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

REGULATIONS

COMMISSION REGULATION (EC) No 369/2009**of 6 May 2009****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 7 May 2009.

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

Done at Brussels, 6 May 2009.

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	71,9
	TN	115,0
	TR	141,3
	ZZ	109,4
0707 00 05	JO	155,5
	MA	32,7
	TR	135,3
	ZZ	107,8
0709 90 70	TR	118,7
	ZZ	118,7
0805 10 20	EG	41,2
	IL	60,3
	MA	46,8
	TN	49,5
	TR	98,3
	US	55,4
	ZZ	58,6
0805 50 10	TR	41,7
	ZA	69,9
	ZZ	55,8
0808 10 80	AR	77,4
	BR	71,5
	CA	114,7
	CL	79,5
	CN	94,5
	NZ	102,5
	US	121,6
	UY	71,7
	ZA	81,2
	ZZ	90,5

⁽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 370/2009**of 6 May 2009****amending Regulation (EC) No 795/2004 laying down detailed rules for the implementation of the single payment scheme provided for in Council Regulation (EC) No 1782/2003**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 73/2009 of 19 January 2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers, amending Regulations (EC) No 1290/2005, (EC) No 247/2006, (EC) No 378/2007 and repealing Regulation (EC) No 1782/2003 ⁽¹⁾, and in particular Article 34(2), second subparagraph and Article 142(c), (d) and (g) thereof,

Whereas:

- (1) Regulation (EC) No 73/2009 has established new rules for the single payment scheme, which apply as from 1 January 2009. As a consequence, the implementing rules laid down in Commission Regulation (EC) No 795/2004 ⁽²⁾ need to be adapted.
- (2) The definitions as set out in Article 2 of Regulation (EC) No 795/2004 should reflect the extended eligibility of areas under the single payment scheme.
- (3) The provisions on eligibility as set out in Article 3b of Regulation (EC) No 795/2004 are obsolete and should therefore be removed. However, Article 34(2)(a) of Regulation (EC) No 73/2009 includes the use of eligible hectares for non-agricultural activities. A framework of criteria should be set for all Member States.
- (4) Regulation (EC) No 73/2009 puts an end to the set aside obligation and abolishes some of the limitations attached to payment entitlements issued from the national reserve, rendering obsolete the provisions on those matters.
- (5) Article 7 of Regulation (EC) No 795/2004 should be clarified as regards the references to Council Regulation (EC) No 1782/2003 ⁽³⁾ and Regulation (EC) No 73/2009.

(6) Regulation (EC) No 73/2009 does not provide any more for special rules on the application procedure to the single payment scheme in its first year of application. Consequently the relevant rules in Regulation (EC) No 795/2004 should be adapted.

(7) In cases of expiry of the lease referred to in Articles 20 and 22 or the programmes referred to in Article 23 of Regulation (EC) No 795/2004 after the last date for lodging an application under the single payment scheme in its first year of application, the deadline for application for the establishment of payment entitlements should be extended in order to provide farmers with sufficient time to lodge an application that reflects the actual situation of the holding.

(8) The regional limitation as fixed in Article 26 of Regulation (EC) No 795/2004 should be adapted to Article 43(1) of Regulation (EC) No 73/2009.

(9) Whereas provisions on compulsory set-aside become obsolete, conditions should be kept in 2009 for voluntary set aside as provided for in Article 107 of Regulation (EC) No 1782/2003.

(10) Where Member States decide to apply Article 72(4) of Regulation (EC) No 73/2009, deadline and content of the communication of this application to the Commission should be fixed.

(11) Provision should be made for rules for new Member States moving from the single area payment scheme to the single payment scheme. These rules should cover in particular the initial allocation of payment entitlements and special entitlements as well as the notification of the decision.

(12) Regulation (EC) No 73/2009 provides for the granting of direct support under the single payment scheme for wine producers in particular by transfer from the support programmes for wine into the single payment scheme. The related detailed rules for allocation of entitlements should therefore be adopted. Those detailed rules should follow the same lines as those already laid down in Regulation (EC) No 795/2004 with regard to the fruit and vegetables sector.

⁽¹⁾ OJ L 30, 31.1.2009, p. 16.

⁽²⁾ OJ L 141, 30.4.2004, p. 1.

⁽³⁾ OJ L 270, 21.10.2003, p. 1.

- (13) For farmers who have already been allocated, or who bought or received payment entitlements by the last date for applying for the establishment of payment entitlements fixed in accordance with Regulation (EC) No 795/2004, the value and number of their payment entitlements should be recalculated. Payment entitlements subject to special conditions should not be taken into account in this calculation.
- (14) Member States that apply the regional model established in Article 59(1) and (3) or Article 71f of Regulation (EC) No 1782/2003, should be empowered to fix the number of payment entitlements per farmer resulting from the transfer of support programmes for wine in accordance with Part C of Annex IX to Regulation (EC) No 73/2009.
- (15) Provision should be made as regards the regional average in the framework of the determination of the value of payment entitlements in application of Part B of Annex IX (grubbing up) to Regulation (EC) No 73/2009.
- (16) Annex I to Regulation (EC) No 795/2004 fixes the date from which the growing of secondary crops may be temporarily allowed in regions where cereals are usually harvested sooner for climatic reasons as referred to in Article 38, second paragraph of Regulation (EC) No 73/2009. At the request of Spain, different dates should be fixed for the different regions of that Member State to take into account the different agronomic and climatic conditions. The Annex should also be updated to take into account the eligibility of fruit and vegetables in those Member States that do not apply its deferred integration.
- (17) Regulation (EC) No 795/2004 should therefore be amended accordingly.
- (18) The proposed amendments should apply as from the date of application of Regulation (EC) No 73/2009.
- (19) The measures provided for in this Regulation are in accordance with the opinion of the Management Committee for Direct Payments,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 795/2004 is amended as follows:

1. Article 2 is amended as follows:

- (a) point (a) is deleted;

(b) point (c) is replaced by the following:

- ‘(c) “permanent crops” shall mean non-rotational crops other than permanent pasture that occupy the land for five years or longer and yield repeated harvests, including nurseries, and short rotation coppice (CN code ex 0602 90 41);’;

(c) point (d) is deleted;

(d) point (f) is replaced by the following:

- ‘(f) “grassland” shall mean arable land used for grass production (sown or natural); for the purposes of Article 49 of Council Regulation (EC) No 73/2009 (*) grassland shall include permanent pasture;

(*) OJ L 30, 31.1.2009, p. 16.’;

2. Article 3b is deleted;

3. the following Article 3c is added in Chapter 1:

‘Article 3c

Predominantly agricultural use

For the purposes of the application of Article 34(2)(a) of Regulation (EC) No 73/2009, where an agricultural area of a holding is used as well for non-agricultural activities that area shall be considered as being used predominantly for agricultural activities, if the agricultural activity can be exercised without being significantly hampered by the intensity, nature, duration and timing of the non-agricultural activity.

Member States shall establish criteria for the implementation of the first subparagraph on their territory.’;

4. Article 6 is amended as follows:

(a) paragraph 3 is amended as follows:

- (i) the second subparagraph is replaced by the following:

‘The unit value of each payment entitlement he already owns may be increased.’;

- (ii) the third subparagraph is deleted;

(b) paragraph 4 is deleted;

5. Article 7 is amended as follows:

- (a) in paragraph 1 the first and the second subparagraphs are replaced by the following:

‘Where a Member State makes use of the option provided for in Article 42(5) of Regulation (EC) No 1782/2003, it may in particular allocate, upon request, in accordance with this Article, payment entitlements to farmers, in the areas concerned, who declare fewer hectares than the number corresponding to payment entitlements they would be or would have been allocated in accordance with Article 43 of that Regulation and Article 59 of Regulation (EC) No 73/2009.

In that case, the farmer shall give up to the national reserve all the payment entitlement he owns or should have been allocated, except payment entitlements subject to special conditions referred to in Article 49 of Regulation (EC) No 1782/2003.’;

- (b) paragraph 3 is deleted;

- (c) paragraph 4 is replaced by the following:

‘4. The unit value of the payment entitlements allocated from the national reserve shall be calculated by dividing the farmer’s reference amount by the number of hectares he declares.’;

6. Article 8 is amended as follows:

- (a) in paragraph 1, the first subparagraph is replaced by:

‘Unused payment entitlements shall be deemed to have reverted to the national reserve on the day following the last day for modifying the application under the single payment scheme in the calendar year in which the period referred to in Articles 28(3) and 42 of Regulation (EC) No 73/2009 expires.’;

- (b) paragraph 2 is deleted;

7. in Article 9(1), point (c) is deleted;

8. in Article 12(4), the first subparagraph is replaced by the following:

‘The definitive establishment of payment entitlements to be allocated in the first year of the single payment scheme shall be subject to an application for entitlements submitted by the deadline set in accordance with Article 21a(3) of Regulation (EC) No 796/2004.’;

9. Article 18 is amended as follows:

- (a) paragraph 3 is deleted;

- (b) paragraph 4 is replaced by the following:

‘4. In cases where the lease referred to in Articles 20 and 22 or the programmes referred to in Article 23 expire after the last date for lodging an application under the single payment scheme in its first year of application, the farmer concerned may apply for the establishment of his payment entitlements, after the expiry of the lease or programme, by a date to be fixed by the Member State but not later than the latest date fixed for amending the aid application in the following year.’;

10. in Article 23a the second paragraph is deleted;

11. in Article 24, paragraph 3 is replaced by the following:

‘3. Farmers may give up voluntarily payment entitlements to the national reserve.’;

12. Article 26 is amended as follows:

- (a) paragraph 1 is replaced by the following:

‘1. Without prejudice to Articles 50(1) and 62(1) of Regulation (EC) No 73/2009 where a Member State makes use of the option provided for in the third subparagraph of Article 43(1) of that Regulation, Member States shall define the region at the appropriate territorial level in accordance with objective criteria and in such a way as to ensure equal treatment between farmers and to avoid market and competition distortion.’;

- (b) paragraph 4 is deleted;

13. Article 32 is replaced by the following:

‘Article 32

Conditions for voluntary set aside provided for in Article 107 of Regulation (EC) No 1782/2003

1. Areas set aside must so remain for a period commencing on 15 January at the latest and ending on 31 August at the earliest. However, Member States shall lay down the conditions under which producers may be authorised to sow seed from 15 July for harvesting in the following year and the conditions to be met for grazing to be authorised from 15 July or, in case of exceptional climatic condition, from 15 June in Member States where transhumance is practised traditionally.

2. Member States shall apply suitable measures compatible with the specific situation of areas set aside in order to ensure they are maintained in good agricultural and environmental condition and that the environment is protected.

Such measures may involve green cover. In that case, the measures shall ensure that the green cover cannot be used for seed production and that it cannot be used for agricultural purposes before 31 August or, before 15 January thereafter, to produce crops for marketing.

3. In cases as referred to in Article 31(c) of Regulation (EC) No 73/2009, Member States may authorise all producers affected to use land declared as set aside for animal feed purposes for the year of the single application. Member States shall take all necessary measures to ensure that the set-aside area subject to the authorisation is not used for lucrative purposes, and in particular that no fodder produced on that set-aside land is sold. Member States shall notify to the Commission their decision on the authorisation and its justification.;

14. Articles 33, 34, 39, 41 and 43 are deleted;

15. in Article 48, paragraph 6 is replaced by the following:

‘6. Member States applying Article 72(4) of Regulation (EC) No 73/2009 shall communicate, at the latest by 7 June 2009, the details of the payments they intend to grant and, in particular the description of the eligibility conditions and the sectors for the measures applied and the financial resources raised.;

16. Chapter 6a is replaced by the following:

‘CHAPTER 6a

NEW MEMBER STATES

Implementation of single payment scheme in the new Member States having applied single area payment scheme

Article 48a

General provisions

1. Save as otherwise provided for in this Chapter, the provisions of this Regulation shall apply to the new Member States having applied the single area payment scheme.

2. Any reference in this Regulation to Article 42 of Regulation (EC) No 1782/2003 or to Article 41 of Regulation (EC) No 73/2009 shall be construed as a reference to Article 57 of Regulation (EC) No 73/2009.

3. For the purposes of the application of Article 57(3) of Regulation (EC) No 73/2009 the new Member State may set a representative period which is preceding the first year of application of the single payment scheme.

4. Any references in this Regulation to the “reference period” shall be construed as a reference to the first year of application of the single payment scheme or to the reference period set under Article 59(3) of Regulation (EC) No 73/2009.

Article 48b

Initial allocation of payment entitlements

1. Without prejudice to Article 59(3) of Regulation (EC) No 73/2009, for the purposes of Article 59(2) of Regulation (EC) No 73/2009, new Member States shall establish the number of eligible hectares referred to in that paragraph by using the number of hectares declared for the establishment of the payment entitlements in the first year of application of the single payment scheme.

2. Despite paragraph 1 of this Article, new Member States may establish the number of eligible hectares referred to in Article 59(2) of Regulation (EC) No 73/2009 by using the number of hectares declared for the year preceding the first year of application of the single payment scheme.

In cases where the number of eligible hectares declared by farmers in the first year of application of the single payment scheme is lower than the number of eligible hectares established in accordance with the first subparagraph, a new Member State may re-allocate, in part or in full, the amounts corresponding to the hectares which have not been declared as a supplement to each payment entitlement allocated in the first year of application of the single payment scheme. The supplement shall be calculated by dividing the amount concerned by the number of payment entitlements allocated.

3. The value and number of the payment entitlements allocated on the basis of the farmers’ declarations for the establishment of the payment entitlements in the first year of application of the single payment scheme shall be provisional. The definitive value and number shall be established, by 1 April of the year following the first year of application of the single payment scheme at the latest, after the checks made pursuant to Regulation (EC) No 796/2004 are carried out.

4. Where a Member State makes use of the option provided for in Article 59(3) of Regulation (EC) No 73/2009 it may, starting from the calendar year preceding the first year of application of the single payment scheme proceed to the identification of the eligible farmers and the provisional establishment of the number of hectares referred to in that paragraph and to a preliminary verification of the conditions referred to in paragraph 6.

Without prejudice to Article 61 of Regulation (EC) No 73/2009, the value of the entitlements shall be calculated by dividing the amount referred to in Article 59(1) of Regulation (EC) No 73/2009 with the total number of entitlements allocated under this paragraph.

5. The farmer shall be informed about the provisional entitlements at least one month before the deadline for application determined in accordance with Article 56(1) of Regulation (EC) No 73/2009.

6. The applicant shall prove to the satisfaction of the Member State that, at the date of application for the payment entitlements, he is a farmer within the meaning of Article 2(a) of Regulation (EC) No 73/2009.

7. A Member State may decide to set up a minimum size per holding in terms of agricultural area for which the establishment of payment entitlements may be requested. However, the minimum size shall not be higher than the limits set under Article 28(1)(b) of Regulation (EC) No 73/2009.

No minimum size shall be set up for the establishment of the payment entitlements subject to special conditions referred to in Article 60 of Regulation (EC) No 73/2009 as provided for by Article 28(1) of that Regulation.

8. A Member State may decide that the application for the definitive establishment of payment entitlements referred to in paragraph 5 may be lodged at the same time as the application for payment under the single payment scheme.

Article 48ba

Allocation of special entitlements

Despite paragraphs 1 and 2 of Article 30 of this Regulation, for the purpose of calculating the agricultural activity expressed in livestock units (LU) referred to in Article 44(2) of Regulation (EC) No 73/2009, the number of animals held by the farmer in a period set by the Member State shall be converted to LU by reference to the following conversion table:

Male bovine animals and heifers older than 24 months, suckler cows, dairy cows	1,0 LU
Male bovine animals and heifers from six months to 24 months	0,6 LU
Male, female bovine animals of less than six months	0,2 LU
Sheep	0,15 LU
Goat	0,15 LU

For the purpose of checking the minimum agricultural activity in new Member States paragraphs 3 to 5 of Article 30 of this Regulation apply.

Article 48bb

Notification of the decision

Where a new Member State intends to terminate the application of the single area payment scheme in accordance with Article 122(3) of Regulation (EC) No 73/2009, it shall communicate to the Commission by 1 August of the year preceding the first year of application of the single payment scheme at the latest, the details of the implementation of the single payment scheme, including the options according to Articles 55(3), 57, 59 and 61 of that Regulation as well as the objective criteria on the basis of which the decisions have been taken.;

17. the following Chapter 6d is inserted:

'CHAPTER 6d

WINE

Section 1

Transfer from wine support programmes into the single payment scheme

Article 48i

General rules

1. For the purposes of the establishment of the amount and the determination of payment entitlements in the framework of the transfer from the wine support programmes into the single payment scheme, Part C of Annex IX to Regulation (EC) No 73/2009 shall apply subject to the specific rules established in Article 48j of this Regulation and, in case the Member State has made use of the option provided for in Articles 59 or 71f of Regulation (EC) No 1782/2003, in Article 48k of this Regulation.

2. Member States may proceed to the identification of the eligible farmers as from 1 January 2009 for allocating payment entitlements deriving from the transfer from wine support programmes into the single payment scheme.

3. For the purpose of the application of Articles 7(1) and 12 of this Regulation in relation to the wine sector, the first year of application of the single payment scheme shall be the year of the determination by the Member State of the amounts and eligible hectares as referred to in Part C of Annex IX to Regulation (EC) No 73/2009.

Article 48j

Specific rules

1. If the farmer does not own payment entitlements or only entitlements subject to special conditions by the last date for applying for the establishment of payment entitlements fixed in accordance with this Regulation, he shall receive payment entitlements for wine calculated in accordance with Part C of Annex IX to Regulation (EC) No 73/2009.

The first subparagraph shall also apply when the farmer has leased in payment entitlements between the first year of the application of the single payment scheme and the year of the transfer from support programmes.

2. If the farmer has been allocated or has bought or received payment entitlements by the last date for applying for the establishment of payment entitlements fixed in accordance with this Regulation, the value and number of the payment entitlements he owns shall be recalculated as follows:

- (a) the number of payment entitlements shall be equal to the number of payment entitlements he owns, increased by the number of hectares established in accordance with Part C of Annex IX to Regulation (EC) No 73/2009;
- (b) the value shall be obtained by dividing the sum of the value of the payment entitlements he owns and the reference amount calculated in accordance with Part C of Annex IX to Regulation (EC) No 73/2009 by the number established in accordance with point (a) of this paragraph.

Payment entitlements subject to special conditions shall not be taken into account in the calculation referred to in this paragraph.

3. Payment entitlements leased out before the date for lodging an application under the single payment scheme

fixed in accordance with this Regulation shall be taken into account in the calculation referred to in paragraph 2.

Article 48k

Regional implementation

1. Where a Member State has made use of the option provided for in Article 59 or Article 71f of Regulation (EC) No 1782/2003, farmers shall receive a number of payment entitlements equal to the number of new eligible hectares under vineyards.

The value of the payment entitlement is calculated on the basis of objective and non-discriminatory criteria.

The first year of application for the wine sector pursuant to Article 59(4) or Article 71f of Regulation (EC) No 1782/2003 shall be 2009.

2. By way of derogation from paragraph 1, Member States may establish the number of entitlements per farmer on the basis of objective criteria in accordance with Part C of Annex IX to Regulation (EC) No 73/2009.

Section 2

Grubbing up

Article 48l

Regional average

For the purposes of determining the value of payment entitlements in application of Part B of Annex IX (grubbing up) to Regulation (EC) No 73/2009, the regional average shall be established by Member States at the appropriate territorial level. It shall be established at a date to be fixed by the Member State. It may be reviewed annually. It shall be based on the value of the payment entitlements allocated to the farmers in the region concerned. It shall not be differentiated per sector of production.;

18. Annex I is replaced by the text set out in the Annex to this Regulation.

Article 2

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

It shall apply from 1 January 2009.

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

Done at Brussels, 6 May 2009.

For the Commission

Mariann FISCHER BOEL

Member of the Commission

ANNEX

‘ANNEX I

Member State	Date
Denmark	15 July
Germany	15 July
Spain: Castilla-La Mancha	1 June
Spain: Aragón, Asturias, Baleares, Cantabria, Castilla y León, Cataluña, Galicia, Madrid, Murcia, País Vasco, La Rioja, Comunidad Valenciana	1 July
Spain: Andalucía	1 September
Spain: Extremadura	15 September
Spain: Navarra	15 August
France: Aquitaine, Midi-Pyrénées and Languedoc-Roussillon	1 July
France: Alsace, Auvergne, Burgundy, Brittany, Centre, Champagne-Ardenne, Corsica, Franche-Comté, Île-de-France, Limousin, Lorraine, Nord-Pas-de-Calais, Lower Normandy, Upper Normandy, Loire Region (except the departments of Loire-Atlantique and Vendée), Picardy, Poitou-Charentes, Provence-Alpes-Côte-d'Azur and Rhône-Alpes	15 July
France: departments of Loire-Atlantique and Vendée	15 October
Italy	11 June
Austria	30 June'

DIRECTIVES

DIRECTIVE 2009/3/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 11 March 2009

amending Council Directive 80/181/EEC on the approximation of the laws of the Member States relating to units of measurement

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽²⁾,

Whereas:

(1) Council Directive 80/181/EEC ⁽³⁾ requires the United Kingdom and Ireland to fix a date for ending the exemptions, where they are still being applied, in respect of the units of measurement known as 'pint' for milk in returnable bottles and beer and cider on draught, 'mile' for road signs and speed indications, and 'troy ounce' for transactions in precious metals. However, experience has shown that, given the local character of those exemptions and the limited number of products concerned, maintaining the exemptions would not result in a non-tariff barrier to trade and, as a consequence, there is no longer a need to put an end to those exemptions.

(2) It is appropriate to clarify that the scope of Directive 80/181/EEC is consistent with the objectives referred to in Article 95 of the Treaty and that it is not limited to any specific Community fields of action.

(3) Directive 80/181/EEC authorises the use of supplementary indications in addition to the legal units laid down in Chapter I of the Annex to that Directive until

31 December 2009. However, in order to avoid creating obstacles for Community undertakings exporting to certain third countries that require products to be marked in other units than those laid down in Chapter I, it is appropriate to maintain the authorisation to use supplementary indications.

(4) Directive 80/181/EEC supports the smooth functioning of the internal market through the level of harmonisation of units of measurement it prescribes. In this context, it is appropriate that the Commission monitor market developments relating to that Directive and its implementation, notably as concerns possible obstacles to the functioning of the internal market and any further harmonisation required to overcome those obstacles.

(5) It is appropriate that the Commission continue to strongly pursue, in the context of its third country trade relations, including the Transatlantic Economic Council, the acceptance in third country markets of products labelled only in the units of the International System of Units (SI).

(6) Supplementary indications could also allow the gradual and smooth introduction of new metric units which may be developed at the international level.

(7) In 1995, the General Conference on Weights and Measures decided to eliminate the class of SI supplementary units as a separate class in the SI and to interpret the units 'radian' and 'steradian' as dimensionless SI derived units, the names and symbols of which may, but need not, be used in expressions for other SI derived units, as is convenient.

(8) In 1999, the General Conference on Weights and Measures adopted, within the framework of the SI, the 'katal', the symbol of which is 'kat', as the SI unit for catalytic activity. This new harmonised SI unit was intended to ensure a coherent and uniform indication of units of measurement in the fields of medicine and biochemistry and, as a consequence, to eliminate any risk of misunderstanding arising from the use of non-harmonised units.

⁽¹⁾ OJ C 120, 16.5.2008, p. 14.

⁽²⁾ Legislative Resolution of the European Parliament of 29 November 2007 (OJ C 297 E, 20.11.2008, p. 105), Council Common Position of 18 November 2008 (OJ C 330 E, 30.12.2008, p. 1) and Position of the European Parliament of 16 December 2008 (not yet published in the Official Journal).

⁽³⁾ OJ L 39, 15.2.1980, p. 40.

- (9) In 2007, in order to eliminate one of the major sources of the observed variability between different realisations of the water triple point, the General Conference on Weights and Measures adopted a note on the definition of the 'kelvin'. The 'kelvin' is defined as a fraction of the thermodynamic temperature of the triple point of water. The note refers to water of a specific isotopic composition.
- (10) Since the acre is no longer in use for land registration purposes in the United Kingdom and Ireland, there is no longer any need to provide for an exemption in that respect.
- (11) In accordance with point 34 of the Interinstitutional Agreement on better law-making ⁽¹⁾, Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public.
- (12) Directive 80/181/EEC should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments

Directive 80/181/EEC is hereby amended as follows:

- (1) Article 1(b) shall be replaced by the following:
- '(b) those listed in Chapter II of the Annex only in those Member States where they were authorised on 21 April 1973.;
- (2) Article 2(a) shall be replaced by the following:
- '(a) The obligations arising under Article 1 relate to measuring instruments used, measurements made and indications of quantity expressed in units of measurement.;
- (3) Article 3(2) shall be replaced by the following:
- '2. The use of supplementary indications shall be authorised.;

- (4) the following Article shall be inserted:

'Article 6b

The Commission shall monitor market developments relating to this Directive and its implementation with regard to the smooth functioning of the internal market and international trade and shall submit a report on those developments, accompanied by proposals where appropriate, to the European Parliament and to the Council by 31 December 2019.;

- (5) the Annex shall be amended as follows:

- (a) in Chapter I, point 1.1, the paragraph entitled 'Unit of thermodynamic temperature' shall be replaced by the following:

'Unit of thermodynamic temperature

The kelvin, unit of thermodynamic temperature, is the fraction 1/273,16 of the thermodynamic temperature of the triple point of water.

This definition refers to water having the isotopic composition defined by the following amount-of-substance ratios: 0,00015576 mole of ²H per mole of ¹H, 0,0003799 mole of ¹⁷O per mole of ¹⁶O and 0,0020052 mole of ¹⁸O per mole of ¹⁶O.

(Thirteenth CGPM (1967), resolution 4 and Twenty-third CGPM (2007), resolution 10);

- (b) in Chapter I, point 1.1.1, the title shall be replaced by the following:

'Special name and symbol of the SI derived unit of temperature for expressing Celsius temperature';

- (c) in Chapter I, point 1.2, the title shall be replaced by the following:

'1.2. SI derived units';

- (d) in Chapter I, point 1.2.1 shall be deleted;

- (e) in Chapter I, points 1.2.2 and 1.2.3 shall be replaced by the following:

'1.2.2. General rule for SI derived units

Units derived coherently from SI base units are given as algebraic expressions in the form of products of powers of the SI base units with a numerical factor equal to 1.

⁽¹⁾ OJ C 321, 31.12.2003, p. 1.

1.2.3. SI derived units with special names and symbols

Quantity	Unit		Expression	
	Name	Symbol	In terms of other SI units	In terms of SI base units
Plane angle	radian	rad		$\text{m} \cdot \text{m}^{-1}$
Solid angle	steradian	sr		$\text{m}^2 \cdot \text{m}^{-2}$
Frequency	hertz	Hz		s^{-1}
Force	newton	N		$\text{m} \cdot \text{kg} \cdot \text{s}^{-2}$
Pressure, stress	pascal	Pa	$\text{N} \cdot \text{m}^{-2}$	$\text{m}^{-1} \cdot \text{kg} \cdot \text{s}^{-2}$
Energy, work; quantity of heat	joule	J	$\text{N} \cdot \text{m}$	$\text{m}^2 \cdot \text{kg} \cdot \text{s}^{-2}$
Power ⁽¹⁾ , radiant flux	watt	W	$\text{J} \cdot \text{s}^{-1}$	$\text{m}^2 \cdot \text{kg} \cdot \text{s}^{-3}$
Quantity of electricity, electric charge	coulomb	C		$\text{s} \cdot \text{A}$
Electric potential, potential difference, electromotive force	volt	V	$\text{W} \cdot \text{A}^{-1}$	$\text{m}^2 \cdot \text{kg} \cdot \text{s}^{-3} \cdot \text{A}^{-1}$
Electric resistance	ohm	Ω	$\text{V} \cdot \text{A}^{-1}$	$\text{m}^2 \cdot \text{kg} \cdot \text{s}^{-3} \cdot \text{A}^{-2}$
Conductance	siemens	S	$\text{A} \cdot \text{V}^{-1}$	$\text{m}^{-2} \cdot \text{kg}^{-1} \cdot \text{s}^3 \cdot \text{A}^2$
Capacitance	farad	F	$\text{C} \cdot \text{V}^{-1}$	$\text{m}^{-2} \cdot \text{kg}^{-1} \cdot \text{s}^4 \cdot \text{A}^2$
Magnetic flux	weber	Wb	$\text{V} \cdot \text{s}$	$\text{m}^2 \cdot \text{kg} \cdot \text{s}^{-2} \cdot \text{A}^{-1}$
Magnetic flux density	tesla	T	$\text{Wb} \cdot \text{m}^{-2}$	$\text{kg} \cdot \text{s}^{-2} \cdot \text{A}^{-1}$
Inductance	henry	H	$\text{Wb} \cdot \text{A}^{-1}$	$\text{m}^2 \cdot \text{kg} \cdot \text{s}^{-2} \cdot \text{A}^{-2}$
Luminous flux	lumen	lm	$\text{cd} \cdot \text{sr}$	cd
Illuminance	lux	lx	$\text{lm} \cdot \text{m}^{-2}$	$\text{m}^{-2} \cdot \text{cd}$
Activity (of a radionuclide)	becquerel	Bq		s^{-1}
Absorbed dose, specific energy imparted, kerma, absorbed dose index	gray	Gy	$\text{J} \cdot \text{kg}^{-1}$	$\text{m}^2 \cdot \text{s}^{-2}$
Dose equivalent	sievert	Sv	$\text{J} \cdot \text{kg}^{-1}$	$\text{m}^2 \cdot \text{s}^{-2}$
Catalytic activity	katal	kat		$\text{mol} \cdot \text{s}^{-1}$

⁽¹⁾ Special names for the unit of power: the name volt-ampere (symbol "VA") when it is used to express the apparent power of alternating electric current, and var (symbol "var") when it is used to express reactive electric power. The "var" is not included in GCPM resolutions.

Units derived from SI base units may be expressed in terms of the units listed in Chapter I.

In particular, derived SI units may be expressed by the special names and symbols given in the above table; for example, the SI unit of dynamic viscosity may be expressed as $\text{m}^{-1} \cdot \text{kg} \cdot \text{s}^{-1}$ or $\text{N} \cdot \text{s} \cdot \text{m}^{-2}$ or $\text{Pa} \cdot \text{s}$;

- (f) in Chapter II, the following row shall be deleted from the table:

Land registration	acre	1 ac = 4 047 m ²	ac'
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- (g) in Chapter II, the final sentence shall be replaced by the following: 'The units listed in this Chapter may be combined with each other or with those in Chapter I to form compound units.'

Article 2

Transposition

1. Member States shall adopt and publish, no later than 31 December 2009, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those measures.

They shall apply those measures from 1 January 2010.

When they are adopted by Member States, those measures shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The

methods of making such reference shall be laid down by Member States.

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

Article 3

Entry into force

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

Article 4

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 11 March 2009.

For the European Parliament

The President

H.-G. PÖTTERING

For the Council

The President

A. VONDRA

IV

(Other acts)

EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY

EFTA SURVEILLANCE AUTHORITY DECISION

No 368/06/COL

of 29 November 2006

on the sale of the Icelandic State's shares in Sementsverksmiðjan hf. (Iceland)THE EFTA SURVEILLANCE AUTHORITY ⁽¹⁾,HAVING CALLED on interested parties to submit their comments pursuant to those provisions on Decision No 421/04/COL ⁽²⁾ and Decision No 367/06/COL ⁽⁶⁾,HAVING REGARD to the Agreement on the European Economic Area ⁽²⁾, in particular to Articles 61 to 63 and Protocol 26 thereof,

Whereas:

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

I. FACTS

1. Procedure

HAVING REGARD to Article 1(3) and (2) of Part I and Articles 4(2), 4(4), 6, 7(2) and of Part II of Protocol 3 to the Surveillance and Court Agreement,

By letter of 19 August 2003 from the Icelandic Mission to the European Union forwarding a letter from the Ministry of Finance dated 19 August 2003, both received and registered by the Authority on the same date (Doc No 03-5685 A), the Icelandic authorities notified the sale of the State's shares in Sementsverksmiðjan hf., pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement.

HAVING REGARD to the Authority's Guidelines ⁽⁴⁾ on the application and interpretation of Articles 61 and 62 of the EEA Agreement,

HAVING REGARD to the Authority's Decision of 14 July 2004 on the implementing provisions referred to under Article 27 of Part II of Protocol 3 to the Surveillance and Court Agreement,

On 17 December 2003, the company Aalborg Portland Íslandi ehf. lodged a complaint with the Authority against the terms and conditions of the sale by the Icelandic State of its shares in Sementsverksmiðjan hf. The Authority received and registered this letter on 23 December 2003 (Doc No 03-9059 A). The complainant requested this complaint to be processed simultaneously to the notification of the sale made by the government.

⁽¹⁾ Hereinafter referred to as the Authority.⁽²⁾ Hereinafter referred to as the EEA Agreement.⁽³⁾ Hereinafter referred to as the Surveillance and Court Agreement.⁽⁴⁾ Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the EFTA Surveillance Authority on 19 January 1994, published in OJ L 231, 3.9.1994, p. 1, and in EEA Supplement No 32 of 3.9.1994. The Guidelines were last amended on 25 October 2006. Hereinafter referred to as the State Aid Guidelines.⁽⁵⁾ EFTA Surveillance Authority Decision No 421/04/COL of 20 December 2004 on the sale of the Icelandic State's Shares in Sementsverksmiðjan, published in OJ C 117, 19.5.2005, p. 17, and in EEA Supplement No 24 of 19.5.2005.⁽⁶⁾ EFTA Surveillance Authority Decision No 367/06/COL of 29 November 2006 on the taking over by the Icelandic State of pension-related liabilities of Sementsverksmiðjan, not published yet.

After various exchanges of correspondence ⁽⁷⁾, by letter dated 21 December 2004 the Authority informed the Icelandic authorities that it had decided to initiate the procedure laid down in Article 1(2) of Part I of Protocol 3 to the Surveillance and Court Agreement in respect of the sale by the Icelandic State of its shares in Sementsverksmiðjan hf. (Event No 296878).

The Authority's Decision No 421/04/COL to initiate the procedure was published in the *Official Journal of the European Union* and the EEA Supplement thereto ⁽⁸⁾. The Authority called on interested parties to submit their comments thereon. The Icelandic authorities submitted comments on this Decision by letter dated 24 February 2005 (Event No 311243). On 20 June 2005, the Authority received comments from Íslenskt sement ehf., the purchaser of Sementsverksmiðjan hf. (Event No 323552). On 2 September 2005, Aalborg Portland Íslandi ehf. submitted further comments (Event No 333018).

The Authority requested the assistance of an independent expert, Mr Erlend Kvaal, Associate Professor at the Norwegian School of Management BI in Oslo, to determine whether the sale of the State's shares in Sementsverksmiðjan hf. was done in accordance with the market investor principle. Based on the independent expert's first assessment of the information on the sale available to the Authority, an information request was sent to the Icelandic authorities on 12 July 2005 (Event No 326295). The Icelandic authorities replied by letter from the Icelandic Mission to the EU forwarding a letter of the Ministry of Finance dated 30 and 31 August 2005 respectively. This letter was received and registered by the Authority on 1 September 2005 (Event No 332274).

A second information request was sent to the Icelandic authorities in the framework of the formal investigation procedure on 28 October 2005 (Event No 347691). This request was followed by a meeting in Brussels on 23 November 2005 between representatives of the Authority, the Icelandic authorities, Sementsverksmiðjan hf. and one of the investors participating in the consortium which acquired the State's shares. The independent expert engaged by the Authority attended this meeting as well.

By letter dated 6 December 2005, received and registered by the Authority on 7 December 2005 (Event No 353483), the Icelandic Mission to the EU forwarded a letter from the Ministry of Finance dated 2 December 2005, replying to the abovementioned information request as well as to some pending issues raised during the meeting.

On 31 January 2006, the independent expert presented to the Authority his final report on whether the sale by the Icelandic State of its shares in Sementsverksmiðjan hf. had been accomplished on market terms (Event No 360438).

⁽⁷⁾ For more detailed information on the various correspondence between the Authority and the Icelandic authorities, reference is made to the Authority's Decision No 421/04/COL to open the formal investigation procedure.

⁽⁸⁾ See footnote 5.

On 16 February, 9 March and 4 August 2006, the Authority sent letters to the Icelandic authorities requesting further information and clarifications on still unclear points (Event Nos 363213, 365145 and 383227). The Icelandic authorities replied with letters dated 20 February, 19 April and 25 September respectively (Event Nos 363608, 370425 and 390092).

On 12 October 2006 at the annual State Aid Package Meeting in Reykjavik, this case was discussed. As a follow-up to this discussion, the Icelandic authorities sent a letter to the Authority on 2 November 2006 (Event No 396476).

On 29 November 2006, the Authority adopted Decision No 367/06/COL to extend the formal investigation procedure opened with the Authority's Decision No 421/04/COL. The extension relates to the taking over by the State of pension related liabilities of Sementsverksmiðjan hf. in the process of preparing the company for sale. With the current Decision, the Authority closes the formal investigation opened on the sale of the Icelandic State's shares in Sementsverksmiðjan hf. to the investors group Íslenskt sement ehf. for the price of ISK 68 million. The other elements of the formal investigation procedure remain under investigation.

2. Description of the measures assessed in the current decision

The State-owned undertaking Sementsverksmiðjan hf. had enjoyed a de facto monopoly in the market for cement in Iceland until the entry in 2000 of an importer of cement from Denmark. It seems that as a result of the new competitive situation, Sementsverksmiðjan hf. experienced economic difficulties and started cumulating losses. Under these circumstances, in 2003, the State decided to sell its shares in the company ⁽⁹⁾. According to the State's announcement on the selling of the shares: 'The Executive Committee on Privatisation and the Minister of Industry intend to sell all shares currently owned by the State in Sementsverksmiðjan hf. of the nominal amount of 450 000 000 kr. to an individual or group of investors. This regards 100 % of issued stock in the company. It is expected that the purchase price will be paid with cash. An investor is sought who is interested in continuing the operations of the company, strengthening it and contributing to healthy competition in the Icelandic construction market.'

On 2 October 2003, the Ministry of Industry, on behalf of the Government of Iceland, signed a Share Purchase Agreement with the investors group Íslenskt sement ehf. On the basis of this Agreement, the State, owner of 100 % of the shares in Sementsverksmiðjan hf., sold them to Íslenskt sement ehf. for a price of ISK 68 million.

⁽⁹⁾ Letter from the Icelandic authorities dated 19 August 2003, p. 3.

Simultaneously, a separate agreement was made between Sementsverksmiðjan hf. and the National Treasury. According to this agreement, the Icelandic State bought certain fixed and financial assets from Sementsverksmiðjan hf., which were redundant for cement production, for the price of ISK 450 million. Proceeds were used to pay outstanding debts of the company.

In addition, following Article 4 of the Share Purchase Agreement between the Government of Iceland and Íslenskt sement ehf., the Icelandic State took over pension liabilities encumbered on Sementsverksmiðjan hf. by means of an agreement between the Ministry of Finance and the Pension Fund of State Employees.

In other words, the company, the shares of which Íslenskt sement ehf. bought, was accordingly stripped for these assets and liabilities.

It is this transaction, the sale of Sementsverksmiðjan hf. to Íslenskt sement ehf., which is addressed in the current decision. The formal investigation procedure regarding the other alleged State aid measures in favour of Sementsverksmiðjan hf. initiated with Decision No 421/04/COL has been extended to cover the taking over by the State of pension-related liabilities of the company with Decision No 367/06/COL, and will be addressed in another decision.

3. Grounds for initiating the formal investigation procedure

Regarding the sale by the State of 100 % of its shares in Sementsverksmiðjan hf., in Decision No 421/04/COL to open the formal investigation procedure, the Authority questioned the applicability to the case at hand of Chapter 18B of the State Aid Guidelines on the sale by public authorities of land and buildings. The Authority considered that the State was not merely selling land and buildings which it owned but its shares in a 100 % owned undertaking.

Furthermore, the Authority had doubts whether the sale had taken place in accordance with the market investor principle. It was uncertain to what extent the State took into account other considerations beyond the mere economic return of the transaction during the negotiation process and whether, accordingly, the price obtained in the sale corresponded to the market value of the company.

With the notification of the transaction, the Icelandic authorities had presented a valuation of Sementsverksmiðjan hf. carried out by an independent expert on the basis of the liquidation value. In the decision to open the formal investigation procedure, the Authority questioned whether the value of a company in operation could be assumed to be equivalent to its liquidation

value, which is based on the supposition that operations would cease. The Authority reasoned that had the market value of 100 % of the State's shares in Sementsverksmiðjan hf. been higher than the price of ISK 68 million paid by Íslenskt sement ehf., the State would have sold the company below its market price. State resources within the meaning of Article 61(1) of the EEA Agreement would have been involved, in form of foregone revenue, because the State would have obtained a lower price than a private operator, acting on market terms, would have got for the same assets.

4. Comments from the Icelandic authorities

In a letter dated 23 February 2005, the Icelandic authorities submitted their comments on the Authority's decision to open the formal investigation procedure regarding the sale of the State's shares in Sementsverksmiðjan hf.

The Icelandic authorities stressed that one of the most important reasons for the existence of the condition that cement production should continue was to raise the value of Sementsverksmiðjan hf. when selling the company to a third party. The Icelandic authorities stated that: 'If no such condition would be applicable the costs for clearing the site would be immediate for the buyer. By imposing a condition that cement production would continue this cost remained latent. Furthermore, it should be noted that the condition was negotiated with the buyers and incorporated in the Share Purchase Agreement as solely an intention from the buyers to continue the operation of Sementsverksmiðjan hf. as long as it is economically viable. The State cannot impose the buyers to run the company if not economically viable. This cannot be seen as evidence that the State took considerations beyond the economic return into account.'

In the opinion of the Icelandic authorities, as also stated in the authority's guidelines, it is only where there are no objective grounds to reasonably expect that an investment gives an adequate rate of return that would be acceptable to a private investor in a comparable private enterprise operating under normal market conditions, that State aid can be involved.

The Icelandic authorities submitted that: 'In consideration of the above it cannot be held that there were no objective grounds for the State to believe that the sale of Sementsverksmiðjan would not give the State an adequate rate of return. On the contrary, the State could, after negotiations with the buyers, expect a purchase price for the company well above the market value. Hence, it must be concluded that the State did not obtain lower revenue than a private operator, acting on market terms, would have got for the same assets. The State therefore acted in accordance with the market economy investor principle. It is for the Authority to show that the State could not expect an adequate rate of return. Since this has not been shown, and in the State's opinion cannot be shown, it must be concluded that the State has acted according to the market economy principle.'

In the notification of the transaction, the Icelandic authorities argued that the value of the company corresponded to its liquidation value. The liquidation value of Sementsverksmiðjan hf. had been estimated to correspond to ISK – 46,5 million without taking into account the costs of clearing the plant in Akranes. In the decision to open the formal investigation procedure, the Authority expressed doubts as to whether the market value of a company which was sold as going concern should be determined by using the liquidation value. In their comments to the Authority's decision to open the formal investigation procedure, the Icelandic authorities furthermore referred to the cash-flow valuations submitted to the Authority. In particular, according to the cash-flow valuation provided in the annex to their letter of 23 February 2005, the market value of Sementsverksmiðjan hf. amounted to an amount of ISK – 1,5 billion. On this basis, the Icelandic authorities considered that the market value of Sementsverksmiðjan hf. as a going concern was considerably lower than its liquidation value.

The Icelandic authorities further contended that since the market value of Sementsverksmiðjan hf., whether applying a cash-flow valuation or a liquidation valuation was lower than the sales price of ISK 68 million, neither Sementsverksmiðjan hf. nor Íslenskt sement ehf., had obtained any economic advantage within the meaning of Article 61(1) of the EEA Agreement.

The Icelandic authorities considered that when determining whether State aid was granted, the Authority should assess the total sales price of the company after the sale of the assets that were redundant to cement production back to the Icelandic State: 'It is further the State's opinion that if the Authority comes to the conclusion that a [cash-flow valuation] of the company is the correct valuation for determining the sales price [...] [t]he Cash-Flow method should then be used, assessing the worth of the company after the sale of the assets.'

The Icelandic authorities explained that the State was not prepared to negotiate a sales price corresponding to a calculated cash-flow value of Sementsverksmiðjan hf. '[B]ecause of the accumulated losses of the company since the time of tender it became clear that for the sale of the company to the buyer it would be necessary to restructure the company. The State would buy from the company all assets that were not elemental to the production and operation, to lessen the operational costs and make the operation of the company viable.'

For the abovementioned reasons, the Icelandic authorities considered that no State aid was involved in the transaction. However, should the Authority come to the conclusion that State aid was involved, in their opinion such State aid should be regarded as justified in accordance with the derogation

provided in Article 61(3)(c) of the EEA Agreement, in particular the provisions of Chapter 16 of the State Aid Guidelines as aid for restructuring a firm in difficulty.

In a letter dated 2 November 2006, the Icelandic authorities requested the Authority to consider not closing some aspects of the existing formal investigation since 'one has to regard all the aspects of the transaction in whole in order to have a clear understanding of the matter'.

5. Comments from third parties

5.1. *Comments from Íslenskt sement ehf.*

By letter dated 20 June 2005, Íslenskt sement ehf. submitted its comments to the Authority's Decision No 421/04/COL to open the formal investigation procedure on the sale of the Icelandic State's shares in Sementsverksmiðjan. In the opinion of Íslenskt sement ehf., no State aid was involved in the abovementioned sale. The company stated that: 'Íslenskt Sement is convinced that the market investor principle was met, especially as the overall purchase price of Sementsverksmiðjan was at least equivalent, if not considerably higher, than the company's real market value in the addressed transaction.'

Íslenskt sement ehf. considered that a cash-flow valuation, as generally used in the valuation of cement companies, was the only fair method of valuing the company. The company alleged, however, that the Icelandic State was not willing to negotiate on this basis as it would have resulted in a negative purchase price. According to Íslenskt sement ehf., had the cash-flow method been applied in the case of Sementsverksmiðjan, the estimated market value would have been zero or even negative. For this reason, Íslenskt sement ehf. considered that the value obtained by the application of the liquidation method corresponded to the maximum market value of the company at the time of purchase. Íslenskt sement ehf. further argued that the liquidation value of ISK 69,6 million did not take into account any expenses due in connection with the liquidation and closing down of operations, including the clearing of the ground. Íslenskt sement ehf. claimed that the purchase price for the shares in Sementsverksmiðjan hf. by far exceeded the company's liquidation value.

Íslenskt sement contended that the particular assets purchased by the National Treasury were not sold individually but in connection with the sale of the shares, as an integral part of the overall purchase agreement. Therefore, 'when assessing whether State aid was involved in the sale of Sementsverksmiðjan the Authority cannot place an individual evaluation on each asset sold but has to take into account the effect of the sale of the individual assets to the overall assessment of the valuation of the company at the time of sale'.

5.2. Comments from Aalborg Portland Íslandi ehf.

By letter of 2 September 2005, Aalborg Portland Íslandi ehf. submitted comments on the Authority's Decision 421/04/COL to open the formal investigation procedure regarding the sale of the State's shares in Sementsverksmiðjan hf. The company shared the concerns and views expressed by the Authority in the said decision but also referred to the Icelandic State's taking over of Sementsverksmiðjan hf.'s pension obligations which had not been addressed in the Authority's Decision.

II. APPRECIATION

1. The existence of State aid in the sale of the State's shares in Sementsverksmiðjan hf.

According to the information provided by the Icelandic authorities, the State sold its shares in Sementsverksmiðjan hf. for a price of ISK 68 million, in a transaction linked to the acquisition by the National Treasury of Iceland of some assets of the company which were not necessary for the operation of the company. Although these two elements of the transaction are closely connected, so that what Íslenskt sement ehf. bought was the operative part of Sementsverksmiðjan hf. released from assets and shares redundant to cement production, in this decision, the Authority will assess the sale of shares on its own merits. This is because the potential beneficiary of State aid in the case of the sale of the State's shares in Sementsverksmiðjan hf. would be Íslenskt sement ehf. In contrast, the potential beneficiary of any possible State aid granted in the context of the assets-liabilities restructuring of the company made by the State in connection to the sale of shares would be the cement producer itself, i.e. Sementsverksmiðjan hf. It is from the latter that the State purchased various assets and took over pension liabilities.

Article 61(1) of the EEA Agreement provides that:

'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, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.'

Before assessing whether the present sale contains State aid within the meaning of Article 61 of the EEA Agreement, the Authority will address the Icelandic Government's arguments that the presence of State aid can be excluded due to the application of Chapter 18B of the State Aid Guidelines on 'State aid elements in sales of land and buildings by public authorities'.

1.1. Chapter 18B of the State Aid Guidelines regarding 'State aid elements in sales of land and buildings by public authorities'

Chapter 18B of the State Aid Guidelines 'State aid elements in sales of land and buildings by public authorities' gives information on how the Authority interprets and applies the provisions of the EEA Agreement governing State aid when it comes to assessing sales of land and buildings by public authorities. If the procedures laid down in Chapter 18B of the Authority's State Aid Guidelines related to public authorities' sales of land and buildings are followed, there is a presumption that no State aid is involved in the sale.

Although the Icelandic authorities notified the terms of the transaction regarding the sale of the State's shares in Sementsverksmiðjan hf., they held the view that the sale had taken place in accordance with Chapter 18B of the State Aid Guidelines on the sales of land and buildings. Therefore, in their opinion, no State aid had been involved in the transaction.

As already stated in the decision to open the formal investigation procedure, the Authority considers that Chapter 18B cannot be applied to the transaction at stake. The State did not merely sell land and buildings which it owned, but its shares in a 100 %-owned undertaking which continues operations. Even if Chapter 18B was applicable, the procedures described to exclude the presence of State aid were not followed.

The bidding procedure followed in the case at hand did not comply with the definition foreseen under Chapter 18B.2.1(1)(b). First of all, it was not sufficiently publicised. Moreover, it only served to select a future buyer with whom the price was negotiated afterwards. Regarding the alternative procedure, i.e. the sale on the basis of an independent expert evaluation, in the case at hand, an expert, MP-verðbréf hf. established the liquidation value of Sementsverksmiðjan hf. Nevertheless, the company was sold as an on-going concern, implying that cement production would continue. In these circumstances, it cannot be presumed that the liquidation value corresponded to the market value excluding the existence of State aid without further assessment.

It seems necessary to determine which is the more appropriate method to determine the market value of a company in these circumstances and to carry out an assessment accordingly. A further analysis of what the market price of the company could be and whether any State aid was involved in the sale of Sementsverksmiðjan hf.'s shares to Íslenskt sement ehf. is given in the following.

1.2. State aid assessment of the sale of shares

In order for a measure to be considered State aid within the meaning of Article 61(1) of the EEA Agreement, it must fulfil the following cumulative conditions:

- the aid constitutes a selective advantage,
- the aid is granted through State resources,
- the aid distorts or threatens to distort competition,
- and affects trade between the Contracting Parties to the EEA Agreement.

A selective advantage — market price

A measure which grants an advantage to certain specific beneficiaries, and which is not a general measure, fulfils the first of the conditions mentioned above. It is therefore necessary to establish whether the undertaking concerned receives an economic advantage which it would not have obtained under normal market conditions⁽¹⁰⁾. Article 61(1) of the EEA Agreement does not distinguish between State interventions by reference to their causes or their objectives but defines them by reference to their effects⁽¹¹⁾. It follows that the concept of aid is an objective one, the test being whether a State measure confers an advantage on one or more particular undertakings⁽¹²⁾.

The acquisition of assets for a price under their market value constitutes, in principle, an advantage. Therefore, had Íslenskt sement ehf. paid for Sementsverksmiðjan hf. a price which corresponded to the market value of the company, it would have obtained no advantage from this transaction.

In order to determine whether Íslenskt sement ehf. paid a price of the State's shares below their market value, the Authority entrusted an independent expert with the assessment of the market value of Sementsverksmiðjan hf. at the time the sale took place. The independent expert assessed the market value of the company once the whole transaction was completed, taking into account the undertaking which continues operations. This means that the independent expert assessed

the market value of Sementsverksmiðjan hf. after the National Treasury of Iceland had re-purchased some assets of the company which were not necessary for cement production⁽¹³⁾, and the Ministry of Finance had taken over pension-related liabilities of the company. In other words, the independent expert assessed the market value of what Íslenskt sement ehf. really purchased, i.e. the shares in a stripped-off company.

In the opinion of the independent expert, the only method that can give an idea of what might be the fair value of the company in a transaction like the sale of the State's shares in Sementsverksmiðjan hf. is the method of discounting estimated future cash flows (value in use)⁽¹⁴⁾. The net present value of the expected cash-flows from future use of a fixed asset represents the calculation of an investor for the outcome of a potential project. Cash-flow projections may therefore vary with the strategies of each individual investor. Therefore, in the opinion of the independent expert, the best approach to follow was to identify a range of possible outcomes for the value in use, establishing an upper and a lower limit to the outcomes. The Icelandic authorities were asked to provide information and calculations necessary to establish these limits⁽¹⁵⁾ to obtain an idea of the fair value of the core activity, which is cement production. Once the operational value had been established, any asset added that did not belong to the core activity (such as any financial asset) represented an addition to the value, and any liability (such as any debt or other financial obligation) represented a reduction.

Cash-flow scenarios presented by the Icelandic authorities

On this basis, upon the request made by the independent expert, the Icelandic authorities were asked to produce two scenarios, Scenario I that assumed cement imports to Iceland at 30 % of the total market, and Scenario II that assumed no import. Scenario I (so-called pessimistic scenario) produced a negative net present value (hereinafter NPV) of future free cash flows of approximately ISK 1 000 million, and Scenario II (so-called optimistic scenario) a positive NPV of future free cash flows of approximately ISK 200 million. Adjusting the NPV measures by subtracting long-term debt and adding excess net current assets, the Icelandic Government arrived at estimated equity values of ISK – 897 million for Scenario I, and ISK 307 million for Scenario II. Capacity utilisation was decisive for the variation in outcome. Variable production cost per tonne were estimated to amount to ISK 5 749 in years with full capacity utilisation (130 000 tonnes) to ISK 7 479 in years with very low capacity utilisation (70 000 tonnes). There was therefore a double economy of scale effect in the calculation, since both variable and by definition fixed costs per tonne decrease with the higher volume produced⁽¹⁶⁾.

⁽¹⁰⁾ Case C-39/94 *Syndicat français de l'Express international (SFEI) and others v La Poste and others* [1996] ECR I-3547, paragraph 60, Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 22, Case CT-116/01 and T-118/01 *P & O Ferries v Commission* [2003] ECR, paragraph 112.

⁽¹¹⁾ Case C-56/93 *Belgium v Commission* [1996] ECR I-723, paragraph 79, and Case C-241/94 *France v Commission* [1996] ECR I-4551, paragraphs 19 and 20.

⁽¹²⁾ Case T-67/94 *Ladbroke Racing v Commission* [1998] ECR II-1, paragraph 52, and Case T-46/97 *SIC v Commission* [2000] ECR II-2125, paragraph 83.

⁽¹³⁾ As foreseen in the Share Purchase Agreement between the Government of Iceland and Íslenskt sement ehf. and accomplished on the basis of the provisions of the Purchase Contract between Sementsverksmiðjan hf. and the Treasury.

⁽¹⁴⁾ Expert's report, p. 2.

⁽¹⁵⁾ The Authority's letter of 12 July 2005.

⁽¹⁶⁾ Expert's report, p. 8.

In the accompanying letter, the Icelandic authorities argued that the optimistic scenario was not realistic, because it assumed no competition in the Icelandic cement market. In view of the investments in facilities by the Danish competitor Aalborg Portland, it was considered unlikely that competition would cease in the Icelandic cement market. The Icelandic authorities did not comment upon the realism of the most pessimistic scenario.

The expert criticised that a high discount rate (which included a risk premium) had been used in the models presented by the Icelandic authorities. A high discount rate may underestimate the liability that followed from negative cash-flows and thus embellish the prospects unduly. Notwithstanding this criticism, for consistency reasons, the real discount rate of 12,4 % suggested by the Icelandic authorities has been used throughout the analysis in the different scenarios proposed.

Reformulating the pessimistic scenario

Scenario I showed an undertaking making continuous losses over a period of 30 years, which seems wholly irrational. Considering that the intention pursued by the independent expert with the establishment of a pessimistic scenario was to determine a lower limit for possible outcomes, Scenario I presented by the Icelandic authorities was clearly inadequate⁽¹⁷⁾. Any rational investment decision is based on an expectation of a positive return. The question arises of how a rational investor would react if the expected positive return does not materialise. A common behaviour in such cases would be to minimise losses in the light of revised expectations.

Accordingly, the independent expert reformulated the pessimistic scenario on the assumption of five years time-frame with low capacity utilisation (82 000 tonnes per year, equal to the average of Scenario I), low sales prices maintained at the level of 2003 (ISK 7 071 per tonne), and assuming that the company would be liquidated after five years of operations. It was further assumed that all negative cash-flows are carried on to the owners. According to the expert, this seemed a reasonable strategy for the worst case scenario since any rational investment decision would be based on an expectation of a positive return and on the possibility to react if this positive return did not materialise.

A worst case scenario that would lead to the discontinuance of cement production after five years would trigger a clean up activity to be carried out immediately thereafter. According to the lease agreement signed between Sementsverksmiðjan hf. and the town of Akranes in July 2003, 'if cement production ceases

for a continuous period of 24 months, Iceland Cement Ltd must demolish the materials storage at its own expense'⁽¹⁸⁾. On the basis of the information provided by the Icelandic authorities, the clean up costs had been estimated to ISK 460 million, presumably at current prices⁽¹⁹⁾.

On this basis, the worst case scenario was found by simulating five years of production at low levels and cement prices maintained at 2003 levels. The net present value of related cash flows was adjusted with the assets and liabilities outside the production cycle at the purchase date. The net effect of alternative usage of the fixed assets (such as for cement importation) and the clean-up costs were added.

According to the reformulation made by the independent expert, a cash-flow simulation on these premises gave a negative cash flow from operations of ISK 144 million each year during five years, and a net present value of a negative outlay of ISK 360 million in the sixth year. The discounted value of these cash flows was calculated at ISK – 691 million, and after the adjustment for balance sheet items outside the operating cycle the value of the investment was determined at ISK – 332 million.

Reformulating the optimistic scenario

The purpose of the optimistic scenario was to establish an upper limit to the possible outcomes. The essential feature of an optimistic scenario was that operations should balance after five years. The starting point was the first operating year after privatisation, with an assumed production of 100 000 tonnes, a cement price of ISK 7 489, variable costs as stated in the cost formula (ISK 6 381 per tonne), and overheads as assumed in scenario I (ISK 127 million). The annual cash effects of re-investments were assumed at ISK 40, which could well exceed depreciations. On the basis of these assumptions, the net cash-flow for the first year was calculated at ISK – 38 million. Subsequently, the net cash-flow would gradually converge over five years towards zero in the sixth year.

The net present value of the cash-flows of the first five years of operations was estimated at ISK – 59 million. Assuming that the operating profit would be close to zero thereafter, the present value of the operations in succeeding years was set to zero. In this scenario the expert assumed it was reasonable that the tax loss carry-forwards⁽²⁰⁾ would not be exploited during the first years. The result of the operations was adjusted with balance sheet items outside the operating cycle (as it was done in the pessimistic scenario) and resulted in a net present value of ISK

⁽¹⁷⁾ Expert's report, p. 8.

⁽¹⁸⁾ Lease contract between the Town of Akranes and Sementsverksmiðjan hf. of 2 October 2003.

⁽¹⁹⁾ Expert's report, p. 9.

⁽²⁰⁾ An income tax loss in one year may be used to refund previously paid taxes in any of the most recent years past or may be used to reduce taxes due in any of the next years.

300 million. The expert used again a discount rate of 12,4 %, as in the pessimistic scenario. He pointed out that this rate reflects the cost of equity (pre-tax) only, whereas the investment project under this scenario would normally be financed for a large part with debt, thus lowering the overall required rate of return. A lower discount rate would produce a less positive result, since the cash flows included are all negative. However, he pointed out that it was important to consistently use the same rate throughout all scenarios.

Summary

On the basis of the abovementioned assessments, in the opinion of the independent expert, it was appropriate to determine an upper and a lower limit for fair value measurements through discounting future cash-flows. The lower limit would relate to the pessimistic scenario, in which cement production was to be interrupted after some years of operation, during which the owners would become persuaded that operations would not become profitable. In addition to the drain on resources from those loss-making years, the company would have to assume clean up-costs when ending the production⁽²¹⁾. On the positive side in this scenario were initial stocks and financial resources, which would give positive proceeds when liquidated, as well as alternative use of some fixed assets. On the basis of cash-flow valuations, the lowest market value of Sementsverksmiðjan hf. was estimated at ISK – 322 million.

The upper limit would be established by the optimistic scenario, in which the profitability of cement production was considered to gradually improve and a break-even would be struck after some years. As in the pessimistic scenario the initial years would bring losses that drained resources from the company, albeit at a more modest level. The net present value of operations after striking break-even was most likely negligible and was therefore ignored in the calculation. In this scenario too, there were positive contributions from initial stocks and financial items. On the basis of cash-flow valuations, the highest market value of Sementsverksmiðjan hf. was estimated at ISK 300 million.

The cash-flow calculations therefore suggested a fair value interval rather symmetric around zero with reasonably likely outcomes within a range of approximately $\pm$ ISK 300 million.

Private interests

In some cases, an agreed transaction may deviate from an observable or hypothetical market value because one party to the transaction has identifiable private interests in that particular transaction. In the opinion of the expert, in the acquisition of the State's shares in Sementsverksmiðjan hf. by Íslenskt sement ehf. there were clearly private interests involved, which may have influenced the transaction price.

⁽²¹⁾ As mentioned above, the mere moral obligation of the State to clean the production site in Akranes has been transformed into a legal obligation imposed on Sementsverksmiðjan hf. with the signature of the lease contracts for the land in Akranes between the company and the township of Akranes.

Íslenskt sement ehf. was a consortium of three companies created for the acquisition of the State's shares in Sementsverksmiðjan hf.: BM Valla, Björgun and Norcem. BM Valla is a major construction firm in Iceland and a large buyer of cement. According to the information provided in the meeting between representatives of the Authority, the independent expert and representatives of the Icelandic authorities and Íslenskt sement ehf., BM Valla has two strategic interests in the Icelandic cement plant. One is to ensure that cement supply in the Icelandic market will not be dominated by one single supplier. The second interest is to maintain local product development and competence, to the long-term benefit of the construction industry, in particular, taking into account the technical specificities of the Icelandic cement market.

Björgun is the supplier of shell sand to Sementsverksmiðjan hf. If local cement production ceases, Björgun would have no alternative outlet for its products.

Norcem is a Norwegian cement producer, owned by the German group Heidelberg Zement. Norcem may have strategic and competitive interests in strengthening its presence in the Icelandic market.

In light of the specific circumstances of the consortium of buyers, in this case, the independent expert considers that the agreed exchange price has been influenced by the existence of private interests.

For these reasons, the independent expert concluded that⁽²²⁾ 'although I find the agreed price of 68 m ISK rather on the high side, there may be elements of the situation of the owners that increase the probability of recovery of the investment cost'.

The Authority has assessed the facts and figures presented by the Icelandic authorities and carefully scrutinised the assessment and the report presented by the independent expert. The Authority has found the analysis of the expert to represent a fair way to establish the value of Sementsverksmiðjan hf. As already indicated in Decision No 421/04/COL to open the formal investigation procedure, one cannot assume that the liquidation value of a company that is foreseen to continue operations represents the market value of the company. In line with the view of the independent expert, the Authority considers that a discounted cash-flow analysis is an appropriate way to calculate the value of an undertaking as the one in the case at hand. The Authority reckons, however, that an

⁽²²⁾ Expert's report, p. 13.

assessment of the value of the company at the time of the transaction is obviously liable to considerable uncertainty. Therefore, in the view of the Authority, for the purpose of estimating the value of a company it appears reasonable to study different scenarios, as the expert did, to establish a range within which it would be justified to assume the value to be found. The sales price of the State's shares in Sementsverksmiðjan hf. was within the established range and even above the middle value of approximately zero.

Moreover, the Icelandic authorities had determined that the liquidation value of the company corresponded to ISK 69,6 million. An agreement between the township of Akranes and Sementsverksmiðjan hf. dated 31 July 2003 states that: 'if clinker production ceases for a continuous period of 24 months, Iceland Cement Ltd must demolish the materials storage at its own expense'. Thus, the liquidation value of Sementsverksmiðjan hf. was lower than ISK 69,6 million because the costs of demolishing the materials storage, as laid down in the abovementioned legal agreement, would have to be added ⁽²³⁾. Thus, the price that Íslenskt sement ehf. paid for the State's shares in Sementsverksmiðjan hf. was higher than the liquidation value of the company.

2. Conclusion

On the basis of these considerations, the Authority cannot conclude that the company was sold under market value. Therefore, the Authority cannot conclude that Íslenskt sement ehf., as the company founded by the investors group to purchase the State's shares in Sementsverksmiðjan hf., obtained an economic advantage within the meaning of Article 61(1) of the EEA Agreement.

According to Article 61(1) of the EEA Agreement, four cumulative conditions must be fulfilled in order for a measure to constitute State aid. On the basis of the foregoing assessment, the Authority has not found reasons to investigate any of the other three conditions listed above for a measure to constitute State aid. As Íslenskt sement ehf. has not received any advantage, the Authority considers that the sale of the State's shares in Sementsverksmiðjan hf. to the group of investors

Íslenskt sement ehf. does not constitute State aid within the meaning of Article 61(1) of the EEA Agreement.

The adoption of this Decision to close the investigation on the sale of the State's shares to Íslenskt sement ehf. for the price of ISK 68 million, part of the formal investigation opened with Authority's Decision No 421/04/COL and extended with Decision No 367/06/COL, does not prejudice the outcome of the remainder of the investigation,

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority considers that the sale by the Icelandic State of its shares in Sementsverksmiðjan hf. to Íslenskt sement ehf. for a price of ISK 68 million does not constitute State aid within the meaning of Article 61 of the EEA Agreement.

Article 2

This Decision is addressed to the Republic of Iceland.

Article 3

Only the English version is authentic.

Done at Brussels, 29 November 2006.

For the EFTA Surveillance Authority,

Björn T. GRYDELAND
President

Kristján A. STEFÁNSSON
College Member

⁽²³⁾ In the assessment of the liquidation value carried out by MP-verðbréf hf. in March 2003, the costs associated with tearing down and cleaning the factory plant (buildings and machinery) were estimated at ISK 460 million. Even if this figure should not be absolutely correct, it gives an idea that there is an encumbrances on Sementsverksmiðjan which can diminish the estimated liquidation value considerably.

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