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I

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

REGULATIONS

COUNCIL REGULATION (EC) No 1000/2008

of 13 October 2008

imposing a definitive anti-dumping duty on imports of sulphanilic acid originating in the People's Republic of China and India following an expiry review pursuant to Article 11(2) of Regulation (EC) No 384/96

THE COUNCIL OF THE EUROPEAN UNION,

7,1 % on imports of the same product originating in India.

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community⁽¹⁾ (the basic Regulation), and in particular Articles 9 and 11(2) thereof,

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

Whereas:

(3) Within the framework of the abovementioned anti-dumping and countervailing proceedings, the Commission, by Decision 2002/611/EC⁽⁴⁾ accepted a price undertaking offered by one Indian exporting producer, Kokan Synthetics and Chemicals Pvt. Ltd (Kokan).

(4) In February 2004, following an anti-absorption reinvestigation pursuant to Article 12 of the basic Regulation, the Council, by Regulation (EC) No 236/2004⁽⁵⁾, increased the rate of the definitive anti-dumping duty applicable to imports of sulphanilic acid originating in the PRC from 21 % to 33,7 %.

(5) In December 2003, Kokan informed the Commission that it wished to withdraw its undertaking voluntarily. Accordingly, the Commission Decision accepting the undertaking was repealed by Commission Decision 2004/255/EC⁽⁶⁾.

(6) In April 2005, following a request lodged by Kokan, the Commission initiated⁽⁷⁾ a partial interim review pursuant to Article 11(3) of the basic Regulation and Article 19 of Council Regulation (EC) No 2026/97⁽⁸⁾ on protection against subsidized imports from countries not members of the European Community (the basic anti-subsidy Regulation), limited in scope to the examination of the acceptability of a subsequent undertaking to be offered by Kokan.

A. PROCEDURE

1. Measures in force

(1) In July 2002, by Regulation (EC) No 1339/2002⁽²⁾, the Council imposed a definitive anti-dumping duty (the existing measures) of 21 % on imports of sulphanilic acid falling within CN codes ex 2921 42 10 (TARIC code 2921 42 10 60) originating in the People's Republic of China (PRC) and a residual duty rate of 18,3 % on imports originating in India. The measures imposed had been based on the results of an anti-dumping proceeding initiated pursuant to Article 5 of the basic Regulation (the original investigation).

(2) At the same time, by Regulation (EC) No 1338/2002⁽³⁾, the Council imposed a definitive countervailing duty of

⁽¹⁾ OJ L 56, 6.3.1996, p. 1.

⁽²⁾ OJ L 196, 25.7.2002, p. 11.

⁽³⁾ OJ L 196, 25.7.2002, p. 1.

⁽⁴⁾ OJ L 196, 25.7.2002, p. 36.

⁽⁵⁾ OJ L 40, 12.2.2004, p. 17.

⁽⁶⁾ OJ L 80, 18.3.2004, p. 29.

⁽⁷⁾ OJ C 101, 27.4.2005, p. 34.

⁽⁸⁾ OJ L 288, 21.10.1997, p. 1.

(7) By Decision 2006/37/EC ⁽¹⁾, the Commission accepted the subsequent undertaking offered by Kokan in connection with the anti-dumping and countervailing proceedings concerning imports of sulphanilic acid originating in India.

(8) At the same time, Regulation (EC) No 1338/2002 imposing a definitive countervailing duty on imports of sulphanilic acid originating in India and Regulation (EC) No 1339/2002 imposing a definitive anti-dumping duty on imports of sulphanilic acid originating, *inter alia*, in India, were amended by Council Regulation (EC) No 123/2006 ⁽²⁾, to take into account the acceptance of the said undertaking.

2. Request for a review

(9) Following the publication of a notice of impending expiry ⁽³⁾, the Commission, on 24 April 2007, received a request for an expiry review pursuant to Article 11(2) of the basic Regulation. This request was lodged by two Community producers (the applicants) representing 100 % of the Community production of sulphanilic acid.

(10) The applicants alleged and provided sufficient *prima facie* evidence that there was a likelihood of continuation and/or recurrence of dumping and recurrence of injury to the Community industry with regard to imports of sulphanilic acid originating in the PRC and India (the countries concerned).

(11) Having determined, after consulting the Advisory Committee, that sufficient evidence existed for the initiation of an expiry review, the Commission announced on 24 July 2007, by a notice of initiation published in the *Official Journal of the European Union* ⁽⁴⁾, the initiation of an expiry review pursuant to Article 11(2) of the basic Regulation.

3. Parallel investigations

(12) By a notice of initiation published in the *Official Journal of the European Union* on 24 July 2007 ⁽⁵⁾, the Commission also initiated an expiry review investigation pursuant to Article 18 of the basic anti-subsidy Regulation on the countervailing measures in force on imports of sulphanilic acid originating in India. This investigation is still on-going.

(13) By a notice of initiation published in the *Official Journal of the European Union* on 29 September 2007 ⁽⁶⁾, the Commission initiated on its own initiative a partial interim review limited to the level of subsidisation,

pursuant to Article 19 of the basic anti-subsidy Regulation, since there was sufficient *prima facie* evidence available to the Commission that the circumstances with regard to subsidisation, on the basis of which measures had been established, had changed and that these changes were of a lasting nature. This investigation is still on-going.

4. Investigation

4.1. Investigation period

(14) The investigation of continuation or recurrence of dumping covered the period from 1 April 2006 to 31 March 2007 (the review investigation period or RIP). The examination of the trends relevant for the assessment of the likelihood of continuation or recurrence of injury covered the period from 2003 to the end of the review investigation period (the period considered).

4.2. Parties concerned by the investigation

(15) The Commission officially advised the exporting producers, importers and users known to be concerned, the representatives of the exporting countries and the applicants, of the initiation of the expiry review. Interested parties were given the opportunity to make their views known in writing and to request a hearing within the time limit set out in the notice of initiation.

(16) All interested parties, who so requested and showed that there were particular reasons why they should be heard, were granted a hearing.

(17) Questionnaires were sent to all parties known to be concerned, namely to the two Community producers and to all known exporting producers, importers and users.

(18) Replies to the questionnaires were received from the two Community producers and from one exporting producer in India, as well as from four users. None of the exporting producers in the PRC and none of the importers replied to the questionnaire nor made themselves known in the course of this investigation.

(19) The Commission sought and verified all the information it deemed necessary for a determination of the likelihood of continuation or recurrence of dumping and resulting injury and of the Community interest. In this regard, the Commission carried out verification visits at the premises of the following companies:

⁽¹⁾ OJ L 22, 26.1.2006, p. 52.

⁽²⁾ OJ L 22, 26.1.2006, p. 5.

⁽³⁾ OJ C 272, 9.11.2006, p. 18.

⁽⁴⁾ OJ C 171, 24.7.2007, p. 18.

⁽⁵⁾ OJ C 171, 24.7.2007, p. 14.

⁽⁶⁾ OJ C 229, 29.9.2007, p. 9.

(a) Exporting producer in India:

- Kokan Synthetics & Chemicals Pvt Ltd, Mumbai, India;

(b) Community producers:

- Ardenity, Givet, France, and
- CUF Químicos Industriais, Estarreja, Portugal;

(c) Users:

- Kemira Germany GmbH, Leverkusen, Germany, and
- Robama SA, Palafolls, Spain.

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

- (20) The product under review is the same as that of the original investigation, namely sulphanilic acid currently classifiable within CN code ex 2921 42 10. There are basically two grades of sulphanilic acid, which are determined according to their purity: a technical grade and a purified grade. In addition, the purified grade is sometimes commercialised in the form of a salt of sulphanilic acid. Sulphanilic acid is used as a raw material in the production of optical brighteners, concrete additives, food colourants and speciality dyes. While there are different uses of sulphanilic acid, all grades and forms are perceived by users to be reasonably substitutable, are used interchangeably in most applications and are, therefore, treated, as was the case in the original investigation, as one single product.

2. Like product

- (21) As established in the original investigation, this review confirmed that sulphanilic acid is a pure commodity product and its quality and basic physical characteristics are identical, whatever the country of origin. The product concerned and the products manufactured and sold by the exporting producer in India on its domestic market and to third countries, as well as those manufactured and sold by the Community producers on the Community market, have thus been found to have the same basic physical and chemical characteristics and essentially the same uses, and are therefore considered to be like products within the meaning of Article 1(4) of the basic Regulation.

C. LIKELIHOOD OF CONTINUATION AND/OR RECURRENCE OF DUMPING

- (22) In accordance with Article 11(2) of the basic Regulation, it was examined whether dumping was taking place

during the RIP and whether or not the expiry of the measures would be likely to lead to a continuation or recurrence of dumping.

1. Preliminary remarks

- (23) It should be noted that, as the Community expanded to 25 Member States in 2004 and to 27 Member States in 2007, export volumes and market shares of imports in the previous investigation and in the current expiry review cannot be directly compared.

1.1. India

- (24) In order to respect confidential business information and in view of the fact that Kokan represents 100 % of imports originating in India, it has been necessary to present the relevant information in ranges or in indexed form.
- (25) This examination was based on the verified questionnaire reply from the cooperating exporting producer in India that fully cooperated with the investigation. It appears from the information provided by the company and available Eurostat data that all imports of the product concerned during the RIP were accounted for by this exporting producer.
- (26) It was found that during the RIP around 800 to 1 000 tonnes of sulphanilic acid were imported from India into the Community, i.e. approximately 8-10 % of Community consumption. In the original investigation, imports from India amounted to 1 712 tonnes.

1.2. People's Republic of China

- (27) In the absence of cooperation from any of the Chinese exporting producers, the examination of whether or not dumping was currently taking place had to be based on the information available to the Commission from other sources. In this respect, and in accordance with the provisions of Article 18 of the basic Regulation, official Eurostat data was used in order to establish import quantities and prices.
- (28) On the basis of available data, it was found that during the RIP, 1 482 tonnes of sulphanilic acid were imported from the PRC into the Community, i.e. approximately 15 % of the Community consumption. In the original investigation period, imports from the PRC amounted to 2 950 tonnes.

2. Likelihood of continuation of dumping

2.1. India

- (29) In accordance with Article 11(9) of the basic Regulation, the same methodology as in the previous investigation was used to establish the dumping margin. It is recalled that in the original investigation a dumping margin of 24,6 % was established.

(a) Normal value

- (30) For the determination of normal value, it was first established for the cooperating exporting producer whether its total domestic sales of the product concerned were representative in comparison with its export sales to the Community. In accordance with Article 2(2) of the basic Regulation, domestic sales were considered representative when the total domestic sales volume was at least 5 % of its total export sales to the Community. The investigation showed that the domestic sales were representative.

- (31) Subsequently, those types of the product concerned sold domestically by the exporting producer having overall representative domestic sales, and which were identical or directly comparable to the types sold for export to the Community, were identified. The criteria used for the identification of the different product types were the grade (pure or technical), the form (acid powder or sodium salt) and the acid concentration.

- (32) For each product type sold by the exporting producer on its domestic market which was found to be directly comparable with the type sold for export to the Community, it was established whether domestic sales were sufficiently representative for the purposes of Article 2(2) of the basic Regulation. Domestic sales of a particular product type were considered sufficiently representative when the total domestic sales volume of that type during the RIP represented 5 % or more of the total sales volume of the comparable product type exported to the Community. The investigation showed that out of the three types exported by the exporting producer concerned, two were sold in representative quantities on the domestic market.

- (33) An examination was also made as to whether the domestic sales of the company could be regarded as being made in the ordinary course of trade pursuant to Article 2(4) of the basic Regulation.

- (34) This was done by establishing the proportion of domestic sales to independent customers, of each of the two types sold in representative quantities, not sold at a loss during

the RIP. For these product types, since more than 80 % by volume was not sold at a loss on the domestic market, and the weighted average sales price was equal to or higher than the weighted average production cost, normal value, by product type, was calculated as the weighted average of all domestic sales prices, paid or payable by independent customers, of the product type in question, as set out in Article 2(1) of the basic Regulation.

- (35) For the product type which was not sold in representative quantities on the domestic market, normal value had to be constructed. In order to establish the constructed normal value, the cooperating exporting producer's own sales, general and administrative (SG&A) costs incurred and weighted average profit realised on the domestic sales of the like product, in the ordinary course of trade, during the RIP, were added to the average cost of manufacturing during the RIP, pursuant to Articles 2(3) and 2(6) of the basic Regulation.

(b) Export price

- (36) The investigation showed that the exports of the Indian exporting producer were made only to unrelated customers in the Community.
- (37) Consequently, the export price was established in accordance with Article 2(8) of the basic Regulation, namely on the basis of export prices actually paid or payable.

(c) Comparison

- (38) The normal value and export price were compared on an ex-works basis. For the purpose of ensuring a fair comparison between the normal value and the export price, due allowance in the form of adjustments was made for differences affecting the price and price comparability in accordance with Article 2(10) of the basic Regulation. These adjustments were made in respect of transport and insurance costs.

(d) Dumping margin

- (39) As provided by Article 2(11) and (12) of the basic Regulation, the weighted average normal value of each product type of the product concerned exported to the Community in the RIP was compared to the weighted average export price of each corresponding type of the product concerned.

- (40) This comparison showed the absence of dumping for the cooperating exporting producer in India that exported to the Community during the RIP.

- (41) With regard to the absence of dumping by the cooperating exporter in the RIP, it should be noted that, as mentioned in recital 7 above, a price undertaking was in force during the RIP which required the exporting producer concerned to respect a certain price level for exports to the Community. Certain transactions were found to be slightly higher than the level of the minimum import prices (MIPs) of the undertaking, but the majority of the sales were priced at the level of the MIPs.

2.2. People's Republic of China

- (42) In accordance with Article 11(9) of the basic Regulation, the same methodology as in the previous investigation was used to establish the dumping margin. It is recalled that in the original investigation a dumping margin of 21 % was established. However, following an anti-absorption reinvestigation initiated in June 2003, the dumping margin was reassessed and found to have increased to 33,7 %, as described in Regulation (EC) No 236/2004.

(e) Analogue country

- (43) In accordance with Article 2(7) of the basic Regulation, the PRC is not a market economy country and therefore, the normal value for imports from the PRC had to be based on data from a market economy third country.
- (44) In the notice of initiation, India was envisaged as an appropriate market economy third country in respect to the Community exports of the PRC. India was also used as the analogue country in the original investigation.
- (45) The applicants suggested, however, that it would be more appropriate to use the United States of America (US) as an analogue country in this case. It was argued that contrary to India, prices of sulphanilic acid in the US are driven by normal undistorted market forces. Moreover, it was claimed that the process of producing sulphanilic acid in the US is carried out in a manner comparable to that in the PRC and that the quantities produced and sold in the US are representative. In addition, the applicants also argued that access to raw materials in India is not comparable to access to raw materials in the PRC, as Indian producers, due to the Advance License Scheme, prefer importing raw materials instead of buying domestic materials.
- (46) As regards the suggestion of using the US as an analogue country, it is noted that the US, for a number of years, has had protective measures in place in the form of anti-

dumping measures against imports from the PRC and India as well as countervailing measures against imports from India. For this reason, it cannot be excluded that prices have been influenced by these trade defence measures.

- (47) Concerning the access to raw materials, it was also found that Indian manufacturers of sulphanilic acid purchase raw materials on the domestic market. Accordingly, it cannot be argued that access to raw materials makes India an inappropriate analogue country. Moreover, there are several producers of sulphanilic acid in India and imports, for instance from the PRC, are also present on the market. There is therefore no evidence to suggest a lack of competition in India.
- (48) In light of the above, and in the absence of other convincing arguments of changed circumstances since the original investigation, it is concluded that India constitutes an appropriate analogue country for the purpose of establishing normal value in accordance with Article 2(7)(a) of the basic Regulation in the context of this expiry review.

(f) Determination of normal value

- (49) Pursuant to Article 2(7)(a) of the basic Regulation, normal value was established on the basis of verified information received from the cooperating exporting producer in the analogue country. More specifically, normal value was based on the price paid or payable in India by unrelated customers for comparable product types, as these were found to be made in the ordinary course of trade.

(g) Export price

- (50) Given the lack of cooperation from Chinese exporting producers, the export price had to be based on facts available in accordance with Article 18 of the basic Regulation. Official Eurostat figures were chosen as the appropriate basis for establishing the export price.

(h) Comparison

- (51) For the purposes of making a fair comparison between the normal value and the export price, due allowance was made for differences which could affect price comparability. These adjustments were made in respect of transport and insurance costs in accordance with Article 2(10) of the basic Regulation. Normal value at Indian ex-works level was then compared to the adjusted Chinese export price at the same level.

(i) Dumping margin

- (52) The comparison of normal value and export price showed the existence of dumping, the dumping margin being equal to the amount by which normal value exceeded the price for export to the Community. The dumping margin found, as a percentage of the CIF Community-frontier price, was in the order of 15 to 20 %.

3. Development of imports should measures be repealed

3.1. India

(j) Preliminary remarks

- (53) In the absence of dumping during the RIP, it was examined whether dumping from India would be likely to recur should measures be repealed. In order to assess whether there was a likelihood of recurrence of dumping, the pricing behaviour of Kokan, namely its prices to other export markets in comparison with its export prices to the Community and with its domestic prices, and its production, production capacity and stocks were examined. The analysis was based on the information provided in the questionnaire reply and verified at the premises of Kokan during the investigation.

(k) Relationship between prices in the Community and prices within India

- (54) Prices on the Community market were higher than those achieved by Kokan on its domestic market during the RIP. This development, however, should be seen in the light of the fact that the export prices of this company were subject to the discipline of the MIPs of the undertaking.

(l) Relationship between export prices to third countries, export prices to the Community and domestic prices in India

- (55) It was found that the average export price charged by Kokan to third countries was significantly below its average export price to the Community. It was also found that these prices were dumped as they were found to be well below the prices charged by Kokan on its domestic market.

- (56) As mentioned in recitals 7 and 41 above, Kokan was subject to a minimum price undertaking for its exports to the Community during the RIP, whereas the prices charged to customers in other third countries were freely established. In these circumstances, the latter prices are an indication of the likely price level for export to the Community should measures be allowed

to lapse. It was thus concluded that Kokan is likely to reduce its export prices to the Community and that dumping is likely to recur in the Community market in case measures are repealed.

(m) Relationship between export prices to third countries and the price level in the Community market

- (57) It is also noted that export prices to third countries were found to be, on average, below the sales prices of the Community industry in the Community market. This means that the prevailing price level for the product concerned in the Community market makes this market very attractive for the exporting producer in India. On this basis, it is considered that there is indeed an economic incentive to shift sales to the higher-priced Community market in case of repeal of the measures in force.

(n) Unused capacities and stocks

- (58) The investigation revealed that the cooperating exporting producer did not build up stocks during the RIP. However, it was found that the company would be able to increase its production as its capacity utilisation rate was around 65 % during the RIP. It is noted in this respect that unused production capacity of the cooperating exporting producer was found to correspond to more than 30 % of Community consumption.

(o) Conclusion on India

- (59) The investigation clearly showed that price levels in India and in other third countries' markets is significantly lower than the price levels in the Community market. If the existing anti-dumping measures are repealed, there will be a strong incentive for the cooperating Indian exporting producer to deploy unused capacities, but also to shift more sales to the Community market and therefore to continue exporting, even at increased quantities. The assessment made above indicates that the increased quantities of exports to the Community would in all likelihood be made at dumped prices.

3.2. PRC

(p) Preliminary remarks

- (60) Further to the finding of dumping during the RIP, the likelihood of continuation of dumping in case measures are repealed was also examined. In the absence of cooperation from any Chinese exporting producers, the conclusions below rely on facts available, namely information submitted by the applicants, in accordance with Article 18 of the basic Regulation, together with data extracted from Eurostat.

(q) Production capacity

- (61) Publicly available data show that the Chinese production volume is around 22 000 tonnes, which is more than double the consumption in the Community during the RIP. In the absence of cooperation from any Chinese exporting producer, no information was available as to whether spare capacities exist in the PRC. However, according to the information available, Chinese producers have the ability to use the relatively simple batch process currently used to make speciality dyes and chemicals in order to produce sulphanilic acid. Moreover, as mentioned in recital 63 below, the Community market has continued for many years to be an attractive market for Chinese exporters. It is, therefore, reasonable to assume that any spare production capacities that might exist in the PRC would be used to channel additional quantities to the Community market and/or that existing production, increased by switches in production between speciality dyes and chemicals, would be redirected to the Community, should the existing anti-dumping measures be repealed.

(r) Relationship between export prices to third countries and export prices to the Community

- (62) According to the available data, Chinese export prices to third countries were below Chinese export prices to the Community during the RIP. There is a strong likelihood, therefore, that if the measures were to be repealed, the Chinese exporters would re-direct their current exports to third countries to the Community market and that these would continue to be at dumped prices.

(s) Absorption practices

- (63) As established by Regulation (EC) No 236/2004, it was found that absorption of the anti-dumping duty had taken place in respect of exports from the PRC to the Community. This practice demonstrated the continued attractiveness for Chinese exporting producers of the Community market. Since exports were found to be made at dumped prices during the RIP, it can be concluded that dumping is likely to continue if the measures are allowed to lapse and export volumes are likely to increase.

(t) Conclusion on PRC

- (64) The investigation showed that the Chinese exporters continued their dumping practices during the RIP at a significant level. On the basis of the findings in recitals 62 and 63 above, it is concluded that there is a likelihood that significant dumping would continue if the existing measures were repealed. Also, there is a like-

lihood that the volume of dumped imports would significantly increase in the absence of measures.

4. Conclusion regarding the likelihood of continuation or recurrence of dumping

- (65) On the basis of the above, it is concluded that dumping is likely to continue as concerns the Chinese exporters and likely to recur as regards the Indian exporting producers, should the existing measures be repealed.

D. DEFINITION OF THE COMMUNITY INDUSTRY

- (66) Within the Community, the like product is manufactured by two producers whose output is deemed to constitute the total Community production of the like product within the meaning of Article 4(1) of the basic Regulation.

- (67) It should be noted that as compared to the original investigation, the 'Sorochimie Chimie Fine' and 'Quimigal SA' companies have been renamed, the former to 'Ardenity' and the latter to 'CUF Químicos Industriais'.

- (68) These two producers cooperated in the investigation and supported the request for a review. They therefore constitute the Community industry within the meaning of Articles 4(1) and 5(4) of the basic Regulation.

E. SITUATION ON THE COMMUNITY MARKET**1. Consumption in the Community market**

- (69) The apparent Community consumption was established on the basis of:

— imports of the product concerned into the Community market derived from Eurostat,

— total sales of the Community industry on the Community market derived from the questionnaires' replies.

- (70) Community consumption of sulphanilic acid in the RIP was around 10 000 tonnes. Over the period considered, a decrease in consumption of 6 % was observed.

Table 1

Consumption on the Community market

	2003	2004	2005	2006	RIP
Consumption (tonnes)	10 684	10 443	10 899	9 939	9 997
Index	100	98	102	93	94

2. Current imports from the countries concerned

- (71) In order to respect confidential business information, in view of the fact that Kokan represents 100 % of imports originating in India and that the Community industry consists of only two producers, it has been necessary to present the information in Tables 2 to 5 below in an indexed form.

2.1. Import volume and market share of the imports concerned in the RIP

- (72) The volumes and market shares of the imports from the PRC and India developed as set out in the tables below. The import volume data is based on Eurostat.

Table 2

Imports from the countries concerned

Imports (index)	2003	2004	2005	2006	RIP
PRC	100	106	128	86	84
India	100	54	59	56	60
Total countries concerned	100	81	95	72	73

Source: Eurostat.

Table 3

Market share of the countries concerned

Market shares (index)	2003	2004	2005	2006	RIP
PRC	100	109	126	92	90
India	100	55	58	60	64
Total countries concerned	100	83	94	77	78

- (73) Imports from the countries concerned decreased by 27 % over the period considered. The market share of the countries concerned decreased by 22 % between 2003 and the RIP.
- (74) Considering each country separately, import volumes from India decreased by 40 % between 2003 and the RIP and the market share of Indian imports decreased by 36 %.
- (75) The volume of imports originating in the PRC decreased by 16 % over the period considered and the market share decreased by 10 % over the same period.

2.2. Price evolution and price behaviour of the imports of the product concerned

Table 4

Prices of the imports concerned

Unit prices (EUR/tonne)	2003	2004	2005	2006	RIP
PRC	773	876	1 138	1 128	1 040
Index	100	113	147	146	135
India (indexed)	100	85	96	110	111
Total countries concerned	956	910	1 131	1 180	1 138
Index	100	95	118	123	119

Source: Eurostat.

- (76) The average price of the imports concerned originating in the PRC increased by 35 % over the period considered. Over the same period, the average price of the imports concerned originating in India increased by 11 %.
- (77) For the purpose of calculating the level of price undercutting during the RIP, the Community industry's ex-works prices to unrelated customers have been compared with the CIF Community-frontier import prices of the countries concerned, and duly adjusted in order to reflect a landed price. This adjustment was made by increasing the prices by the normal custom duty and post importation costs, for both the PRC and India, and by further increasing the Chinese prices with the anti-dumping duty. The comparison showed that the adjusted Chinese and Indian prices were not undercutting the prices of the Community industry.

3. Imports from other third countries

Table 5

Imports from other third countries

Rest of the world	2003	2004	2005	2006	RIP
Imports (index)	100	80	100	97	97
Market share (index)	100	82	98	104	104
Average prices (EUR/tonne)	935	927	1 100	1 255	1 285
Index	100	99	118	134	137

Source: Eurostat.

- (78) The volume of imports from other third countries slightly decreased by 3 % over the period considered. However, in view of the contraction in demand, their market share increased by 0,7 percentage points. The main exporting country, notably the US, accounted for most of these imports during the period considered.
- (79) Prices of sulphanilic acid from other third countries were slightly lower than those of the Community industry and followed the Indian price trends from 2005 onwards.

4. Economic situation of the Community industry

(a) Preliminary remarks

- (80) In order to respect confidential business information, it has been necessary to present information concerning the two companies forming the Community industry in an indexed form.
- (81) In accordance with Article 3(5) of the basic Regulation, all relevant economic factors and indices pertaining to the Community industry were examined.

(b) Data relating to the Community industry

— Production, installed production capacity and capacity utilisation rate

Table 6

Production, installed production capacity, capacity utilisation

	2003	2004	2005	2006	RIP
Capacity tonnes (index)	100	100	100	105	112
Production tonnes (index)	100	119	115	115	117
Capacity utilisation (index)	100	119	115	109	105

Source: Questionnaire replies of the Community industry.

- (82) The Community industry's level of production in the RIP was 17 % higher than the level recorded at the beginning of the period considered. The Community industry's production capacity also increased over the period considered by 12 % as a result of a Community producer increasing its capacity by investing in equipment in order to produce pure grade sulphanilic acid. The combination of these two factors led to an overall increase in the capacity utilisation rate of the Community industry during the period considered. It should be also noted that the Community industry achieved a satisfactory level of capacity utilisation (in the range of 75-80 %) in the RIP.

— Inventories

- (83) The Community industry's year-end stock levels decreased over the period considered by 22 %. The levels of stock fell significantly in 2004 and 2005 but progressively increased in 2006 and in the RIP.

Table 7

Closing stock in volume

	2003	2004	2005	2006	RIP
Stocks tonnes (index)	100	35	38	64	78

Source: Questionnaire replies of the Community industry.

— Sales volume, market share and growth

- (84) The sales volumes of the Community industry in the RIP were 5 % higher in comparison with the beginning of the period considered. As Community consumption decreased by 6 % over the period considered (see recital 70 above), the market share held by the Community industry increased by 12 % over the same period. Specifically, the Community industry gained around 7 percentage points of market share over the period considered. The Community industry market share was kept above 50 % throughout the period considered.

Table 8

Sales volume and market share

	2003	2004	2005	2006	RIP
Sales volume – tonnes (index)	100	114	107	105	105
Market share % (index)	100	116	105	113	112

Source: Questionnaire replies of the Community industry.

- (85) It should be noted that the decrease in Community consumption in 2006 and in the RIP somewhat affected the growth of the Community industry. The increase in market share is explained almost equally by an increase in the sales volumes and by the weaker consumption towards the end of the period considered.

— Factors affecting Community prices

- (86) Average sales prices of the Community industry increased substantially by 26 % over the period considered. The developments observed as from 2005 appear to reflect, in particular, the effects of the anti-absorption measures imposed in 2004. The Community industry's average selling prices increased significantly between 2004 and 2005 and remained rather stable thereafter. However, this increase was at a lower rate than the increase in the price of aniline, which is the most significant raw material for the production of sulphanilic acid. Indeed, aniline, which is a benzene derivative, represented around 50 % of the total manufacturing cost during the RIP and marked a price increase of around 45 % between 2003 and the RIP.

Table 9

Sales prices

	2003	2004	2005	2006	RIP
Average sales price (index)	100	104	124	125	126

Source: Questionnaire replies of the Community industry.

— Employment and productivity

- (87) The level of employment declined by 9 % between 2003 and the RIP, while production increased, thus reflecting an increase in the Community industry's productivity and competitiveness. The average cost per employee, however, rose during the same period by 15 %.

Table 10

Employment and productivity

	2003	2004	2005	2006	RIP
Employment (index)	100	96	96	98	91
Productivity (index)	100	125	120	117	129
Average labour cost (index)	100	82	94	106	115

Source: Questionnaire replies of the Community industry.

— Profitability

Table 11

Profitability

	2003	2004	2005	2006	RIP
Index	100	- 1 286	1 519	335	191

Source: Questionnaire replies of the Community industry.

- (88) The Community industry's profitability, with the exception of the year 2005, was around or below 1 % of its turnover. Important losses were recorded in 2004, whereas the Community industry recorded profits in 2005, 2006 and the RIP. Given that the profitability of the Community industry was remarkably low in 2003, the apparent increase shown in the period considered led to a level of profitability still far below the level which could be acceptable in this type of industry.

- (89) It is also noted that the Community industry's profitability was influenced by the evolution of raw material prices. The average production cost increased by 25 % between 2003 and the RIP. As mentioned in recital 86 above, aniline is the key input in sulphanilic acid production and it accounts for approximately half of the manufacturing cost. Given the fact that aniline prices significantly rose in 2004, the Community industry was not able to pass this price increase to its customers and incurred losses. The situation for the Community industry improved in 2005 as the prices of aniline stabilised and the Community industry was able to increase its prices of sulphanilic acid to the extent necessary to cover the rise in raw material costs. In 2006 and the RIP, confronted with new rise of prices of the aniline, the Community industry's profitability declined to levels below 1 % in relation to turnover.

— Investments, return on investments and ability to raise capital

Table 12

Investments, return on investment

	2003	2004	2005	2006	RIP
Investments (index)	100	39	57	255	305
Return on investments (index)	100	- 1 779	2 498	420	224

Source: Questionnaire replies of the Community industry.

- (90) The Community industry continued to make investments in its sulphanilic acid activities throughout the period considered. In 2006 and the RIP, besides investments primarily related to the maintenance of existing capital assets, one Community producer made investments in order to increase its capacity concerning the production of pure grade sulphanilic acid. It should be however noted that this new capacity is expected to be fully operational only from 2008.
- (91) As the Community industry realised low profits throughout the period considered, the figure for the return on investments, which expresses the pre-tax result as a percentage of the average opening and closing net book value of assets employed in the production of sulphanilic acid, has also remained very low, namely around 2 % during the RIP.
- (92) The investigation showed that the capital requirements of the Community industry have been adversely affected by the difficult financial situation. Although one of the Community producers is part of a large group, capital requirements are not always met to the desired level, as within this group financial resources are generally allocated to the most profitable entities.

— Cash flow

- (93) Cash flow significantly decreased, by 85 % between 2003 and the RIP, but still remained positive. Cash flow is not following the trend of profitability as it was influenced by non-cash items such as depreciation and inventory movements.

Table 13

Cash flow

Cash flow	2003	2004	2005	2006	RIP
Index	100	41	64	32	15

Source: Questionnaire replies of the Community industry.

5. Conclusion

- (94) Between 2003 and the RIP, most of the indicators pertaining to the Community industry developed positively: sales volumes, capacity utilisation, production volume, closing stocks, productivity, investments and return on investment. However, its profitability remained below 1 % of turnover during the RIP.
- (95) The Community industry has benefited from a rise in its unit price of sulphanilic acid, notably from 2004 to the end of the RIP. However, the increase in the selling price could not fully compensate for the rise in production costs, and profit margins therefore decreased.
- (96) In addition, the decrease in Community consumption in 2006 and in the RIP somewhat hindered the recovery of the Community industry.
- (97) Overall, it is clear that the introduction of the anti-dumping measures enabled the Community industry to stabilise, but not to fully recover from its injurious situation because of the continued presence of dumped imports from the PRC, as well as the increase in the cost of raw materials, which the Community industry was unable to pass on to its customers. Nevertheless, the investigation showed that the Community industry started to invest in new equipment during the period considered.
- (98) In the light of the above analysis, it emerged, on the one hand, that the volume indicators developed positively during the period considered. On the other, the financial indicators pertaining to the Community industry such as profitability and cash flow showed that the Community industry is still in a vulnerable economic situation. It is therefore concluded that the

Community industry could not fully recover from the effects of injurious dumping.

F. LIKELIHOOD OF RECURRENCE OF INJURY

1. General

- (99) Pursuant to Article 11(2) of the basic Regulation, an analysis of the likelihood of recurrence of injury should the existing measures be repealed was carried out. In this respect, the likely development of export volumes and prices from the countries concerned was examined in particular, as well as their likely effects on the situation of the Community industry in the absence of measures.

2. Development of import volumes and prices from the countries concerned should measures be repealed

- (100) It is recalled that even with anti-dumping measures in place, imports from the countries concerned had a market share of 24,6 % in the RIP.
- (101) The investigation showed that the cooperating Indian exporting producer has significant spare capacity, corresponding to more than 30 % of Community consumption. In addition, information available to the Commission showed that the existing production of sulphanilic acid in the PRC is around 22 000 tonnes, which corresponds to more than double the Community consumption. On the basis of the same information, it also appears that Chinese producers are able to easily switch production from speciality dyes and chemicals to sulphanilic acid. These capacities, which may be available in the countries concerned, indicate that the exporting producers have the possibility to increase their current production and thus also to increase their exports of sulphanilic acid to the Community.

- (102) It is also noted that Community consumption slightly decreased over the period considered and it is not expected that the demand in the next few years will be such as to absorb the potential increase in imports from the PRC and India should the measures be terminated. In this scenario, exports of sulphanilic acid from the PRC and India would very likely replace a large share of the sales made by the Community industry, as the prices of imports are likely to be lower.
- (103) The investigation established that the Community market remains attractive for both Chinese and Indian exporting producers. Indeed, as mentioned in recitals 57 and 62 above, it was found that the average export price of Indian and Chinese sales to other third countries was significantly below the average export price to the Community. Despite the fact that no price undercutting was found to exist for Chinese and Indian export prices when adjusted by the current anti-dumping and normal customs duties, the Chinese and Indian CIF export prices were found, on average, to be considerably lower (around 18 %) than the average price of the Community industry. Therefore, without any measures in place, imports of sulphanilic acid from the countries concerned into the Community are likely to significantly increase in the light of (i) the unused capacities (namely in India), (ii) the re-direction of exports to other third countries into the Community market, (iii) the possibility to switch production from speciality dyes and chemicals to sulphanilic acid (namely in the PRC), at price levels significantly below the current price levels in the Community.

3. Conclusion on likelihood of recurrence of injury

- (104) On the basis of the foregoing, it can be concluded that, should measures lapse, imports into the Community market from the countries concerned would very likely occur in significant volumes and at dumped prices which would be below the Community industry's prices. This would in all likelihood have the effect of introducing a price-depressive trend on the Community market, with an expected negative impact on the economic situation of the Community industry. This would, in particular, reverse the recovery that was achieved over the period considered, leading to a likely recurrence of injury.

G. COMMUNITY INTEREST

1. Introduction

- (105) According to Article 21 of the basic Regulation, it was examined whether maintenance of the existing anti-dumping measures would be against the interest of the Community as a whole. The determination of the Community interest was based on an appreciation of all various interests involved.
- (106) Furthermore, the fact that the present investigation is a review, thus analysing a situation in which anti-dumping

measures have already been in place, allows the assessment of any undue negative impact on the parties concerned by the current anti-dumping measures.

- (107) On this basis, it was examined whether, despite the conclusions on the likelihood of recurrence of injurious dumping, compelling reasons existed which would lead to the conclusion that it is not in the Community interest to maintain measures in this particular case.

2. Interest of the Community industry

- (108) It can reasonably be expected that the Community industry will continue to benefit from the measures currently imposed and further recover by regaining market share and improving its profitability. Should the measures not be maintained, it is likely that the Community industry will again begin to suffer injury as a result of increased imports at dumped prices from the countries concerned and that its currently fragile financial situation will deteriorate.
- (109) On this basis, it can be concluded that maintaining the measures would be in the interest of the Community industry.

3. Interest of importers

- (110) It is recalled that in the original investigation, it was found that the imposition of measures would not have a serious impact on Community traders of sulphanilic acid. As indicated above, no importer cooperated in this investigation; therefore, no compelling reasons were presented to suggest that the imposition of measures would be against the interest of importers.

4. Interest of users

- (111) The Commission sent questionnaires to all 31 known users, of which only four submitted a questionnaire reply. Three questionnaire replies were received from Community companies producing optical brighteners and one questionnaire reply from a company producing dyes. However, the information provided by these users regarding the effect of the measures and the proportion that sulphanilic acid represented in their manufacturing costs was not meaningful.
- (112) The volumes of the product concerned imported by these four users represented 47,3 % of the total imports in the Community. Moreover, as these four users purchase significant volumes of sulphanilic acid from the Community industry, they accounted overall for around 40 % of Community consumption in the RIP.

(113) Three users have made the same comments opposing the maintenance of the measures on the grounds that the production capacity of the Community industry is insufficient to meet domestic demand and on the grounds that the measures harm their competitiveness on the downstream products. The fourth user remained silent on whether it was in favour or against the maintenance of the measures.

(114) Regarding the supply situation on the Community market, it is to be noted that the current production capacity of the Community industry could satisfy in the region of 80 % of Community consumption. It should also be stressed that the Community industry has invested in new facilities in order to increase its output of pure grade sulphanilic acid. In any event, the purpose of the measures is not to prevent imports from the countries concerned entering the Community market but to ensure that they are made at non-dumped and non-injurious prices. It is therefore expected that imports from the countries concerned will continue to enter the market, as has been the case following the imposition of measures in 2002.

(115) It should also be noted that sulphanilic acid production outside the Community is now restricted to a few countries in the world, such as India, the PRC and the US. It is therefore important that the Community industry is allowed to operate under effective competition conditions so that domestic supplies of the product continue to be available to all users in the Community.

(116) Regarding the competitiveness of the users, it should be noted that, despite the lack of information obtained from the users in the framework of this investigation, it was shown in the original investigation that anti-dumping measures would increase the full costs of optical brighteners and of dyes containing sulphanilic acid by less than 1 %.

(117) On the basis of the above, it is also considered, in the framework of this expiry review investigation, that the maintenance of measures would not have a major adverse impact on the situation of users.

5. Conclusion on Community interest

(118) Given the above, it is concluded that there are no compelling reasons against the maintenance of the current anti-dumping measures.

H. ANTI-DUMPING MEASURES

(119) All parties were informed of the essential facts and considerations on the basis of which it was intended to recommend that the existing measures be maintained. They were also granted a period during which to make representations and to comment. No comments which were of a nature to change the above conclusions were received.

(120) In view of the conclusions reached with regard to the likelihood of continuation of dumping regarding imports of sulphanilic acid from the PRC, the likelihood of recurrence of dumping in regard to imports from India, the likelihood of recurrence of injury and Community interest, the anti-dumping measures on imports of sulphanilic acid should be maintained in order to prevent a recurrence of injury being caused to the Community industry by the dumped imports.

(121) The duty rate will not be applicable for imports of the product concerned which are manufactured and sold for export to the Community by one Indian company from which an undertaking has been accepted by Commission Decision 2006/37/EC,

HAS ADOPTED THIS REGULATION:

Article 1

1. A definitive anti-dumping duty is hereby imposed on imports of sulphanilic acid falling within CN codes ex 2921 42 10 (TARIC code 2921 42 10 60) originating in the People's Republic of China and India.

2. The rate of the definitive anti-dumping duty applicable to the net free-at-Community frontier price, before duty, for the products described in paragraph 1, shall be as follows:

Country	Definitive duty (%)
The People's Republic of China	33,7
India	18,3

3. Notwithstanding paragraph 1, the definitive anti-dumping duty shall not apply to imports released for free circulation in accordance with Article 2.

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

Article 2

1. Imports declared for release into free circulation which are invoiced by companies from which undertakings are accepted by the Commission and whose names are listed in Decision 2006/37/EC, as from time to time amended, shall be exempt from the anti-dumping duty imposed by Article 1, on condition that:

- they are manufactured, shipped and invoiced directly by the said companies to the first independent customer in the Community, and
- such imports are accompanied by an undertaking invoice which is a commercial invoice containing at least the elements and the declaration stipulated in the Annex of this Regulation, and
- the goods declared and presented to customs correspond precisely to the description on the undertaking invoice.

2. A customs debt shall be incurred at the time of acceptance of the declaration for release into free circulation whenever it is established, in respect of goods described in Article 1 and exempted from the duties under the conditions listed in

paragraph 1, that one or more of such conditions is not fulfilled. The condition set out in the second indent of paragraph 1 shall be considered as not being fulfilled where the undertaking invoice is found not to comply with the provisions of the Annex or found not to be authentic or where the Commission has withdrawn the acceptance of the undertaking pursuant to Article 8(9) of Regulation (EC) No 384/96 or Article 13(9) of the basic anti-subsidy Regulation in a Regulation or Decision which refers to (a) particular transaction(s) and declares the relevant undertaking invoice(s) as invalid.

3. Importers shall accept as a normal trade risk the fact that the non-fulfilment, by any party, of one or more of the conditions listed in paragraph 1 and further defined in paragraph 2, may give rise to a customs debt incurred under Article 201 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code⁽¹⁾. The customs debt incurred shall be recovered upon withdrawal by the Commission of the acceptance of the undertaking.

Article 3

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

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

Done at Luxembourg, 13 October 2008.

For the Council
The President
B. KOUCHNER

⁽¹⁾ OJ L 302, 19.10.1992, p. 1.

ANNEX

The following elements shall be indicated in the commercial invoice accompanying the company's sales of sulphanilic acid to the Community which are subject to an undertaking:

1. The heading 'COMMERCIAL INVOICE ACCOMPANYING GOODS SUBJECT TO AN UNDERTAKING'.
2. The name of the company, mentioned in Article 1 of Commission Decision 2006/37/EC accepting the undertaking, issuing the commercial invoice.
3. The commercial invoice number.
4. The date of issue of the commercial invoice.
5. The TARIC additional code under which the goods on the invoice are to be customs-cleared at the Community frontier.
6. The exact description of the goods, including:
 - the product code number (PCN) used for the purpose of the undertaking (e.g. PA99, PS85 or TA98),
 - the technical/physical specifications of the PCN, i.e. for 'PA99' and 'PS85' white free-flowing powder, and for 'TA98' grey free-flowing powder,
 - the company product code number (CPC) (if applicable),
 - CN code,
 - quantity (to be given in tonnes).
7. The description of the terms of the sale, including:
 - price per tonne,
 - the applicable payment terms,
 - the applicable delivery terms,
 - total discounts and rebates.
8. Name of the company acting as an importer in the Community to which the commercial invoice accompanying goods subject to an undertaking is issued directly by the company.
9. The name of the official of the company that has issued the commercial invoice and the following signed declaration:

'I, the undersigned, certify that the sale for direct export to the European Community of the goods covered by this invoice is being made within the scope and under the terms of the Undertaking offered by [COMPANY], and accepted by the European Commission through Decision 2006/37/EC. I declare that the information provided in this invoice is complete and correct.'

COUNCIL REGULATION (EC) No 1001/2008**of 13 October 2008****imposing a definitive anti-dumping duty on imports of certain tube and pipe fittings, of iron or steel, originating in the Republic of Korea and Malaysia following an expiry review pursuant to Article 11(2) of Regulation (EC) No 384/96**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community⁽¹⁾ (the basic Regulation), and in particular Articles 9 and 11(2) thereof,

After consulting the Advisory Committee,

Whereas:

A. PROCEDURE**1. Measures in force**

- (1) In August 2002, definitive anti-dumping measures on imports of certain tube and pipe fittings ('TPFs' or the 'product concerned') originating, *inter alia*, in the Republic of Korea and Malaysia (the 'countries concerned') were imposed by Council Regulation (EC) No 1514/2002⁽²⁾ (the 'original investigation'). The anti-dumping duties in force for Malaysia are: 59,2 % for Anggerik Laksana Sdn Bhd and 75 % for all other companies; for the Republic of Korea the duty is 44 % for all companies.
- (2) Outside the scope of this proceeding, anti-dumping measures are currently in force imposed by Council Regulation (EC) No 964/2003⁽³⁾ on exports from the People's Republic of China (58,6 %) and Thailand (58,9 %), with the exception of two companies in Thailand, and those consigned from Taiwan, whether declared as originating in Taiwan or not. The measures for the product concerned originating in China were extended to imports of the same product consigned from Indonesia by Council Regulation (EC) No 2052/2004⁽⁴⁾, Sri Lanka by Council Regulation (EC) No 2053/2004⁽⁵⁾ and the Philippines by Council Regu-

lation (EC) No 655/2006⁽⁶⁾, whether declared as originating in the Philippines, Indonesia, Sri Lanka or not.

2. Request for a review

- (3) Following the publication of a notice of impending expiry⁽⁷⁾ of the anti-dumping measures in force on imports of TPFs originating in the Republic of Korea and Malaysia, the Commission received a request to review these measures pursuant to Article 11(2) of the basic Regulation.
- (4) The request was lodged on 23 May 2007 by the Defence Committee of the Steel Butt-Welding Fittings Industry of the European Union (the applicant) on behalf of producers representing a major proportion, in this case more than 50 %, of the total Community production of certain tube and pipe fittings.
- (5) The request was based on the grounds that the expiry of the measures would be likely to result in a continuation or recurrence of dumping and injury to the Community industry.
- (6) Having determined, after consultation of the Advisory Committee, that sufficient evidence existed for the initiation of a review, the Commission initiated an expiry review⁽⁸⁾ pursuant to Article 11(2) of the basic Regulation.

3. Investigation

- (7) The Commission officially advised the applicant Community producers, the other Community producers, the exporting producers in the countries concerned, the importers/traders, users and their associations known to be concerned, as well as the representatives of the governments of both exporting countries, of the initiation of the review.
- (8) The Commission sent questionnaires to all these parties and to those who made themselves known within the time limit set out in the notice of initiation.

⁽¹⁾ OJ L 56, 6.3.1996, p. 1.

⁽²⁾ OJ L 228, 24.8.2002, p. 1.

⁽³⁾ OJ L 139, 6.6.2003, p. 1.

⁽⁴⁾ OJ L 355, 1.12.2004, p. 4.

⁽⁵⁾ OJ L 355, 1.12.2004, p. 9.

⁽⁶⁾ OJ L 116, 29.4.2006, p. 1.

⁽⁷⁾ OJ C 286, 23.11.2006, p. 8.

⁽⁸⁾ OJ C 192, 18.8.2007, p. 15.

- (9) The Commission also gave interested parties the opportunity to make their views known in writing and to request a hearing within the time limit set out in the notice of initiation.
- (10) In view of the apparent high number of exporting producers in the Republic of Korea, importers/traders of the product concerned and Community producers, sampling was envisaged in the notice of initiation, in accordance with Article 17 of the basic Regulation. In order to be able to decide whether sampling would be necessary and, if so, to select a sample, the Commission sent out sampling forms requesting specific information on the average sales volume and prices of each Community producer, exporting producer and importer concerned. No reply was received from any Korean exporting producer and eleven replies were received from importers. Only four Community producers replied to the sampling form. It was therefore decided that sampling was not necessary.
- (11) Four Community producers replied to the questionnaire, but one sent a partial answer and failed to reply after a deficiency letter had been sent. Regarding Malaysia, two replies to the questionnaire were received, one from a newcomer company and the other from a company that later on refused the verification visit. No Korean exporting producers replied to the questionnaire. Two importers submitted a reply to the questionnaire.
- (12) The Commission sought and verified all information deemed necessary for the purposes of determining the likely continuation or recurrence of dumping and injury and the Community interest. Verification visits were carried out at the premises of the following companies:

(a) applicant Community producers:

- Erne Fittings GmbH, Schlins, Austria,
- Interfit SA, Maubeuge, France,
- Virgilio Cena & Figli SpA, Brescia, Italy;

(b) newcomer producer in Malaysia:

- Pantech Steel Industries Sdn Bhd, Selangor, Malaysia.

4. Investigation period

- (13) The investigation of continuation or recurrence of dumping covered the period from 1 July 2006 to 30 June 2007 (the 'IP'). The examination of the trends relevant for the assessment of a likelihood of a conti-

nuation or recurrence of injury covered the period from 1 January 2002 up to the end of the IP (the 'period considered').

B. PRODUCT CONCERNED AND LIKE PRODUCT

1. Product concerned

- (14) The product under review is tube and pipe fittings (other than cast fittings, flanges and threaded fittings), of iron or steel (not including stainless steel), with a greatest external diameter not exceeding 609,6 mm, of a kind used for butt-welding or other purposes, originating in the Republic of Korea and Malaysia, currently classifiable within CN codes ex 7307 93 11, ex 7307 93 19, ex 7307 99 30 and ex 7307 99 90.
- (15) TPFs are manufactured essentially by cutting and forming tubes and pipes. They are used to join tubes and pipes and come in different shapes: elbows, reducers, tees and caps, as well as different sizes and material grades. They are used mainly in the petrochemical industry, construction, energy generation, shipbuilding and industrial installations. When sold for use in the petrochemical industry, the global standard used is the ANSI standard. For other purposes, the most common standard used in the Community is the DIN standard.

2. Like product

- (16) As in the original proceeding, the investigation has shown that the TPFs produced in the countries concerned, sold domestically and/or exported to the Community, have the same basic physical, technical and chemical characteristics and end uses as the products sold in the Community by the applicant Community producers and are therefore considered to be like products within the meaning of Article 1(4) of the basic Regulation.

C. LIKELIHOOD OF A CONTINUATION OF DUMPING

- (17) In accordance with Article 11(2) of the basic Regulation, it was examined whether the expiry of the measures would be likely to lead to a continuation of dumping.

1. Preliminary remarks

- (18) As mentioned above, in the absence of cooperation from any exporting producers in Korea and Malaysia, except for one newcomer company, this examination had to be based on information available to the Commission from other sources. In this respect, and in accordance with the provisions of Article 18 of the basic Regulation, Eurostat data referring to the 8-digit CN code, checked against other sources, were used to establish import quantities and prices. Facts available were used to calculate the dumping margin, i.e. in this case the information contained in the request and US statistics.

- (19) Due to the current small volume of imports of TPFs from Korea and Malaysia in the EU, the Commission had to use data from another country. The USA was considered appropriate, since the market is of a similar size, with many domestic producers but also with a large proportion of imports, making this market a very competitive one. In addition, the USA is the major destination for exports from Korea and Malaysia.

2. Dumping of imports during the investigation period

(a) Normal value

- (20) In accordance with Article 18 of the basic Regulation, and in the absence of any cooperation from Korean or Malaysian exporting producers, except for one newcomer company, the normal value was based on the data provided in the request, i.e. estimated cost of manufacturing to which was added 12,3 % and 15,1 % for SGA and 5,6 % and 6 % for profit for Korea and Malaysia respectively, both expressed as a percentage of turnover. It is considered that the above percentages are rather conservative.

(b) Export price

- (21) In accordance with Article 18 of the basic Regulation, and in the absence of cooperation from both Korean and Malaysian exporting producers, except from one newcomer company, the export price was calculated by using the Korean and Malaysian export prices for the product concerned to the USA, derived from the USA import statistics. These figures were adjusted by product types in proportion to the tonnage of each product type based on information provided in the request.

(c) Comparison

- (22) The weighted average normal value was compared with the weighted average export price of TPFs, in accordance with Article 2(11) of the basic Regulation, both at ex-works level.
- (23) For the purpose of ensuring a fair comparison between normal value and export price, account was taken of differences in factors affecting prices and price comparability in accordance with Article 2(10) of the basic Regulation. In this respect, adjustments were made for inland and ocean freight, insurance, handling, loading and ancillary costs.

(d) Dumping margin

- (24) The comparison of constructed normal value and constructed export price showed the existence of

dumping in both countries concerned, the dumping margin being equal to the amount by which the normal value established exceeded the export price. The dumping margin found, as a percentage of the CIF Community-frontier import price, was 15,1 % for Korea and 61,3 % for Malaysia.

3. Developments of imports should measures be repealed

(a) Preliminary remarks

- (25) Further to the analysis of the existence of dumping during the IP, the likelihood of continuation of dumping was also examined. In the absence of cooperation from any Korean or Malaysian exporting producers, except for one newcomer company, and given the lack of publicly available information on the TPF industry, the conclusions below rely mainly on the facts available in accordance with Article 18 of the basic Regulation, namely Eurostat data, the review request, and US statistics.

(b) Korean and Malaysian production capacity

- (26) The capacity available in both Korea and Malaysia is estimated at 35 300 tonnes and their export capacity at 20 000 tonnes. This represents more than one quarter of the Community consumption.

(c) Korean and Malaysian export prices to the Community

- (27) As mentioned in the preliminary remarks, the exports of the product concerned from the two countries concerned to the Community market are almost non-existent. With regard to the exports to other third countries, it is alleged in the request that the exports of the product concerned to the USA are made at dumped prices.

(d) Conclusion on the likelihood of a continuation of dumping

- (28) In the light of the above, i.e. the high dumping margins, the huge spare capacity available in these countries together with their high export capacities, it may be concluded that dumped imports from these two countries to the EU would resume if the measures were allowed to lapse. In addition, despite the high level of the anti-dumping duties imposed on their exports which virtually ceased, none of the exporting producers in Malaysia requested an interim review. Furthermore, it should be borne in mind that the Korean exporting companies have never cooperated in the original investigation. The absence of cooperation in this investigation also suggests that these exporting producers were not willing or able to show that no dumping would take place if measures were allowed to lapse.

D. DEFINITION OF THE COMMUNITY INDUSTRY

- (29) Three companies cooperated fully in the investigation. These companies are located in France (Interfit), Austria (Erne Fittings) and Italy (Virgilio Cena). The Austrian group also has a related company in Germany (Siekmann Fittings). The investigation established that the three applicant and fully cooperating Community producers represented more than 50 % of the Community production of TPFs and therefore constitute the Community industry within the meaning of Articles 4(1) and 5(4) of the basic Regulation.

E. SITUATION ON THE COMMUNITY MARKET**1. Consumption in the Community market**

- (30) Community consumption was based on the combined volume of sales made by the applicant Community producers and other Community producers, based on the request, and imports from the countries concerned and imports from other third countries, both based on Eurostat.
- (31) On this basis, during the period considered, Community consumption increased by 26 %, from 58 561 tonnes in 2002 to 73 519 tonnes during the IP. Tube and pipe fittings are used mainly in the petrochemical industry, construction, energy generation, shipbuilding and industrial installations which, combined with the recovery of the steel industry, may explain this rise.

- (32) *Table 1*

Community consumption

Community consumption	2002	2003	2004	2005	2006	IP
Tonnes	58 561	62 122	64 480	56 255	65 667	73 519
Index	100	106	110	96	112	126
Y/Y trend	100	6	4	- 14	16	13

Source: Eurostat, request, verified questionnaire replies of the Community industry.

2. Imports from the countries concerned*(a) Volume and market share*

- (33) Volumes imported from Malaysia and Korea decreased drastically from 404 to 11 tonnes. This seems to be the result of the anti-dumping measures in force since February 2002. Their market share is *de minimis*.

- (34) *Table 2*

Imports from the countries concerned

Imports from the countries concerned	2002	2003	2004	2005	2006	IP
Tonnes	404	22	54	94	17	11
Index	100	5	13	23	4	3
Y/Y trend	100	- 95	8	10	- 19	- 1
Market share in % of Community consumption	1	0,04	0,08	0,17	0,03	0,01

Source: Eurostat.

(b) Price evolution of the imports and undercutting

- (35) Due to very limited imports from the countries concerned and in view of the large variety of different types of products, prices provided by Eurostat cannot be considered as a reliable source for a detailed analysis.
- (36) In the absence of cooperation in the countries concerned, the undercutting margins were calculated using the same methodology as in the request, i.e. by comparing the export prices of the countries concerned to the USA and prices of the applicants charged on the Community market. The undercutting margin is 25,2 % for Korea and 53,3 % for Malaysia.

3. Economic situation of the Community industry*(a) Production, production capacity and capacity utilisation*

- (37) The Community industry's production increased by 5 % during the period considered, while Community consumption increased by 26 %.

- (38) *Table 3*

Production volume

Production volume	2002	2003	2004	2005	2006	IP
Tonnes	46 454	43 504	47 155	40 881	49 300	48 922
Index	100	94	102	88	106	105
Y/Y trend	100	- 6	8	- 14	18	- 1

Source: Verified questionnaire replies of the Community industry.

- (39) During the period considered the production capacity of the Community industry increased by 6 %, despite a slight decrease in 2003.

- (40) *Table 4*

Production capacity

Production capacity	2002	2003	2004	2005	2006	IP
Tonnes	89 400	87 800	89 700	90 300	94 800	95 000
Index	100	98	100	101	106	106
Y/Y trend	100	- 2	2	1	5	0

Source: Verified questionnaire replies of the Community industry.

- (41) During the period considered capacity utilisation decreased by 1 %.

(42)

Table 5

Capacity utilisation

Capacity utilisation	2002	2003	2004	2005	2006	IP
%	52	50	53	45	52	51
Index	100	95	101	87	100	99
Y/Y trend	100	- 5	6	- 14	13	- 1

Source: Verified questionnaire replies of the Community industry.

(b) Sales volume and sales prices

- (43) The Community industry's sales to unrelated customers on the Community market increased by 11 % between 2002 and IP.

(44)

Table 6

Community industry's sales to unrelated parties

Community industry's sales to unrelated parties	2002	2003	2004	2005	2006	IP
Tonnes	34 968	34 893	38 401	32 841	36 908	38 750
Index	100	100	110	94	106	111
Y/Y trend	100	- 0,2	10	- 16	12	5

Source: Verified questionnaire replies of the Community industry.

- (45) During the period considered, the average sales prices charged by the Community industry on the Community market increased gradually. The total increase between 2002 and the IP was 63 %. This rise is partly explained by the increase in the cost of the main raw material, steel tubes, and partly by a shift in two Community producers' production scope to focus on more expensive special types.

(46)

Table 7

Community industry's sales price

Community industry's sales price	2002	2003	2004	2005	2006	IP
EUR/tonne	1 553	1 652	1 783	2 133	2 217	2 528
Index	100	106	115	137	143	163
Y/Y trend	100	6	8	23	5	20

Source: Verified questionnaire replies of the Community industry.

(c) Market share

- (47) The overall market share held by the Community industry from 2002 to the IP decreased by 7 percentage points.

(48)

Table 8

Market share of the Community industry's sales

Market share of the Community industry's sales	2002	2003	2004	2005	2006	IP
Percentage of market	60 %	56 %	60 %	58 %	56 %	53 %

Source: Eurostat and verified questionnaire replies of the Community industry.

(d) *Growth*

- (49) While Community consumption increased by 26 % during the period considered, the volume of Community industry sales on the market increased by only 11 % and the Community industry market share on the market decreased by 7 percentage points. Thus, the growing trend in Community consumption was not followed by a corresponding increase in Community industry sales.

(e) *Profitability and return on investments*

- (50) During the period considered, profitability, expressed as a percentage of net sales value to unrelated parties, developed as follows:

(51)

Table 9

Profitability

Profitability	2002	2003	2004	2005	2006	IP
Percentage of net sales value	2 %	1 %	4 %	1 %	6 %	10 %

Source: Verified questionnaire replies of the Community industry.

- (52) The Community industry's profitability followed a positive trend, in line with the increase in the Community industry sales prices. Despite a significant decrease in 2003 and 2005, overall profitability reached 10 %. This was due to a switch to the production of products with a higher added value during the period considered, when the average profit made by the Community industry was 4 %.

- (53) Return on investments, expressed as profits/losses in relation to the net book value of investments, followed the same trend as profitability.

(54)

Table 10

Return on investments

Return on investments	2002	2003	2004	2005	2006	IP
%	6	2	11	4	18	37
Index	100	37	184	62	310	618
Y/Y trend	100	- 63	147	- 122	248	309

Source: Verified questionnaire replies of the Community industry.

(f) *Cash flow*

- (55) There were considerable fluctuations in cash flow between 2002 and 2005 and a dramatic increase in 2006 and during the IP. This increase of cash flow also indicates that the industry was recovering. This level of cash flow allows companies to invest in the TPF business again after low periods.

- (56) *Table 11*

Cash flow

Cash flow	2002	2003	2004	2005	2006	IP
EUR	1 310 693	3 826 570	2 378 520	1 233 797	7 559 501	10 040 180
Index	100	292	181	94	577	766
Y/Y trend	100	192	- 110	- 87	483	189

Source: Verified questionnaire replies of the Community industry.

(g) *Investments and ability to raise capital*

- (57) The Community industry increased investments by 65 % during the period considered. Most of them were concentrated on machinery to increase productivity. None of the companies investigated mentioned any current difficulty in raising capital.

- (58) *Table 12*

Investments

Investments	2002	2003	2004	2005	2006	IP
EUR	5 839 416	5 824 908	3 438 352	7 422 926	9 986 636	9 643 822
Index	100	100	59	127	171	165
Y/Y trend	100	- 0,2	- 41	68	44	- 6

Source: Verified questionnaire replies of the Community industry.

(h) *Stocks*

- (59) The table below shows that closing stocks maintained a stable curve; nevertheless, in the period considered there is a small decrease of around 1 %.

- (60) *Table 13*

Stocks

Closing stock in volume	2002	2003	2004	2005	2006	IP
Tonnes	7 233	7 115	7 449	7 206	7 580	7 190
Index	100	98	103	100	105	99
Y/Y trend	100	- 2	5	- 3	5	- 5

Source: Verified questionnaire replies of the Community industry.

(i) *Employment, productivity and labour cost*

- (61) After a decrease of 5 % in 2003, during the period considered the overall labour force decreased by 2 %.

- (62) *Table 14*

Employment

Employment	2002	2003	2004	2005	2006	IP
Number of employees	760	725	719	692	729	741
Index	100	95	95	91	96	98
Y/Y trend	100	- 5	- 0,8	- 3	5	2

Source: Verified questionnaire replies of the Community industry.

- (63) In line with the increase in production and the decrease in employment, productivity improved by 8 % during the investigation period.

- (64) *Table 15*

Productivity

Productivity	2002	2003	2004	2005	2006	IP
Tonnes/employee	61	60	66	59	68	66
Index	100	98	107	97	111	108
Y/Y trend	100	- 2	9	- 11	14	- 3

Source: Verified questionnaire replies of the Community industry.

- (65) During the period considered, the labour costs of the Community industry gradually increased. The total increase in labour cost for the period considered was 22 %. The main increase in labour costs happened in a company which changed its product mix from commodities to specialised products, which required higher professional qualifications.

- (66) *Table 16*

Labour costs

Labour costs/wages	2002	2003	2004	2005	2006	IP
EUR	28 941 652	28 436 139	29 607 915	29 754 664	33 069 402	35 312 821
Index	100	98	102	103	114	122
Y/Y trend	100	- 2	4	1	11	8

Source: Verified questionnaire replies of the Community industry.

4. Effect of other factors

(a) Export activity of the Community industry

- (67) The Community industry's exports of tube and pipe fittings during the period considered were not very stable, showing strong fluctuations. Overall, the level of exports to third countries decreased by 15 %, this reduction being mainly due to the unfavourable EUR/USD exchange rate.

(68)

Table 17

Exports of the Community industry

Exports of the Community industry	2002	2003	2004	2005	2006	IP
Tonnes	10 893	8 003	9 358	8 410	11 890	9 278
Index	100	73	86	77	109	85
Y/Y trend	100	- 27	12	- 9	32	- 24

Source: Verified questionnaire replies of the Community industry.

(b) Import volumes and prices from other third countries

- (69) Regulation (EC) No 964/2003 imposed anti-dumping duties on imports of TPFs from the People's Republic of China (58,6 %) and Thailand (58,9 %). Measures are applicable for the product concerned originating in China and consigned from one of the following countries: the Philippines, Indonesia, Sri Lanka and Taiwan. Despite the measures in force against imports from China, exports from China to the EU are increasing steadily.

- (70) The total import volumes of TPFs from third countries other than the countries concerned more than doubled during the period considered, increasing from 9 654 tonnes in 2002 to 24 105 tonnes at the end of the IP.

- (71) Import volumes of TPFs into the Community from countries other than Korea and Malaysia developed as follows:

(72)

Table 18

Imports from other third countries

Imports from other third countries	2002	2003	2004	2005	2006	IP
Tonnes	9 654	12 453	11 488	13 344	19 020	24 105
Index	100	129	119	138	197	250
Y/Y trend	100	29	- 10	19	59	53

Source: Eurostat.

- (73) The market share of imports originating in third countries other than the countries concerned reached 33 % of the EU consumption. This means an increase of 99 % in the period considered, from 16 to 33 %.

(74)

Table 19

Market share of imports from other third countries

Market share imports from other third countries	2002	2003	2004	2005	2006	IP
Percentage of market	16 %	20 %	18 %	24 %	29 %	33 %
Index	100	122	108	144	176	199
Y/Y trend	100	22	- 14	36	32	23

Source: Eurostat and market information provided by the applicant producers.

(75)

Table 20

Main imports into the EU

Imports from other third countries in tonnes	2002	2003	2004	2005	2006	IP
China	859	1 428	1 772	2 236	5 846	8 339
Taiwan	1 101	2 372	1 894	2 540	4 774	5 854
Vietnam	1 835	1 214	767	694	1 224	1 475
India	1 522	1 569	1 537	1 763	1 552	2 096
Thailand	676	1 508	778	558	1 622	2 334

(c) Recovery from the effects of dumping

- (76) As shown by the positive evolution of most of the indicators listed above, in the years 2002 to mid-2007 the economic situation of the Community industry has partially recovered from the injurious effect of dumped imports originating in the two countries concerned.

5. Conclusion on the situation of the Community industry

- (77) The measures in force have led to a partial recovery of the Community industry since 2002. The Community industry managed to increase its sales volumes and its prices. Injury indicators such as production, production capacity, profitability, investments, return on investments and productivity also showed a positive development. This demonstrates that the Community industry made efforts to improve its competitiveness. As a result, Community industry sales in the Community have been profitable since 2002.
- (78) However, the Community industry did not manage to take advantage of the significant growth in consumption in the Community and some of the positive factors are also the result of the disappearance of a significant Community producer in the United Kingdom, whose activities were taken over by two of the companies supporting the request.

- (79) It may nevertheless be concluded that the introduction of measures against Korea and Malaysia had a positive impact on the economic situation of the Community industry.

- (80) In view of the tentative recovery of the Community industry, the continuation of injury caused by dumped imports could not be established. It was therefore examined whether there would be recurrence of injury if the measures were allowed to lapse.

F. LIKELIHOOD OF RECURRENCE OF INJURY

- (81) As mentioned above, the Korean and Malaysian producers have the potential to redirect huge export volumes to the Community market if measures are allowed to lapse. According to the request, these countries are heavily dependent on export markets: 75 % for Korea and 84 % for Malaysia. In addition, it seems that other export markets, such as the USA and Japan, could not absorb the spare capacity, since export volumes to these countries are already significant, and therefore these would be directed to the Community market. In addition, it seems that there is a general over-capacity on the Asian market.

(82) With regard to prices, it was found from US statistics that the Malaysian and Korean export prices to the USA were lower than those of the Community industry. Even though a detailed analysis could not be carried out because of the many different types of products, it is likely that these exporters will align their prices with the very low ones from the other Asian countries in order to regain their lost market share. Such pricing behaviour, attested by their non-cooperation coupled with their ability to deliver significant quantities of the product concerned to the Community market, would suggest a negative impact on the Community industry.

(83) In addition, it should be borne in mind that the Community industry needs to remain competitive to produce a certain volume of standard products, which are therefore in direct competition with the imports from Korea and Malaysia, in order to make economies of scale.

(84) In the light of the above, it is concluded that allowing the measures to lapse would in all likelihood result in a recurrence of injury to the Community industry caused by the dumped imports.

G. COMMUNITY INTEREST

1. Introduction

(85) According to Article 21 of the basic Regulation, it was examined whether a prolongation of the existing anti-dumping measures would be contrary to the interests of the Community industry as a whole. The determination of the Community interest was based on an appreciation of all the various interests involved, i.e. those of the Community industry, the importers/traders as well as the users of the product concerned. No submissions were received from users.

(86) In order to assess the likely impact of the continuation or non-continuation of the measures, the Commission requested information from all interested parties mentioned above. The Commission sent sampling questionnaires to 64 importers of the product concerned and received eleven answers. The Commission sent a questionnaire to these 11 companies and only received two partial answers which did not provide any evidence that the measures in force had materially affected them. It is clear that the importers have found other sources of supply, as can be seen from the significant market share (33 %) held by other third countries, which showed that conditions of competition on the Community market are ensured.

(87) Furthermore, the fact that the present investigation is a review, thus analysing a situation in which anti-dumping measures have already been in place, allows the assessment of any undue negative impact on the parties concerned by the current anti-dumping measures.

(88) On this basis, it was examined whether, despite the conclusions on continuation of dumping and likelihood of recurrence of injury, compelling reasons existed which would lead to the conclusion that it was not in the Community interest to maintain measures in this particular case.

2. Interests of the Community industry

(89) The Community industry has proved to be a structurally viable industry. This was confirmed by the positive development of its economic situation at a time when effective competition had been restored after the imposition of the anti-dumping measures that are currently in force. Indeed, the efforts made by the Community industry to rationalise its production and enhance its competitiveness have led to a reasonable profit in the last two years of the period considered.

(90) Given the above, it appears necessary to maintain the existing measures in order to avoid the adverse effects of dumped imports, which could endanger the recovery process of the Community industry and ultimately its very existence. It has also to be borne in mind that if the Community industry disappeared, there would also be a negative impact on the downstream industry, since the latter would see a significant reduction in its choice of suppliers.

3. Interests of importers/traders

(91) As stated above, only two of the 64 unrelated importers replied to the Commission's questionnaire. However, they did not express any negative opinions on a possible continuation of measures. The lack of cooperation is in itself an indication that this sector did not suffer any substantial negative effect on its economic situation as a result of the measures. This is confirmed by the fact that the importers continued to trade the product concerned in significant volumes, even raising the volume imported during the period considered.

(92) It is therefore concluded that the economic situation of the importers of the product concerned has not been negatively influenced by the imposition of the anti-dumping measures currently in force. On the same grounds, it is also unlikely that a continuation of the measures would lead to a deterioration in their economic situation in the future.

4. Interests of users

- (93) No users made themselves known in the current investigation. The users of the product concerned are mainly the petrochemical and building industries. Their lack of cooperation seems to confirm that the tube or pipe fittings represent a very small part of their total production costs and that the measures in force do not appear to have caused any loss of competitiveness for them.
- (94) It was concluded that maintaining the measures at the same level would not imply any deterioration in the situation of the users.

recommend that the existing measures be maintained. They were also granted a period within which to make representations after disclosure. No comments were received from Korea; one comment was received from a Malaysian company, but not such as to alter the above conclusions.

- (98) It follows from the above that, as provided for by Article 11(2) of the basic Regulation, the anti-dumping duties on imports of tube and pipe fittings originating in the Republic of Korea and Malaysia, imposed by Regulation (EC) No 1514/2002, should be maintained,

5. Conclusion on Community interest

- (95) The investigation has shown that the existing anti-dumping measures have allowed the Community industry to recover to a certain extent. If measures were allowed to lapse, this would endanger the recovery process and possibly lead to the disappearance of the Community industry. Therefore, the continuation of measures is in the interest of the Community industry.
- (96) Furthermore, in the past, the existing measures appear not to have had any significant negative effects on the economic situation of users and importers. It is therefore concluded that there are no compelling reasons against the continuation of the existing anti-dumping measures.

HAS ADOPTED THIS REGULATION:

Article 1

1. A definitive anti-dumping duty is hereby imposed on imports of tube and pipe fittings (other than cast fittings, flanges and threaded fittings), of iron or steel (not including stainless steel), with a greatest external diameter not exceeding 609,6 mm, of a kind used for butt-welding or other purposes, originating in the Republic of Korea and Malaysia and falling within CN codes ex 7307 93 11, ex 7307 93 19, ex 7307 99 30 and ex 7307 99 90 (TARIC codes 7307 93 11 91, 7307 93 11 93, 7307 93 11 94, 7307 93 11 95, 7307 93 11 99, 7307 93 19 91, 7307 93 19 93, 7307 93 19 94, 7307 93 19 95, 7307 93 19 99, 7307 99 30 92, 7307 99 30 93, 7307 99 30 94, 7307 99 30 95, 7307 99 30 98, 7307 99 90 92, 7307 99 90 93, 7307 99 90 94, 7307 99 90 95, 7307 99 90 98).

H. ANTI-DUMPING MEASURES

- (97) All parties concerned were informed of the essential facts and considerations on the basis of which it is intended to

2. The rate of the definitive anti-dumping duty applicable to the net, free-at-Community frontier price, before duty, of the products described in paragraph 1 and produced by the companies below shall be as follows:

Country	Company	Rate of duty (%)	TARIC additional code
Malaysia			
	Anggerik Laksana Sdn Bhd, Selangor Darul Ehsan	59,2	A324
	All other companies	75	A999
Republic of Korea			
	All companies	44	—

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

Article 2

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

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

Done at Luxembourg, 13 October 2008.

For the Council

The President

B. KOUCHNER

COMMISSION REGULATION (EC) No 1002/2008**of 15 October 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 Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) ⁽¹⁾,

Having regard to Commission Regulation (EC) No 1580/2007 of 21 December 2007 laying down implementing rules for Council Regulations (EC) No 2200/96, (EC) No 2201/96 and (EC) No 1182/2007 in the fruit and vegetable sector ⁽²⁾, and in particular Article 138(1) thereof,

Whereas:

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 Annex XV, Part A thereto,

HAS ADOPTED THIS REGULATION:

Article 1

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

Article 2

This Regulation shall enter into force on 16 October 2008.

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

Done at Brussels, 15 October 2008.

For the Commission

Jean-Luc DEMARTY

*Director-General for Agriculture and
Rural Development*

⁽¹⁾ OJ L 299, 16.11.2007, p. 1.

⁽²⁾ OJ L 350, 31.12.2007, p. 1.

ANNEX

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

(EUR/100 kg)

CN code	Third country code ⁽¹⁾	Standard import value
0702 00 00	MA	73,5
	MK	51,9
	TR	86,7
	ZZ	70,7
0707 00 05	MK	81,9
	TR	100,5
	ZZ	91,2
0709 90 70	TR	117,4
	ZZ	117,4
0805 50 10	AR	77,7
	TR	104,7
	UY	95,7
	ZA	84,1
	ZZ	90,6
0806 10 10	BR	261,2
	TR	97,8
	US	224,7
	ZZ	194,6
0808 10 80	AR	67,2
	CL	64,0
	CN	53,8
	MK	37,6
	NZ	89,9
	US	121,5
	ZA	82,2
	ZZ	73,7
0808 20 50	CL	60,3
	CN	50,9
	TR	128,9
	ZA	83,4
	ZZ	80,9

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

COMMISSION REGULATION (EC) No 1003/2008**of 15 October 2008****fixing the import duties in the cereals sector applicable from 16 October 2008**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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

Having regard to Commission Regulation (EC) No 1249/96 of 28 June 1996 laying down detailed rules for the application of Council Regulation (EEC) No 1766/92 in respect of import duties in the cereals sector ⁽²⁾, and in particular Article 2(1) thereof,

Whereas:

(1) Article 136(1) of Regulation (EC) No 1234/2007 states that the import duty on products falling within CN codes 1001 10 00, 1001 90 91, ex 1001 90 99 (high quality common wheat), 1002, ex 1005 other than hybrid seed, and ex 1007 other than hybrids for sowing, is to be equal to the intervention price valid for such products on importation increased by 55 %, minus the cif import price applicable to the consignment in question. However, that duty may not exceed the rate of duty in the Common Customs Tariff.

(2) Article 136(2) of Regulation (EC) No 1234/2007 lays down that, for the purposes of calculating the import duty referred to in paragraph 1 of that Article, represen-

tative cif import prices are to be established on a regular basis for the products in question.

(3) Under Article 2(2) of Regulation (EC) No 1249/96, the price to be used for the calculation of the import duty on products of CN codes 1001 10 00, 1001 90 91, ex 1001 90 99 (high quality common wheat), 1002 00, 1005 10 90, 1005 90 00 and 1007 00 90 is the daily cif representative import price determined as specified in Article 4 of that Regulation.

(4) Import duties should be fixed for the period from 16 October 2008 and should apply until new import duties are fixed and enter into force.

(5) However, in accordance with Commission Regulation (EC) No 608/2008 of 26 June 2008 temporarily suspending customs duties on imports of certain cereals for the 2008/2009 marketing year ⁽³⁾, the application of certain duties set by this Regulation is suspended,

HAS ADOPTED THIS REGULATION:

Article 1

From 16 October 2008, the import duties in the cereals sector referred to in Article 136(1) of Regulation (EC) No 1234/2007 shall be those fixed in Annex I to this Regulation on the basis of the information contained in Annex II.

Article 2

This Regulation shall enter into force on 16 October 2008.

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

Done at Brussels, 15 October 2008.

For the Commission

Jean-Luc DEMARTY

*Director-General for Agriculture and
Rural Development*

⁽¹⁾ OJ L 299, 16.11.2007, p. 1.

⁽²⁾ OJ L 161, 29.6.1996, p. 125.

⁽³⁾ OJ L 166, 27.6.2008, p. 19.

ANNEX I

Import duties on the products referred to in Article 136(1) of Regulation (EC) No 1234/2007 applicable from 16 October 2008

CN code	Description	Import duties ⁽¹⁾ (EUR/t)
1001 10 00	Durum wheat, high quality	0,00 ⁽²⁾
	medium quality	0,00 ⁽²⁾
	low quality	0,00 ⁽²⁾
1001 90 91	Common wheat seed	0,00
ex 1001 90 99	High quality common wheat, other than for sowing	0,00 ⁽²⁾
1002 00 00	Rye	19,11 ⁽²⁾
1005 10 90	Maize seed other than hybrid	0,00
1005 90 00	Maize, other than seed ⁽³⁾	0,00 ⁽²⁾
1007 00 90	Grain sorghum other than hybrids for sowing	19,11 ⁽²⁾

⁽¹⁾ For goods arriving in the Community via the Atlantic Ocean or via the Suez Canal the importer may benefit, under Article 2(4) of Regulation (EC) No 1249/96, from a reduction in the duty of:

- 3 EUR/t, where the port of unloading is on the Mediterranean Sea, or
- 2 EUR/t, where the port of unloading is in Denmark, Estonia, Ireland, Latvia, Lithuania, Poland, Finland, Sweden, the United Kingdom or the Atlantic coast of the Iberian peninsula.

⁽²⁾ In accordance with Regulation (EC) No 608/2008, application of this duty is suspended.

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

ANNEX II

Factors for calculating the duties laid down in Annex I

1.10.2008-14.10.2008

1. Averages over the reference period referred to in Article 2(2) of Regulation (EC) No 1249/96:

(EUR/t)

	Common wheat ⁽¹⁾	Maize	Durum wheat, high quality	Durum wheat, medium quality ⁽²⁾	Durum wheat, low quality ⁽³⁾	Barley
Exchange	Minneapolis	Chicago	—	—	—	—
Quotation	195,25	123,95	—	—	—	—
Fob price USA	—	—	281,83	271,83	251,83	116,56
Gulf of Mexico premium	—	15,20	—	—	—	—
Great Lakes premium	4,76	—	—	—	—	—

⁽¹⁾ Premium of 14 EUR/t incorporated (Article 4(3) of Regulation (EC) No 1249/96).⁽²⁾ Discount of 10 EUR/t (Article 4(3) of Regulation (EC) No 1249/96).⁽³⁾ Discount of 30 EUR/t (Article 4(3) of Regulation (EC) No 1249/96).

2. Averages over the reference period referred to in Article 2(2) of Regulation (EC) No 1249/96:

Freight costs: Gulf of Mexico–Rotterdam: 22,09 EUR/t

Freight costs: Great Lakes–Rotterdam: 21,36 EUR/t

COMMISSION REGULATION (EC) No 1004/2008**of 15 October 2008****amending Regulation (EC) No 1725/2003 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council as regards International Accounting Standard (IAS) 39 and International Financial Reporting Standard (IFRS) 7****(Text with EEA relevance)**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards ⁽¹⁾, and in particular Article 3(1) thereof,

Whereas:

(1) By Commission Regulation (EC) No 1725/2003 of 29 September 2003 ⁽²⁾ certain international standards and interpretations that existed on 14 September 2002 were adopted.

(2) On 13 October 2008, the International Accounting Standards Board (IASB) adopted amendments to international accounting standard (IAS) 39 financial instruments: recognition and measurement and international financial reporting standard (IFRS) 7 financial instruments: disclosures, hereinafter 'amendments to IAS 39 and IFRS 7'. The amendments to IAS 39 and IFRS 7 allow the reclassification of certain financial instruments out of the category 'held-for-trading' in rare circumstances. The current financial crisis is considered to be such a rare circumstance which would justify the use of this possibility by companies.

(3) In accordance with the amendments to IAS 39 and IFRS 7, companies should be allowed to reclassify certain financial instruments as from 1 July 2008.

(4) The consultation with the Technical Expert Group (TEG) of the European Financial Reporting Advisory Group (EFRAG) confirms that the amendments to IAS 39 and IFRS 7 meet the technical criteria for adoption set out in

Article 3(2) of Regulation (EC) No 1606/2002. In accordance with Commission Decision 2006/505/EC of 14 July 2006 setting up a Standards Advice Review Group to advise the Commission on the objectivity and neutrality of the European Financial Reporting Advisory Group's (EFRAG's) opinions ⁽³⁾, the Standards Advice Review Group considered EFRAG's opinion on endorsement and advised the European Commission that it is well-balanced and objective.

(5) Regulation (EC) No 1725/2003 should therefore be amended accordingly.

(6) Considering the context of the current financial turmoil and the fact that certain financial instruments are no longer traded or related markets have become inactive or distressed, there is a need to give immediate effect to the amendments allowing for reclassification of certain financial instruments and this Regulation consequently should enter into force as a matter of urgency.

(7) The measures provided for in this Regulation are in accordance with the opinion of the Accounting Regulatory Committee,

HAS ADOPTED THIS REGULATION:

Article 1

In the Annex to Regulation (EC) No 1725/2003, international accounting standard (IAS) 39 financial instruments: recognition and measurement and international financial reporting standard (IFRS) 7 financial instruments: disclosures are amended as set out in the Annex to this Regulation.

Article 2

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

⁽¹⁾ OJ L 243, 11.9.2002, p. 1.

⁽²⁾ OJ L 261, 13.10.2003, p. 1.

⁽³⁾ OJ L 199, 21.7.2006, p. 33.

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

Done at Brussels, 15 October 2008.

For the Commission
Charlie McCREEVY
Member of the Commission

ANNEX

INTERNATIONAL ACCOUNTING STANDARDS

IAS 39	Amendments to IAS 39 <i>financial instruments: recognition and measurement</i>
IFRS 7	IFRS 7 <i>financial instruments: disclosures</i>

Reclassification of financial assets (amendments to IAS 39 financial instruments: recognition and measurement and IFRS 7 financial instruments: disclosures)

Amendments to IAS 39

Paragraph 50 is amended and paragraphs 50B to 50F and 103G are added.

MEASUREMENT

Reclassifications

50 An entity:

- (a) shall not reclassify a derivative out of the fair value through profit or loss category while it is held or issued;
- (b) shall not reclassify any financial instrument out of the fair value through profit or loss category if upon initial recognition it was designated by the entity as at fair value through profit or loss; and
- (c) may, if a financial asset is no longer held for the purpose of selling or repurchasing it in the near term (notwithstanding that the financial asset may have been acquired or incurred principally for the purpose of selling or repurchasing it in the near term), reclassify that financial asset out of the fair value through profit or loss category if the requirements in paragraph 50B or 50D are met.

An entity shall not reclassify any financial instrument into the fair value through profit or loss category after initial recognition.

- 50B A financial asset to which paragraph 50(c) applies (except a financial asset of the type described in paragraph 50D) may be reclassified out of the fair value through profit or loss category only in rare circumstances.
- 50C If an entity reclassifies a financial asset out of the fair value through profit or loss category in accordance with paragraph 50B, the financial asset shall be reclassified at its fair value on the date of reclassification. Any gain or loss already recognised in profit or loss shall not be reversed. The fair value of the financial asset on the date of reclassification becomes its new cost or amortised cost, as applicable.
- 50D A financial asset to which paragraph 50(c) applies that would have met the definition of loans and receivables (if the financial asset had not been required to be classified as held for trading at initial recognition) may be reclassified out of the fair value through profit or loss category if the entity has the intention and ability to hold the financial asset for the foreseeable future or until maturity.
- 50E A financial asset classified as available for sale that would have met the definition of loans and receivables (if it had not been designated as available for sale) may be reclassified out of the available-for-sale category to the loans and receivables category if the entity has the intention and ability to hold the financial asset for the foreseeable future or until maturity.
- 50F If an entity reclassifies a financial asset out of the fair value through profit or loss category in accordance with paragraph 50D or out of the available-for-sale category in accordance with paragraph 50E, it shall reclassify the financial asset at its fair value on the date of reclassification. For a financial asset reclassified in accordance with paragraph 50D, any gain or loss already recognised in profit or loss shall not be reversed. The fair value of the financial asset on the date of reclassification becomes its new cost or amortised cost, as applicable. For a financial asset reclassified out of the available-for-sale category in accordance with paragraph 50E, any previous gain or loss on that asset that has been recognised in other comprehensive income in accordance with paragraph 55(b) shall be accounted for in accordance with paragraph 54.

EFFECTIVE DATE AND TRANSITION

- 103G *Reclassification of financial assets* (Amendments to IAS 39 and IFRS 7), issued in October 2008, amended paragraphs 50 and AG8, and added paragraphs 50B–50F. An entity shall apply those amendments from 1 July 2008. An entity shall not reclassify a financial asset in accordance with paragraph 50B, 50D or 50E before 1 July 2008. Any reclassification of a financial asset made in periods beginning on or after 1 November 2008 shall take effect only from the date when the reclassification is made. Any reclassification of a financial asset in accordance with paragraph 50B, 50D or 50E shall not be applied retrospectively to reporting periods ended before the effective date set out in this paragraph.

In Appendix A *Application guidance*, paragraph AG8 is amended.

Effective interest rate

- AG8 If an entity revises its estimates of payments or receipts, the entity shall adjust the carrying amount of the financial asset or financial liability (or group of financial instruments) to reflect actual and revised estimated cash flows. The entity recalculates the carrying amount by computing the present value of estimated future cash flows at the financial instrument's original effective interest rate. The adjustment is recognised as income or expense in profit or loss. If a financial asset is reclassified in accordance with paragraph 50B, 50D or 50E, and the entity subsequently increases its estimates of future cash receipts as a result of increased recoverability of those cash receipts, the effect of that increase shall be recognised as an adjustment to the effective interest rate from the date of the change in estimate rather than as an adjustment to the carrying amount of the asset at the date of the change in estimate.

Amendments to IFRS 7

Paragraph 12 is amended and paragraphs 12A and 44E are added.

SIGNIFICANCE OF FINANCIAL INSTRUMENTS FOR FINANCIAL POSITION AND PERFORMANCE

Statement of financial position

Reclassification

- 12 If the entity has reclassified a financial asset (in accordance with paragraphs 51 to 54 of IAS 39) as one measured:
- (a) at cost or amortised cost, rather than fair value; or
 - (b) at fair value, rather than at cost or amortised cost;
- it shall disclose the amount reclassified into and out of each category and the reason for that reclassification.
- 12A If the entity has reclassified a financial asset out of the fair value through profit or loss category in accordance with paragraph 50B or 50D of IAS 39 or out of the available-for-sale category in accordance with paragraph 50E of IAS 39, it shall disclose:
- (a) the amount reclassified into and out of each category;
 - (b) for each reporting period until derecognition, the carrying amounts and fair values of all financial assets that have been reclassified in the current and previous reporting periods;
 - (c) if a financial asset was reclassified in accordance with paragraph 50B, the rare situation, and the facts and circumstances indicating that the situation was rare;
 - (d) for the reporting period when the financial asset was reclassified, the fair value gain or loss on the financial asset recognised in profit or loss or other comprehensive income in that reporting period and in the previous reporting period;
 - (e) for each reporting period following the reclassification (including the reporting period in which the financial asset was reclassified) until derecognition of the financial asset, the fair value gain or loss that would have been recognised in profit or loss or other comprehensive income if the financial asset had not been reclassified, and the gain, loss, income and expense recognised in profit or loss; and
 - (f) the effective interest rate and estimated amounts of cash flows the entity expects to recover, as at the date of reclassification of the financial asset.

EFFECTIVE DATE AND TRANSITION

- 44E *Reclassification of financial assets* (amendments to IAS 39 and IFRS 7), issued in October 2008, amended paragraph 12 and added paragraph 12A. An entity shall apply those amendments from 1 July 2008.

II

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

DECISIONS

COMMISSION

COMMISSION DECISION

of 10 October 2008

fixing, for the 2008 financial year and in respect of a certain number of hectares, the definitive financial allocations to Member States for the restructuring and conversion of vineyards under Council Regulation (EC) No 1493/1999

(notified under document number C(2008) 5738)

(Only the Bulgarian, Spanish, Czech, German, Greek, French, Italian, Hungarian, Maltese, Portuguese, Romanian, Slovenian and Slovak texts are authentic)

(2008/799/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

the references to a given financial year refer to the payments actually made by the Member States between 16 October and the following 15 October.

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1493/1999 of 17 May 1999 on the common organisation of the market in wine ⁽¹⁾, and in particular Article 14(2) thereof,

(3) In accordance with Article 14(1) of Regulation (EC) No 1493/1999, the Commission makes initial allocations to Member States each year on the basis of objective criteria, taking into account particular situations and needs and the efforts to be undertaken in the light of the objective of the scheme.

Whereas:

(4) The Commission fixed the financial allocations for the 2007/08 marketing year in Decision 2007/719/EC ⁽³⁾.

(1) The rules for the restructuring and conversion of vineyards are laid down in Regulation (EC) No 1493/1999 and Commission Regulation (EC) No 1227/2000 of 31 May 2000 laying down detailed rules for the application of Council Regulation (EC) No 1493/1999 on the common organisation of the market in wine, as regards production potential ⁽²⁾.

(5) Under Article 17(4) of Regulation (EC) No 1227/2000, a penalty is applied where the actual per hectare expenditure of a Member State exceeds the initial allocation. For the 2008 financial year, this penalty is to be applied to Slovakia for an amount of EUR 6 169.

(2) The detailed rules on financial planning and participation in financing the restructuring and conversion scheme laid down in Regulation (EC) No 1227/2000 stipulate that

(6) Under Article 16(1)(c) of Regulation (EC) No 1227/2000, Member States may submit a further request in the current financial year. For the 2008 financial year, the Czech Republic, Spain, Italy, Hungary and Romania have submitted such requests.

⁽¹⁾ OJ L 179, 14.7.1999, p. 1.

⁽²⁾ OJ L 143, 16.6.2000, p. 1.

⁽³⁾ OJ L 289, 7.11.2007, p. 59.

- (7) Under Article 17(3) of Regulation (EC) No 1227/2000, requests for further financing of which Member States notify the Commission are accepted on a pro rata basis, using the amounts available after deducting, for all Member States, the total of the amounts notified in accordance with Article 16(1)(a) and (b) of that Regulation from the total amount allocated to the Member States. This provision applies for the 2008 financial year to the Czech Republic, Spain, Italy, Hungary and Romania. As the requests for further financing submitted by these Member States are for a total amount lower than the amount available for reallocation, it has been possible to accept them in full,

HAS ADOPTED THIS DECISION:

Article 1

The definitive financial allocations to the Member States for the 2007/08 wine year, in respect of a certain number of hectares, for the restructuring and conversion of vineyards under Regu-

lation (EC) No 1493/1999, for the period of the 2008 financial year, shall be as set out in the Annex to this Decision.

Article 2

This Decision is addressed to the Republic of Bulgaria, the Czech Republic, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Republic of Austria, the Portuguese Republic, Romania, the Republic of Slovenia and the Slovak Republic.

Done at Brussels, 10 October 2008.

For the Commission

Mariann FISCHER BOEL

Member of the Commission

ANNEX

DEFINITIVE FINANCIAL ALLOCATIONS FOR 2007/2008
(2008 financial year)

Member State	Area (ha)	Financial allocation (EUR)
Bulgaria	1 200	9 013 796
Czech Republic	706	11 883 827
Germany	1 406	12 097 072
Greece	647	6 360 118
Spain	21 154	169 516 302
France	8 977	69 071 668
Italy	12 358	101 761 476
Cyprus	150	2 131 684
Luxembourg	5	38 001
Hungary	1 852	14 813 090
Malta	3	38 157
Austria	888	5 068 342
Portugal	2 711	23 511 590
Romania	4 205	35 050 228
Slovenia	124	2 401 900
Slovakia	228	863 646
Total	56 614	463 620 897

IV

(Other acts)

EUROPEAN ECONOMIC AREA

THE EEA JOINT COMMITTEE

EFTA SURVEILLANCE AUTHORITY DECISION

No 318/05/COL

of 14 December 2005

to close the formal investigation procedure provided for in Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement with regard to the exemptions from document duties and registration fees in connection with the establishment of Entra Eiendom AS (Norway)

THE EFTA SURVEILLANCE AUTHORITY,

WHEREAS:

HAVING REGARD TO the Agreement on the European Economic Area ⁽¹⁾, in particular to Articles 61 to 63 and Protocol 26 thereof,

I. FACTS

1. Procedure and correspondence

HAVING REGARD TO the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice ⁽²⁾, in particular to Article 24 and Article 1 in Part I of Protocol 3 thereof,

HAVING REGARD TO the Authority's Guidelines ⁽³⁾ on the application and interpretation of Articles 61 and 62 of the EEA Agreement,

HAVING CALLED ON interested parties to submit their comments pursuant to the provisions cited above ⁽⁴⁾ and having regard to their comments,

By letter dated 22 May 2002 (Doc. No: 02-3856 D), the Authority requested the Norwegian Government to submit relevant information regarding the establishment of Entra Eiendom AS (hereinafter 'Entra') to enable the Authority to assess whether the founding of the enterprise was in accordance with the State aid rules. The Norwegian authorities responded by letter from the Mission of Norway to the European Union dated 25 June 2002, forwarding a letter dated 20 June 2002 from the Ministry of Labour and Government Administration, both received and registered by the Authority on 26 June 2002 (Doc. No: 02-4850 A).

By letter dated 10 October 2002 (Doc. No: 02-7036 D) the Authority requested additional information. The letter addressed, as point 1, the exemption from document duties and registration fees connected with the change of ownership of real estate, and as point 2, the deduction in the assessed value on the basis of special termination conditions. The Norwegian authorities submitted the additional information by letter from the Mission of Norway to the European Union dated 14 November 2002, forwarding a letter from the Ministry of Trade and Industry dated 7 November 2002, both received and registered by the Authority on 14 November 2002 (Doc. No: 02-8219 A).

⁽¹⁾ Hereinafter referred to as the EEA Agreement.

⁽²⁾ Hereinafter referred to as the Surveillance and Court Agreement.

⁽³⁾ Procedural and Substantive Rules in the Field of State Aid (State Aid Guidelines), adopted and issued by the EFTA Surveillance Authority on 19 January 1994, published in Official Journal L 231, 3.9.1994. The State aid guidelines are available on the Authority's website: www.eftasurv.int

⁽⁴⁾ Dec. No: 132/04/COL. The decision to open the formal investigation procedure was published in OJ C 319, 23.12.2004, p. 17, and in the EEA Supplement No 64, on the same date, p. 46. The decision can also be found at the Authority's homepage: http://www.eftasurv.int/fieldsofwork/fieldstateaid/stateaidregistry/sadecinor04/132_04_entra.DOC

By telefax from the Ministry of Trade and Industry dated 9 December 2002, received and registered by the Authority the same day (Doc. No: 02-8912 A), the Norwegian Government requested that the Authority provide its conclusion in the case regarding the establishment of Entra. By letter dated 17 December 2002 (Doc. No: 02-9062 D) to the Mission of Norway to the European Union, the Authority informed the Norwegian authorities that the Authority might be in a position to close the part of the case as regards deduction in the assessed value on the basis of special termination conditions depending upon the submission of additional specified and detailed documentation concerning this issue.

Such detailed documentation was submitted by a telefax from the Ministry of Trade and Industry dated 23 January 2003, received and registered by the Authority on 23 January 2003 (Doc. No: 03-424 A). By letter to the Mission of Norway to the European Union dated 31 January 2003 (Doc. No: 03-588 D), the Authority informed the Norwegian authorities that — since no aid seemed to be involved — it *'will not raise objections to the value assessment made in the opening balance of the properties transferred from the Norwegian State to Entra Eiendom AS'*. However, the Authority stressed that this statement was without prejudice to the issue on document duties and registration fees.

By letter dated 2 April 2003 (Doc. No: 03-1827 D), the Authority once more addressed the issue of exemption from registration fees and excise duties and requested the Norwegian authorities to provide additional and clarifying information. By letter from the Mission of Norway to the European Union dated 5 June 2003, forwarding a letter from the Ministry of Trade and Industry dated 4 June 2003, both received and registered by the Authority on 10 June 2003 (Doc. No: 03-3631 A), additional information was submitted.

On 16 June 2004, the Authority decided to open the formal investigation procedure (Dec. No: 132/04/COL). The decision to open the formal investigation procedure was published on 23 December 2004.

By telefax dated 13 August 2004 (Event No: 290206) and letter from the Norwegian Mission to the European Union dated 17 August 2004, received and registered by the Authority on 18 August 2004 (Event No: 290456), the Norwegian authorities requested a one month extension of the deadline for submitting comments.

By letter dated 17 August 2004 (Event No: 290305), the Authority agreed to extend the deadline by one month.

By telefax dated 16 September 2004 (Event No: 292867) and letter from the Norwegian Mission to the EU dated 20 September 2004, forwarding a letter from the Ministry of

Trade and Industry dated 16 September 2004, received and registered by the Authority on 21 September 2004 (Event No: 293392), the Norwegian authorities submitted comments to the opening decision. The Norwegian authorities concluded that the exemption from document duties and registration fees provided for in the establishment of Entra does not constitute State aid within the meaning of Article 61(1) of the EEA Agreement.

The Authority did not receive any comments to the opening decision from other interested parties within the deadline of one month after publication in the *Official Journal of the European Union*.

By letter dated 4 May 2005, received and registered by the Authority on 9 May 2005 (Event No: 318691), the law firm Selmer, representing Entra, submitted comments to the Authority's decision to open the formal investigation procedure (see point 3.4 below).

The case was discussed at a meeting in Oslo on 19 May 2005 with representatives from different Norwegian Ministries and representatives from the Authority present.

By telefax from the Ministry of Modernisation dated 26 July 2005 (Event No: 327938), and letter from the Mission of Norway to the EU dated 1 August 2005, received and registered on 3 August 2005 (Event No: 329110), forwarding a letter dated 30 June 2005 from the Ministry of Trade and Industry, the Norwegian authorities submitted further information concerning whether the exemption constituted an economic advantage for Entra. The conclusion of the Ministry of Trade and Industry was that the exemption was no advantage for Entra.

2. The establishment of Entra

2.1. Proposal to establish a new limited liability company

The Norwegian Government presented the reorganisation of the public body, the Directorate of Public Construction and Property ('Statsbygg'), and the establishment of Entra, on 4 June 1999 ⁽¹⁾. On the same date, the Government presented a special Act on the conversion of parts of the real estate activity of Statsbygg to a limited liability company to resolve some transitional questions concerning the transformation and establishment of Entra ⁽²⁾. Paragraph 3 of this Act (hereinafter

⁽¹⁾ 'St prp nr 84 (1998-99) Om ny strategi for Statsbygg og etablering av Statens utleiebygg AS'. The original name of the company was 'Statens utleiebygg AS'. Hereinafter 'Entra' is used for Entra Eiendom AS and Statens utleiebygg AS.

⁽²⁾ 'Ot prp nr 83 (1998-99) Om lov om omdanning av deler av Statsbyggs eiendomsvirksomhet til aksjeselskap'. Law of 18 February 2000, No 11.

'the contested Act') states that re-registration in the real estate registry and other public registries are to be done as a change of name. As a consequence of this, Entra was not obliged to pay document duties and registration fees, but still became the title holder in the Real Estate Register.

Statsbygg is an administrative body ('Forvaltningsbedrift'), responsible to the Ministry of Modernisation. Statsbygg acts on behalf of the Norwegian Government as manager and advisor in construction and property affairs and offers premises to governmental organisations. Statsbygg continued operations and management of the property stock that was not transferred to Entra. Statsbygg currently manages around 2,2 million m² of floor space, in Norway and abroad. The property portfolio consists of office buildings, schools, accommodation and specialised buildings throughout the country, embassies and residences outside Norway. The annual building budget is approximately NOK 2,3 billion (some EUR 288 million). Statsbygg has 669 employees (October 2005) ⁽¹⁾.

In St.prp. nr. 84 (1998-1999) it is *i.a.* stated that the purpose of the reorganisation is to clarify the different roles of Statsbygg and to achieve a more efficient use of buildings owned by the State. To ensure better framework conditions for the part of Statsbygg being in competition with other private undertakings, buildings operated in a competitive market ('konkurranseutsatte bygg') were to be diverged from the special purpose buildings and become part of a new portfolio of real estate owned by Entra. The Government indicated that at a later stage, an alternative could be to sell part of the company to private interests.

Entra has the following object clause in its bylaws: 'The main purpose of the company is to provide state agencies with premises. The company may own, purchase, sell, operate and administer real estate and conduct other businesses in connection with this. The company may also own shares or interests in and participate in other companies that conduct activities such as those mentioned in the previous sentence' (unofficial translation by the Authority).

2.2. Entra's opening balance

In the proposal presented to Parliament, the Norwegian Government laid out the basic principles behind the transfer of assets to the new undertaking. No conclusions were drawn with regards to the actual value of the assets to be transferred. Rather, it is stated that this question was to be dealt with at a later stage, as it is written that: 'the final opening balance for the company will be presented in the budget for year 2000' ⁽²⁾. Nor was there established any specific methodology for determining this value.

In the period from 4 June 1999 and until the final valuation was settled by Royal Decree 22.6.2000, the value of the assets to be transferred was subject to extensive scrutiny. The aim was to determine the correct transaction value in accordance with the principles from Proposition No 84 (1998-99) for the transfer of the assets. Several methods and assumptions for arriving at this price were considered.

Firstly, Statsbygg requested the independent consultant Catella Eiendom Consult AS (CEC) to perform a valuation of the properties to be transferred. This valuation was done according to the Norwegian Valuers and Surveyors Association (NTF) framework for valuation, by evaluating each property and then adding up the individual properties to arrive at the total portfolio value. The result arrived at was NOK 3 852 110 000. This valuation was later audited by the Norwegian Valuers' and Surveyors' Association (NTF), who concluded that the value arrived at was acceptable, but cautiously assessed.

Secondly, Statsbygg performed its own valuation of the assets. This was done according to another methodology. Statsbygg used the discounted cash flows for the total portfolio as a basis for their calculations, instead of considering each property as a separate calculation to be added to the total. The result arrived at was NOK 3 137 500 000.

Thirdly, the Ministry of Administration also performed a valuation, based on the same principles as Statsbygg, but with different assumptions. The result arrived at was NOK 3 337 500 000.

The band between the highest and lowest valuations at this point was NOK 714 610 000, or a difference of 22 % relative to the lowest assumed price. Without going into further details, it should be mentioned that the methods used differ significantly. This observation was also made in an independent audit carried out by PricewaterhouseCoopers (PWC), where the three above values were assessed.

In their assessment PWC concluded that given the large methodological differences, a detailed comparison between the three assessments would be both a complex task to assemble and, more importantly, of little relevance. They concluded that 'In our view, all the three values are all within a reasonable band'. Further, PWC stressed the point that it was impossible to arrive at any specific number that should be regarded as the 'correct' value. Rather, this price would be the subject of negotiations between the parties, and might thus fluctuate according to the assumptions made.

⁽¹⁾ Source: <http://www.statsbygg.no/english/>

⁽²⁾ Unofficial translation by the Authority.

Fourthly, the Ministry decided to reassess the value once again. After an extensive discussion on whether or not the fact that the government agencies were able to terminate their leases on 12 month's notice should affect the market value of the properties, the value of the properties was now set to NOK 2 837 550 000. This value was submitted to Stortinget ⁽¹⁾ in connection with the State budget for 1999-2000. However, the proposal reserved the right for the Government to make final adjustments.

Fifthly, this right to adjust the final balance was exercised by the Ministry, who after adjusting, *inter alia*, some of Entra's rental contracts, and thereby changing the assumptions of the model again, arrived at a higher value. By Royal Decree the value in the final opening balance was set at NOK 3 222 871 000.

The process is summarised below. As can be seen, the band of values that has been suggested ranges from NOK 3 852 110 000 to NOK 2 837 550 000. This difference of NOK 1 014 560 000, or 35,8 % relative to the lowest price, can be explained both by differences in the methodology applied, and the assumptions made in the different models.

Valuation by Catella Eiendoms Consult (CEC) ⁽¹⁾	NOK 3 852 110 000
Statsbygg's recommendation	NOK 3 137 500 000
Ministry's valuation	NOK 3 337 500 000
Ministry's reassessed value due to termination conditions ⁽²⁾	NOK 2 837 550 000
Final opening balance ⁽³⁾	NOK 3 222 871 000

⁽¹⁾ 'Porteføljevurdering konkurransebyggene Statsbygg' Letter to Statsbygg dated 10.8.1999 containing CEC's valuations.

⁽²⁾ 'St.prp. nr. 1 Tillegg nr. 10 (1999-2000) Om etablering av Statens utleiebygg AS'.

⁽³⁾ 'Statens utleiebygg AS – Fastsettelse av åpningsbalanse og endelige bevilgninger til egenkapital og lån'. Kongelig resolusjon av 22.6.2000.

The final opening balance was based on the discounted cash flow of the total portfolio, as used in Statsbygg's original recommendation, but based on certain changes in assumptions.

Entra was originally founded as a 'minimum' company based on cash contributions. Subsequently, property, capital and personnel (assets and liabilities) were transferred from the State to Entra in exchange for the issue of shares, with effect from 1 July 2000. Ownership and title of the properties in question were transferred from the Norwegian State to Entra and registered in Entra's name. On the basis of the Act establishing Entra, no document duties and registration fees were

paid. The company is a limited liability company 100 per cent owned by the Norwegian State.

The company (group ⁽²⁾) had an operating income of NOK 1 072 million (some EUR 128 million ⁽³⁾) in 2004, and a profit before tax of NOK 134 million (some EUR 16 million). The group's consolidated equity (book value) as of 31.12.2004 was NOK 1 288 million (some EUR 154 million). At year-end, the group's property portfolio (book value) was NOK 8 768 million (some EUR 1 047 million). As of 31.12.2004, Entra had 133 employees. The total property portfolio consists of some 110 properties, amounting to approximately 900 000 m² ⁽⁴⁾.

According to the Norwegian authorities, simulated accumulated document duty is estimated to NOK 80 571 775, and accrued registration fee is estimated to an amount of NOK 147 300 (150 properties * NOK 982), in total NOK 80 719 075 (some EUR 9,87 million) ⁽⁵⁾.

3. The Norwegian Government's assessment of whether the exemption of document duties and registration fees is in compliance with the state aid provisions of the EEA Agreement

3.1. The Government's assessment presented in connection with the establishment of Entra

An assessment by the Norwegian Government as to whether the exemption from stamp duty and registration fees is in compliance with the State aid provisions of the EEA Agreement is given in Proposition no 84 (1998-99), chapter 7.6.1. The text reads as follows (unofficial translation by the Authority):

'The next question raised is whether the company can be absolved from the duty to register the transfer of title from Statsbygg to Statens utleiebygg AS and thereby not pay the registration fee and excise duty. According to the Act on Court Charges Chapter 6 and Article 7 of the Act on Document Duty, duties in connection with registration of documents transferring rights to property shall be paid to the Treasury. The duty to pay costs therefore only becomes due when the transfer of title is registered in the real estate registry. Payment of excise duty is not required for a change of name in the register.

⁽²⁾ The Group consists of, in addition to Entra eiendom AS, Entra Service AS, Universitetsgaten 2 AS, Biskop Gunnerus gate 14 AS, Instituttveien 24 AS, Entra Kultur 1 AS, Langkaia 1 AS, Kr Augustgate 23 AS, Nonnen utbygging AS and Krambugt 3 AS. Source: Annual Report 2004. See http://www.entraeiendom.no/files/Entra_Eiendom_Arsrapport_2004.pdf

⁽³⁾ Average exchange rate for 2004: EUR 1 = NOK 8,3715.

⁽⁴⁾ Source: Entra Annual Report 2004.

⁽⁵⁾ Exchange rate 30 June 2000: EUR 1 = NOK 8,1815.

⁽¹⁾ 'St.prp. nr. 1 Tillegg nr. 10 (1999-2000) Om etablering av Statens utleiebygg AS'.

The Ministry finds it highly uncertain whether the division of property between the State and Statens utleiebygg AS will imply a transfer of title that should be entered into the real estate register. It seems more natural to regard the situation as an organisational change in the State's property portfolio where the State will retain the registered rights to the properties. It is not a question of transfer of title, but merely a change of name in the register. A consequence of this is that the situation does not require the payment of excise duty. The company is therefore not required to pay registration fees and excise duty. The Ministry, however, further suggests, in a separate proposal to the Odelsting, that re-registering in connection with organisational changes is carried only as a name change. In relation to the Real Estate Register this will imply that there will be no need for a transfer of title. The provision entails that there, with certainty, will be no need for a transfer of title. The proposal corresponds to rules given in connection with other transformations to State-owned undertakings, cf. e.g. Act of 24 June 1994 No 45 on the establishment of Televerket as a limited liability company, and Act of 22 November 1996 No 65 on the establishment of the State-owned Post company article 73. The question is whether this practice leads to a different competition situation for the State limited liability companies than that of private entities who separate parts of their property activity into their wholly owned limited liability company.

The EFTA Surveillance Authority (ESA) has published guidelines for the use of State aid rules in Article 61 of the EEA Agreement in connection with financial transactions between public undertakings and the authorities, cf. State Aid Guidelines Chapters 19 and 20. The central assessment criteria of whether or not State aid exists is, according to these guidelines, the 'market investor principle'. This means that the State in its economic dispositions is required to act as a private investor would have done in the same situation towards a similar or comparable private company.

The starting point within Norwegian law is that transfer of rights to property from one legal subject to another shall be registered in order for it to be valid in relation to a third subject. Private investors will therefore, at the outset, be obliged to register the transfer of title and to pay stamp duties. A similar starting point entails that a limited liability company owned by the State has a similar duty to register transfer of title from the State.

On the other hand, it is unlikely that a rational investor would have chosen a solution whereby he in connection with separation of the part of the undertaking dealing with real estate would have registered a transfer of title with the effect of being imposed the excise duty. As such a transfer of title would cost the company dearly, it hardly seems likely to

imagine that a rational investor would choose such a solution. It would be more likely that one chooses a solution where the payment of fees is avoided, for example by keeping the title with the mother company, or to create a holding company. These options are not available for the State. When the State chooses to become a player in the market, it is more convenient to separate this part of the business and organise it in a separate company. Hence, the State is in a situation where it must transfer its properties to another legal entity. This argues strongly for the registration of transfer of rights not being in conflict with the State aid rules.

The Ministry therefore must assume that the exception from the requirement to register transfer of rights will not place Statens utleiebygg AS in a different competitive situation than that pertaining to a private investor on the market. The exception is not seen as being in conflict with the EEA Agreement.

Further, it is a general assumption that the value assessment of the properties to be transferred to Statens utleiebygg AS is put at market value, and that any possible later transfer of capital from the State takes place in the same manner as a private investor providing contributions to the undertaking.'

3.2. Arguments presented by the Norwegian authorities before the Authority decided to open the formal investigation procedure

By letter of 20 June 2002, the Ministry of Labour and Government Administration provided information concerning the framework conditions for Entra and the establishment of its opening balance. The Ministry described the cash flow method used to assess the total value of the property portfolio and stated that this method was used 'because it would better satisfy the requirements of Proposition No 84 to the Storting (1998-99) to provide the company with framework conditions on equal footing with other players in the same sector'. The letter did not describe whether, and if so how and to what extent, the lack of payment of the excise duty influenced the opening balance. Nor did it discuss whether paragraph 3 of the contested Act required that the exception from the excise duty should be met with an increase in the portfolio assessment corresponding to the amount that would have been paid had the registration in the real estate register been treated as a change of title and not as a change of name.

By letter dated 7 November 2002, the Ministry of Trade and Industry developed in more detail its argument already presented in the preparatory works that private investors might choose solutions that avoid a formal transfer of the

deed and thus avoid having to pay document duties and registration fees. As the registration of the transfer of title was not mandatory, enterprises could, regardless of whether they were privately or publicly owned, lawfully avoid document duties and registration fees by simply not registering any transfer of ownership. To let the title remain with the original owner constituted a risk for the new owner for 'holder of good faith' towards a third party. However, it was possible to eliminate that risk by the registration of a 'restriction of the right of ownership'. The registration of declaration on the restriction of the right to ownership did not exclude the risk of execution proceedings/creditor's or bankruptcy estate's extinction of the rights of a legal successor to the debtor's property. According to the Norwegian authorities, that method was widely used by privately owned enterprises, especially between related parties.

In the view of the Ministry, a private owner of Statsbygg would, most probably, have demerged Statsbygg without releasing the obligation to pay registration fee or excise duty. This method was not a realistic option in the case of the establishment of Entra. That is *i.a.* due to obstacles arising from the fact that Statsbygg is subject to public and political control. Methods like keeping the title to the properties with Statsbygg would imply that Entra would be dependent on the approval from a public body for transactions concerning the properties. If the title to the properties remained in Statsbygg, that would imply that the State was both the renter and the formal title holder of the properties. To use such methods for Statsbygg/Entra would blur the distinction between the two entities' different roles. Statsbygg is entrusted with the task of owning and operating non-commercial public buildings, while Entra operates on a commercial basis.

In the letter dated 7 November 2002, the Ministry also brought forward an argument against the application of Article 61 of the EEA Agreement that was not mentioned in the preparatory works cited above. The Ministry reiterated that the value of the real estate portfolio was based on the method of 'net capitalisation'. In short this method implied that the property's future cash flow (net rent from existing contracts plus assessment of future net rent after the expiry of existing contracts) was discounted to present value by a factor observing a relevant rate of return requirement. This rate was set at 9,5 % as it reflected a benchmarking with similar private operators in the trade. According to the Ministry, if document duties and registration fees had been payable, the costs would have been activated as an asset, while the value of the properties would have been reduced correspondingly. Thus, this would not have reduced Entra's total balance sheet or the total asset valuation. In contrast, if the excise duty would have been introduced without adjusting the value of the properties, this would have resulted in 'a higher value of total assets, resulting in a rate of return of only 9,1 %, which is well below Entra Eiendom AS required level. This would give Entra Eiendom AS a considerable disadvantage compared to private operators'.

By letter dated 4 June 2003, the Ministry of Trade and Industry submitted additional information and arguments concerning *i.a.* the measures used by private undertakings. The Ministry, moreover, reiterated the arguments in the letter dated 7 November 2002 as to why it believed that the non-payment of the duty did not affect the company's capital structure, solidity and total value.

As an additional third argument for not viewing the exemption from the excise duty as aid, the Ministry referred to the 'continuity principle' in Norwegian law. It stated that this principle is an umbrella term for a number of rules that presuppose that the acquiring undertaking takes over the legal position of the transferring company. The purpose of the continuity principle is to facilitate mergers and demergers. When the continuity principle applies, the transferring undertaking's legal situation is deemed to continue in the acquiring company. According to the Ministry, continuity with regard to tax and duty positions was an important aspect of the principle. Indeed, the Registration Act construed in light of the company legislation implied that reorganisation of private activities in numerous cases could occur without triggering demands for registration fees and document duties. On this basis, the Ministry argued that the exemption was a general measure, which did not constitute State aid within the meaning of Article 61(1) of the EEA Agreement. Point 9, Conclusion, of the letter dated 4 June 2003, reads:

'The common system regarding registration fee and document duty is that the continuity principle determines if conversion processes, both public and private, may be done as a name change in relation to *inter alia* the rules on registration fee and document duty. The purpose of the continuity principle is to facilitate the implementation of mergers, demergers and restructurings, which is regarded as socio-economically desirable. The special legislation and the reimbursement of accrued document duty resulting from the reorganisation of hydropower/electricity companies are a result of the same considerations. Thus, the practice is a general measure, which according to well established case law does not constitute State aid within the meaning of Article 61 of the EEA Agreement.'

3.3. Arguments presented by the Norwegian authorities after the Authority opened the formal investigation procedure

In the letter from the Ministry of Trade and Industry dated 16 September 2004, the Norwegian authorities commented upon the Authority's decision to open the formal investigation procedure. The view of the Norwegian Government was that none of the conditions of Article 61(1) of the EEA Agreement were fulfilled. Hence, the non-payment for Entra of excise duty did not constitute State aid within the meaning of Article 61(1) of the EEA Agreement.

The Ministry reiterated, firstly, its previously presented argument that the measure did not constitute an advantage for Entra. It did not change the capital structure, the solidity and the total value of the company. If document duties and registration fees were accrued in the opening balance sheet, there would have been an alternative opening balance. It stated that it is the Norwegian Government's opinion that the tax measure in question should not be distinctly separated from the opening balance of the company. Moreover, the purpose of the main rule on document duties and registration fees is to tax real transfers between different economic entities. Where the transfer is in appearance only and the entities transferring and acquiring are substantially the same, the main principle in Norwegian law, according to the Ministry, would be to let the acquiring undertaking keep the legal position of the transferring undertaking (continuity principle). The Ministry considers that the continuity principle is not restricted to specific transfers, but is regarded as the main rule where the transferring entity and the acquiring entity are substantially the same. Entra was consequently not relieved from a charge normally borne from their budgets, according to the Norwegian authorities.

Secondly, the Ministry referred to the fact that the transfer of title in the case at hand by paragraph 3 of the contested Act was done as a change of name and not by transfer of title. Thus, the obligation on Entra to pay document duty was never released and there was, according to the Norwegian authorities, no loss of tax revenue and hence, no consumption of State resources.

Thirdly, the Norwegian authorities argued that the measure in question did not affect trade between the Contracting Parties. The Ministry considered that a market survey can show whether the real estate market for urban business premises in Norway was of a purely national character and not subject to cross-border competition. The Ministry considered that except for foreign investments in financial institutions, non-Norwegian investors have not operated in the Norwegian real estate market.

Fourthly, the Ministry argued that the exemption from the document duties and registration fees was not a selective measure. The Ministry referred to the fact that a main criterion in applying Article 61(1) of the EEA Agreement to a tax measure is that the measure provides an exception to the application of the tax system in favour of certain undertakings in the EFTA State. The common system applicable should thus first be determined. If a tax measure derogates from the common system, it must be examined whether the derogation is justified by the nature or general scheme of the tax system. The Ministry considered that the practice with name changes as a procedure for transferring property title did not constitute a derogation from the tax system. In case the Authority would find that the practice constituted a derogation from the tax system, the Ministry considered the derogation to be justified by the nature or general scheme of the tax system.

Finally, the Ministry referred to Commission decision C 27/99 of 5 June 2002 ⁽¹⁾ regarding exemptions from transfer taxes in the case of restructuring of certain public undertakings into joint stock companies in Italy. According to the Ministry, the factual situation in the Italian case was similar to the case in hand and that the same considerations could be made. The Ministry concluded that the exemption was justified by the nature or general scheme of the system and did not constitute State aid within the meaning of Article 61(1) of the EEA Agreement.

By letter dated 30 June 2005, the Ministry of Trade and Industry submitted further arguments as to why the exemption from document duties and registration fees did not constitute an economic advantage for Entra. The Ministry referred to the fact that the opening balance for Entra was prepared by using the Net Present Value method (NPV). The future expected cash flow from each building was estimated and discounted with a required rate of return. The rate of return was fixed by using the Capital Asset Pricing Model after having compared other competing real estate companies. The equity was fixed at approximately 40 %, which was comparable to other similar companies.

The Ministry considered that the calculated value of the properties was the best estimate of what an investor, 'not having to pay the document duties and registration fees', would have been willing to pay for the portfolio. If the buyer of the portfolio (in this case Entra) would have to pay the document duties and registration fees, the price the investor would be willing to pay would be reduced by the same amount as the document duties and registration fees. The fixed asset value of the properties in the balance sheet would have been reduced by the same amount, while financial fixed assets would have been increased by the same amount, so that the total value of the assets would have been the same. On the liability side, equity and total debt would not have changed although short-term debt would have increased corresponding to the value of the document duties and registration fees. The Ministry concluded that the financial position of Entra had not changed as a consequence of the exemption from the document duties and registration fees.

The Ministry acknowledged that one cannot draw a general conclusion that it will always be the seller of a property who *de facto* bears the burden of an excise duty, since this result is dependent on particular circumstances. However, in the case at hand, it would be the seller that carried the burden, as the method for the assessment of the real estate that was used in relation to Entra in the opening balance implied that (unofficial translation by the Authority): 'In such a case, and when the NPV-method is used, all types of costs in connection to the purchase will be deducted from the purchase price, since all elements are a part of the value assessment method itself, as the buyer otherwise does not obtain the required rate of return)'

⁽¹⁾ OJ L 77, 24.3.2003, p. 21.

3.4. Comments from interested parties

By letter dated 4 May 2005, the law Firm Selmer, representing Entra, submitted comments to the Authority's decision to open the formal investigation procedure. Selmer argued that the exemption from document duties and registration fees did not constitute an advantage for Entra and that the exemption was within the nature and general logic of the Norwegian system.

Firstly, Selmer referred to the fact that it was decided to establish the company with equity of 40 % of the total capital. As a consequence of this, if Entra had to pay the document duties and registration fees, the value of the properties would have been reduced by the same amount as the document duties and registration fees and the Norwegian State would have to inject the same amount into the company, in order to keep the equity at 40 %. Selmer considered that this did not change the economic situation of the company and that Entra did not receive any economic advantage.

Secondly, Selmer stated that all state reorganisations have taken place in a consistent manner based on the continuity principle, and referred to the reorganisations of the Norwegian Broadcasting Corporation (NRK), Telenor, the National Rail Company (NSB), Posten Norge, Avinor, Mesta and Statkraft. Selmer therefore considered that the exemption of document duties and registration fees was within the nature and general logic of the Norwegian system.

4. The Norwegian legislation concerning document duty and registration fee on the registration of transfer of real estate

4.1. What triggers the obligation to pay document duty and registration fee?

All real estate in Norway is identified in the Real Estate Registry ('Eiendomsregisteret'), which, from 1995, onwards contains information from 'Tinglysingsregisteret/Grunnboken' and 'GAB-registeret (Grunneiendommer, Adresser og Bygninger)' ⁽¹⁾.

Tinglysingsregisteret was established pursuant to the Registration Act 1935 No 2 ('Lov om tinglysing'). Every property is identified by registry identification under which information about the ownership, title and encumbrances etc. may be entered. The registry contains, *inter alia*, information on various rights and obligations to the property in question. Interested parties acting

in good faith are entitled to rely on the information contained in the Real Estate Registry.

Pursuant to Section 7(1) of the Act on Document Duty 1975 No 59 ('Lov om dokumentavgift'), the registration of transfer of ownership title ('hjemmelsoverføring') to real estate property releases an obligation to pay document duties ('dokumentavgift'). The tax rate is 2,5 % based on the sales value of the property. The new title holder is responsible for paying the duty, cf. Section 2-6 of Regulation on Document Duty, Ministry of Finance, 16 September 1975 and later amendments.

In addition, the registration of transfer of title in the Real Estate Registry is subject to a registration fee ('tinglygingsgebyr') pursuant to the Court Fee Act 1982 No 86 ('Rettsgebyrloven'). When Entra was established, this fee was fixed at NOK 982 (some EUR 123) per document registered. The provisions concerning the conditions for levying the document duty and registration fee are identical.

As mentioned above, the excise duty is released by the registration of the transfer of title to another legal entity ('hjemmelsoverføring'). Consequently, if there is no transfer of title to another legal entity, but only a change of name of the same legal entity in the registry ('grunnboken'), no excise duty will be payable.

There is no legal obligation to register ('tinglyse') rights related to real estate (ownership etc.) in the registry. It is not necessary to register transfer of title in order to affect the transfer of ownership. The holder of the rights may however choose to register his rights in order to protect his rights against third parties.

4.2. When can the designation of the title holder be changed without inferring excise duty?

The practise with regard to the payment of excise duties from 1990 to 1 July 2005 — and thus at the time Entra was established — is described in two sets of circulars, namely Circular G-37/90 from 25 May 1990 from the Norwegian Ministry of Justice and the yearly circulars from the Norwegian Customs and Excise (NCE) ('Toll- og Avgiftsdirektoratet') ⁽²⁾. According to point 1.1 in the latter circulars, an exemption from stamp duty will not be granted unless there is a direct legal basis in the Act on Document Duty or by Parliamentary decisions ⁽³⁾.

⁽¹⁾ Source: Statens Kartverk — Tinglysingen, see: <http://www.statkart.no/IPS/tinglysing/?module=Articles;action=ArticleFolder.publicOpenFolder;ID=2207>

⁽²⁾ f. *inter alia* Dokumentavgift 2000 — S12-DOK-2001 and Rundskriv nr. 12/2005 S, to which reference is made below. See also http://www.toll.no/upload/dokumentavgift1_1.pdf

⁽³⁾ The text reads as follows in Norwegian: 'Det gis ikke fritak for dokumentavgift med mindre det er direkte hjemmel i loven eller stortingsvedtak.'

(i) Mergers

In the cases of mergers, there exists, according to the Norwegian Ministry of Justice, no transfer of title for the purpose of the Act on Document Duty. It is therefore sufficient that the merger be registered in the Real Estate Registry by confirming that the company has been merged with another. Such a confirmation can be issued by the Company Registry and does not trigger the payment of registration fee and excise duty. This applies to mergers between limited liability companies within the meaning of Section 14(7) of Law No 59 of 4 June 1976 (the 'limited liability Company Act') ⁽¹⁾, and also to other mergers undertaken on the basis of Chapter 14 in the same law and mergers between saving banks (Chapter 8 of Law No 1 of 24 May 1961; the 'Saving Bank Act') ⁽²⁾.

(ii) Demergers under the Limited Liability Company Act of 1976

Where, in the case of demergers, the ownership of real estate was transferred from the original company ('A') to the company which has been separated out ('B'), both Circular G-37/90 and point 1.4 in the yearly circulars from Norwegian Customs and Excise Directorate provided that both registration fee and document duty must be paid ⁽³⁾.

In contrast, in case the real estate remained with the original company (A) from which a part (B) was separated out, there was no obligation to pay registration fee and document duty ⁽⁴⁾. The reason for this is that in this case the real estate is not transferred to a new legal subject (which would have been the case if the real estate had been transferred to the company which had been separated out).

(iii) Transfer of ownership from joint ownership to a form of partnership

In the relevant period, transfer of ownership of real estate from joint ownership to a general partnership or limited partnership (or vice versa) implied a transfer from one legal subject to another legal subject. Thus, both Circular G-37/90 and point

1.5 in the yearly circulars from the Norwegian Customs and Excise Directorate stated that this will therefore trigger payment of excise duty.

(iv) Conversion from one corporate form to another

A situation which is not mentioned in the Circular is the situation where an undertaking is transformed from one form of corporation to another. In the Norwegian Government's letter of 4 June 2002 it is stated, that the main rule in such situations was that *'there must be a transfer of title. Accordingly, registration fee and document duty are payable. This is how the legislation has been practised.'* The Norwegian Government, however, argues that it should be possible to consider exemptions to this rule based on considerations linked to the continuity principle ⁽⁵⁾.

To this, the Authority notes that the Court of Appeal (*Frostatting Lagmannsrett*) in an order of 1997-10-09 published in LF-1997-671 held that a conversion from a *'kommandittselskap'* to a *'aksjeselskap'* ('North West Terminalen AS') did trigger excise duty. In this respect, the Lagmannsrett referred to the above mentioned circulars from the Ministry of Justice and the Customs and Excise Directorate and stated that it follows from the Act on Document Duty that duty should be paid unless directly stated in the act itself or provisions made pursuant thereto. As the new company was a different legal entity than the original one, it did not matter that it was the same owners who continued in the new company and thus that the only change in reality was the form under which the company was operated.

In addition, reference can be made to a case mentioned in Annex 1 of the Norwegian Government's letter of 4 June 2002 in which the Norwegian authorities refused to exempt from duty a conversion from a *'selveiende institusjon'* to a *'allmenaksjeselskap'*.

(v) Transfer of ownership from a municipality to a separate legal entity wholly owned by the municipality

At the meeting between the Norwegian Authorities and the Authority on 19 May 2005, the Norwegian Authorities indicated that it was most likely that under the circulars applicable at the time of the establishment of Entra, stamp duty would have incurred in connection to a reorganisation in which the ownership of a building was transferred from a municipality to a limited liability company owned by that municipality. In contrast, it had for some time been the practice that no stamp duty would incur in relation to transfer of titles in connection with reorganisations pursuant to the Norwegian act of 29 January 1999 on inter-municipal companies ⁽⁶⁾.

⁽¹⁾ Reference is also made to law No 44 and law No 45 of 13 June 1997 on limited liability companies and public limited liability companies, respectively.

⁽²⁾ Reference is made to In Circular G-37/90, page 1, to point 1.3. in *Dokumentavgift 2000* and to point 1.3 in *Rundskriv nr. 12/2005 S*.

⁽³⁾ The Authority takes note of the remark by the Norwegian Government in point 4.3 in its letter of 4 June 2003 that it could be discussed *'whether registration of a document should still be required as an expression of transfer of title. The question is under consideration in the Ministry of Justice'*. However, the fact remains that consecutive circulars of the Government maintained that position until June 2005 and only changed the registration practice with regard to registrations after that date.

⁽⁴⁾ This is so even if the company which has been separated out (B) takes over the name of the original company (A) since the reality is that the owner of the real estate remains to be the same, namely the original company (A). This will be considered as a mere name change. See also opinion of the Norwegian Ministry of Justice published in U87-4.

⁽⁵⁾ Cf. Point 7h) of the letter.

⁽⁶⁾ Cf. e.g. point 3.9 in *Rundskriv nr. 12/2005 S*.

(vi) The practice after 1 July 2005

As the registration of the name change in the Real Estate Registry took place in connection with the establishment of Entra, the rules described above form the relevant comparison with provision in paragraph 3 of the contested Act. It should, however, be mentioned that on 21 June 2005, The Ministry of Justice adopted a new Circular (G-6/05) on the procedure of transfer of real estate in connection with mergers, de mergers and transformation of companies⁽¹⁾. The new circular introduced, with effect from 1 July 2005, a new practice with regard to situations where the designation of the title holder can be changed without it being considered a transfer of title. According to the new Circular, registration in connection with de mergers based on the continuity principle will now be treated in the same way as mergers in relation to the rules on excise duties and thus no longer be subject to stamp duty. The same applies to conversions carried out on the basis of the rules in Chapters 13, 14 and 15 of the Limited Liability Company Act and the Public Limited Liability Company Act.

In contrast, according to the new Circular, excise duty will still be payable when real estate is transferred according to a set of rules not based on continuity (for example a merger of general partnerships (*ansvarlige selskaper*)). A transfer from one form of company to another, for example from a general partnership to a limited liability company, will also continue to be liable to excise duty.

5. Other reorganisations of public undertakings

As stated in the letter dated 4 June 2003 from the Norwegian authorities, other reorganisations have contained provisions similar to the contested Act (Posten AS, NSB AS, Mesta AS, Avinor AS, Telenor AS and health enterprises)⁽²⁾.

The Authority notes that other reorganisations have also taken place where a provision similar to the one contained in the contested Act was not adopted. The reorganisations that the Authority has become aware of, where such a provision has not been adopted include the establishment of BaneTele AS, Secora AS and Statkraft AS.

⁽¹⁾ 'Rundskriv G-6/05: Den tingblyingsmessige fremgangsmåten når fast eiendom blir overført i forbindelse med fusjon, fisjon og omdanning'. The Circular can be found at the homepage of the Ministry of Justice: <http://odin.dep.no/jd/norsk/dok/regelverk/rundskriv/012081-250018/dok-bn.html>

⁽²⁾ For some of the reorganisations no reasons for the exemptions are given in the preparatory works. For others, the provision is seen as a deviation from the normal rules pertaining to excise duties. It is stated, moreover, that the provision corresponds to similar provision in relation to the other transformations of state enterprises to public limited companies. Finally, it is often said that the provision concerned corresponds to the approach concerning transfer of real estate in case of mergers of public limited companies and banks.

BaneTele AS is a provider of a nationwide fibre broadband network. The limited liability company was established on 1 July 2001. Before this date, the activities carried out were a part of the National Rail Administration ('Jernbaneverket'). BaneTele is a limited liability company 100 % owned by the Norwegian State, represented by the Ministry of Trade and Industry. The National Rail Administration is responsible for the management of the national railway network, on behalf of the Ministry of Transport and Communication. The proposal to establish the limited liability company BaneTele was presented to the Parliament in St.prp. nr. 80 (2000-2001) *Omdanning av BaneTele til aksjeselskap* ⁽³⁾ and Ot.prp. nr. 93 (2000-2001) *Om lov om omdanning av Jernbaneverkets kommersielle televirksomhet til aksjeselskap* ⁽⁴⁾. Ot.prp. nr. 93 (2000-2001) and the subsequent law (Law of 15 June 2001) do not contain any provision similar to paragraph 3 in the contested Act.

Secora AS is a specialised contractor in the development of safe and efficient harbours and coastal waterways. The limited liability company was established on 1 January 2005. The activities were previously carried out by the production unit of the Norwegian Coastal Administration ('Kystverket'). Secora AS is 100 % owned by the Norwegian State represented by the Ministry of Fisheries and Coastal Affairs. The Norwegian Coastal Administration is the Norwegian national agency for coastal management, marine safety and communication. The proposal to establish Secora AS was presented in St.prp. nr. 1 (2004-2005) *Om omdanning av Kystverkets produksjonsvirksomhet til statlig aksjeselskap m.m.* ⁽⁵⁾ and in Ot.prp. nr. 20 (2004-2005) *Om lov om omdanning av Kystverkets produksjonsvirksomhet til statsaksjeselskap* ⁽⁶⁾. Ot.prp. nr. 20 (2004-2005) and the subsequent law (Law of 17 December 2004) do not contain any provision similar to paragraph 3 in the contested Act.

Statkraft AS is the biggest producer of electricity in Norway. The limited liability company was established on 1 October 2004. The company was previously a state undertaking ('Statsforetak (SF)'), and the state undertaking Statkraft SF still exists as the formal owner of Statkraft AS. The first proposal to establish the limited liability company was presented to the Parliament in St.meld. nr. 22 (2001-2002) *Et mindre og bedre statlig eierskap* ⁽⁷⁾ and thereafter in St.prp. nr. 53 (2003-2004) *Statens eierskap i Statkraft SF* ⁽⁸⁾ and in Ot.prp. nr. 63 (2003-2004) *Om lov om omorganisering av Statkraft SF* ⁽⁹⁾. In St. prp. nr. 53 (2003-2004) the Government stated that the reorganisation would entail

⁽³⁾ See <http://www.odin.dep.no/repub/00-01/stprp/80>

⁽⁴⁾ See <http://www.odin.dep.no/repub/00-01/otprp/93>

⁽⁵⁾ See <http://www.odin.dep.no/filarkiv/226433/STP0405001-T06-TS.pdf>

⁽⁶⁾ See <http://www.odin.dep.no/repub/04-05/otprp/20>

⁽⁷⁾ See <http://odin.dep.no/nhd/norsk/dok/regpubl/stmeld/024001-040006/dok-bn.html>

⁽⁸⁾ See <http://www.odin.dep.no/filarkiv/208116/STP0304053-TS.pdf>

⁽⁹⁾ See <http://odin.dep.no/filarkiv/207892/OTP0304063-TS.pdf>

that Statkraft AS would have to pay excise duties (unofficial translation by the Authority) 'in accordance with the normal rules of the act' on excise duties and that the costs would reduce the surplus for the undertaking and thus also the basis for dividends. The excise duties were estimated to be NOK 1 500 million (approximately EUR 188 million) ⁽¹⁾.

II. APPRECIATION

1. The existence of State aid

Article 61(1) of the EEA Agreement reads as follows:

'Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.'

To be considered as State aid under Article 61(1) of the EEA Agreement, a measure must fulfil all the following four criteria:

1. The aid must be granted by the State or through State resources;
2. the aid must confer an advantage to the recipients that reduces the costs they normally bear in the course of the business;
3. the advantage must be specific or selective in that it favours certain undertakings or the production of certain goods;
4. the aid must distort or threaten to distort competition and affect trade between the Contracting Parties.

⁽¹⁾ The text reads as follows in Norwegian: 'Den foreslåtte omorganiseringen av Statkraft vil medføre at det påløper dokumentavgift til staten, jf Stortingets vedtak om dokumentavgift § 1 første ledd. Utgiften vil være i størrelsesorden 1,5 milliarder kroner. Departementet legger til grunn at Statkraft betaler dokumentavgift i tråd med lovens normalordning. Utgifter til dokumentavgift vil redusere overskuddet til selskapet og dermed også utbyttegrunnlaget'.

Whereas the Authority, in its decision to open formal investigations, made the preliminary conclusion that all the said conditions were fulfilled, the Norwegian Government have argued that none of the conditions were fulfilled ⁽²⁾. The Authority must therefore examine the exemption of excise duty in light of relevant case law to see whether it constitutes State aid within the meaning of Article 61(1) of the EEA Agreement.

1.1. The aid must be granted by the state or through state resources

With regard to the first condition mentioned above, it is established case law ⁽³⁾ that this condition is fulfilled when a measure directly or indirectly entails some form of financial burden on public funds.

In its decision to open the formal investigation procedure, the Authority made the preliminary conclusion that the provision in paragraph 3 in the contested Act entailed that an excise duty otherwise payable was not paid. This exemption from paying excise duty entailed a direct loss of tax revenue for the Norwegian State which was equivalent to the consumption of State resources. Therefore, the Authority drew the preliminary conclusion that the first condition was fulfilled.

In their comments to the opening decision, the Norwegian authorities, however, argued ⁽²⁾ that as the obligation on Entra to pay the document duty was never released (because 'the transfer of title in the case at hand was done as a name change and not by transfer of title'), there had been no loss of tax revenue and hence, no consumption of State resources.

The Authority cannot agree with that argument. A benefit in the form of a tax exemption covered by Article 61(1) is typically made by way of an express exemption. However, as Article 61(1) focuses on the effect of, and not the formality behind, the national legal system, it also covers situations where a tax relief is brought about indirectly by reference to a particular legal notion (*in casu* 'name change') the result of which is that no tax should be paid. In both situations, and with reference to the case at hand, the effect is that a registration in the real estate register could take place without triggering excise duties only because of the particular legislative provision. No such tax-free registration could have taken place had it not been for the special provision.

⁽²⁾ Letter dated 16 September 2004 from the Ministry of Trade and Industry.

⁽³⁾ Cf. Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy v Commission* [1988] ECR 219; Case C-290/83, *Commission v France* [1985] ECR 439; Case C-482/99 *French Republic v Commission* [2002] ECR I-4397; Case C-379/98 *Preussen Elektra AG v Schleswig AG* [2001] ECR-I 2099.

In the proposal to the Parliament⁽¹⁾, the Norwegian Government stated that it was highly uncertain if the transfer of the properties from Statsbygg to Entra would trigger the excise duty. However, as demonstrated below under point 1.2, the Norwegian Government has not convincingly shown that the registration of the transfer of properties from the State to Entra could have been exempted from excise duty in the absence of the particular provision in paragraph 3 of the Act of 18 February 2000. No other provision in Norwegian law explicitly prescribed that such a transaction was exempted from the general rule that registration of change of ownership triggers excise duty. Moreover, the Authority cannot see how the reorganisation of Statsbygg — in the absence of Paragraph 3 in the Act of 18 February 2000 — could have been exempted under the Registration Act as it was then interpreted.

The Authority therefore maintains that the first condition is fulfilled.

1.2. *The measure must be specific or selective in that it favours 'certain undertakings or the production of certain goods'*

1.2.1. Material selectivity

In its decision to open formal investigations, the Authority made the preliminary conclusion that the adoption of a special law exempting it from paying excise duty, (for one company only (Entra)), should be classified as a selective measure.

In contrast, with reference to its above presented arguments concerning the continuity principle, the Norwegian authorities have argued that the practice with name changes as a procedure for transferring property title did not constitute a *de facto* derogation from the common tax system. It was, therefore, a general measure.

The Authority makes reference to Chapter 17B.3.1 of the Authority's State Aid Guidelines on direct business taxation concerning the specificity or selectivity of tax measures, which reads:

'Tax measures, which are open to all economic agents operating within the EFTA State, are in principle general measures. They must be effectively open to all firms on an equal access basis, and they may not *de facto* be reduced in scope through, for example, the discretionary power of the State to grant them or through other factors that restrict their practical effect.'

The contested Act applies only to a particular transaction between Statsbygg and Entra. It is true that similar acts have been adopted when other state owned limited liability

companies have been established (see Part I above). However, the fact that similar rules have been introduced in relation to a range of other state privatisations does not entail that the *lex specialis* at hand becomes non-selective.

Firstly, it should not be overlooked, that in other state reorganisations, similar provisions to the contested Act were not adopted. For example, when BaneTele AS⁽²⁾ was established, the new limited liability company was not exempted from paying excise duties. The same applies when Secora AS⁽³⁾ was established. In the case of the reorganisation of Statkraft, the Norwegian Government stated that the company should pay excise duties in accordance with the normal rules⁽⁴⁾.

Secondly, it would in any event be the case that tax legislation that treats reorganisations of state undertakings more favourably than those concerning restructurings of private undertakings would be selective within the meaning of Article 61(1). However, under the Act on Document Duty the starting point was that all transfer of titles between different entities release excise duty regardless of whether or not the new owner continues the same activity as the previous one. As shown above, until July 2005, both the 1990-circular from the Ministry of Justice and a range of consecutive circulars from the Customs and Excise Directorate only contained one relevant exception to this rule. Both sets of circulars unequivocally stated that it was only where ownership was transferred in the context of mergers between limited liability companies that continuity considerations implied that a registration with the new title holder could be done by a name change and not a change of title triggering excise duty. In contrast, excise duty was triggered as a result of the registration or the transfer or ownership of title in the Real Estate Registry for demergers, conversions from one corporate form to another, transfers of ownership from joint ownership to a form of partnership and transfer of ownership from a municipality to a separate legal entity wholly owned by the municipality⁽⁵⁾. This was also made clear in the judgment from Frostating lagmannsrett, cited above, which held that excise duties should be paid where an unlimited liability type of company ('kommandittselskap') was converted to a limited liability company even if the same owners continued in the new company and the only real change was the form under which the company operated.

The Authority finds that the establishment of Entra cannot be said to be analogous with a merger. It is much more similar to either a demerger, a conversion of one legal entity to another, or to a municipality's separation of a given activity into a separate legal subject. Thus, exemptions from excise duties similar to the one found in paragraph 3 of the contested Act were not, at the time of the establishment of Entra, open to the most comparable transactions.

⁽¹⁾ St.prp.nr.84 (1998-99) 'Om ny strategi for Statsbygg og etablering av Statens utleiebygg AS'. Presented on 4 June 1999.

⁽²⁾ Lov av 15.6.2001 'Om omdanning av Jernbaneverkets kommersielle televirksomhet til aksjeselskap'.

⁽³⁾ Lov av 17.12.2004 'Om omdanning av Kystverkets produksjonsvirksomhet til statsaksjeselskap'.

⁽⁴⁾ The text reads as follows in Norwegian: 'Departementet legger til grunn at Statkraft betaler dokumentavgift i tråd med lovens normalordning'.

⁽⁵⁾ See point I.4 above.

Therefore, paragraph 3 in the contested Act cannot be said to be an expansion of an already general (non-selective) rule regarding non-payment in relation to certain types of transfer of title in the Real Estate Registry. Consequently, the measure was materially selective.

1.2.2. Is the exemption from paying excise duty justified by the nature or general scheme of the tax system?

According to the case law of the ECJ ⁽¹⁾, it is possible to draw a distinction between:

- differentiated treatment that results from the application, to specific situations, of the same principles as those underlying the ordinary rules (no aid);
- differentiated treatment, which, favouring certain undertakings, departs from the internal logic of the ordinary rules (aid) ⁽²⁾.

This distinction is also described in Chapter 17B.3.4(1) of the Authority's State Aid Guidelines on direct business taxation concerning the justification of a derogation by 'the nature or general scheme of the system': 'The differential nature of some measures does not necessarily mean that they must be considered to be State aid. This is the case with measures whose economic rationale makes them necessary to the smooth functioning and effectiveness of the tax system. However, it is up to the EFTA State to provide such justification.' This latter rule of proof has been confirmed by the ECJ ⁽³⁾.

The Norwegian authorities have argued that '*even if the Authority deems the practice (with name changes as a procedure for transferring property title without releasing the obligation to pay the excise duty) to constitute an exemption from the main rule, it is justified by the nature or general scheme of the tax system*'. In support of this position, the Norwegian authorities claimed that the continuity principle and the considerations for applying this principle with effect, *inter alia*, for excise duty purposes in the case at issue entailed that the exemption from the excise duty fell within the logic and nature of the

relevant Norwegian legislation. In their view, the contested Act reflected the continuity principle and was in line with the general rules governing restructurings.

To this argument the Authority notes that, in the case at hand, the question is the scope of the continuity principle in relation to the obligation to pay document duties and not the scope of the continuity principle as such, hereunder its application in company law.

Based on the analysis of the rules pertaining to excise duties given above under point I.4, the Authority takes the view that while the continuity principle might have had a fundamental place in Norwegian law at the time of the establishment of Entra, it was not, at that time, an inherent and general part of the rules and practice on excise duties in connection with other types of reorganisations of companies.

As already stated, until July 2005, it was only where ownership was transferred, in the context of mergers between limited liability companies, that continuity considerations implied that a registration with the new title holder could be done as a change of name and not a change of title, triggering excise duty. In contrast, excise duty was triggered as a result of the registration or the transfer or ownership of title in the Real Estate Registry for demergers, conversions from one corporate form to another, transfers of ownership from joint ownership to a form of partnership, and transfer of ownership from a municipality to a separate legal entity wholly owned by the municipality ⁽⁴⁾.

The Norwegian authorities have explained that the logic behind the exemptions to the general rule on excise duty can be found in the continuity principle. However, the authorities have not explained the logic behind the different treatment of the above listed types of transfers. On the contrary, the Norwegian Government has merely stated that it would in fact be more logical to treat mergers and certain other reorganisations alike. Yet, only with effect from July 2005, approximately five years after the establishment of Entra, has the interpretation of the Act on Document Duty been changed so that the treatment of certain different situations has been aligned. On this basis, the Authority finds it difficult to establish any other logic behind the interpretation of the Act on Document Duty that prevailed at the time of the establishment of Entra than what follows from the quoted Circulars, namely that only mergers between limited liability companies would escape excise duties otherwise payable. The application of the continuity principle in relation to the Act on Document Duty was limited to such cases and not to other cases as mentioned above.

⁽¹⁾ See in this context: Case 173/73 *Italy v Commission* [1974] ECR 709 (paragraph 33) and Case C-75/97 *Kingdom of Belgium v Commission* [1999] ECR Page I-3671.

⁽²⁾ Cf., *inter alia*, Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil, Pål and the Kingdom of Norway v the EFTA Surveillance Authority*, judgment of 21 July 2005 (paragraphs 82-85); Case 173/73 *Italy v Commission*, [1974] ECR 709 (paragraph 33), Case C-143/99 *Adria Wien Pipeline* [2001] ECR I-8365 (paragraph 42); Case C-157/01 *Kingdom of the Netherlands v Commission*, cited above (paragraph 42), and Case C-308/01 *GIL Insurance Ltd*, cited above.

⁽³⁾ Cf. e.g. Case C-157/01 *Kingdom of the Netherlands v Commission*, cited above, paragraph 43.

⁽⁴⁾ See point I.4 above.

As stated above under point 1.2.1, the Authority, in any event, finds the establishment of Entra much more similar to these situations where a registration in the Real Estate Register at the relevant time would have entailed excise duties than those in which it did not. On that basis, the Authority cannot see that the exemption in the contested Act can be justified by the nature and logic of the Norwegian rules pertaining to excise duty at the time the exemption was applied. It does not change the assessment that similar reorganisations of public commercial activities also have been exempted from excise duty. The pursuance of the underlying objectives of the continuity principle cannot justify that an exemption to the general rule on excise duties should be applicable to specific reorganisations if the most comparable private reorganisations are not subject to similar exemptions.

1.2.3. The 'Italian case'

The Norwegian Authorities have referred to a decision from the European Commission and argued that the factual situation of this case is the same as in the Entra case.

In the Commission Decision of 5 June 2002 ⁽¹⁾, the Commission examined the Italian law which provided for a special tax regime for joint stock companies with a majority public shareholding set up under a specific law. In this regard the Italian law specifically provided for an exemption from all transfer taxes related to the conversion of special and municipal undertakings into joint stock companies ('the transfer tax exemption'). In the Italian legal system transfer taxes normally applied to the creation of a new economic entity or to the transfer of assets between different economic entities. However, the Italian authorities had explained that Italian law generally reflected the principle of tax neutrality (which means that no tax is applied) in the context of the conversion of the legal status of a company (i.e. *'when the legal status of a firm changes but the firm remains the same from an economic viewpoint'*) ⁽²⁾.

The Commission found that although it appeared as if the winding up of the municipal undertaking and the setting up of a 'new' joint stock company would be equivalent to creating a new economic entity, this was in appearance only due to legal technicalities. In reality the new joint stock company was the same economic entity as the municipal undertaking operating under a different legal status. In the light of this the Commission accepted that the general principle of tax neutrality in Italian law was similarly applied with regard to the situations falling within the special tax regime. Hence, no transfer tax had to be paid ⁽³⁾.

The Authority understands the reasoning of the Commission to be that where the national law pertaining to stamp duties in connection with conversions made by private undertakings builds upon a general principle of tax neutrality — so that the focus is on the continuation of the same economic entity rather than on whether the legal subject used thereto is the same — it will be within the logic of such a tax regime to extend that principle also to cover situations whereby the State or a municipality separates an economic entity that has hitherto been driven as a part of the State or municipality into a separate legal entity.

The Authority fully agrees with such an approach. However, the logic of each tax system must be assessed on its own merits. The Commission Decision relied on the fact that the Italian legal system provided for a possibility of exempting transfer tax in the context of the conversion from one corporate form to another. In contrast, Norwegian legislation, as interpreted and applied by the tax authorities, did not provide for such a possibility. In fact, as already stated, comparable cases to Entra concerning private reorganisations (regarding demergers or conversion from one corporate form to another) were not exempted from paying the excise duties. In the view of the Authority, the factual situations of the two cases are therefore different. That the continuity principle might have existed in other areas of Norwegian law, including most notably company law and the legislation pertaining to direct taxation of the entity concerned, cannot be given weight in the assessment of the similarity between the Italian and the Norwegian situations.

1.2.4. Conclusion on selectivity

In conclusion, the measure must be considered to be selective in the sense of Article 61(1) of the EEA Agreement and cannot escape that classification by reference to the nature and logic of the Norwegian rules on excise duties.

1.3. The measure must confer an advantage to the recipients that reduces the costs they normally bear in the course of the business

According to the case law of the European Court of Justice (ECJ) ⁽⁴⁾ and Chapter 17B.3.1(2) of the Authority's State Aid Guidelines 'the measure must confer on recipients an advantage, which relieves them of charges that are normally borne from their budgets. The advantage may be provided through a reduction in the firm's tax burden in various ways, including: (...) 'a total or partial reduction in the amount of tax (such as exemption or a tax credit)'.

⁽¹⁾ Case C 27/99 published in OJ L 77, 24.3.2003, p. 21.

⁽²⁾ Cf. paragraph 37 of the Decision.

⁽³⁾ Cf. paragraphs 76-81 of the Decision.

⁽⁴⁾ Cf. Case 173/73 *Italy v Commission* [1974] ECR 709.

By the adoption of the statutory provision in paragraph 3 of the contested Act, Entra was relieved of the cost of excise duties for approximately NOK 81 million (close to EUR 10 million). As demonstrated above under point 1.1 and 1.2, these duties would otherwise have been payable from its budgets. On that basis, the Authority, in its decision to open formal investigation, drew the preliminary conclusion that Entra did receive an advantage in the sense of Article 61(1) of the EEA Agreement.

In contrast, the Norwegian Authorities have argued that the condition is not fulfilled for two reasons: firstly, that the exemption did not place Entra in a better competitive position compared to a private investor. Secondly, that the capital structure, the solidity and the total values in the company would have been unchanged if the excise duty had been paid. In the following, the Authority will discuss these arguments in turn.

1.3.1. The comparison with private firms

As referred to above under point I.3.1, in the proposal to the Parliament, the Norwegian Government stated that a private owner could choose not to transfer the title, but, for example, keep the title in a holding company, when a new company is established. The State, according to the Norwegian authorities, must transfer the properties to a new legal entity. Thus, according to the Norwegian authorities, there is no distortion of competition when Entra is exempted from the document duty.

According to the European Court of First Instance, an advantage in the sense of Article 87(1) EC (corresponding to Article 61(1) EEA) does not necessarily exist in all situations where a measure is introduced in order to free a public company from a structural disadvantage that it has in relation to its private sector competitors⁽¹⁾. Article 61(1) of the EEA Agreement is aimed merely at prohibiting advantages for certain undertakings, and the concept of aid covers only benefits or release of burdens normally assumed in an undertaking's budget and which are to be regarded as an economic advantage, which the recipient undertaking would not have obtained under normal market conditions. However, the Authority does not agree with the Norwegian authorities that the arguments advanced by Norway can lead to the conclusion that a comparison with private operators shows that Entra did not receive an advantage by being exempt from excise duties.

The methods that a private owner can use to avoid paying excise duty are equally open to undertakings established in

connection with state privatisations. The structural disadvantage that the Norwegian authorities claim to have faced was not of a legal kind. Norwegian law would not have precluded the establishment of and transfer of the properties to Entra without registering this in the Real Estate Register. Moreover, Entra and the Norwegian authorities could have taken the same precautions as a private operator. The reason for not using these methods in relation to Statsbygg and Entra was merely that the Norwegian authorities found that the political, managerial and practical inconveniences connected to such methods were so negative that Entra should become the new title holder.

In the opinion of the Authority, such considerations cannot lead to a conclusion that Entra was not granted an advantage by the exemption to pay the excise duty. This follows already from the fact that the methods that can be used to avoid excise duties all are based on the non-registration of transfer of ownership (retaining of the title). If the title ('grunnbokshjemmel') is not transferred, no excise duty is payable. But the protection offered by the registration is not available to private operators not transferring the title, whereas Entra did obtain this protection. Such methods are therefore not equivalent to the procedure that took place in the present case where Entra became the new title holder.

Moreover, even if that had been the case, the Authority cannot see that the claimed structural problem for the Norwegian State is of a fundamentally different character than the one faced by private operators. It might be correct that a non-transfer of title in practice might, in some respects, pose greater inconveniences to a publicly owned entity than to a privately owned company. However, in the Authority's opinion, questions concerning the *inter partes* relationship between the previous and the present owner of real estate should be viewed apart from the discussions relating to registration in the Real Estate Registry. This registration will normally not affect the *inter partes* relation between the two legal subjects but only have importance in relation to third parties. Thus, registration might be important in order for the buyer to avoid that a third party, who in good faith, later buys the property from the previous owner, would have a stronger title to the real estate. It also has important bearing on the protection against the creditors of the previous owner, just as it can influence the ability of the buyer to obtain mortgage and other loans. In all these situations, the disadvantages of not registering in the Real Estate Registry is fundamentally the same for privately and publicly owned undertakings. In fact, in some aspects, the methods described may be less favourable for private undertakings compared to public ones, since the registration of declaration on the restriction of the right to ownership does not exclude the risk of execution proceedings/creditor's or bankruptcy estate's extinction of the rights of a legal successor to the debtor's property.

⁽¹⁾ Cf. Case T-157/01 *Danske Busvognmænd v Commission*, judgment of 16 March 2004, para. 57.

Finally, the Authority emphasises that the Norwegian authorities have not demonstrated that a private party would choose with certainty not to transfer the title. Norway has merely argued that it was more likely than not that a private operator in similar circumstances would have decided not to transfer the title in the Real Estate Registry.

1.3.2. The argument concerning the opening balance

As already mentioned, the Norwegian authorities have argued ⁽¹⁾ that the exemption from excise duty should not be viewed separately from the opening balance sheet of the company. They argue that the measure in question did not change the capital structure, the solidity and the total value of the company. Theoretically, if excise duties were to be accrued in the opening balance sheet, there would have been an alternative opening balance where the value of the properties would have been reduced with the same amount as the excise duty.

As demonstrated above in point 1.2, according to the normal rules of the Norwegian tax system, Entra was obliged to pay the excise duty. Consequently, irrespective of how the opening balance was established, it is the transaction value between the seller and the buyer which constitutes the tax base for the excise duty. Whatever considerations the buyer (Entra) or the seller (the State) would have in relation to the agreed price, it is that price and nothing else that the tax authorities will apply when they calculate the excise duty to be paid.

As a matter of principle, the Authority disagrees with the Norwegian Authorities that the existence of this tax relief would not constitute an advantage in the sense of Article 61(1) of the EEA Agreement if the exemption from excise duty has influenced the settingup of the opening balance sheet of Entra in a way that, allegedly, has neutralised the advantage flowing from the tax exemption. According to Norwegian legislation, Entra would, in the absence of paragraph 3 in the contested Act, have been obliged to pay to the tax authorities the excise duty on the agreed transaction price for the registration that took place, without it being relevant whether the transaction price might have looked different. The tax has never been paid and it is this missing tax payment which is under consideration in the present case. The appearance of Entra's opening balance sheet influenced by other circumstances, in particular whether the seller would have accepted a lower value on the buildings if Entra had paid the excise duty, are factors which cannot be taken into account

when determining whether the company has received an advantage or not.

The argument of the Norwegian authorities that the tax exemption should be seen in conjunction with an otherwise different price on the real estate, builds on the reasoning that the aid flowing from the tax exemption led Entra to have a net loss in the form of a higher price setting of the transferred real estate. However, to take account of an all ensuing more or less direct possible economic consequences of an aid measure for the particular aid beneficiary would, in the Authority's opinion, be contrary to the approach generally applied in State aid cases. In the same vein, it can normally not be admitted that the ensuing economic effects of the aid measure in contractual relations between the aid beneficiary and other legal subject should be taken into account when assessing whether, and to what extent, the aid measure qualifies as an advantage in the sense of Article 61(1) of the EEA Agreement. In this respect, the Authority emphasises that the Norwegian State as a tax collector and as a seller of real estate should be viewed as two distinct entities for the purpose of the State aid regime.

The Authority cannot therefore agree with the Norwegian Government that Entra did not receive an advantage in the sense of Article 61(1) of the EEA Agreement by being exempt from excise duty, and still receiving the protection afforded by being in the Real Estate Register.

In the letter dated 4 June 2003 from the Ministry of Trade and Industry, the Ministry states that: 'Theoretically, if document duty and registration fee were to be accrued in the opening balance sheet, the adjusted and alternative opening balance would have been as described in attachment 2'. Attachment 2 describes an alternative opening balance sheet where total assets and liabilities/equity are the same, but where *i.a.* the value of the properties is reduced with the same amount as the excise duty. The Ministry concludes that Entra has not received any economic advantages as a consequence of the exemption from excise duties.

The hypothetical opening balance sheet described by the Norwegian authorities is based on the assumptions that the buyer (Entra) would not reduce its demanded rate of return (9,5 %) and equity ratio (40 %) if the excise duty had to be paid. This implies that the hypothetical opening balance sheet is based on the assumption that the seller will always pay 100 % of the excise duty and that the value of the buildings in an alternative opening balance would be reduced by exactly the same amount as the excise duty.

⁽¹⁾ Letters dated 4 June 2003, 16 September 2004 and 30 June 2005 from the Ministry of Trade and Industry.

The Authority has no reason to question the legitimacy of the Net Present Value method used when the opening balance of Entra was established. However, as the Norwegian Government's own attempts to find the correct value of the real estate shows (see point I 2.2 above and the considerable differences between the alternative values), other methods could have been used. Other assumptions could also have been used, and those other methods and assumptions could very well have resulted in a situation where the burden of the tax would not have been born 100 % by the seller. In a normal market situation with several bidders, it is more likely that the extra burden of the excise duty through the agreed transaction price would have been split between the seller and the buyer.

The Authority does not find it possible to establish a general rule according to which the market price of a building will always rise with exactly the amount that the buyer should normally pay in indirect taxes for registering that building in situations where those taxes have either already been paid or shall not be incurred due to a legislative exemption. Indeed, in the letter dated 30 June 2005 from the Ministry of Trade and Industry, the Ministry acknowledges that one cannot make such a sweeping conclusion and that the Government's argument about the net effect on the non-payment on the excise duty is based purely on the use of the specific method for value assessment that the Government chose to apply to Entra.

In the present case, Norway chose not to levy the excise duty on Entra and did specify that the later assessment of the value of the real estate depended on this premise. Norway, therefore, basically argues that in the hypothetical situation it had decided that Entra should be subject to normal excise duty, it would still have chosen the net-present-value method and used the same assumptions for calculating the sales price. To admit such an argument would be to let the scope of Article 61(1) of the EEA Agreement depend on an EEA State's ability to persuade the Authority and the EFTA Court that it would have taken imaginary steps in hypothetical situations.

Finally, the Authority emphasises that in the very few cases where the Court of Justice — in different kinds of situations — has accepted a *quid pro quo* argument, it has always been a precondition that the countervailing mechanism was decided beforehand (and not *ex post facto*) in a clearly defined, objective and transparent manner⁽¹⁾. However, nowhere in the preparatory works to the relevant legislation is it specified that it was a precondition for granting the advantage ensuing from the exemption to pay excise duty, that this advantage be

met by a higher assessment of the value of the relevant real estate than a private party would have paid for the building in open sale. On the contrary, the Norwegian authorities' argument that Entra did not receive an advantage compared to a situation in which it would have paid the excise duty, seems to run counter to the explicitly stated aim behind relieving Entra from paying excise duty. As cited above in point I.3.1, in the Government's proposal to the Stortinget, it was explained that the purpose of the exemption clause was that Entra should not bear the economic burden of the excise duty, since private competing undertakings could, to a large extent, escape that burden by other means. In other words, in the proposal to the Parliament, there is an underlying assumption that payment of the excise duty would indeed put Entra in a less economically advantageous position than if Entra did not pay the duties. Furthermore, it was the intention of the Parliament that Entra should not be put in this non-advantageous position.

1.3.3. Conclusion on advantage

In conclusion, the Authority maintains that paragraph 3 of the contested Act did confer Entra an advantage in the meaning of Article 61(1) of the EEA Agreement.

1.4. *The measure must distort or threaten to distort competition and it must affect trade between the Contracting Parties*

In the opening decision, the Authority came to the preliminary conclusion that the measure did threaten to distort competition and affected intra EEA-trade within the meaning of Article 61 (1) of the EEA Agreement. In contrast, The Norwegian authorities argue that the measure in question '*will not affect trade between the Contracting Parties*' and that the Authority must assess the relevant market. Furthermore, the Norwegian authorities claim that '*non-Norwegian investors have not operated in the Norwegian real estate market*'⁽²⁾.

The ECJ has held⁽³⁾ that competition is distorted from the moment that the state's financial aid strengthens the position of an undertaking compared with other competing undertakings. The granting of aid reduces costs and thereby gives beneficiaries a competitive advantage over those who have to bear all costs at their own expense. On that basis, the Authority finds that the aid granted to Entra in the form of no excise duty distorted competition within the meaning of Article 61(1) of the EEA Agreement. Indeed, the Norwegian authorities have not argued that competition is not distorted (but only that trade is not affected).

⁽¹⁾ Cf. for a corresponding approach within a related field of State aid, Case C-280/00 *Altmark Trans GmbH* [2003] ECR I-7747 (paragraphs 83-95). See also Advocate General Jacobs points 117-129 in Case C-126/01 *GEMO* [2003] ECR I-13769.

⁽²⁾ See letter dated 16 September 2004 from the Ministry of Trade and Industry.

⁽³⁾ Case 730/79 *Philip Morris Holland BV v Commission* [1980] ECR 2671, paragraph 11.

Turning to the question concerning effect on trade, it must be examined whether the aid in question is capable of strengthening the position of an undertaking compared with that of undertakings competing in EEA trade ⁽¹⁾. As held by the EFTA Court, the Authority is not required to establish that the aid has an appreciable effect on trade between the Contracting Parties, but only to examine whether the aid was liable to have such an effect ⁽²⁾. Hence, the criterion of the effect on trade has been traditionally interpreted in a non-restrictive way to the effect that, in general terms, a measure is considered to be State aid if it is capable of affecting trade between the EEA States ⁽³⁾.

According to Chapter 17B.3(2) of the Authority's State Aid Guidelines, '[u]nder settled case-law, for the purposes of this provision, the criterion of trade being affected is met if the recipient firm carries on an economic activity involving trade between Contracting Parties'. However, aid may affect trade within the EEA even if the recipient undertaking does not itself participate in cross-border activities ⁽⁴⁾. This is because the granting of state support to an undertaking may lead to the internal supply being maintained or increased, with the consequence that the opportunities for undertakings established in other EEA States to offer their services to the market of that State are reduced ⁽⁵⁾.

According to Entra's own Annual Accounts for 2001, Entra is engaged in 'developing, letting, management, operation, sale, and purchase of real estate in Norway'.

Entra is a member of 'Association of Commercial Real Estate' ('Foreningen Næringsseiendom') ⁽⁶⁾, whose members wholly or partly conduct the same kind of activities as Entra. The Association of Commercial Real Estate has 74 members (in October 2005). The members include companies like ABB AS-Eiendom, Aberdeen Property Investors, Avantor AS, ICA Eiendom

Norge AS, KLP Eiendom AS, Linstow ASA, Mustad Eiendom AS, NCC Property Development AS, Reitan Eiendom AS, Skanska Eiendomsutvikling AS, Smedvig Eiendom AS, Steen & Strøm ASA, Storebrand Eiendom AS, Umoe Sterkorder AS, Veidekke Eiendom AS, Vesta Forsikring AS-Eiendom and Vital Eiendomsforvaltning AS ⁽⁷⁾.

The biggest Norwegian owned real estate company (or group of companies), is the Olav Thon Gruppen. The Group was also active in 2000 when Entra was established. Olav Thon Gruppen currently owns 320 properties in Norway and 18 abroad (mainly in Brussels). The first property in Brussels was bought in 1988 (Thon Belgium SA). The Group employs about 3 400 people. In addition to letting of offices, the Group is also involved in hotels, restaurants and shopping centres ⁽⁸⁾.

One of the companies mentioned above, Linstow AS, owns and develops real estate in Norway as well as in the Baltic States, Portugal and Sweden. Linstow AS is wholly owned by the Anders Wilhelmsen Group which purchased and delisted the company from the Oslo Stock Exchange in 1999. The Anders Wilhelmsen Group is one of the owners of the shipping company Royal Caribbean Cruise Line (RCCL). Linstow AS i.a. manages the Norwegian portfolio (Nordea Portfolio) of properties owned by Curzon Global Partners. The portfolio consists of 31 properties (by November 2005) spread all over Norway. Curzon Global Partners is a London-based investment management company owned by IXIS AEW Europe (IAE). IAE is a European real estate investment manager owned by *Groupe Caisse d'Epargne* and *Caisse des Dépôts* in France. IAE is responsible for approximately EUR 11 billion of assets under management ⁽⁹⁾.

One of the other companies, ICA Eiendom Norge AS, is a daughter company of ICA Fastigheter AB, a Swedish company. ICA Fastigheter AB is a wholly owned subsidiary to ICA AB. ICA Fastigheter AB builds, manages and sells real estate in Scandinavia and the Baltic countries. The portfolio has a book value of SEK 5,7 billion and consists mainly of store facilities and warehouse facilities. Besides ICA stores and companies, the company also offers real estate to external clients. The ICA Group (ICA AB) is one of the Nordic region's leading retail companies, with just over 2 600 of its own and associated stores in Scandinavia and the Baltic countries ⁽¹⁰⁾.

⁽¹⁾ Cf. *inter alia*, Case C-126/01 *Gemo*, judgment of 20 November 2003; Case E-6/98 *The Government of Norway v EFTA Surveillance Authority* [1999] Report of the EFTA Court, page 76, paragraph 59; Case 730/79, *Philip Morris v Commission* [1980] ECR 2671, paragraph 11.

⁽²⁾ Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil, Pil and the Kingdom of Norway v the EFTA Surveillance Authority*, judgment of 21 July 2005, pr. 94.

⁽³⁾ Joined Cases T-298/97 - T-312/97 *e.a., Alzetta a.o. v Commission* [2000] ECR-2319, paragraphs 76-78.

⁽⁴⁾ Case T-55/99 *CETM v Commission* [2000] ECR II-3207, paragraph 86.

⁽⁵⁾ Case C-303/88 *Italy v Commission* [1991] ECR I-1433, paragraph 27; Joined Cases C-278/92 to C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 40.

⁽⁶⁾ Association of Commercial Real Estate is a part of the Federation of Norwegian Building Industries ('Byggenæringens Landsforening (BNL)'). BNL is a part of Confederation of Norwegian Enterprise (NHO).

⁽⁷⁾ Source: <http://www.foreningen-naringsseiendom.no/medlemsbedriftene>

⁽⁸⁾ Source: <http://www.olavthon.no/>

⁽⁹⁾ Source: <http://www.ne.no/linstow>

⁽¹⁰⁾ Source: http://www.ica.no/FrontServlet?s=eiendom&state=eiendom_dynamic&viewid=919&expand=1

At the same time as Entra was established (in 2000), Aberdeen Property Investors Norway AS was established as a daughter company of Aberdeen Property Investors. Aberdeen Property Investors is a part of Aberdeen Asset Management PLC, an independent fund management group listed on the London Stock Exchange. Currently, Aberdeen Property Investors manages EUR 7,8 billion in property investments in Northern Europe, of which NOK 9 billion (some EUR 1,1 billion) is in Norway. In 2001, Aberdeen Property Investors Norway AS bought Norske Liv Eiendom, another real estate company on the Norwegian market, and today the company manages the real estate portfolios of i.a. NSB, Nordea Liv and API Eienfondsfond. Aberdeen Property Investors has 200 employees in Norway ⁽¹⁾.

Of the companies mentioned above which are active in the same market as Entra (*the developing, letting, management, operation, sale and purchase of real estate in Norway*), and which were active in 2000 when Entra was established, it is thus clear that several had non-Norwegian owners, several were active both in Norway and outside Norway and several managed real estate portfolios owned by foreign clients.

It follows from the description in point I above that the assets and activities transferred to Entra were exposed to competition. Accordingly, Entra competes with other providers of buildings/properties. This applies to Entra as owner, purchaser, seller, operator and administrator of real estate. Entra operates all over Norway in a market where economic agents from other EEA States are active. Consequently, condition 4 is also fulfilled as the measure affects or threatens to affect competition and trade between the Contracting Parties.

2. Compatibility of the aid

Based on the foregoing considerations, the tax exemptions at issue constitute aid within the meaning of Article 61(1) of the EEA Agreement.

The Norwegian authorities have argued that the measure at issue does not contain aid, and have not put forward any arguments concerning compatibility. However, after assessing the likely involvement of State aid, it has to be considered whether such aid could be compatible with the EEA Agreement by virtue of Article 61(2) and (3) of the Agreement.

The application of the exceptions under Article 61(2) is not appropriate. The establishment of Entra does not entail aid

having a social character granted to individual consumers or aid to make good the damage caused by natural disasters or exceptional occurrences.

Under Article 61(3)(a) aid may be considered compatible with the EEA Agreement when it is designed to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment. Since the measure in question is not limited to such areas, this provision does not apply. Also the exemption laid down in Article 61(3)(b) is not applicable. Lastly, as regards the exemption laid down in Article 61(3)(c), the Authority cannot see that the aid can be considered to facilitate the development of certain economic activities or of certain economic areas in the meaning of this Article. Consequently, the aid does not qualify for any of the exemptions provided for in Article 61(3) of the EEA Agreement.

3. Procedural requirements and the character of the aid

3.1. The notification obligation

Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement states: 'The EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid.' Aid provided without notification or aid that is notified late, i.e. notified after being 'put into effect' is considered unlawful aid.

The exemption from excise duties provided for in the establishment of Entra was not notified to the Authority and it was put into effect.

3.2. Recovery

The Authority draws the attention of the Norwegian Government to Article 1 in Part II of Protocol 3 to the Surveillance and Court Agreement. The exemption from excise duties was introduced after the entry into force of the EEA Agreement. Any aid in this case should therefore be qualified as new aid. As stated above no notification of such aid has been received. The aid is in this case to be considered unlawful as defined in Article 1(f) of Part II to Protocol 3 to the Surveillance and Court Agreement.

According to Article 14 in Part II of Protocol 3 to the Surveillance and Court Agreement, in cases of unlawful aid, should it be found incompatible, the Authority orders, as a rule, the EFTA State concerned to reclaim aid from the recipient.

⁽¹⁾ Source: <http://www.aberdeenpropertyinvestors.no>

The Authority is of the opinion that no general principles preclude repayment in the present case. According to settled case law, abolishing unlawful aid by means of recovery is the logical consequence of a finding that it is unlawful. Consequently, the recovery of State aid unlawfully granted, for the purpose of restoring the previously existing situation, cannot in principle be regarded as disproportionate to the objectives of the EEA Agreement in regard to State aid. By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored⁽¹⁾. It also follows from that function of repayment of aid that, as a general rule, save in exceptional circumstances, the Authority will not exceed the bounds of its discretion, recognised by the case law of the Court, if it asks the EFTA State concerned to recover the sums granted by way of unlawful aid since it is only restoring the previous situation⁽²⁾. Moreover, in view of the mandatory nature of the supervision of State aid by the Authority under Protocol 3 of the Surveillance and Court Agreement, undertakings to which aid has been granted cannot, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in the provisions of that Protocol⁽³⁾.

4. Conclusion

In light of the foregoing considerations, the Authority finds that the exemption from document duties and registration fees adopted in connection with the establishment of Entra is State aid which is not compatible with the functioning of the EEA Agreement. Consequently, the Authority closes the procedure provided for in Article 1(2) in Part I of Protocol 3 of the Surveillance and Court Agreement with a negative decision and orders the Norwegian authorities to recover the State aid plus accrued interest from Entra,

HAS ADOPTED THIS DECISION:

1. The exemption of document duties and registration fees provided for in the establishment of Entra Eiendom AS (ref. Paragraph 3 of Law of 18 February 2000, No 11) constitutes State aid within the meaning of Article 61(1) of the EEA Agreement. The aid has been awarded in contra-

vention to the procedural requirements of Article 1(3) in Part 1 of Protocol 3 to the Surveillance and Court Agreement, and does not qualify for exemptions according to Articles 61(2) or 61(3) of the EEA Agreement.

2. The Norwegian Government shall recover from Entra the foregone stamp duty and the foregone registration fees plus accrued interest calculated on the basis of the relevant reference rate of interest, beginning from the date on which the excise duties were payable until the date of recovery.
3. The Norwegian Government shall be informed by means of a letter containing a copy of this decision.
4. The Norwegian Government shall inform the Authority within two months of the date of the notification of this Decision, of the measures taken to comply with it.
5. The EC Commission shall be informed, in accordance with Protocol 27(d) of the EEA Agreement, by means of a copy of this Decision.
6. Other EFTA States, EC Member States, and interested parties shall be informed by the publishing of this decision in its authentic language version in the EEA Section of the *Official Journal of the European Union* and the EEA Supplement thereto.
7. This decision is authentic in the English language.

Done at Brussels, 14 December 2005.

For the EFTA Surveillance Authority

Einar M. BULL
President

Kurt JÄGER
College Member

⁽¹⁾ Cf. Case C-350/93 *Commission v Italy* [1995] ECR I-699, paragraph 22.

⁽²⁾ Cf. Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraph 66, and Case C-310/99 *Italy v Commission* [2002] ECR I-2289, paragraph 99.

⁽³⁾ Cf. Case C-169/95 *Spain v Commission* [1997] ECR I-135, paragraph 51.

RECOMMENDATION OF THE EFTA SURVEILLANCE AUTHORITY

No 119/07/COL

of 16 April 2007

on the monitoring of background levels of dioxins, dioxin-like PCBs and non-dioxin-like PCBs in foodstuffs

THE EFTA SURVEILLANCE AUTHORITY,

HAVING REGARD to the Agreement on the European Economic Area (hereinafter referred to as the EEA Agreement), in particular Article 109 and Protocol 1 thereof,

HAVING REGARD to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, in particular Article 5(2)(b) and Protocol 1 thereof,

HAVING REGARD to the Act referred to at Point 54zn a of Chapter XII of Annex II to the EEA Agreement,

Commission Regulation (EC) No 466/2001 of 8 March 2001 setting maximum levels for certain contaminants in foodstuffs ⁽¹⁾,

as amended and as adapted to the EEA Agreement by Protocol 1 thereto,

HAVING REGARD to the Act referred to at Point 54zzc of Chapter XII of Annex II to the EEA Agreement,

Commission Directive 2002/69/EC of 26 July 2002 laying down the sampling methods and the methods of analysis for the official control of dioxins and the determination of dioxin-like PCBs in foodstuffs ⁽²⁾,

as amended and as adapted to the EEA Agreement by Protocol 1 thereto,

HAVING REGARD to the EFTA Surveillance Authority Decision 37/07/COL of 27 February 2007, whereby the competent College Member is instructed to adopt the Recommendation if the draft Recommendation is in accordance with the opinion of the EFTA Foodstuffs Committee (EFC),

WHEREAS Commission Regulation (EC) No 466/2001 establishes maximum levels for dioxins and for the sum of dioxins and dioxin-like Polychlorinated Biphenyls (PCBs) in foodstuffs,

WHEREAS it is necessary to generate reliable data across the European Economic Area on the presence of dioxins, furans and dioxin-like PCBs in the widest range of foodstuffs in order to have a clear picture of the time trends in background presence of these substances in foodstuffs,

WHEREAS the EFTA Surveillance Authority Recommendation 144/06/COL of 11 May 2006 on the reduction of the presence of dioxins, furans and PCBs in feedingstuffs and foodstuffs recommends that EFTA States perform random monitoring of the presence of dioxins, dioxin-like PCBs and, if possible, non-dioxin-like PCBs in foodstuffs according to Commission Recommendation 2004/705/EC ⁽³⁾,

WHEREAS Recommendation 2004/705/EC recommends to the Member States minimum frequency of samples to be analysed yearly for the different categories of foodstuffs as well the format of reporting of the results for the monitoring of the background presence of dioxins, furans and dioxin-like PCBs in foodstuffs,

WHEREAS it is appropriate to amend the current monitoring programme laid down in Recommendation 2004/705/EC by taking into account the experiences gained and that the EEA EFTA States participate in the investigation into levels dioxins, dioxin-like PCBs and non-dioxin-like PCBs in foodstuffs,

WHEREAS it is important that data gathered under this Recommendation are reported on a regular basis to the EFTA Surveillance Authority and that, in accordance with Article 2(1) of Protocol 1 of the Surveillance and Court Agreement, the EFTA Surveillance Authority passes on that information to the European Commission, which will ensure the compilation of those data into a database. Data from recent years obtained by making use of a method of analysis complying with the requirements laid down in Commission Directive 2002/69/EC should also be provided,

WHEREAS the measures provided for in this Recommendation are in accordance with the opinion of the EFTA Foodstuffs Committee assisting the EFTA Surveillance Authority,

⁽¹⁾ OJ L 77, 16.3.2001, p. 1.

⁽²⁾ OJ L 209, 6.8.2002, p. 5.

⁽³⁾ OJ L 321, 22.10.2004, p. 45.

HEREBY RECOMMENDS THE EFTA STATES:

1. To perform from the year 2007 onwards until 31 December 2008 the monitoring of the background presence of dioxins, furans and dioxin-like polychlorinated biphenyls (PCBs) in foodstuffs using the recommended minimum frequency of samples to be analysed yearly, as foreseen in the table of Annex I as guidance.
2. If possible, to also perform the analysis of non dioxin-like PCBs in the same samples.
3. To provide on a regular basis to the EFTA Surveillance Authority the monitoring data with the information and in the format as foreseen in Annex II for compilation into one database. Data from recent years obtained by making use of

a method of analysis complying with the requirements, laid down by Directive 2002/69/EC and reflecting background levels, should also be provided.

4. References to Recommendation 2004/705/EC in the EFTA Surveillance Authority Recommendation 144/06/COL of 11 May 2006 shall be construed as references to this Recommendation.

Done at Brussels, 16 April 2007.

For the EFTA Surveillance Authority

Kristján Andri STEFÁNSSON
College Member

Niels FENGER
Director

ANNEX I

Table: Overview of the recommended minimum number of food samples to analyse yearly. Distribution of samples is based on production in each country. Particular attention is paid to foodstuffs expected to have a large variation in background levels of dioxins, furans and dioxin-like PCBs. This is particularly the case for fish.

Product, including also derived products	Aquaculture (*)	Wild caught fish (**)	Meat (***)	Milk (****)	Eggs (*****)	Other (*****)	Total
No of samples							
Norway							
Iceland							

Remarks on the Table

The figures mentioned in the table are minimum figures. EEA EFTA States are invited to take more samples.

(*) *Aquaculture*: The samples for aquaculture should be divided over the fish species proportionate to the production.

(**) *Wild caught fish*: The samples for wild caught fish should be divided over the fish species proportionate to the catch. Special attention should be paid to wild caught eel.

(***) *Meat*: In addition to meat and meat products originating from beef cattle, pigs, poultry and sheep, significant number of samples should be taken from horsemeat, reindeer meat, goat meat, rabbit meat, venison and game.

(****) *Milk*: A large proportion of the milk samples should be taken from farm milk (mainly cow's milk). It is also appropriate to take samples of milk and milk products other than cow's milk (goat milk, etc ...).

(*****) *Eggs*: Particular attention should be paid to free-range hen eggs and eggs of ducks, geese and quails should also be sampled.

(*****) *Other*: In this category particular attention should be paid to:

- food supplements (particular those ones based on marine oil),
- food for infants and young children,
- food products originating from regions where due to e.g. climatic conditions resulting in floods, changes have happened in the production conditions which could possibly affect the dioxin and dioxin-like PCB concentration of the food products in the region.

ANNEX II

A. Explanatory notes to the form for analytical results of dioxins, furans and dioxin-like PCBs and other PCBs in food**1. General information about the samples analysed**

Sample code: identification code of the sample.

Country: name of the Member State where the monitoring has been carried out.

Year: the year the monitoring was carried out.

Product: food item analysed — describe the food item as precisely as possible.

Stage of marketing: place where the product (sample) was collected.

Tissue: part of product analysed.

Expression of results: The results are to be expressed on the basis on which the maximum levels have been established. In case of the analysis of non-dioxin-like PCBs, it is highly recommended to express the levels on the same basis.

Type of sampling: random sampling — analytical results from targeted sampling can also be reported but it must be clearly indicated that the sampling was targeted and does not necessarily reflect normal background levels.

Number of subsamples: if the analysed sample is a pooled sample, the number of subsamples (number of individuals) should be notified. If the analytical result is just based on one sample, one should be notified. Number of subsamples in a pooled sample could vary, so please specify this for every sample.

Method of production: conventional/organic (as detailed as possible).

Area: insofar relevant, district or region where the sample was collected, if possible with indication if it concerns rural area, urban area, industrial zone, harbour, open sea, etc., e.g. *Brussels — urban area, Mediterranean — open sea*. It is of particular importance to clearly indicate the area in case the sample has been collected from food produced in regions which have been flooded.

Fat content (%): the percentage of fat content in the sample.

Moisture content (%): the percentage of moisture content in the sample (if available).

2. General information on the method of analysis used

Method of analysis: refer to the method used.

Accreditation status: specify if the analytical method is accredited or not.

Uncertainty: the decision limit or the percentage of the expanded measurement uncertainty embodied in the analytical method.

Lipid extraction method: specify the lipid extraction method used to determine the fat content of the sample.

3. Analytical results

Dioxins, furans, dioxin-like PCBs: results of every congener should be reported in ppt — picogram/gram (pg/g).

Non-dioxin-like PCBs: results of every congener should be reported in ppb — nanogram/gram or microgram/kilo (ng/g or µg/kg).

LOQ: Limit of quantification in pg/g (for dioxins, furans and dioxin-like PCBs) or µg/kg — ng/g (for non-dioxinlike PCBs).

For congeners determined but being below LOQ (limit of quantification) the case should be filled in as < LOQ (the LOQ should be reported as a value).

For PCB congeners analysed in addition to the PCB-6 and dioxin-like PCBs the number of the PCB congener needs to be added to the form, e.g. 31, 99, 110, etc. If the sample is analysed for more PCB congeners than there are marked rows, just add new rows at the bottom of the form.

4. General remarks to the table

— Reporting of the recovery rate

The reporting of the recovery rate is optional if the recovery rate for the individual congeners falls within the range of 60-120 %. In case the recovery rate for some individual congeners falls outside that range, the reporting of the recovery rate is obligatory.

— Reporting of the LOQ

The reporting of the LOQ is not required but in the column of results, the non-quantified congeners have to be reported as < LOQ (effective figure).

— Reporting of the TEQ value for individual congeners

The column for TEQ values for the individual congeners is optional.

ANNEX III

B. Form for reporting of congener-specific analytical results of dioxins, furans, dioxin-like PCBs and other PCBs in food

Country	
Year	
Product	
Stage of marketing	
Tissue	
Expression of results	
Type of sampling	
Sample No	
Production method	
Area	
Number of subsamples	
Fat content (%)	
Moisture content (%)	

Information on:		Remarks			
Method of analysis					
Accreditation status					
Uncertainty (decision limit or confidence interval)					
Lipid extraction method					

1	Dioxins and furans (pg/g)	Congeners	TEF	LOQ (see remarks)	Recovery (%) (see remarks)	Results	TEQ (see remarks)
		2,3,7,8-TCDD	1				
		1,2,3,7,8-PeCDD	1				
		1,2,3,4,7,8-HxCDD	0,1				
		1,2,3,6,7,8-HxCDD	0,1				
		1,2,3,7,8,9-HxCDD	0,1				
		1,2,3,4,6,7,8-HpCDD	0,01				
		OCDD	0,0001				
		2,3,7,8-TCDF	0,1				
		1,2,3,7,8-PeCDF	0,05				
		2,3,4,7,8-PeCDF	0,5				
		1,2,3,4,7,8-HxCDF	0,1				
		1,2,3,6,7,8-HxCDF	0,1				
		1,2,3,7,8,9-HxCDF	0,1				
		2,3,4,6,7,8-HxCDF	0,1				
		1,2,3,4,6,7,8-HpCDF	0,01				
		1,2,3,4,7,8,9-HpCDF	0,01				
		OCDF	0,0001				

Total TEQ-PCDD/PCDF	
Upper bound	
Medium bound	
Lower bound	

2	Non-ortho PCBs (pg/g)	PCB congeners	TEF	LOQ	Recovery (%) (see remarks)	Results	TEQ (see remarks)
		PCB-77	0,0001				
		PCB-81	0,0001				
		PCB-126	0,1				
		PCB-169	0,01				

3	Mono-ortho PCBs (pg/g)	PCB congeners	TEF	LOQ	Recovery (%) (see remarks)	Results	TEQ (see remarks)
		PCB-105	0,0001				
		PCB-114	0,0005				
		PCB-118	0,0001				
		PCB-123	0,0001				
		PCB-156	0,0005				
		PCB-157	0,0005				
		PCB-167	0,00001				
		PCB-189	0,0001				

Total TEQ-PCB	
Upper bound	
Medium bound	
Lower bound	

Non-dioxin-like PCBs

4	PCB-6 (µg/kg or ppb)	PCB congeners		LOQ	Results
Information on: Method of analysis Accreditation status Uncertainty (decision limit or confidence interval)		PCB-	28		
		PCB-	52		
		PCB-	101		
		PCB-	138		
		PCB-	153		
		PCB-	180		
		Total PCB-6		—	

[illegible]

NOTE TO THE READER

The institutions have decided no longer to quote in their texts the last amendment to cited acts.

Unless otherwise indicated, references to acts in the texts published here are to the version of those acts currently in force.