses, such as organising the call of the vessels or taking delivery of cargoes for shipment.

#### *Article 6*

##### **Transparency**

1. Each Party shall, after prior consultation and appropriate pre-notice, publish promptly all relevant measures of general application, which pertain to or affect the operation of this Agreement.
2. Where publication as referred to in paragraph 1 is not practicable, such information shall be made otherwise publicly available.
3. Each Party shall respond promptly to all requests by the other Party for specific information on any of its measures of general application within the meaning of paragraph 1.

#### *Article 7*

##### **Domestic regulation**

1. The Parties shall ensure that all measures of general application affecting trade in international maritime transport services are administered in a reasonable, objective and impartial manner.
2. In those cases where authorisation is required, the competent authorities of a Party shall, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the competent authorities of a Party

shall provide, without undue delay, information concerning the status of the application.

3. To ensure that measures relating to technical standards and licensing requirements and procedures do not constitute unnecessary barriers to trade, requirements shall be based on objective, non-discriminatory, pre-established and transparent criteria, such as the ability to supply the service; and in the case of licensing procedures, not in themselves be a restriction on or a barrier to the supply of the service.

#### *Article 8*

##### **Key personnel**

The wholly-owned or jointly-invested subsidiaries, branch or representative offices of the shipping companies of one Party established in the other Party shall be entitled to employ key personnel, in accordance with the legislation in force in the host country, irrespective of their nationality. Each Party shall facilitate the acquisition of work permits and visas for foreign employees.

#### *Article 9*

##### **Payments and capital movements**

1. Revenues of nationals or companies of one Party derived from international maritime transport and multimodal operations in the other Party may be settled in freely convertible currencies.
2. The revenues and expenses of the economic activities of the subsidiaries and branch and representative offices of the shipping companies of a Party established in the other Party may be settled in the currency of the host country. The balance after the payment of the local fees by the abovementioned shipping companies, subsidiaries, branch or representative offices may be freely remitted abroad at the exchange rate of the bank on the date of remittance.

#### *Article 10*

##### **Maritime cooperation**

The Parties shall, for the purpose of promoting the development of their maritime industry, encourage their competent authorities, shipping companies, ports, relevant research institutions, universities and colleges to cooperate, including, but not limited to, the following fields:

1. exchange of views related to their activities in the framework of international maritime organisations;

2. formulate and perfect the legislation relating to maritime transport and market administration;
3. promote efficient transport service for international sea trade by the effective exploitation of the ports and fleets of the Parties;
4. guarantee shipping safety and prevent marine pollution;
5. promote maritime education and training, especially the training of seafarers;
6. exchange personnel scientific information and technology;
7. enhance their efforts to combat piracy and terrorism.

#### *Article 11*

##### **Consultations and settlement of disputes**

1. The Parties shall establish appropriate procedures to ensure the proper implementation of this Agreement.
2. Should any dispute between the Parties arise from the interpretation or application of this Agreement, their competent authorities shall seek to resolve the dispute through friendly consultation. In the event that no agreement is reached, it shall be settled through diplomatic channels.

#### *Article 12*

##### **Amendment**

This Agreement may be amended by a written agreement between the Parties and the amendment will come into force in accordance with the procedures specified in Article 15(2).

#### *Article 13*

##### **Territorial application**

This Agreement shall apply, on the one hand, to the territories in which the Treaty establishing the European Community is

applied and under the conditions laid down in that Treaty and, on the other hand, to the territory of China.

#### *Article 14*

##### **Authentic text**

This Agreement is drawn up in duplicate in the Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish and Chinese languages, each of these texts being equally authentic.

#### *Article 15*

##### **Duration and entry into force**

1. This Agreement is concluded for a period of five years. It shall be tacitly renewed on a yearly basis unless one of the Parties denounces it in writing six months before the date of expiry.

2. This Agreement will be approved by the Parties in accordance with their own procedures.

This Agreement shall enter into force on the first day of the second month following the date on which the Parties notify each other that the procedures referred to in the first subparagraph have been completed.

3. If this Agreement is less favourable on certain issues than existing bilateral agreements between individual Member States of the Community and China, the more favourable provisions shall prevail without prejudice to Community obligations and taking into account the Treaty establishing the European Community. The provisions of this Agreement replace those of previous bilateral agreements concluded between Member States of the Community and China, if the latter provisions are either inconsistent with the former, save for the situation referred to in the preceding sentence, or identical to them. Provisions of existing bilateral agreements not covered by this Agreement shall continue to apply.

EN FE DE LO CUAL, los plenipotenciarios abajo firmantes suscriben el presente Acuerdo.

TIL BEKRÆFTELSE HERAF har undertegnede befuldmægtigede underskrevet denne aftale.

ZU URKUND DESSEN haben die unterzeichneten Bevollmächtigten dieses Abkommen unterzeichnet.

ΣΕ ΠΙΣΤΩΣΗ ΤΩΝ ΑΝΩΤΕΡΩ, οι υπογράφωντες πληρεξούσιοι έδεσαν την υπογραφή τους κάτω από την παρούσα συμφωνία.

IN WITNESS WHEREOF the undersigned Plenipotentiaries have signed this Agreement.

EN FOI DE QUOI, les plénipotentiaires soussignés ont apposé leur signature sur le présent accord.

IN FEDE DI CHE i Plenipotenziari sottoscritti hanno apposto le loro firme in calce al presente accordo.

TEN BLIJKE WAARVAN de, hiertoe naar behoren gemachtigde, ondergetekenden hun handtekening onder deze overeenkomst hebben gesteld.

EM FÉ DO QUE, os abaixo-assinados apuseram as suas assinaturas no presente Acordo.

TÄMÄN VAKUUDEKSI alla mainitut täysivaltaiset edustajat ovat allekirjoittaneet tämän sopimuksen.

TILL BEVIS HÄRPÅ har undertecknade befullmäktigade undertecknat detta avtal.

以下特命全权代表已在本协定上签字，以昭信守。

Hecho en Bruselas, el seis de diciembre del dos mil dos.

Udfærdiget i Bruxelles den sjette december to tusind og to.

Geschehen zu Brüssel am sechsten Dezember zweitausendzwei.

Έγινε στις Βρυξέλλες, στις έξι Δεκεμβρίου δύο χιλιάδες δύο.

Done at Brussels on the sixth day of December in the year two thousand and two.

Fait à Bruxelles, le six décembre deux mille deux.

Fatto a Bruxelles, addì sei dicembre duemiladue.

Gedaan te Brussel, de zesde december tweeduizendtwee.

Feito em Bruxelas, em seis de Dezembro de dois mil e dois.

Tehty Brysselissä kuudentena päivänä joulukuuta vuonna kaksituhattakaksi.

Som skedde i Bryssel den sjätte december tjugohundratvå.

本协定于二〇〇二年十二月六日在布鲁塞尔签订。

Pour le Royaume de Belgique  
Voor het Koninkrijk België  
Für das Königreich Belgien



Cette signature engage également la Communauté française, la Communauté flamande, la Communauté germanophone, la Région wallonne, la Région flamande et la Région de Bruxelles-Capitale.

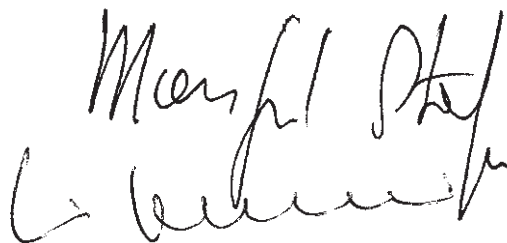
Deze handtekening verbindt eveneens de Vlaamse Gemeenschap, de Franse Gemeenschap, de Duitstalige Gemeenschap, het Vlaamse Gewest, het Waalse Gewest en het Brussels Hoofdstedelijk Gewest.

Diese Unterschrift bindet zugleich die Deutschsprachige Gemeinschaft, die Flämische Gemeinschaft, die Französische Gemeinschaft, die Wallonische Region, die Flämische Region und die Region Brüssel-Hauptstadt.

På Kongeriget Danmarks vegne



Für die Bundesrepublik Deutschland



Για την Ελληνική Δημοκρατία



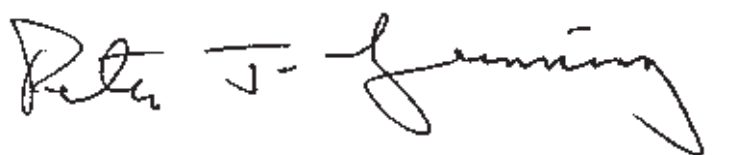
Por el Reino de España



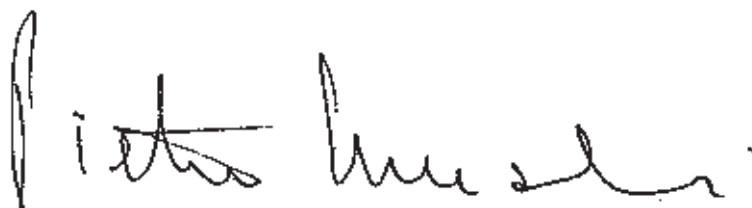
Pour la République française



Thar cheann Na hÉireann  
For Ireland



Per la Repubblica italiana



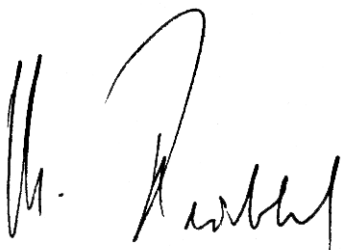
Pour le Grand-Duché de Luxembourg



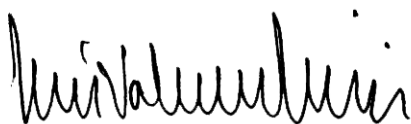
Voor het Koninkrijk der Nederlanden

A stylized, cursive signature in black ink, consisting of a large loop followed by a long, horizontal stroke.

Für die Republik Österreich

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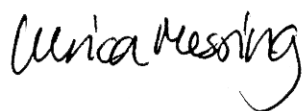
Pela República Portuguesa

A cursive signature in black ink, featuring a series of connected loops and a long horizontal stroke.

Suomen tasavallan puolesta

A cursive signature in black ink, starting with a large 'J' and followed by several loops and a long horizontal stroke.

För Konungariket Sverige

A cursive signature in black ink, starting with a large 'U' and followed by several loops and a long horizontal stroke.

For the United Kingdom of Great Britain and Northern Ireland



Por la Comunidad Europea

For Det Europæiske Fællesskab

Für die Europäische Gemeinschaft

Για την Ευρωπαϊκή Κοινότητα

For the European Community

Pour la Communauté européenne

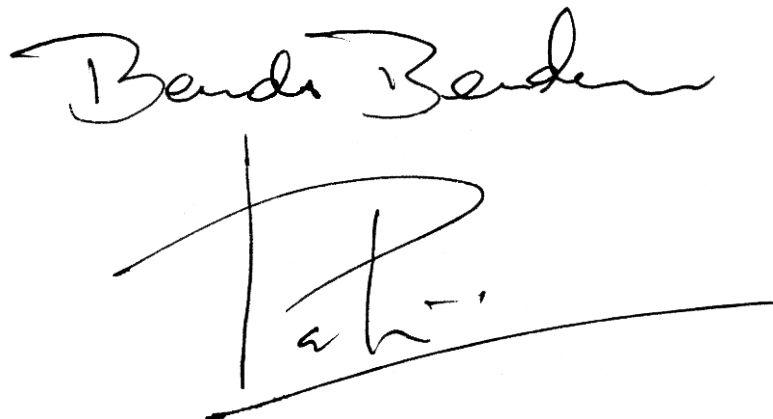
Per la Comunità europea

Voor de Europese Gemeenschap

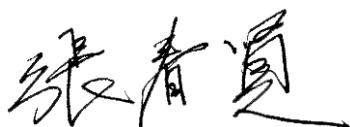
Pela Comunidade Europeia

Euroopan yhteisön puolesta

På Europeiska gemenskapens vägnar



中华人民共和国政府代表



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## COUNCIL DECISION

of 28 January 2008

**concerning the conclusion of the Protocol amending the Agreement on maritime transport between the European Community and its Member States, on the one hand, and the People's Republic of China, on the other hand, to take account of the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union**

(2008/144/EC)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 80(2) thereof in conjunction with the first sentence of the first subparagraph of Article 300(2) and the first subparagraph of Article 300(3) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament <sup>(1)</sup>,

Whereas:

- (1) The Agreement on maritime transport between the European Community and its Member States, on the one hand, and the People's Republic of China, on the other hand (hereinafter the Agreement), was signed in Brussels on 6 December 2002.
- (2) A Protocol amending the Agreement to take account of the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union was signed in Beijing on 5 September 2005.
- (3) In accordance with Article 6(2) of the 2005 Act of Accession Bulgaria and Romania are to accede to the Agreement by way of a protocol between the Council and the People's Republic of China.

- (4) The necessary constitutional and institutional procedures have been completed and the Protocol should therefore be approved,

HAS DECIDED AS FOLLOWS:

*Sole Article*

1. The Protocol amending the Agreement on maritime transport between the European Community and its Member States, on the one hand, and the People's Republic of China, on the other hand, to take account of the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union is hereby approved on behalf of the Community.

The text of the Protocol <sup>(2)</sup> is attached to this Decision.

2. The President of the Council shall, on behalf of the European Community and its Member States, give the notification provided for in Article 3 of the Protocol.

Done at Brussels, 28 January 2008.

*For the Council*  
*The President*  
D. RUPEL

<sup>(1)</sup> Opinion delivered on 5 July 2005 (OJ C 157 E, 6.7.2006, p. 53).

<sup>(2)</sup> See page 38 of this Official Journal.

**PROTOCOL****amending the Agreement on maritime transport between the European Community and its Member States, of the one part, and the Government of the People's Republic of China, of the other part**

THE KINGDOM OF BELGIUM,

THE CZECH REPUBLIC,

THE KINGDOM OF DENMARK,

THE FEDERAL REPUBLIC OF GERMANY,

THE REPUBLIC OF ESTONIA,

THE HELLENIC REPUBLIC,

THE KINGDOM OF SPAIN,

THE FRENCH REPUBLIC,

IRELAND,

THE ITALIAN REPUBLIC,

THE REPUBLIC OF CYPRUS,

THE REPUBLIC OF LATVIA,

THE REPUBLIC OF LITHUANIA,

THE GRAND DUCHY OF LUXEMBOURG,

THE REPUBLIC OF HUNGARY,

THE REPUBLIC OF MALTA,

THE KINGDOM OF THE NETHERLANDS,

THE REPUBLIC OF AUSTRIA,

THE REPUBLIC OF POLAND,

THE PORTUGUESE REPUBLIC,

THE REPUBLIC OF SLOVENIA,

THE SLOVAK REPUBLIC,

THE REPUBLIC OF FINLAND,

THE KINGDOM OF SWEDEN,

THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND,

hereinafter referred to as the 'Member States', represented by the Council of the European Union, and

THE EUROPEAN COMMUNITY, hereinafter referred to as 'the Community', represented by the Council of the European Union,

of the one part, and

THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA,

of the other part,

HAVING REGARD TO the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union and thereby to the Community on 1 May 2004,

HAVE AGREED AS FOLLOWS:

#### Article 1

The Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic shall be Parties to the Agreement on Maritime Transport between the European Community and its Member States, of the one part, and the Government of the People's Republic of China, of the other part, signed in Brussels on 6 December 2002 (hereinafter called the Agreement).

#### Article 2

The texts of the Agreement in the Czech, Estonian, Latvian, Lithuanian, Hungarian, Maltese, Polish, Slovenian and Slovak languages, which are attached to this Protocol shall become authentic under the same conditions as the other language versions drawn up in accordance with Article 14 of the Agreement.

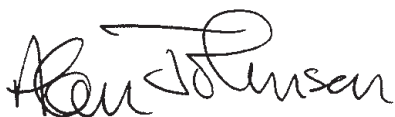
#### Article 3

This Protocol shall be approved by the Contracting Parties in accordance with their own procedures. It shall enter into force on the same day the Agreement enters into force. Should however this Protocol be approved by the Contracting Parties on a later date than the entry into force of the Agreement, then the Protocol shall enter into force on the date on which the Parties have notified each other on the accomplishment of the internal procedures for approval.

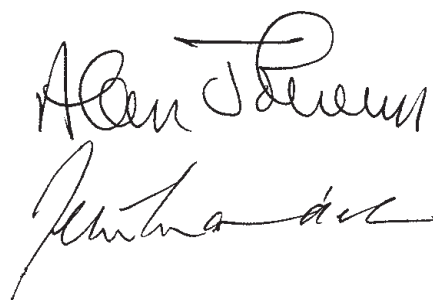
#### Article 4

This Protocol is drawn up at Beijing, on this fifth day of September in the year two thousand and five, in duplicate, in the Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovenian, Slovak, Spanish, Swedish and Chinese languages, each of these texts being equally authentic.

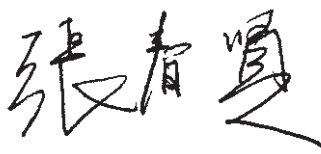
Por los Estados miembros  
Za členské státy  
For medlemsstaterne  
Für die Mitgliedstaaten  
Liikmesriikide nimel  
Για τα κράτη μέλη  
For the Member States  
Pour les États membres  
Per gli Stati membri  
Dalībvalstu vārdā  
Valstybių narių vardu  
A tagállamok részéről  
Ghall-Istati Membri  
Voor de lidstaten  
W imieniu państw członkowskich  
Pelos Estados-Membros  
Za členské štáty  
Za države članice  
Jäsenvaltioiden puolesta  
På medlemsstaternas vägnar  
欧共体成员国代表



Por la Comunidad Europea  
Za Evropské společenství  
For Det Europæiske Fællesskab  
Für die Europäische Gemeinschaft  
Euroopa Ühenduse nimel  
Για την Ευρωπαϊκή Κοινότητα  
For the European Community  
Pour la Communauté européenne  
Per la Comunità europea  
Eiropas Kopienas vārdā  
Europos bendrijos vardu  
az Európai Közösség részéről  
Ghall-Komunità Ewropea  
Voor de Europese Gemeenschap  
W imieniu Wspólnoty Europejskiej  
Pela Comunidade Europeia  
Za Európske spoločenstvo  
za Evropsko skupnost  
Euroopan yhteisön puolesta  
På Europeiska gemenskapens vägnar  
欧洲共同体代表



Por el Gobierno de la República Popular China  
Za vládu Čínské lidové republiky  
For Folkerepublikken Kinas regering  
Im Namen der Regierung der Volksrepublik China  
Hiina Rahvavabariigi valitsuse nimel  
Για την κυβέρνηση της Λαϊκής Δημοκρατίας της Κίνας  
For the Government of the People's Republic of China  
Pour le gouvernement de la République populaire de Chine  
Per il Governo della Repubblica popolare cinese  
Kīnas Tautas Republikas vārdā  
Kinijos Liaudies Respublikos Vyriausybės vardu  
A Kínai Népköztársaság kormányának részéről  
Ghall-Gvern tar-Repubblika tal-Poplu taċ-Ċina  
Voor de regering van de Volksrepubliek China  
W imieniu rządu Chińskiej Republiki Ludowej  
Pelo Governo da República Popular da China  
Za vládu Čínskej ľudovej republiky  
Za Vlado Ljudske republike Kitajske  
Kiinan kansantasavallan hallituksen puolesta  
På Folkrepubliken Kinas regerings vägnar  
中华人民共和国政府代表



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# COMMISSION

## COMMISSION DECISION

of 12 September 2007

on State aid C 54/2006 (ex N 276/2006) planned by Poland for Bison Bial SA

(notified under document number C(2007) 4145)

(Only the Polish version is authentic)

(Text with EEA relevance)

(2008/145/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 <sup>(1)</sup> pursuant to the provisions cited above,

Whereas:

### 1. PROCEDURE

- (1) On 4 May 2006 Poland gave notification of planned restructuring aid for Bison Bial SA (hereinafter 'BB').
- (2) By letter of 13 June 2006 the Commission asked Poland to submit some missing information, which was duly provided by the Polish authorities on 13 July 2006. The Commission requested further information by letter of 29 August 2006. The Polish authorities replied by letters dated 18 September, 20 October and 3 November 2006.
- (3) By letter of 20 December 2006 the Commission informed Poland that it had decided to initiate the proceedings laid down in Article 88(2) of the EC Treaty in respect of the measure. The Commission's decision to initiate proceedings under Article 88(2) of the EC Treaty was published in the *Official Journal of the European Union* <sup>(2)</sup>. The Commission invited interested parties to submit their comments on the measure.
- (4) The Polish authorities submitted their observations by letter of 23 January 2007. No reactions from third parties have been received.

- (5) On 28 March a meeting was organised with representatives of the Polish authorities and BB. The Commission asked for further information by letter of 17 April 2007. The Polish authorities replied by letter of 15 May 2007.

### 2. DETAILED DESCRIPTION OF THE AID

#### 2.1. The company

- (6) BB is a large company which produces machine tool fixtures such as lathe chucks, spindle tooling, milling fixtures and tool holders. It was created in 1948 as a State enterprise. In 1997 the State sold 53 % of BB's shares to the private company Metalexport Sp. z o.o., which in 2004 was renamed Mex-Holding Sp. z o.o. At the end of 2006 the State held 18 % of BB's shares; while the remaining shareholders were private investors. BB had 950 employees in 2006, down from 1 680 in 2000.
- (7) In 2004 the company had a 17 % share of the Polish machine tool fixtures market, which represented only 20 % of BB's output, since the company produces mainly for export (in 2004 30 % of output was exported to the United States, 15 % to Italy, 7 % to Eastern European countries including Russia and 5 % to the United Kingdom). The company distributes most of its exported products through companies from the Mex-Holding Group, such as Toolmex Corporation (USA), Mexpol GmbH (Germany), Toolmex Polmach (UK) or Italmex SA (Italy).
- (8) BB's estimated share of the European market amounts to 1,3 %. The geographical scope of the market for these products is at least European and possibly worldwide. Production of standard machine tool fixtures like the ones made by BB is characterised by overcapacity at world and European level.
- (9) The company is based in a region eligible for aid under Article 87(3)(a) of the EC Treaty.

<sup>(1)</sup> OJ C 23, 1.2.2007, p. 20.

<sup>(2)</sup> See footnote 1.

## 2.2. Difficulties faced by the company

- (10) BB first experienced difficulties in 2001, with losses amounting to PLN 24 million. Poland has identified the following main reasons for these financial difficulties:

— appreciation of the Polish zloty against the US dollar (the United States accounts for 30 % of the company's sales);

— the difficult financial situation in the business group as a whole and non-repayment by the parent company of a PLN 16 million loan;

— declining export sales as a result of stagnation in the United States and Western Europe after September 2001.

- (11) These circumstances, coupled with the high cost of borrowing prevailing in the market, caused serious liquidity problems. The financial difficulties resulted in debt arrears. In 2002 four banks demanded the immediate repayment of loans. BB was unable to meet its existing commitments, including wages, which led to a four-month plant shutdown. Sales dropped by half (from PLN 91 million in 2001 to PLN 48 million in 2002) and the year ended with a net loss of PLN 74,8 million.

- (12) BB's difficulties mirrored the deteriorating situation of its parent company — Mex-Holding Sp. z o.o. In 2002 the group as a whole generated losses of PLN 75,8 million. Since then the situation has improved, but the group continues to record losses and its equity is negative.

- (13) In 2003 the company managed to reduce its losses to PLN 8,5 million, and in 2004 it generated a profit of PLN 5,1 million. According to the Polish authorities, this reflected the fact that a start had been made on restructuring BB. Implementation of the first restructuring measures resulted in increased sales, reduced costs and partial debt remission. Consequently in 2005 and 2006 the company generated profits amounting to PLN 20 million and PLN 12,5 million respectively.

- (14) Despite generating profits, however, BB is still struggling. Accumulated losses on operating activities since 2001

have led to significant indebtedness. In 2004 the value of assets was estimated at PLN 57 million and liabilities amounted to PLN 115,7 million. In other words, equity was negative. At end-2006 equity was still negative, amounting to – PLN 26 million. The analysis submitted to the Commission shows that without aid, the company will go bankrupt in the near future, as it will not be able to reimburse various immediately payable debts.

### *The restructuring operation*

- (15) BB has devised a restructuring plan for 2003-2009. Restructuring focuses mainly on finances, assets and employment. Financial restructuring, which started in 2003, included repayment of old debts in accordance with agreements concluded with private creditors, the writing-off of part of the private and public debt and repayment of the remaining public debt using the loan to be granted by the State-owned Industry Development Agency ('the IDA').

- (16) In 2004 the company signed agreements concerning repayment of debts to banks and its employees and a court settlement agreement with other private creditors.

- (17) Operational restructuring started in 2001. The company reduced employment from 1 680 employees in 2000 to 1 144 employees in 2001 and to 925 employees in 2005. By the end of the restructuring period the company should have a workforce of 800. In other words, by the end of restructuring employment will have been reduced by 52 % in relation to 2000 or by 30 % in relation to 2001.

- (18) As regards asset restructuring, BB plans to sell its redundant assets, move and sell the land on which it is currently located. According to the evaluation submitted, the market value of the land is PLN [...] <sup>(3)</sup> million. Originally the Polish authorities indicated that the land should be sold in 2009, as first all the machines and equipment had to be transferred to the new site. In addition, the real estate for sale is encumbered with a mortgage. Following the Commission decision to initiate the formal investigation procedure, Poland indicated that the sale might be delayed until 2010.

<sup>(3)</sup> Confidential information.

- (19) Between 2003 and 2005 BB invested PLN 1,4 million, and the investments planned for 2006-2009 amount to PLN 14,2 million. These are mainly replacement investments, i.e. purchase of more efficient and environmentally friendly machines and equipment. The plan postpones any significant increase in investments until after 2009 in view of the scarce financial resources available. The bulk of investments will be made in 2010 and will be linked to the company's planned move to a new site.
- (20) Poland initially suggested that the reduction in the number of jobs and the company's production area should be regarded as sufficient to mitigate the adverse effects of the aid. However, Poland also confirmed that these reductions would be counterbalanced by the planned investments in more productive equipment, with the result that BB's production capacity would be unchanged. Poland stated that maintaining capacity at current levels (instead of increasing it) should in itself be regarded as a compensatory measure.
- (21) The notified restructuring plan assumed that restructuring costs for 2003-2009 would amount to PLN 138 million, the main item being financial restructuring costs of PLN 122,6 million. The remaining PLN 15,6 million are investment costs.
- (22) The plan assumes that financial restructuring will consist of repayment of debts to banks of PLN 65,6 million on the basis of composition agreements, repayment of other private debts of PLN 17,5 million and repayment of public debt of PLN 39,5 million. The full amount of the planned state aid will be earmarked for the settlement of public debt. Part of the restructuring costs will be financed by the revenue acquired from the sale of assets after the company moves to its new site.
- (24) The Act of 30 August 2002 incorporated into the Polish system the possibility for companies in financial difficulties to restructure public debt by way of write-offs. The company concerned had to file an application together with a restructuring plan to each public authority whose claims were to be restructured (hereinafter 'restructuring authority'). Having concluded that the proposed restructuring plan could improve the company's financial situation, the restructuring authority issued a decision on restructuring conditions which listed the debts covered by restructuring. If the company fulfilled all the conditions imposed by the decision, the restructuring authority was legally obliged to issue a decision to write off the debts listed in the decision on restructuring conditions.
- (25) The Act of 30 October 2002 subsequently centralised this system and empowered the President of the IDA to issue an equivalent of the above-mentioned decision on restructuring conditions, referred to as a restructuring decision (Article 10(1)(4), read in conjunction with Article 19). The restructuring decision contains an assessment of the restructuring plan and indicates how the public debt referred to in the plan should be restructured. The restructuring authorities in question are then obliged by law to issue individual decisions to write off the public debt listed in the restructuring decision.
- (26) Lastly, the Act of 14 November 2003 amending the Act of 30 October 2002 made the public debt restructuring conditional on the transfer of assets corresponding to at least 25 % of the total amount of debt to be restructured to a third company, the Operator (a company wholly owned by the IDA or the Treasury). The proceeds from the sale of these assets by the Operator were to cover at least part of the public debt concerned, the remainder being written off on completion of restructuring.
- (27) BB applied for public debt restructuring pursuant to the Acts of 30 August 2002 and 30 October 2002. The overall nominal value of the planned state aid is PLN 31,43 million<sup>(4)</sup> (EUR 8,2 million). These measures comprise a preferential loan and write-offs of public debt. A detailed description of the state aid measures is set out in the following table.

#### *The aid measures*

- (23) State aid for the restructuring of BB is based on two pieces of legislation: the Restructuring of Businesses' Public Debt Act of 30 August 2002 ('the Act of 30 August 2002') and the State Aid to Enterprises of Special Significance to the Labour Market Act of 30 October 2002 ('the Act of 30 October 2002'), as amended by the Act of 14 November 2003.

<sup>(4)</sup> The Polish authorities suggested that in order to calculate the aid element of the measure, the value of assets that would be transferred to the Operator in exchange for debt cancellation should be deducted from the nominal value of aid. Basically, the transfer of these assets represents the company's contribution to restructuring and it has no impact on the value of the aid measure. Therefore in this case the aid element is equal to the nominal amount of aid.

Table 2

**Planned state aid**

(PLN)

| No                                                       | Awarding authority                                        | Type of aid       | Nominal amount of aid                                                              |
|----------------------------------------------------------|-----------------------------------------------------------|-------------------|------------------------------------------------------------------------------------|
| <b>Aid under the Act of 30 August 2002</b>               |                                                           |                   |                                                                                    |
| 1.                                                       | ZUS, Bialystok                                            | Write-off         | 933 474,51                                                                         |
| 2.                                                       | ZUS, Bielsk Podlaski                                      | Write-off         | 113 884,66                                                                         |
| 3.                                                       | ZUS, Zambrów                                              | Write-off         | 144 934,88                                                                         |
| 4.                                                       | Mayor of Bialystok                                        | Write-off         | 1 448 108,90                                                                       |
| 5.                                                       | State Fund for the Rehabilitation of the Disabled (PFRON) | Write-off         | 519 591,35                                                                         |
| 6.                                                       | Tax Office II, Bialystok                                  | Write-off         | 217 590,00                                                                         |
| <b>Total aid under the Act of 30 August 2002</b>         |                                                           |                   | 3 377 584,30<br>(with interest as of<br>31 December 2005:<br><b>6 171 774,74</b> ) |
| <b>Aid under the Act of 30 October 2002</b>              |                                                           |                   |                                                                                    |
| 7.                                                       | ZUS, Bialystok                                            | Write-off         | 3 019 362,90                                                                       |
| 8.                                                       | Mayor of Bialystok                                        | Write-off         | 1 505 534,12                                                                       |
| 9.                                                       | State Fund for the Rehabilitation of the Disabled (PFRON) | Write-off         | 539 650,70                                                                         |
| 10.                                                      | Tax Office, Bialystok                                     | Write-off         | 71 516,60                                                                          |
| 11.                                                      | Bialystok Voivodship Office                               | Write-off         | 25 064,81                                                                          |
| 12.                                                      | Grajewo District                                          | Write-off         | 12 133,80                                                                          |
| 13.                                                      | Kolno District                                            | Write-off         | 17 224,60                                                                          |
| 14.                                                      | Mayor of Kolno                                            | Write-off         | 248 648,09                                                                         |
| 15.                                                      | ZUS, Zambrów                                              | Write-off         | 626 625,15                                                                         |
| 16.                                                      | ZUS, Bialystok                                            | Write-off         | 398 029,30                                                                         |
| <b>Total write-offs under the Act of 30 October 2002</b> |                                                           |                   | 6 463 790,07<br>(with interest as of<br>31 December 2005:<br><b>9 259 229,92</b> ) |
| 17.                                                      | Industrial Development Agency                             | Preferential loan | 16 000 000                                                                         |
| <b>Total</b>                                             |                                                           |                   | <b>31 431 004,66</b>                                                               |

### 3. DECISION TO INITIATE PROCEEDINGS UNDER ARTICLE 88(2) OF THE EC TREATY

- (28) The Commission decided to initiate the formal investigation procedure because it had doubts as to whether the restructuring aid was compatible with the common market.
- (29) First, the Commission doubted that the restructuring plan would restore the company's long-term viability. The

Commission suspected that the profits recorded in 2004 and 2005 had been due to one-off items (e.g. debt waivers) and, as such, were not an indication of real improvements within the company. In addition, the plan focused on settling old debts and the investment for which it made provision would not be sufficient to guarantee competitive means of production at the end of the restructuring period.

(30) Second, the Commission had doubts as to the validity of the proposed compensatory measures. The company planned to reduce the surface area of the plant, but that would not have reduced production capacity. Employment had been already significantly reduced, but this seemed to have been necessary for viability reasons.

(31) Lastly, it seemed that not all the measures indicated by the Polish authorities as the company's own contribution could be regarded as such within the meaning of the Guidelines. Therefore it was not clear whether the real own contribution would be large enough, i.e. whether the aid was limited to the minimum necessary.

#### 4. COMMENTS FROM POLAND

(32) Following the Commission decision to initiate the formal investigation procedure with regard to the planned aid for BB, the Polish authorities submitted detailed information on the company's strategy.

(33) The Polish authorities explained that the company's production in Bialystok was located on two sites, one of which was in Bialystok city centre (site at ulica [...]). BB plans to sell this real estate and either move production to its second site or buy a third site, transfer all production there and sell both sites it owns at present. According to the forecasts submitted, BB plans to invest PLN [...] million in 2010, once the site on ulica [...] has been sold. If the company decides to sell both sites and move to a new location the amount of the investments will be even higher.

(34) The Polish authorities have confirmed that basically the company will be modernised in 2010, after it moves. Between 2010 and 2014 BB plans to invest PLN 43 million, PLN [...] million of which should be realised by end-2010, the scheduled date of the move.

(35) The Polish authorities indicate that the investments planned for 2010-2014 are designed to modernise the design and production management system, automate the assembling process for standard fixtures, improve the quality of products, optimise technological production processes and the thermal and chemical treatment of products and improve measurement and control methods. The Polish authorities have also confirmed that the change of site and the investments

which will take place thereafter constitute implementation of the company's long-term strategy.

(36) With a view to avoiding undue distortion of competition, the Polish authorities and the company have proposed three alternative options as possible compensatory measures to be implemented by the company:

(a) capping production by reducing the number of BB's products by 5 % in comparison with its projected future production, or

(b) reducing capacity by selling 5 % of BB's machine tools, or

(c) reducing capacity by selling BB's production division in [...] which, in 2006, accounted for 13 % of BB's turnover and generated a PLN 1,2 million profit.

(37) The third option, i.e. selling off the production division in [...], would lead to a 46 % reduction in BB's product range and a 12 % decrease in the number of machine tools. However, the production division in [...] is partially burdened with debt, the restructuring of which is supposed to be financed by the notified state aid. Moreover, [...]s assets are mortgaged or constitute securities for repayment of BB's commercial debts. Therefore the Polish authorities claim that the problem of [...]s indebtedness needs to be resolved first and that the division cannot be sold until 2009 at the earliest. BB has undertaken to take all the necessary steps to complete the sale by end-2009 if the Commission decides that this would be an appropriate compensatory measure.

(38) As regards the financing of the restructuring process, the Polish authorities have indicated that, taking into account the recent increase in real-estate prices in the region and the location of the plot to be sold (Bialystok city centre), the expected revenue from the sale is PLN [...] million. Estimated revenue from the sale of the [...] production division is PLN [...] million. Lastly, in accordance with the legal basis underpinning the planned state aid scheme, BB is obliged to transfer assets worth PLN 2,795 million to the public body (the Operator) in exchange for cancellation of the debt.

## 5. ASSESSMENT OF THE AID

### 5.1. State aid within the meaning of Article 87(1) of the EC Treaty

- (39) 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 and affects trade between Member States is incompatible with the common market.
- (40) The planned cancellation of public debt, including accrued interest, and the loan from the state-owned agency both involve state resources. These solutions also confer an advantage on the company by reducing its costs. As regards the second measure, given that BB is a company in difficulty whose liabilities far exceed its assets, it would not have obtained this type of financing on the market. The aid element may therefore be regarded as the full amount of the loan.
- (41) The previous restructuring decisions promising the cancellation of public debt and suspending enforcement of debt repayments may also constitute aid. However, the Commission takes the view that, in this case, the aid element of these 'deferments' is reflected in the notified aid, i.e. in the interest accrued over the whole period and added to the total amount of the debt to be cancelled.
- (42) The metal tools fixtures produced by BB are sold on the EU market. BB also competes with other European producers on third markets. Thus the stronger position which BB enjoys as a result of the state aid may impact on the competition in Europe, which means that the criterion of distortion of trade within the Community is fulfilled.
- (43) Therefore the above-mentioned measures are regarded as constituting state aid within the meaning of Article 87(1) of the EC Treaty.

### 5.2. Derogations under Article 87(2) and 87(3) of the EC Treaty

- (44) The exemptions provided for in Article 87(2) of the EC Treaty do not apply in this case. As regards exemptions under Article 87(3), given that the primary objective of the aid is to restore the long-term viability of a firm in difficulty, only the exemption set out in Article 87(3)(c), which authorises state aid to promote the development of certain economic activities where such aid does not adversely affect trading conditions to an extent contrary to the common interest, can be applied. Therefore, the

aid can be considered compatible on the basis of Article 87(3)(c) of the EC Treaty only if the conditions laid down in the Community Guidelines on State aid for rescuing and restructuring firms in difficulty <sup>(5)</sup> (hereinafter 'the Guidelines') are respected.

### 5.3. Eligibility of the company

- (45) According to the Guidelines, a firm is in difficulty if it is unable to recover by using its own resources, by raising the funds it needs from shareholders or by borrowing and if, without intervention by the authorities, it will almost certainly go out of business. The Guidelines also list some of these companies' typical characteristics, such as mounting debt or falling/zero net asset value. Under point 13 of the Guidelines a firm belonging to a larger business group is not normally eligible for restructuring aid, except where it can be demonstrated that the firm's difficulties are intrinsic and are not the result of an arbitrary allocation of costs within the group, and that the difficulties are too serious to be dealt with by the group itself.
- (46) BB should be regarded as a 'firm in difficulty' within the meaning of the Guidelines. Its equity is negative. The company is repaying old debts to private creditors in accordance with signed agreements (the last instalments are to be paid in 2009). If the company does not settle its public debt (through repayment or cancellation), it will be payable immediately. Enforcement of this debt will make repayment of instalments to private creditors impossible and in all probability the company will go bankrupt. BB cannot borrow funds on the market to repay this public debt as its financial situation is very weak and all its assets have already been pledged.
- (47) The existence of profits does not change this assessment of the company's eligibility because BB's equity remains negative. It should also be borne in mind that it was possible to generate profits only because the public authorities suspended enforcement in view of the planned debt cancellation.
- (48) BB's parent company is also in difficulty, making losses and accumulating debt, and so it is unable to resolve BB's problems. The parent company's difficulties started soon after 2000. The parent company's failure to repay a loan granted by BB, which is one of the reasons for BB's difficulties, reflects the real financial difficulties faced by the parent company. This was not an attempt to increase the profits of part of the group or a deliberate aggravation of BB's difficulties.

<sup>(5)</sup> OJ C 244, 1.10.2004, p. 2.

#### 5.4. Restoration of viability

- (49) In the decision to initiate the formal investigation procedure, the Commission expressed doubts about the restructuring operation, pointing out that it was essentially financial in scope and failed to take sufficient account of industrial restructuring. Following the decision to initiate the formal investigation procedure, the Polish authorities provided further information, thereby allaying the Commission's doubts as regards restoration of viability.
- (50) A detailed analysis of BB's accounts points to a real improvement in the company's operations since 2004-2005. Incidental events have made only a limited contribution to this improvement. Incidental events, e.g. debt cancellations, had an additional positive impact on the company's results, but the main source of BB's profits derives from its operational activities.
- (51) The product restructuring analysis demonstrates that the company is increasingly focusing on products with higher added value (in 2001 BB produced 709 000 items with a turnover of PLN 84,9 million, while in 2006 it produced 377 000 items with a turnover of PLN 93,8 million).
- (52) The planned investments for 2003-2009 amount to PLN 14,75 million. In fact the company plans to implement a programme of additional major investments in 2010 worth PLN [...] million which is connected with the plant's planned move to a new location. In the Commission's view, only by implementing the second part of the investment programme will the company's long-term viability be restored.
- (53) For this reason, and taking into account that the real-estate sale necessary to finance the investments is to be delayed until 2010, the Commission is of the opinion that the restructuring period should be prolonged until end-2010 and that the investments planned by the company for 2010 should form part of the restructuring measures. As a result, investments between 2003 and 2010 would amount to PLN [...] (PLN 14,75 million + PLN [...] million), significantly more than the originally planned amount of PLN 15,6 million.
- (54) The Commission notes that the return on equity of BB cannot be calculated at present since its equity is negative. By 2010 the company's equity will have been gradually reconstituted. The figures for 2011 can serve as the long-term value. That year, return on equity will be 9 % (net profit of PLN 4 million on own capital of PLN 44 million). While not very high, this level appears to be justified in the light of the fact that BB operates in a

market with significant competition from Asia and in which margins are squeezed.

- (55) On the basis of these elements, the Commission concludes that implementation of the restructuring plan will restore the company's viability provided that restructuring includes implementation of the investments planned for 2010 and the restructuring period is extended until end-2010.

#### 5.5. Avoidance of undue distortion of competition

- (56) Following the Commission's decision pursuant to Article 88(2) of the EC Treaty, the Polish authorities proposed three alternative compensatory measures that could be implemented by BB.
- (57) As for the first proposal, i.e. a 5 % reduction of the number of items produced, the Commission notes that BB is naturally evolving towards a smaller product range, but with a higher added value. Accordingly, the Commission takes the view that this measure may have no impact on the company's behaviour in practice, and hence will not ensure that BB's market presence is reduced.
- (58) The second option envisaged the sale of 5 % of the company's machines. Taking into account the fact that BB plans to implement a significant modernisation programme which includes the purchase of new, more efficient machines, the Commission does not regard this option as a valid compensatory measure, given that the production capacity of the sold machines could be offset by the higher capacity of the new equipment.
- (59) In the light of the above, the Commission takes the view that these two options do not ensure that the adverse effects of the aid on competition are limited.
- (60) The third option consists in the sale of the company's production division in [...]. This sale would reduce BB's product range by 46 %, its turnover by 13 % and the number of machine tools by 12 %. As such, this option incorporates the solutions provided for in the first two proposals, plus additional elements. In addition, once the [...] production division is put up for sale, the company's potential competitors will have an opportunity to acquire an organised part of BB's capacities, which could mitigate the negative effects of the aid. Lastly, the production division in [...] is viable, generating profits of PLN 1,2 million in 2006, and as such it is not necessary to sell it for restructuring purposes.

(61) In the light of the above, the Commission takes the view that the sale of the division in [...] constitutes a valid and sufficient compensatory measure.

#### 5.6. Aid limited to the minimum

(62) In paragraph 45 of the decision to initiate proceedings, the Commission expressed doubts that the planned repayment of certain debts during the restructuring period <sup>(6)</sup> could be incorporated into restructuring costs. These doubts have not been allayed. The Commission notes that these funds were borrowed as part of the normal financing of the company's operations, and that they can be repaid with the company's existing resources.

(63) However, following extension of the restructuring period until 2010 with a view to including the investments to take place that year, these investments must be included in the list of restructuring costs.

(64) In paragraphs 46 and 47 of the decision to initiate proceedings, the Commission raised doubts that certain measures notified by Poland could be considered as a beneficiary's contribution pursuant to paragraph 43 and 44 of the Guidelines. These doubts have not been allayed. Therefore these measures will not be regarded as a beneficiary's contribution in the following analysis.

(65) As a result, the list of restructuring costs, the beneficiary's contribution and state aid is as follows:

(PLN thousand)

|                                              | 2003-2009     | 2010  | 2003-2010     |
|----------------------------------------------|---------------|-------|---------------|
| <b>Restructuring costs</b>                   |               |       |               |
| Public debt restructuring                    | 31 431        |       | 31 431        |
| Investments                                  | 14 754        | [...] | [...]         |
| <b>Total</b>                                 | <b>46 185</b> | [...] | [...]         |
| <b>Own contribution</b>                      |               |       |               |
| Sale of assets (site at ulica [...])         |               | [...] | [...]         |
| Transfer of assets                           | 2 795         |       | 2 795         |
| Sale of production division in [...]         | [...]         |       | [...]         |
| <b>Total</b>                                 | [...]         | [...] | [...]         |
| <b>State aid</b>                             | <b>31 431</b> |       | <b>31 431</b> |
| Own contribution/restructuring costs: 50,4 % |               |       |               |

(66) BB's own contribution to total restructuring costs is therefore equivalent to 50,4 %, which is in line with the rescue and restructuring aid Guidelines.

(67) Paragraph 45 of the Guidelines states: 'To limit the distortive effect, the amount of the aid or the form in which it is granted must be such as to avoid providing the company with surplus cash.' The Commission observes that the firm is once again making a profit. However, its viability is threatened because of the

amount of its immediately payable debts. The fact that half of the aid was granted in the form of a loan helps to ensure that the aid is limited to the minimum necessary. This is because the loan provides BB with immediate resources for repayment of its arrears. At the same time, BB will have to repay this loan in the future. This will be possible thanks to regular profits and will ensure that the firm does not accumulate surplus cash within the meaning of the Guidelines.

(68) The Commission therefore takes the view that the aid is limited to the minimum necessary.

<sup>(6)</sup> See Table 1 of the decision to initiate proceedings.

## 6. CONCLUSIONS

- (69) The Commission concludes that the notified state aid in favour of Bison Bial can be declared compatible with the common market provided that the imposed conditions are met,

4. The production division in [...] shall be sold by end-2009 to a buyer independent of BB. The Polish authorities shall ensure that, prior to the sale, the business activity of the production division in [...] is properly run, that it is provided with the means to enable its normal development and that no measures are taken by the beneficiary that would intentionally diminish its value, e.g. transfer of intangible assets, staff, customers or sales capacity to other parts of Bison Bial.

HAS ADOPTED THIS DECISION:

### *Article 1*

The aid measures to the amount of PLN 31,43 million notified by Poland for Bison Bial are compatible with the common market, subject to the obligations and conditions set out in Article 2.

### *Article 2*

1. The restructuring period shall be extended until end-2010 and the restructuring plan shall be implemented in full.

2. The site at ulica [...] shall be sold by end-2010.

3. Investments of at least PLN 41,61 million shall be implemented by the end of the restructuring period, i.e. end-2010.

### *Article 3*

The Polish authorities shall submit half-yearly progress reports on the restructuring process.

### *Article 4*

This Decision is addressed to the Republic of Poland.

Done at Brussels, 12 September 2007.

*For the Commission*

Neelie KROES

*Member of the Commission*