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Contents

II *Non-legislative acts*

REGULATIONS

- ★ **Commission Regulation (EU) No 566/2011 of 8 June 2011 amending Regulation (EC) No 715/2007 of the European Parliament and of the Council and Commission Regulation (EC) No 692/2008 as regards access to vehicle repair and maintenance information ⁽¹⁾ 1**
- ★ **Commission Implementing Regulation (EU) No 567/2011 of 14 June 2011 entering a name in the register of protected designations of origin and protected geographical indications (Porchetta di Ariccia (PGI)) 25**
- ★ **Commission Implementing Regulation (EU) No 568/2011 of 14 June 2011 entering a name in the register of protected designations of origin and protected geographical indications (Miód drahimski (PGI)) 27**
- Commission Implementing Regulation (EU) No 569/2011 of 15 June 2011 establishing the standard import values for determining the entry price of certain fruit and vegetables 29
- Commission Implementing Regulation (EU) No 570/2011 of 15 June 2011 amending the representative prices and additional import duties for certain products in the sugar sector fixed by Regulation (EU) No 867/2010 for the 2010/11 marketing year 31
- Commission Implementing Regulation (EU) No 571/2011 of 15 June 2011 fixing the import duties in the cereals sector applicable from 16 June 2011 33

Price: EUR 4

(Continued overleaf)

⁽¹⁾ Text with EEA relevance

EN

Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

The titles of all other acts are printed in bold type and preceded by an asterisk.

DECISIONS

2011/341/CFSP:

- ★ **Political and Security Committee Decision Atalanta/2/2011 of 15 June 2011 on the appointment of an EU Operation Commander for the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta)** 36

2011/342/EU:

- ★ **Decision of the European Central Bank of 9 May 2011 amending Decision ECB/2004/3 on public access to European Central Bank documents (ECB/2011/6)** 37

IV *Acts adopted before 1 December 2009 under the EC Treaty, the EU Treaty and the Euratom Treaty*

- ★ **EFTA Surveillance Authority Decision No 341/09/COL of 23 July 2009 on the notified scheme concerning tax benefits for certain cooperatives (Norway)** 39

Corrigenda

- ★ **Corrigendum to Commission Regulation (EU) No 446/2011 of 10 May 2011 imposing a provisional anti-dumping duty on imports of certain fatty alcohols and their blends originating in India, Indonesia and Malaysia (OJ L 122, 11.5.2011)** 54

II

(Non-legislative acts)

REGULATIONS

COMMISSION REGULATION (EU) No 566/2011

of 8 June 2011

amending Regulation (EC) No 715/2007 of the European Parliament and of the Council and Commission Regulation (EC) No 692/2008 as regards access to vehicle repair and maintenance information**(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information ⁽¹⁾, and in particular Articles 4(4), 5(3) and 8 thereof,Having regard to Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) ⁽²⁾, in particular Article 39(2) thereof,

Whereas:

- (1) Regulation (EC) No 715/2007 establishes common technical requirements for the type approval of motor vehicles (vehicles) and replacement parts with regard to their emissions and lays down rules for in-service conformity, durability of pollution control devices, on-board diagnostic (OBD) systems, measurement of fuel consumption and accessibility of vehicle repair and maintenance information.
- (2) Commission Regulation (EC) No 692/2008 of 18 July 2008 implementing and amending Regulation (EC) No 715/2007 of the European Parliament and of the Council on type-approval of motor vehicles with respect to emissions from light passenger and commercial vehicles

(Euro 5 and Euro 6) and on access to vehicle repair and maintenance information ⁽³⁾ requires the Commission to introduce the new test procedure for particle mass and numbers emitted by light duty vehicles.

- (3) Council Directive 76/756/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to the installation of lighting and light-signalling devices on motor vehicles and their trailers ⁽⁴⁾ requires the use of daytime running lamps for safety reasons. The effect of those devices, which are switched on permanently during the operation of vehicles, should be appropriately reflected in the measured pollutant and carbon dioxide (CO₂) emissions.
- (4) The risk of tampering with and total failures of diesel particle filters (DPFs) necessitates the monitoring of DPFs, regardless of the exceedance of the applicable OBD threshold limit.
- (5) Due to its permanent nature, the monitoring of electric circuits should be exempt from the reporting resulting from the in-use-performance-ratio requirements on the OBD system.
- (6) The limited frequency of driving situations during which monitors of the boost control system or monitors requiring a cold start can be operated requires special performance requirements for these monitors.
- (7) The statistical conditions under which compliance with in-use-performance-ratio requirements is assessed by default should be harmonised.

⁽¹⁾ OJ L 171, 29.6.2007, p. 1.

⁽²⁾ OJ L 263, 9.10.2007, p. 1.

⁽³⁾ OJ L 199, 28.7.2008, p. 1.

⁽⁴⁾ OJ L 262, 27.9.1976, p. 1.

- (8) If tampering of the Selective Catalytic Reduction (SCR) system is identified by direct monitoring of nitrogen oxides (NO_x) emissions, the conditions under which its driver inducement system is activated should be better defined.
- (9) The recording of activation of the driver inducement system should be clarified with regard to possible future use of this information during roadworthiness inspections.
- (10) The protection of the emission control computer against tampering should be open for technical improvements due to innovation.
- (11) Recording and reporting of data are essential parts of a mandatory OBD monitor and should not be waived by alleged deficiencies, in particular not in a systematic manner where the manufacturer opts for certain standards for on/off board communication.
- (12) In order to ensure effective competition on the market for vehicle repair and maintenance information services, and in order to clarify that the information concerned also covers information which needs to be provided to independent operators other than repairers, so as to ensure that the independent vehicle repair and maintenance market as a whole can compete with authorised dealers, regardless of whether the vehicle manufacturer gives such information to authorised dealers and repairers directly, further clarifications with regard to the details of the information to be provided under Regulation (EC) No 715/2007 are necessary.
- (13) Considering the proportionality principle, while vehicle manufacturers should not be forced to collect data on modifications of individual vehicles from third parties exclusively for the purposes of Regulation (EC) No 715/2007 and its implementing acts, in order to ensure a competitive repair and maintenance market, independent operators should receive updates to vehicle component data to the extent the updates are available to authorised dealers and repairers.
- (14) Work units are important technical repair and maintenance information for independent operators. Clarifying that work units are covered by Article 6 of Regulation (EC) No 715/2007 is expected to provide commercial certainty to the market players.
- (15) Where vehicle manufacturers provide that repair and maintenance records are no longer kept in physical format — which vehicle owners can also make accessible to independent repairers for the latter to introduce a statement of the repair and maintenance work carried out — in the vehicle, but kept in the vehicle manufacturers' central data base, these records must, with the consent of the vehicle owners, also be accessible by the independent repairer in order to allow them to continue to produce such complete record of the repair and maintenance work carried out and to enable vehicle owners to have a single document proving all such works.
- (16) More flexibility should be given for the re-programming of vehicle control units and the data exchange between vehicle manufacturers and independent operators in order to allow for innovations and to save costs.
- (17) It should be ensured that vehicles approved in accordance with the relevant Regulation from the United Nations Economic Commission for Europe (UN/ECE) equivalent to the emissions-related requirements of Regulation (EC) No 715/2007 and Regulation (EC) No 692/2008 and fulfilling the requirements of those Regulations on access to information are approved in accordance with Regulation (EC) No 715/2007 without administrative burdens.
- (18) Since there is currently no common structured process for the exchange of vehicle component data between vehicle manufacturers and independent operators, it is appropriate to develop principles for such an exchange of data. A future common structured process on the standardised format of the data exchanged should be developed by the European Committee for Standardization (CEN) formally, whereupon the mandate given to CEN does not predetermine the level of detail this standard will provide. The CEN's work should, in particular, reflect the interests and needs of vehicle manufacturers and independent operators alike and should also investigate solutions such as open data formats described by well defined meta-data to accommodate existing IT infrastructures.
- (19) Regulations (EC) No 715/2007 and (EC) No 692/2008 should therefore be amended accordingly.
- (20) The measures provided for in this Regulation are in accordance with the opinion of the Technical Committee — Motor Vehicles,
- HAS ADOPTED THIS REGULATION:
- Article 1*
- Regulation (EC) No 715/2007 is amended as follows:
- (1) Article 6 is amended as follows:
- (a) paragraph 2 is replaced by the following:
- ‘2. The information referred to in paragraph 1 shall include:
- (a) an unequivocal vehicle identification;
- (b) service handbooks, including repair and maintenance records;

- (c) technical manuals;
- (d) component and diagnosis information (such as minimum and maximum theoretical values for measurements);
- (e) wiring diagrams;
- (f) diagnostic trouble codes (including manufacturer specific codes);
- (g) the software calibration identification number applicable to a vehicle type;
- (h) information provided concerning, and delivered by means of, proprietary tools and equipment;
- (i) data record information and two-directional monitoring and test data; and
- (j) standard work units or time periods for repair and maintenance tasks if made available, either directly or through a third party, to manufacturers' authorised dealers and repairers.;

(b) the following paragraph 8 is added:

'8. Where vehicle repair and maintenance records are kept in a central data base of the vehicle manufacturer or on its behalf, independent repairers, approved and authorised as required in point 2.2 of Annex XIV to Commission Regulation (EC) No 692/2008 (*), shall have access to such records free of charge and under the same conditions as authorised dealers or repairers in order to record information on repair and maintenance performed.

(*) OJ L 199, 28.7.2008, p. 1.;

(2) in Article 7, paragraph 2 is replaced by the following:

'2. Manufacturers shall make available vehicle repair and maintenance information including transactional services such as reprogramming or technical assistance on an hourly, daily, monthly, and yearly basis, with fees for access to such information varying in accordance with the respective periods of time for which access is granted. In addition to time-based access, manufacturers may offer transaction-based access, for which fees are charged per transaction and not based on the time for which access is granted. Where both access systems are offered by manufacturers, independent repairers shall choose a preferred access system, either time-based or transaction-based.;

(3) in Annex I, notes 1 and 2 of Table 1 and notes 1, 2 and 5 of Table 2 are deleted.

Article 2

Regulation (EC) No 692/2008 is amended as follows:

(1) in Article 2, the following point 33 is added:

'33. "Cold start" means an engine coolant temperature (or equivalent temperature) at engine start less than or equal to 35 °C and less than or equal to 7 K higher than ambient temperature (if available) at engine start.;

(2) in Article 6(1), the following fourth and fifth subparagraphs are added:

'The relevant requirements shall be deemed to be met if all the following conditions are fulfilled:

- (a) the requirements of Article 13 are met;
- (b) the vehicle has been approved according to UN/ECE Regulations No 83, series of amendments 06, No 101, series of amendments 01 and in the case of compression ignition vehicles No 24 Part III, series of amendments 03.

In the case referred to in the fourth subparagraph Article 14 shall also apply.;

(3) in Article 10(1), the following third and fourth subparagraphs are added:

'The relevant requirements shall be deemed to be met if all the following conditions are fulfilled:

- (a) the requirements of Article 13 are met;
- (b) the replacement pollution control devices have been approved according to UN/ECE Regulation No 103.

In the case referred to in the third subparagraph Article 14 shall also apply.;

(4) Article 13(9) is replaced by the following:

'9. The Forum on Access to Vehicle Information (the Forum) is hereby established.

The Forum shall consider whether access to information affects the advances made in reducing vehicle theft and shall make recommendations for improving the requirements relating to access to information. In particular, the Forum shall advise the Commission on the introduction of a process for approving and authorising independent operators by accredited organisations to access information on vehicle security.

The Commission may decide to keep the discussions and findings of the Forum confidential.;

(5) Annexes I, III, IV, VIII, IX, XI, XII, XIV, XVI and XVIII are amended in accordance with Annex I to this Regulation;

(6) Annex II is replaced by the text set out in Annex II to this Regulation.

Article 3

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

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

Done at Brussels, 8 June 2011.

For the Commission

The President

José Manuel BARROSO

ANNEX I

Amendments to certain Annexes to Regulation (EC) No 692/2008

(1) Annex I is amended as follows:

(a) point 2.3.1 is replaced by the following:

‘2.3.1. Any vehicle with an emission control computer shall include features to prevent modification, except as authorised by the manufacturer. The manufacturer shall authorise modifications if these modifications are necessary for the diagnosis, servicing, inspection, retrofitting or repair of the vehicle. Any reprogrammable computer codes or operating parameter shall be resistant to tampering and afford a level of protection at least as good as the provisions in ISO 15031-7; dated 15 March 2001 (SAE J2186 dated October 1996). Any removable calibration memory chips shall be potted, encased in a sealed container or protected by electronic algorithms and shall not be changeable without the use of specialised tools and procedures. Only features directly associated with emissions calibration or prevention of vehicle theft may be so protected.’;

(b) Figure I.2.4 is replaced by the following:

Figure I.2.4.

Application of test requirements for type approval and extensions

	Vehicles with positive ignition engines including hybrids								Vehicles with C.I. engines including hybrids	
	Mono fuel				Bi fuel ⁽¹⁾			Flex fuel ⁽¹⁾	Flex fuel	Mono fuel
Reference fuel	Petrol (E5)	LPG	NG/Biomethane	Hydrogen	Petrol (E5)	Petrol (E5)	Petrol (E5)	Petrol (E5)	Diesel (B5)	Diesel (B5)
					LPG	NG/Biomethane	Hydrogen	Ethanol (E85)	Biodiesel	
Gaseous pollutants (Type 1 test)	Yes	Yes	Yes		Yes (both fuels)	Yes (both fuels)	Yes (petrol only) ⁽²⁾	Yes (both fuels)	Yes (B5 only) ⁽²⁾	Yes
Particulate mass & Particle number (Type 1 test)	Yes	—	—		Yes (petrol only)	Yes (petrol only)	Yes (petrol only) ⁽²⁾	Yes (both fuels)	Yes (B5 only) ⁽²⁾	Yes
Idle emissions (Type 2 test)	Yes	Yes	Yes		Yes (both fuels)	Yes (both fuels)	Yes (petrol only) ⁽²⁾	Yes (both fuels)	—	—
Crankcase emissions (Type 3 test)	Yes	Yes	Yes		Yes (petrol only)	Yes (petrol only)	Yes (petrol only) ⁽²⁾	Yes (petrol)	—	—
Evaporative emissions (Type 4 test)	Yes	—	—		Yes (petrol only)	Yes (petrol only)	Yes (petrol only) ⁽²⁾	Yes (petrol)	—	—
Durability (Type 5 test)	Yes	Yes	Yes		Yes (petrol only)	Yes (petrol only)	Yes (petrol only) ⁽²⁾	Yes (petrol)	Yes (B5 only) ⁽²⁾	Yes
Low temperature emissions (Type 6 test)	Yes	—	—		Yes (petrol only)	Yes (petrol only)	Yes (petrol only) ⁽²⁾	Yes (both fuels) ⁽³⁾		
In-service conformity	Yes	Yes	Yes		Yes (both fuels)	Yes (both fuels)	Yes (petrol only) ⁽²⁾	Yes (both fuels)	Yes (B5 only) ⁽²⁾	Yes
On-board diagnostics	Yes	Yes	Yes		Yes	Yes	Yes	Yes	Yes	Yes

	Vehicles with positive ignition engines including hybrids								Vehicles with C.I. engines including hybrids	
	Mono fuel				Bi fuel ⁽¹⁾			Flex fuel ⁽¹⁾	Flex fuel	Mono fuel
CO ₂ emissions and fuel consumption	Yes	Yes	Yes		Yes (both fuels)	Yes (both fuels)	Yes (petrol only)	Yes (both fuels)	Yes (B5 only) ⁽²⁾	Yes
Smoke opacity	—	—	—		—	—	—	—	Yes (B5 only) ⁽²⁾	Yes

⁽¹⁾ Where a bi fuel vehicle is combined with a flex fuel vehicle, both test requirements are applicable.
⁽²⁾ This provision is temporary, further requirements for biodiesel and hydrogen shall be proposed later on.
⁽³⁾ Test on petrol only before the dates set out in Article 10(6) of Regulation (EC) No 715/2007. The test will be performed on both fuels after these dates. The E75 test reference fuel specified in Annex IX Section B shall be used.;

(c) in Appendix 3, point 3.4.8 is replaced by the following:

‘3.4.8. Vehicle electric range km (according to Annex 9 to UN/ECE Regulation No 101)’;

(d) in Appendix 4, point 3.2 is replaced by the following:

‘3.2. Terms and conditions of access (i.e. duration of access, price of access on a hourly, daily, monthly, annual and per-transaction basis) to websites referred to in point 3.1):’;

(e) in Appendix 6, the following is added to key of table 1:

‘Euro 5b emissions standard = Full Euro 5 emission requirements including revised measurement procedure for particulates, particle number standard and flex fuel vehicle low temperature emission testing with biofuel.

Euro 6b emissions standard = Full Euro 6 emission requirements including revised measurement procedure for particulates, particle number standard and flex fuel vehicle low temperature emission testing with biofuel.

Euro 5 OBD standards = Base Euro 5 OBD requirements excluding in-use-performance ratio (IUPR), NO_x monitoring for petrol vehicles and tightened PM threshold limits for diesel.

Euro 6 OBD standards = Full Euro 6 OBD requirements.’;

(2) Annex III is amended as follows:

(a) point 3.1 is replaced by the following:

‘3.1. The technical requirements shall be those set out in Annex 4 to UN/ECE Regulation No 83 with the exceptions set out in points 3.2 to 3.12. As from the dates set out in the second sentence of Article 10(6) of Regulation (EC) No 715/2007 the mass of particulate matter (PM) and the number of particles (P) shall be determined according to the emission test procedure set out in Section 6 of Annex 4a to UN/ECE Regulation No 83, series of amendments 05, supplement 07, using the test equipment described in points 4.4 and 4.5 thereof, respectively.’;

(b) in point 3.4, the following is added:

‘For ethanol (E75) (C₁ H_{2,61} O_{0,329}) d = 0,886 g/l’;

(c) the table in point 3.8 is replaced by the following:

Fuel	X
Petrol (E5)	13,4
Diesel (B5)	13,5
LPG	11,9
NG/biomethane	9,5
Ethanol (E85)	12,5
Ethanol (E75)	12,7’

(d) in point 3.10, the following is added:

‘Q_{THC} = 0,886 in the case of ethanol (E75)’;

(e) the following point 3.14 is added:

‘3.14. As from the dates laid down in Article 2 of Commission Directive 2008/89/EC (*) the daytime running lamps of the vehicle as defined in Section 2 of UN/ECE Regulation No 48 (**) shall be switched on during the test cycle. The vehicle tested shall be equipped with the daytime running lamp system that has the highest electrical energy consumption among the daytime running lamp systems, which are fitted by the manufacturer to vehicles in the group represented by the type-approved vehicle. The manufacturer shall supply appropriate technical documentation to the type-approval authorities in this respect.

(*) OJ L 257, 25.9.2008, p. 14.

(**) OJ L 135, 23.5.2008, p. 1.’;

(3) in Annex IV, point 2.2 of Appendix 1 is replaced by the following:

‘2.2. The atomic ratios specified in point 5.3.7.3 shall be understood as follows:

Hcv = Atomic ratio of hydrogen to carbon

- for petrol (E5) 1,89
- for LPG 2,53
- for NG/biomethane 4,0
- for ethanol (E85) 2,74
- for ethanol (E75) 2,61

Ocv = Atomic ratio of oxygen to carbon

- for petrol (E5) 0,016
- for LPG 0,0
- for NG/biomethane 0,0
- for ethanol (E85) 0,39
- for ethanol (E75) 0,329;

(4) in Annex VIII, point 2.3 is replaced by the following:

‘2.3. The limit values referred to in point 5.3.5.2 of UN/ECE Regulation No 83 relate to the limit values set out in Annex 1, Table 4, to Regulation (EC) No 715/2007.’;

(5) at the end of Annex IX, Section B, the text ‘Reference fuel specification to be developed in advance of the dates set out in Article 10(6) of Regulation (EC) No 715/2007’ shall be replaced by the following table:

Parameter	Unit	Limits ⁽¹⁾		Test method ⁽²⁾
		Minimum	Maximum	
Research octane number, RON		95	—	EN ISO 5164
Motor octane number, MON		85	—	EN ISO 5163
Density at 15 °C	kg/m ³	report		EN ISO 12185
Vapour pressure	kPa	50	60	EN ISO 13016-1 (DVPE)
Sulphur content ⁽³⁾ ⁽⁴⁾	mg/kg	—	10	EN ISO 20846 EN ISO 20884
Oxidation stability	minutes	360	—	EN ISO 7536
Existent gum content (solvent washed)	mg/100ml	—	4	EN ISO 6246
Appearance shall be determined at ambient temperature or 15 °C whichever is higher		Clear and bright, visibly free of suspended or precipitated contaminants		Visual inspection
Ethanol and higher alcohols ⁽⁷⁾	% (V/V)	70	80	EN 1601 EN 13132 EN 14517
Higher alcohols (C ₃ – C ₈)	% (V/V)	—	2	
Methanol		—	0,5	
Petrol ⁽⁵⁾	% (V/V)	Balance		EN 228
Phosphorus	mg/l	0,30 ⁽⁶⁾		EN 15487 ASTM D 3231
Water content	% (V/V)	—	0,3	ASTM E 1064 EN 15489

Parameter	Unit	Limits ⁽¹⁾		Test method ⁽²⁾
		Minimum	Maximum	
Inorganic chloride content	mg/l	—	1	ISO 6227 — EN 15492
pHe		6,50	9	ASTM D 6423 EN 15490
Copper strip corrosion (3h at 50 °C)	Rating	Class 1		EN ISO 2160
Acidity (as acetic acid CH ₃ COOH)	% (m/m)		0,005	ASTM D1613 EN 15491
	mg/l		40	
Carbon/hydrogen ration		report		
Carbon/oxygen ration		report		

(¹) The values referred to in the specifications are "true values". When establishing the value limits, the terms of ISO 4259 Petroleum products — Determination and application of precision data in relation to methods of test were applied. When fixing a minimum value, a minimum difference of 2R above zero was taken into account. When fixing a maximum and minimum value, the minimum difference used was 4R (R = reproducibility). Notwithstanding this procedure, which is necessary for technical reasons, fuel manufacturers shall aim for a zero value where the stipulated maximum value is 2R and for the mean value for quotations of maximum and minimum limits. Where it is necessary to clarify whether fuel meets the requirements of the specifications, the ISO 4259 terms shall be applied.

(²) In cases of dispute, the procedures for resolving the dispute and interpretation of the results based on test method precision, described in EN ISO 4259 shall be used.

(³) In cases of national dispute concerning sulphur content, either EN ISO 20846 or EN ISO 20884 shall be called up similar to the reference in the national annex of EN 228.

(⁴) The actual sulphur content of the fuel used for the Type 6 test shall be reported.

(⁵) The unleaded petrol content may be determined as 100 minus the sum of the percentage content of water and alcohols.

(⁶) There shall be no intentional addition of compounds containing phosphorus, iron, manganese, or lead to this reference fuel.

(⁷) Ethanol to meet specification of EN 15376 is the only oxygenate that shall be intentionally added to this reference fuel.

(6) Annex XI is amended as follows:

(a) the following point 2.14 is added:

‘2.14. As from 1 September 2011, in deviation from point 3.3.5 of Annex 11 to UN/ECE Regulation No 83, a particulate trap, where fitted as a separate unit or integrated into a combined emission control device, shall always be monitored at least for total failure or removal if the latter resulted in exceeding the applicable emission limits. It shall also be monitored for any failure that would result in exceeding the applicable OBD threshold limits.’;

(b) point 3.3 is replaced by the following:

‘3.3. The approval authority shall not accept any deficiency request that includes the complete lack of a required diagnostic monitor or of mandated recording and reporting of data related to a monitor.’;

(c) Appendix 1 is amended as follows:

(i) points 3.1.7 and 3.1.8 are replaced by the following:

‘3.1.7. The manufacturer shall demonstrate to the approval authority and, upon request, to the Commission that these statistical conditions are satisfied for all monitors required to be reported by the OBD system according to point 3.6 of this Appendix not later than 18 months after the entry onto the market of the first vehicle type with IUPR in an OBD family and every 18 months thereafter. For this purpose, for OBD families consisting of more than 1 000 registrations in the Union, that are subject to sampling within the sampling period, the process described in Annex II shall be used without prejudice to the provisions of point 3.1.9 of this Appendix.

In addition to the requirements set out in Annex II and regardless of the result of the audit described in Section 2 of Annex II, the authority granting the approval shall apply the in-service conformity check for IUPR described in Appendix 1 to Annex II in an appropriate number of randomly determined cases. "In an appropriate number of randomly determined cases" means, that this measure has a dissuasive effect on non-compliance with the requirements of Section 3 of this Annex or the provision of manipulated, false or non-representative data for the audit. If no special circumstances apply and can be demonstrated by the type-approval authorities, random

application of the in-service conformity check to 5 % of the type approved OBD families shall be considered as sufficient for compliance with this requirement. For this purpose, type-approval authorities may find arrangements with the manufacturer for the reduction of double testing of a given OBD family as long as these arrangements do not harm the dissuasive effect of the type-approval authority's own in-service conformity check on non-compliance with the requirements of Section 3 of this Annex. Data collected by Member States during surveillance testing programmes may be used for in-service conformity checks. Upon request, type-approval authorities shall provide data on the audits and random in-service conformity checks performed, including the methodology used for identifying those cases, which are made subject to the random in-service conformity check, to the Commission and other type-approval authorities.

3.1.8. For the entire test sample of vehicles the manufacturer must report to the relevant authorities all of the in-use performance data to be reported by the OBD system according to point 3.6 of this Appendix in conjunction with an identification of the vehicle being tested and the methodology used for the selection of the tested vehicles from the fleet. Upon request, the type-approval authority granting the approval shall make these data and the results of the statistical evaluation available to the Commission and other approval authorities.;

(ii) the following point 3.1.10 is added:

'3.1.10. Non-compliance with the requirements of point 3.1.6 established by tests described in points 3.1.7 or 3.1.9 shall be considered as an infringement subject to the penalties set out in Article 13 of Regulation (EC) No 715/2007. This reference does not limit the application of such penalties to other infringements of other provisions of Regulation (EC) No 715/2007 or this Regulation, which do not explicitly refer to Article 13 of Regulation (EC) No 715/2007.;

(iii) in point 3.3.2, the following points (e) and (f) are added:

'(e) without prejudice to requirements for the increment of denominators of other monitors the denominators of monitors of the following components shall be incremented if and only if the driving cycle started with a cold start:

(i) liquid (oil, engine coolant, fuel, SCR reagent) temperature sensors;

(ii) clean air (ambient air, intake air, charge air, inlet manifold) temperature sensors;

(iii) exhaust (EGR recirculation/cooling, exhaust gas turbo-charging, catalyst) temperature sensors;

(f) the denominators of monitors of the boost pressure control system shall be incremented if the all of the following conditions are met:

(i) the general denominator conditions are fulfilled;

(ii) the boost pressure control system is active for a time greater than or equal to 15 seconds.;

(iv) point 3.6.2 is replaced by the following:

'3.6.2. For specific components or systems that have multiple monitors, which are required to be reported by this point (e.g. oxygen sensor bank 1 may have multiple monitors for sensor response or other sensor characteristics), the OBD system shall separately track numerators and denominators for each of the specific monitors except those monitoring for short circuit or open circuit failures and report only the corresponding numerator and denominator for the specific monitor that has the lowest numerical ratio. If two or more specific monitors have identical ratios, the corresponding numerator and denominator for the specific monitor that has the highest denominator shall be reported for the specific component.;

(7) Annex XII is amended as follows:

(a) point 2.3 is replaced by the following:

'2.3. Point 5.2.4 of UN/ECE Regulation No 101 shall read:

(1) density: measured on the test fuel according to ISO 3675 or an equivalent method. For petrol, diesel, biodiesel and ethanol (E85 and E75) the density measured at 15 °C will be used; for LPG and natural gas/biomethane a reference density shall be used, as follows:

0,538 kg/litre for LPG,

0,654 kg/m³ for NG ⁽³⁾

(2) hydrogen-carbon-oxygen ratio: fixed values shall be used which are:

C₁H_{1,89}O_{0,016} for petrol,

C₁H_{1,86}O_{0,005} for diesel,

C₁H_{2,525} for LPG (liquefied petroleum gas),

CH₄ for NG (natural gas) and biomethane,

C₁H_{2,74}O_{0,385} for ethanol (E85),

C₁ H_{2,61} O_{0,329} for ethanol (E75).;

(b) the following point 3.5 is added:

‘3.5. During the test cycle used for determining the CO₂ emissions and fuel consumption of the vehicle the provision of point 3.14 of Annex III shall apply.’;

(8) Annex XIV is amended as follows:

(a) in point 2.1, the following is added:

‘Information on all parts of the vehicle, with which the vehicle, as identified by the vehicle identification number (VIN) and any additional criteria such as wheelbase, engine output, trim level or options, is equipped by the vehicle manufacturer and which can be replaced by spare parts offered by the vehicle manufacturer to its authorised repairers or dealers or third parties by means of reference to original equipment (OE) parts number, shall be made available in a database easily accessible to independent operators.

This database shall comprise the VIN, OE parts numbers, OE naming of the parts, validity attributes (valid-from and valid-to dates), fitting attributes and where applicable structuring characteristics.

The information on the database shall be regularly updated. The updates shall include in particular all modifications to individual vehicles after their production if this information is available to authorised dealers.’;

(b) points 2.2 and 2.3 are replaced by the following:

‘2.2. Access to vehicle security features used by authorised dealers and repair shops shall be made available to independent operators under protection of security technology according to the following requirements:

(i) data shall be exchanged ensuring confidentiality, integrity and protection against replay;

(ii) the standard https//ssl-tls (RFC4346) shall be used;

(iii) security certificates in accordance with ISO 20828 shall be used for mutual authentication of independent operators and manufacturers;

(iv) the independent operator's private key shall be protected by secure hardware.

The Forum on Access to Vehicle Information provided for by paragraph 9 of Article 13 will specify the parameters for fulfilling these requirements according to the state-of-the-art.

The independent operator shall be approved and authorised for this purpose on the basis of documents demonstrating that they pursue a legitimate business activity and have not been convicted of relevant criminal activity.

2.3. Reprogramming of control units of vehicles manufactured later than 31 August 2010 shall be conducted in accordance with either ISO 22900 or SAE J2534, regardless of the date of type approval. For the validation of the compatibility of the manufacturer-specific application and the vehicle communication interfaces (VCI) complying to ISO 22900 or SAE J2534, the manufacturer shall offer either a validation of independently developed VCIs or the information, and loan of any special hardware, required for a VCI manufacturer to conduct such validation himself. The conditions of Article 7(1) of Regulation (EC) No 715/2007 apply to fees for such validation or information and hardware.

For vehicles manufactured before 1 September 2010 the manufacturer may offer either full reprogramming in accordance with ISO 22900 or SAE J2534 or reprogramming via the sale or lease of its own proprietary tool. In the latter case independent operators must get access in a non-discriminatory, prompt and proportionate way, and the tool must be provided in a usable form. The provisions of Article 7 of Regulation (EC) No 715/2007 shall apply to fees for the access to these tools;

(c) point 2.8 is replaced by the following:

‘2.8. Manufacturers shall establish fees for hourly, daily, monthly, annual and per-transaction access to their repair and maintenance information websites, which are reasonable and proportionate.’;

(9) Annex XVI is amended as follows:

(a) in point 6.2, the following is added:

‘For the purposes of this point these situations are presumed to occur, if the applicable NO_x emission limit of Table 1 of Annex I to Regulation (EC) No 715/2007, multiplied by a factor of 1,5, is exceeded. By way of exception, for a vehicle approved to the interim Euro 6 OBD threshold limits of point 2.3.2 of Annex XI to this Regulation, those situations are presumed to occur if the applicable NO_x emission limit of Table 2 of Annex I to Regulation (EC) No 715/2007 is exceeded by 100 mg or more. NO_x emissions during the test to demonstrate compliance with these requirements shall be not more than 20 % higher than the values referred to in the first and second sentence.’;

(b) point 7.1 is replaced by the following:

‘7.1. Where reference is made to this point, non-erasable Parameter Identifiers (PID) shall be stored identifying the reason for and the distance travelled by the vehicle during the inducement system activation. The vehicle shall retain a record of the PID for at least 800 days or 30 000 km of vehicle operation. The PID shall be made available via the serial port of a standard diagnostic connector upon request of a generic scan tool according to the provisions of point 6.5.3.1 of Appendix 1 to Annex 11 to UN/ECE Regulation No 83 and point 2.5 of Appendix 1 to Annex XI to this Regulation. From the dates referred to in Article 17, the information stored in the PID shall be linked to the period of cumulated vehicle operation, during which it has occurred, with an accuracy of not less than 300 days or 10 000 km.’;

(10) in Annex XVIII, point 3.4.8 is replaced by the following:

‘3.4.8. Vehicle electric range km (according to Annex 9 to UN/ECE Regulation No 101)’.

ANNEX II

'ANNEX II

IN-SERVICE CONFORMITY**1. INTRODUCTION**

- 1.1. This Annex sets out the tailpipe emissions and OBD (inclusive IUPR_M) in-service conformity requirements for vehicles type approved to this Regulation.

2. AUDIT OF IN-SERVICE CONFORMITY

- 2.1. The audit of in-service conformity by the approval authority shall be conducted on the basis of any relevant information that the manufacturer has, under the same procedures as those for the conformity of production defined in Article 12(1) and (2) of Directive 2007/46/EC and in points 1 and 2 of Annex X to that Directive. Information from approval authority and Member State surveillance testing may complement the in-service monitoring reports supplied by the manufacturer.
- 2.2. The figure referred to in point 9 of Appendix 2 to this Annex and Figure 4/2 of Appendix 4 to UN/ECE Regulation No 83 (for tailpipe emissions only) illustrates the procedure for in-service conformity checking. The process for in-service conformity is described in Appendix 3 to this Annex.
- 2.3. As part of the information provided for the in-service conformity control, at the request of the approval authority, the manufacturer shall report to the type-approval authority on warranty claims, warranty repair works and OBD faults recorded at servicing, according to a format agreed at type-approval. The information shall detail the frequency and substance of faults for emissions-related components and systems. The reports shall be filed at least once a year for each vehicle model for the duration of the period defined in Article 9(4) of this Regulation.

2.4. Parameters defining the tailpipe emissions in-service family

The in-service family may be defined by basic design parameters which shall be common to vehicles within the family. Accordingly, vehicle types may be considered as belonging to the same in-service family if they have in common, or within the stated tolerances, the following parameters:

- 2.4.1. combustion process (two stroke, four stroke, rotary);
- 2.4.2. number of cylinders;
- 2.4.3. configuration of the cylinder block (in-line, V, radial, horizontally opposed, other. The inclination or orientation of the cylinders is not a criteria);
- 2.4.4. method of engine fuelling (e.g. indirect or direct injection);
- 2.4.5. type of cooling system (air, water, oil);
- 2.4.6. method of aspiration (naturally aspirated, pressure charged);
- 2.4.7. fuel for which the engine is designed (petrol, diesel, NG, LPG, etc.). Bi fuelled vehicles may be grouped with dedicated fuel vehicles providing one of the fuels is common;
- 2.4.8. type of catalytic converter (three-way catalyst, lean NO_x trap, SCR, lean NO_x catalyst or other(s));
- 2.4.9. type of particulate trap (with or without);
- 2.4.10. exhaust gas recirculation (with or without, cooled or non-cooled); and
- 2.4.11. engine cylinder capacity of the largest engine within the family minus 30 %.

2.5. Information requirements

An audit of in-service conformity will be conducted by the approval authority on the basis of information supplied by the manufacturer. Such information shall include in particular, the following:

- 2.5.1. the name and address of the manufacturer;
- 2.5.2. the name, address, telephone and fax numbers and e-mail address of his authorised representative within the areas covered by the manufacturer's information;
- 2.5.3. the model name(s) of the vehicles included in the manufacturer's information;
- 2.5.4. where appropriate, the list of vehicle types covered within the manufacturer's information, i.e. for tailpipe emissions, the in-service family group in accordance with point 2.4, and for OBD and IUPR_M, the OBD family in accordance with Appendix 2 to Annex XI;

- 2.5.5. the vehicle identification number (VIN) codes applicable to these vehicle types within the family (VIN prefix);
- 2.5.6. the numbers of the type-approvals applicable to these vehicle types within the family, including, where applicable, the numbers of all extensions and field fixes/recalls (re-works);
- 2.5.7. details of extensions, field fixes/recalls to those type-approvals for the vehicles covered within the manufacturer's information (if requested by the approval authority);
- 2.5.8. the period of time over which the manufacturer's information was collected;
- 2.5.9. the vehicle build period covered within the manufacturer's information (e.g. vehicles manufactured during the 2007 calendar year);
- 2.5.10. the manufacturer's in-service conformity checking procedure, including:
 - (i) vehicle location method;
 - (ii) vehicle selection and rejection criteria;
 - (iii) test types and procedures used for the programme;
 - (iv) the manufacturer's acceptance/rejection criteria for the family group;
 - (v) geographical area(s) within which the manufacturer has collected information;
 - (vi) sample size and sampling plan used;
- 2.5.11. the results from the manufacturer's in-service conformity procedure, including:
 - (i) identification of the vehicles included in the programme (whether tested or not). The identification shall include the following:
 - model name,
 - vehicle identification number (VIN),
 - vehicle registration number,
 - date of manufacture,
 - region of use (where known),
 - tyres fitted (tailpipe emissions only);
 - (ii) the reason(s) for rejecting a vehicle from the sample;
 - (iii) service history for each vehicle in the sample (including any re-works);
 - (iv) repair history for each vehicle in the sample (where known);
 - (v) test data, including the following:
 - date of test/download,
 - location of test/download,
 - distance indicated on vehicle odometer;
 - (vi) test data for tailpipe emissions only:
 - test fuel specifications (e.g. test reference fuel or market fuel),
 - test conditions (temperature, humidity, dynamometer inertia weight),
 - dynamometer settings (e.g. power setting),
 - test results (from at least three different vehicles per family);
 - (vii) test data for IUPR_M only:
 - all required data downloaded from the vehicle,
 - For each monitor to be reported the in-use-performance ratio IUPR_M;
- 2.5.12. records of indication from the OBD system;

2.5.13. for IUPR_M sampling, the following:

- The average of in-use-performance ratios IUPR_M of all selected vehicles for each monitor according to points 3.1.4 and 3.1.5 of Appendix 1 to Annex XI,
- The percentage of selected vehicles, which have an IUPR_M greater or equal to the minimum value applicable to the monitor according to points 3.1.4 and 3.1.5 of Appendix 1 to Annex XI.

3. SELECTION OF VEHICLES FOR IN-SERVICE CONFORMITY

3.1. The information gathered by the manufacturer shall be sufficiently comprehensive to ensure that in-service performance can be assessed for normal conditions of use. The manufacturer's sampling shall be drawn from at least two Member States with substantially different vehicle operating conditions (unless only sold in one Member State). Factors such as differences in fuels, ambient conditions, average road speeds, and urban/highway driving split shall be taken into consideration in the selection of the Member States.

For OBD IUPR_M testing only vehicles fulfilling the criteria of point 2.2.1 of Appendix 1 shall be included in the test sample.

- 3.2. In selecting the Member States for sampling vehicles, the manufacturer may select vehicles from a Member State that is considered to be particularly representative. In this case, the manufacturer shall demonstrate to the approval authority which granted the type approval that the selection is representative (e.g. by the market having the largest annual sales of a vehicle family within the Union). When a family requires more than one sample lot to be tested as defined in point 3.5, the vehicles in the second and third sample lots shall reflect different vehicle operating conditions from those selected for the first sample.
- 3.3. The emissions testing may be done at a test facility which is located in a different market or region from where the vehicles have been selected.
- 3.4. The in-service tailpipe emissions conformity tests by the manufacturer shall be continuously carried out reflecting the production cycle of applicable vehicles types within a given in-service vehicle family. The maximum time period between commencing two in-service conformity checks shall not exceed 18 months. In the case of vehicle types covered by an extension to the type-approval that did not require an emissions test, this period may be extended up to 24 months.

3.5. Sample size

3.5.1. When applying the statistical procedure defined in Appendix 2 (i.e. for tailpipe emissions), the number of sample lots shall depend on the annual sales volume of an in-service family in the Union, as defined in the following table:

EU Registrations — per calendar year (for tailpipe emission tests), — of vehicles of an OBD family with IUPR in the sampling period	Number of sample lots
up to 100 000	1
100 001 to 200 000	2
above 200 000	3

3.5.2. For IUPR, the number of sample lots to be taken is described in the table in point 3.5.1 and is based on the number of vehicles of an OBD family that are approved with IUPR (subject to sampling).

For the first sampling period of an OBD family, all of the vehicle types in the family that are approved with IUPR shall be considered to be subject to sampling. For subsequent sampling periods, only vehicle types which have not been previously tested or are covered by emissions approvals that have been extended since the previous sampling period shall be considered to be subject to sampling.

For families consisting of fewer than 5 000 EU registrations that are subject to sampling within the sampling period the minimum number of vehicles in a sample lot is six. For all other families, the minimum number of vehicles in a sample lot to be sampled is fifteen.

Each sample lot shall adequately represent the sales pattern, i.e. at least high volume vehicle types ($\geq 20\%$ of the family total) shall be represented.

4. On the basis of the audit referred to in Section 2 the approval authority shall adopt one of the following decisions and actions:
- (a) decide that the in-service conformity of a vehicle type, vehicle in-service family or vehicle OBD family is satisfactory and not take any further action;
 - (b) decide that the data provided by the manufacturer is insufficient to reach a decision and request additional information or test data from the manufacturer;

- (c) decide that based on data from the approval authority or Member State surveillance testing programmes, that information provided by the manufacturer is insufficient to reach a decision and request additional information or test data from the manufacturer;
- (d) decide that the in-service conformity of a vehicle type, that is part of an in-service family, or of an OBD family, is unsatisfactory and proceed to have such vehicle type or OBD family tested in accordance with Appendix 1.

If according to the IUPR_M audit the test criteria of point 6.1.2 point (a) or (b) of Appendix 1 are met for the vehicles in a sample lot, the type-approval authority must take the further action described in point (d) of this point.

- 4.1. Where type 1 tests are considered necessary to check the conformity of emission control devices with the requirements for their performance while in service, such tests shall be carried out using a test procedure meeting the statistical criteria defined in Appendix 2.
 - 4.2. The approval authority, in cooperation with the manufacturer, shall select a sample of vehicles with sufficient mileage whose use under normal conditions can be reasonably assured. The manufacturer shall be consulted on the choice of the vehicles in the sample and allowed to attend the confirmatory checks of the vehicles.
 - 4.3. The manufacturer shall be authorised, under the supervision of the approval authority, to carry out checks, even of a destructive nature, on those vehicles with emission levels in excess of the limit values with a view to establishing possible causes of deterioration which cannot be attributed to the manufacturer (e.g. use of leaded petrol before the test date). Where the results of the checks confirm such causes, those test results shall be excluded from the conformity check.
-

*Appendix 1***In-service conformity check****1. INTRODUCTION**

- 1.1. This Appendix sets out the criteria referred to in Section 4 regarding the selection of vehicles for testing and the procedures for the in-service conformity control.

2. SELECTION CRITERIA

The criteria for acceptance of a selected vehicle are defined for tailpipe emissions in points 2.1 to 2.8 and for IUPR_M in Sections 2.1 to 2.5.

- 2.1. The vehicle shall belong to a vehicle type that is type-approved under this Regulation and covered by a certificate of conformity in accordance with Directive 2007/46/EC. For checking of IUPR_M, the vehicle shall be approved to the OBD standards Euro 5+, Euro 6- plus IUPR or later. It shall be registered and have been used in the Union.
- 2.2. The vehicle shall have been in service for at least 15 000 km or 6 months, whichever the later, and for no more than 100 000 km or 5 years, whichever the sooner.
- 2.2.1. For checking IUPR_M, the test sample shall include only vehicles that:

- (a) have collected sufficient vehicle operation data for the monitor to be tested.

For monitors required to meet the in-use monitor performance ratio and to track and report ratio data pursuant to point 3.6.1 of Appendix 1 to Annex XI, sufficient vehicle operation data shall mean the denominator meets the criteria set forth below. The denominator, as defined in points 3.3 and 3.5 of Appendix 1 to Annex XI, for the monitor to be tested must have a value equal to or greater than one of the following values:

- (i) 75 for evaporative system monitors, secondary air system monitors, and monitors utilising a denominator incremented in accordance with point 3.3.2 points (a), (b) or (c) of Appendix 1 to Annex XI (e.g. cold start monitors, air conditioning system monitors, etc.); or
- (ii) 25 for particulate filter monitors and oxidation catalyst monitors utilising a denominator incremented in accordance with point 3.3.2(d) of Appendix 1 to Annex XI; or
- (iii) 150 for catalyst, oxygen sensor, EGR, VVT, and all other component monitors;

- (b) have not been tampered with or equipped with add-on or modified parts that would cause the OBD system not to comply with the requirements of Annex XI.

- 2.3. There shall be a maintenance record to show that the vehicle has been properly maintained (e.g. has been serviced in accordance with the manufacturer's recommendations).
- 2.4. The vehicle shall exhibit no indications of abuse (e. g. racing, overloading, mis-fuelling, or other misuse), or other factors (e. g. tampering) that could affect emission performance. The fault code and mileage information stored in the computer shall be taken into account. A vehicle shall not be selected for testing if the information stored in the computer shows that the vehicle has operated after a fault code was stored and a relatively prompt repair was not carried out.
- 2.5. There shall have been no unauthorised major repair to the engine or major repair of the vehicle.
- 2.6. The lead content and sulphur content of a fuel sample from the vehicle tank shall meet the applicable standards laid down in Directive 98/70/EC of the European Parliament and of the Council ⁽¹⁾ and there shall be no evidence of mis-fuelling. Checks may be done in the tailpipe.
- 2.7. There shall be no indication of any problem that might jeopardise the safety of laboratory personnel.
- 2.8. All anti-pollution system components on the vehicle shall be in conformity with the applicable type-approval.

⁽¹⁾ OJ L 350, 28.12.1998, p. 58.

3. DIAGNOSIS AND MAINTENANCE

Diagnosis and any normal maintenance necessary shall be performed on vehicles accepted for testing, prior to measuring exhaust emissions, in accordance with the procedure laid down in points 3.1 to 3.7.

- 3.1. The following checks shall be carried out: checks on air filter, all drive belts, all fluid levels, radiator cap, all vacuum hoses and electrical wiring related to the antipollution system for integrity; checks on ignition, fuel metering and pollution control device components for maladjustments and/or tampering. All discrepancies shall be recorded.
- 3.2. The OBD system shall be checked for proper functioning. Any malfunction indications in the OBD memory shall be recorded and the requisite repairs shall be carried out. If the OBD malfunction indicator registers a malfunction during a preconditioning cycle, the fault may be identified and repaired. The test may be rerun and the results of that repaired vehicle used.
- 3.3. The ignition system shall be checked and defective components replaced, for example spark plugs, cables, etc.
- 3.4. The compression shall be checked. If the result is unsatisfactory the vehicle shall be rejected.
- 3.5. The engine parameters shall be checked to the manufacturer's specifications and adjusted if necessary.
- 3.6. If the vehicle is within 800 km of a scheduled maintenance service, that service shall be performed according to the manufacturer's instructions. Regardless of odometer reading, the oil and air filter may be changed at the request of the manufacturer.
- 3.7. Upon acceptance of the vehicle, the fuel shall be replaced with appropriate emission test reference fuel, unless the manufacturer accepts the use of market fuel.

4. IN-SERVICE TESTING

- 4.1. When a check on vehicles is deemed necessary, emission tests in accordance with Annex III are performed on pre-conditioned vehicles selected in accordance with the requirements of Sections 2 and 3 of this Appendix. This test shall only include the measurement of particle number emissions for vehicles approved to the Euro 6 emission standards in categories W, X and Y as defined in Table 1 of Appendix 6 to Annex I. Pre-conditioning cycles additional to those specified in points 5.3 of Annex 4 to UN/ECE Regulation No 83 will only be allowed if they are representative of normal driving.
- 4.2. Vehicles equipped with an OBD system may be checked for proper in-service functionality, of the malfunction indication, etc., in relation to levels of emissions (e.g. the malfunction indication limits defined in Annex XI) for the type-approved specifications.
- 4.3. The OBD system may be checked, for example, for levels of emissions above the applicable limit values with no malfunction indication, systematic erroneous activation of the malfunction indication and identified faulty or deteriorated components in the OBD system.
- 4.4. If a component or system operates in a manner not covered by the particulars in the type-approval certificate and/or information package for such vehicle types and such deviation has not been authorised under Article 13(1) or (2) of Directive 2007/46/EC, with no malfunction indication by the OBD, the component or system shall not be replaced prior to emission testing, unless it is determined that the component or system has been tampered with or abused in such a manner that the OBD does not detect the resulting malfunction.

5. EVALUATION OF EMISSION TEST RESULTS

- 5.1. The test results shall be submitted to the evaluation procedure in accordance with Appendix 2.
- 5.2. Test results shall not be multiplied by deterioration factors.

6. PLAN OF REMEDIAL MEASURES

- 6.1. The approval authority shall request the manufacturer to submit a plan of remedial measures to remedy the non-compliance when:
 - 6.1.1. For tailpipe emissions, more than one vehicle is found to be an outlying emitter that meets either of the following conditions:
 - (a) the conditions set out in point 3.2.3 of Appendix 4 to UN/ECE Regulation No 83 and where both the approval authority and the manufacturer agree that the excess emission is due to the same cause; or
 - (b) the conditions set out in point 3.2.4 of Appendix 4 to UN/ECE Regulation No 83 where the approval authority has determined that the excess emission is due to the same cause.

6.1.2. For $IUPR_M$ of a particular monitor M the following statistical conditions are met in a test sample, the size of which is determined according to point 3.5 of this Annex:

- (a) For vehicles certified to a ratio of 0,1 in accordance with point 3.1.5 of Appendix 1 to Annex XI, the data collected from the vehicles indicate for at least one monitor M in the test sample either that the test sample average in-use-performance ratio is less than 0,1 or that 66 % or more of the vehicles in the test sample have an in-use monitor performance ratio of less than 0,1.
- (b) For vehicles certified to the full ratios in accordance with point 3.1.4 of Appendix 1 to Annex XI, the data collected from the vehicles indicate for at least one monitor M in the test sample either that the test sample average in-use performance ratio in the test sample is less than the value $Test_{min}(M)$ or that 66 % or more of the vehicles in the test sample have an in-use performance ratio of less than $Test_{min}(M)$.

The value of $Test_{min}(M)$ shall be:

- (i) 0,230 if the monitor M is required to have an in-use ratio of 0,26;
- (ii) 0,460 if the monitor M is required to have an in-use ratio of 0,52;
- (iii) 0,297 if the monitor M is required to have an in-use ratio of 0,336;

according to point 3.1.4 of Appendix 1 to Annex XI.

- 6.2. The plan of remedial measures shall be filed with the type-approval authority not later than 60 working days from the date of the notification referred to in point 6.1. The type-approval authority shall within 30 working days declare its approval or disapproval of the plan of remedial measures. However, where the manufacturer can demonstrate, to the satisfaction of the competent approval authority, that further time is required to investigate the non-compliance in order to submit a plan of remedial measures, an extension shall be granted.
- 6.3. The remedial measures shall apply to all vehicles likely to be affected by the same defect. The need to amend the type-approval documents shall be assessed.
- 6.4. The manufacturer shall provide a copy of all communications related to the plan of remedial measures, and shall also maintain a record of the recall campaign, and supply regular status reports to the approval authority.
- 6.5. The plan of remedial measures shall include the requirements specified in points 6.5.1 to 6.5.11. The manufacturer shall assign a unique identifying name or number to the plan of remedial measures.
 - 6.5.1. A description of each vehicle type included in the plan of remedial measures.
 - 6.5.2. A description of the specific modifications, alterations, repairs, corrections, adjustments or other changes to be made to bring the vehicles into conformity including a brief summary of the data and technical studies which support the decision of the manufacturer as to the particular measures to be taken to correct the non-conformity.
 - 6.5.3. A description of the method by which the manufacturer informs the vehicle owners.
 - 6.5.4. A description of the proper maintenance or use, if any, which the manufacturer stipulates as a condition of eligibility for repair under the plan of remedial measures, and an explanation of the reasons why the manufacturer imposes any such condition. No maintenance or use conditions may be imposed unless it is demonstrably related to the non-conformity and the remedial measures.
 - 6.5.5. A description of the procedure to be followed by vehicle owners to obtain correction of the non-conformity. This description shall include a date after which the remedial measures may be taken, the estimated time for the workshop to perform the repairs and where they can be done. The repair shall be done expeditiously, within a reasonable time after delivery of the vehicle.
 - 6.5.6. A copy of the information transmitted to the vehicle owner.
 - 6.5.7. A brief description of the system which the manufacturer uses to assure an adequate supply of component or systems for fulfilling the remedial action. It shall be indicated when there will be an adequate supply of components or systems to initiate the campaign.
 - 6.5.8. A copy of all instructions to be sent to those persons who are to perform the repair.
 - 6.5.9. A description of the impact of the proposed remedial measures on the emissions, fuel consumption, driveability, and safety of each vehicle type, covered by the plan of remedial measures with data and technical studies which support these conclusions.
 - 6.5.10. Any other information, reports or data the type-approval authority may reasonably determine is necessary to evaluate the plan of remedial measures.
 - 6.5.11. Where the plan of remedial measures includes a recall, a description of the method for recording the repair shall be submitted to the type-approval authority. If a label is used, an example of it shall be submitted.

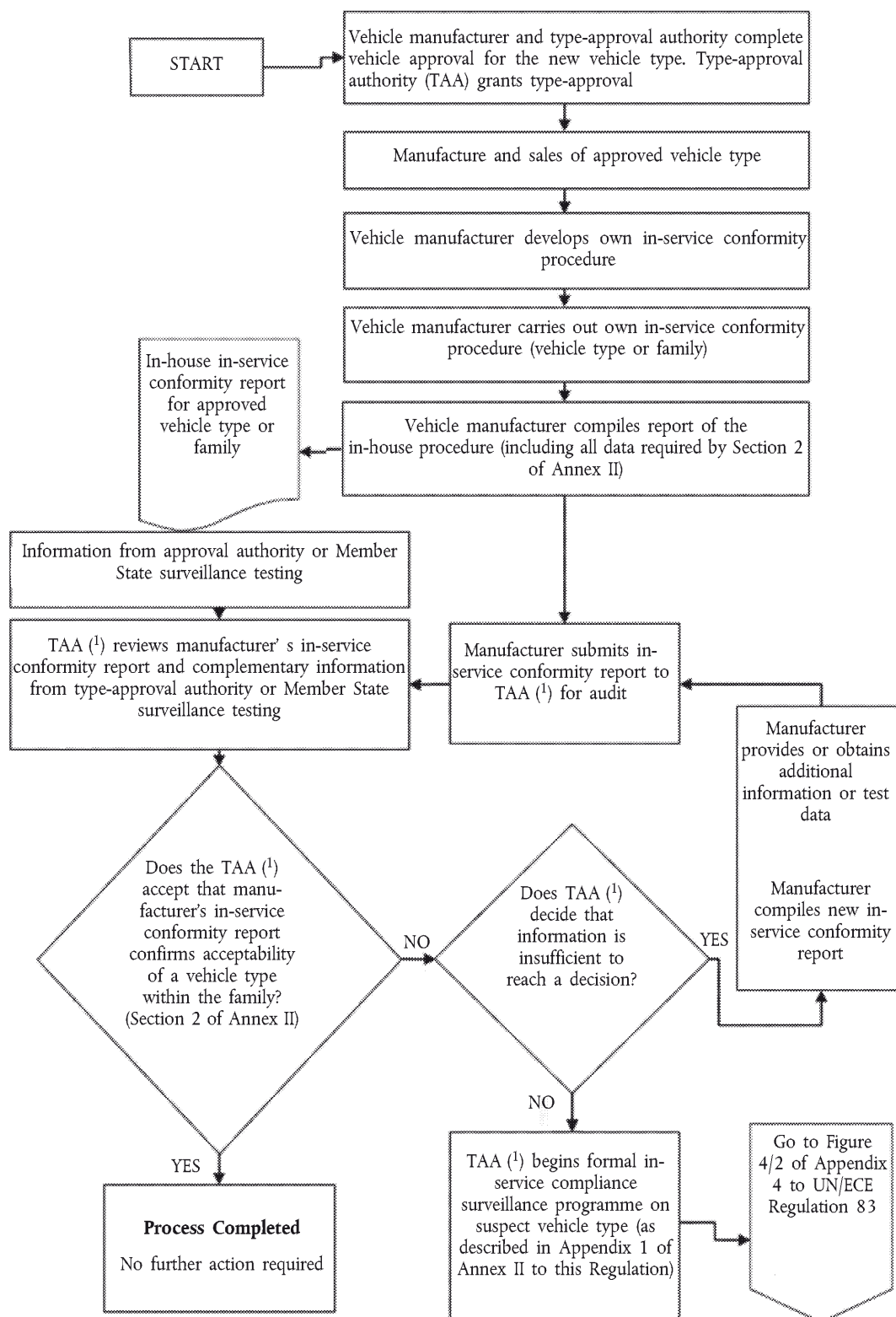
- 6.6. The manufacturer may be required to conduct reasonably designed and necessary tests on components and vehicles incorporating a proposed change, repair, or modification to demonstrate the effectiveness of the change, repair, or modification.
 - 6.7. The manufacturer is responsible for keeping a record of every vehicle recalled and repaired and the workshop which performed the repair. The type-approval authority shall have access to the record on request for a period of 5 years from the implementation of the plan of remedial measures.
 - 6.8. The repair and modification or addition of new equipment shall be recorded in a certificate supplied by the manufacturer to the vehicle owner.
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*Appendix 2***Statistical procedure for tailpipe emissions in-service conformity testing**

1. This procedure shall be used to verify the in-service conformity requirements for the type 1 test. The applicable statistical method set out in Appendix 4 to UN/ECE Regulation No 83 shall apply, with the exceptions described in the Sections 2 to 9 of this Appendix.
2. Note 1 shall not apply.
3. Point 3.2 shall be understood as follows:

A vehicle is said to be an outlying emitter when the conditions given in point 3.2.2 are met.
4. Point 3.2.1 shall not apply.
5. In point 3.2.2, the reference to row B of the table in point 5.3.1.4 shall be understood as reference to Table 1 of Annex I to Regulation (EC) No 715/2007 for Euro 5 vehicles and to Table 2 of Annex I to Regulation (EC) No 715/2007 for Euro 6 vehicles.
6. In points 3.2.3.2.1 and 3.2.4.2, the reference to Section 6 of Appendix 3 shall be understood as reference to Section 6 of Appendix 1 to Annex II to this Regulation.
7. In notes 2 and 3, the reference to row A of the table in point 5.3.1.4 shall be understood as reference to Table 1 of Annex I to Regulation (EC) No 715/2007 for Euro 5 vehicles and to Table 2 of Annex I to Regulation (EC) No 715/2007 for Euro 6 vehicles.
8. In point 4.2, the reference to point 5.3.1.4 shall be understood as reference to Table 1 of Annex I to Regulation (EC) No 715/2007 for Euro 5 vehicles and Table 2 of Annex I to Regulation (EC) No 715/2007 for Euro 6 vehicles.
9. Figure 4/1 shall be replaced by the following figure:

"Figure 4/1



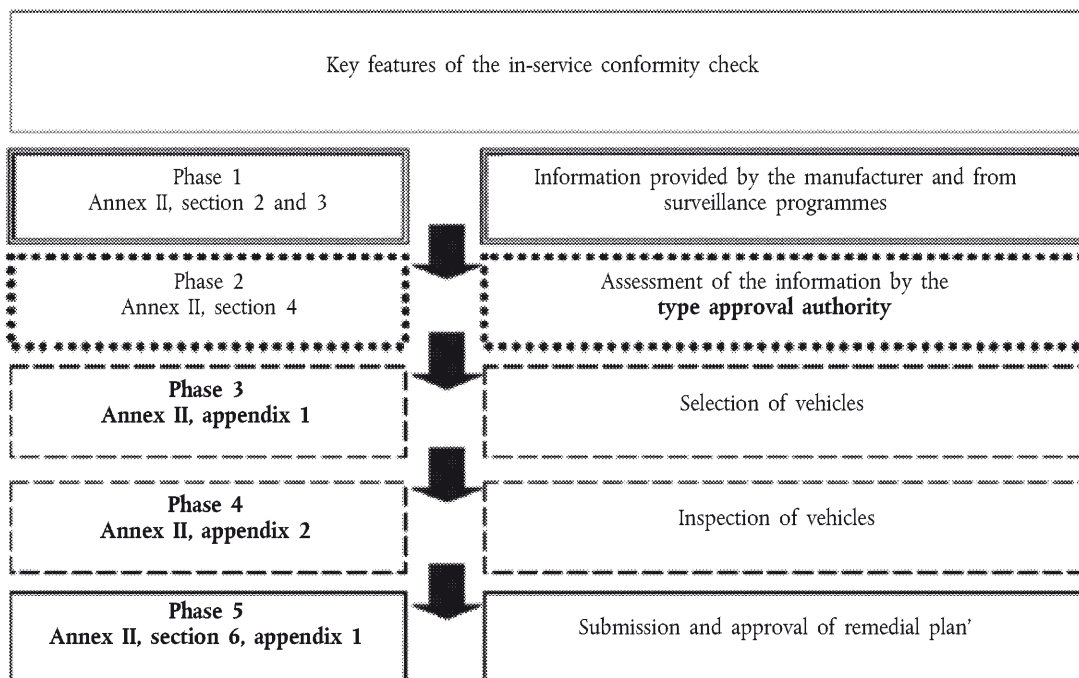
⁽¹⁾ In this case, TAA means the approval authority that granted the type-approval according to this Regulation."

Appendix 3

Responsibilities for in-service conformity

1. The process of checking in-service conformity check is illustrated in Figure 1.
2. The manufacturer shall compile all the information needed to comply with the requirements of this Annex. The approval authority may also take information from surveillance programmes into consideration.
3. The approval authority shall conduct all the procedures and tests necessary to ensure that the requirements regarding the in-service conformity are met. (Phases 2 to 4).
4. In the event of discrepancies or disagreements in the assessment of information supplied, the approval authority shall request clarification from the technical service that conducted the type-approval test.
5. The manufacturer shall establish and implement a plan of remedial measures. This plan shall be approved by the approval authority before it is implemented (Phase 5).

Figure 1

Illustration of the in-service conformity process

COMMISSION IMPLEMENTING REGULATION (EU) No 567/2011**of 14 June 2011****entering a name in the register of protected designations of origin and protected geographical indications (Porchetta di Ariccia (PGI))**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

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

Whereas:

- (1) Pursuant to the first subparagraph of Article 6(2) of Regulation (EC) No 510/2006, Italy's application to register the name 'Porchetta di Ariccia' was published in the *Official Journal of the European Union* ⁽²⁾.

- (2) As no statement of objection under Article 7 of Regulation (EC) No 510/2006 has been received by the Commission, this name should therefore be entered in the register,

HAS ADOPTED THIS REGULATION:

Article 1

The name appearing in the Annex to this Regulation is hereby entered in the register.

Article 2

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

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

Done at Brussels, 14 June 2011.

*For the Commission,
On behalf of the President,*

Dacian CIOLOŞ
Member of the Commission

⁽¹⁾ OJ L 93, 31.3.2006, p. 12.

⁽²⁾ OJ C 256, 23.9.2010, p. 10.

ANNEX

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

Class 1.2. Meat products (cooked, salted, smoked, etc.)

ITALY

Porchetta di Ariccia (PGI)

COMMISSION IMPLEMENTING REGULATION (EU) No 568/2011**of 14 June 2011****entering a name in the register of protected designations of origin and protected geographical indications (Miód drahimski (PGI))**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

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

Whereas:

- (1) Pursuant to the first subparagraph of Article 6(2) of Regulation (EC) No 510/2006, Poland's application to register the name 'Miód drahimski' was published in the *Official Journal of the European Union* ⁽²⁾.

- (2) As no statement of objection under Article 7 of Regulation (EC) No 510/2006 has been received by the Commission, that name should therefore be entered in the register,

HAS ADOPTED THIS REGULATION:

Article 1

The name contained in the Annex to this Regulation is hereby entered in the register.

Article 2

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

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

Done at Brussels, 14 June 2011.

*For the Commission,
On behalf of the President,
Dacian CIOLOŞ
Member of the Commission*

⁽¹⁾ OJ L 93, 31.3.2006, p. 12.

⁽²⁾ OJ C 248, 15.9.2010, p. 8.

ANNEX

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

Class 1.4. Other products of animal origin (eggs, honey, various dairy products except butter, etc.)

POLAND

Miód drahimski (PGI)

COMMISSION IMPLEMENTING REGULATION (EU) No 569/2011**of 15 June 2011****establishing the standard import values for determining the entry price of certain fruit and vegetables**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

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 June 2011.

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

Done at Brussels, 15 June 2011.

*For the Commission,
On behalf of the President,
José Manuel SILVA RODRÍGUEZ
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	90,3
	MK	31,8
	TR	93,0
	ZZ	71,7
0707 00 05	TR	112,2
	ZZ	112,2
0709 90 70	TR	117,4
	ZZ	117,4
0805 50 10	AR	74,7
	CL	79,9
	TR	63,4
	ZA	98,2
	ZZ	79,1
0808 10 80	AR	107,8
	BR	74,6
	CL	95,6
	CN	99,6
	NZ	114,6
	US	178,7
	UY	57,7
	ZA	99,5
	ZZ	103,5
0809 10 00	TR	166,5
	ZZ	166,5
0809 20 95	TR	409,3
	XS	175,4
	ZZ	292,4

⁽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 IMPLEMENTING REGULATION (EU) No 570/2011**of 15 June 2011****amending the representative prices and additional import duties for certain products in the sugar sector fixed by Regulation (EU) No 867/2010 for the 2010/11 marketing year**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

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 951/2006 of 30 June 2006 laying down detailed rules for the implementation of Council Regulation (EC) No 318/2006 as regards trade with third countries in the sugar sector ⁽²⁾, and in particular Article 36(2), second subparagraph, second sentence thereof,

Whereas:

- (1) The representative prices and additional duties applicable to imports of white sugar, raw sugar and certain syrups

for the 2010/11 marketing year are fixed by Commission Regulation (EU) No 867/2010 ⁽³⁾. These prices and duties have been last amended by Commission Implementing Regulation (EU) No 565/2011 ⁽⁴⁾.

- (2) The data currently available to the Commission indicate that those amounts should be amended in accordance with the rules and procedures laid down in Regulation (EC) No 951/2006,

HAS ADOPTED THIS REGULATION:

Article 1

The representative prices and additional duties applicable to imports of the products referred to in Article 36 of Regulation (EC) No 951/2006, as fixed by Regulation (EU) No 867/2010 for the 2010/11 marketing year, are hereby amended as set out in the Annex hereto.

Article 2

This Regulation shall enter into force on 16 June 2011.

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

Done at Brussels, 15 June 2011.

*For the Commission,
On behalf of the President,
José Manuel SILVA RODRÍGUEZ
Director-General for Agriculture and
Rural Development*

⁽¹⁾ OJ L 299, 16.11.2007, p. 1.

⁽²⁾ OJ L 178, 1.7.2006, p. 24.

⁽³⁾ OJ L 259, 1.10.2010, p. 3.

⁽⁴⁾ OJ L 156, 15.6.2011, p. 3.

ANNEX

Amended representative prices and additional import duties applicable to white sugar, raw sugar and products covered by CN code 1702 90 95 from 16 June 2011

(EUR)

CN code	Representative price per 100 kg net of the product concerned	Additional duty per 100 kg net of the product concerned
1701 11 10 ⁽¹⁾	47,19	0,00
1701 11 90 ⁽¹⁾	47,19	0,75
1701 12 10 ⁽¹⁾	47,19	0,00
1701 12 90 ⁽¹⁾	47,19	0,45
1701 91 00 ⁽²⁾	48,59	2,89
1701 99 10 ⁽²⁾	48,59	0,00
1701 99 90 ⁽²⁾	48,59	0,00
1702 90 95 ⁽³⁾	0,49	0,22

⁽¹⁾ For the standard quality defined in point III of Annex IV to Regulation (EC) No 1234/2007.⁽²⁾ For the standard quality defined in point II of Annex IV to Regulation (EC) No 1234/2007.⁽³⁾ Per 1 % sucrose content.

COMMISSION IMPLEMENTING REGULATION (EU) No 571/2011
of 15 June 2011
fixing the import duties in the cereals sector applicable from 16 June 2011

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

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 (EU) No 642/2010 of 20 July 2010 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 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, representative cif import prices are to be established on a regular basis for the products in question.

- (3) Pursuant to Article 2(2) of Regulation (EU) No 642/2010, 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 5 of that Regulation.

- (4) Import duties should be fixed for the period from 16 June 2011 and should apply until new import duties are fixed and enter into force,

HAS ADOPTED THIS REGULATION:

Article 1

From 16 June 2011, 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 June 2011.

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

Done at Brussels, 15 June 2011.

For the Commission,
On behalf of the President,
José Manuel SILVA RODRÍGUEZ
Director-General for Agriculture and
Rural Development

⁽¹⁾ OJ L 299, 16.11.2007, p. 1.

⁽²⁾ OJ L 187, 21.7.2010, p. 5.

ANNEX I

Import duties on the products referred to in Article 136(1) of Regulation (EC) No 1234/2007 applicable from 16 June 2011

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

⁽¹⁾ For goods arriving in the Union via the Atlantic Ocean or via the Suez Canal the importer may benefit, pursuant to Article 2(4) of Regulation (EU) No 642/2010, from a reduction in the duty of:

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

⁽²⁾ The importer may benefit from a flatrate reduction of EUR 24 per tonne where the conditions laid down in Article 3 of Regulation (EU) No 642/2010 are met.

ANNEX II

Factors for calculating the duties laid down in Annex I

31.5.2011-14.6.2011

1. Averages over the reference period referred to in Article 2(2) of Regulation (EU) No 642/2010:

(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	270,51	205,35	—	—	—	—
Fob price USA	—	—	338,30	328,30	308,30	172,34
Gulf of Mexico premium	—	16,15	—	—	—	—
Great Lakes premium	92,13	—	—	—	—	—

⁽¹⁾ Premium of 14 EUR/t incorporated (Article 5(3) of Regulation (EU) No 642/2010).⁽²⁾ Discount of 10 EUR/t (Article 5(3) of Regulation (EU) No 642/2010).⁽³⁾ Discount of 30 EUR/t (Article 5(3) of Regulation (EU) No 642/2010).

2. Averages over the reference period referred to in Article 2(2) of Regulation (EU) No 642/2010:

Freight costs: Gulf of Mexico–Rotterdam: 17,78 EUR/t

Freight costs: Great Lakes–Rotterdam: 47,92 EUR/t

DECISIONS

POLITICAL AND SECURITY COMMITTEE DECISION ATALANTA/2/2011

of 15 June 2011

on the appointment of an EU Operation Commander for the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta)

(2011/341/CFSP)

THE POLITICAL AND SECURITY COMMITTEE,

Having regard to the Treaty on European Union, and in particular Article 38 thereof,

Having regard to Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast ⁽¹⁾ (Atalanta), and in particular Article 6 thereof,

Whereas:

- (1) Pursuant to Article 6 of Joint Action 2008/851/CFSP, the Council authorised the Political and Security Committee to take decisions on the appointment of the EU Operation Commander.
- (2) The United Kingdom has proposed that Rear Admiral Duncan POTTS replace Major-General Buster HOWES as EU Operation Commander.
- (3) The EU Military Committee supports that proposal.
- (4) In accordance with Article 5 of Protocol (No 22) on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the

European Union, Denmark does not participate in the elaboration and the implementation of decisions and actions of the Union which have defence implications,

HAS ADOPTED THIS DECISION:

Article 1

Rear-Admiral Duncan POTTS is hereby appointed EU Operation Commander for the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast.

Article 2

This Decision shall enter into force on 1 August 2011.

Done at Brussels, 15 June 2011.

For the Political and Security Committee
The Chairperson
O. SKOOG

⁽¹⁾ OJ L 301, 12.11.2008, p. 33.

DECISION OF THE EUROPEAN CENTRAL BANK

of 9 May 2011

amending Decision ECB/2004/3 on public access to European Central Bank documents

(ECB/2011/6)

(2011/342/EU)

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

Having regard to the Statute of the European System of Central Banks and of the European Central Bank, and in particular Article 12.3 thereof,

Having regard to Decision ECB/2004/2 of 19 February 2004 adopting the Rules of Procedure of the European Central Bank ⁽¹⁾, and in particular Article 23 thereof,

Whereas:

(1) Pursuant to Article 127(6) of the Treaty on the Functioning of the European Union, the Council may confer specific tasks upon the European Central Bank (ECB) concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings. The Council has exercised this option and pursuant to Article 2 of Council Regulation (EU) No 1096/2010 of 17 November 2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board ⁽²⁾ has conferred on the ECB the task of ensuring the Secretariat to the European Systemic Risk Board (ESRB) thereby providing analytical, statistical, logistical and administrative support to the ESRB. In this context, the ECB will also draw up or hold documents relating to its ESRB-related activities and policies or decisions which will qualify as ECB documents within the meaning of Decision ECB/2004/3 of 4 March 2004 on public access to European Central Bank documents ⁽³⁾.

(2) While pursuant to Article 7(1) of Regulation (EU) No 1096/2010, the Secretariat of the ESRB ensures the application of Decision ECB/2004/3 which defines the conditions and limits according to which the ESRB must give access to ESRB documents, the ECB should adapt Decision ECB/2004/3 to reflect the fact that the ECB will draw up or hold documents relating to its ESRB-related activities and policies or decisions which will qualify as ECB documents within the meaning of Decision ECB/2004/3.

(3) There is a need to ensure that the ECB can refuse access to documents relating to its activities and policies or

decisions pursuant to Article 127(5) and (6) of the Treaty drawn up or held by it in the field of financial stability, including those relating to its support to the ESRB, where their disclosure would undermine the protection of the public interest as regards the stability of the financial system in the Union.

(4) The necessary amendments should also be made to Decision ECB/2004/3 to reflect terminology changes and article renumbering following the entry into force of the Treaty of Lisbon,

HAS ADOPTED THIS DECISION:

Article 1

Decision ECB/2004/3 is amended as follows:

(1) Article 4(1) is amended as follows:

(a) in point (a) the following indent is added:

‘— the stability of the financial system in the Union or in a Member State;’

(b) the word ‘Community’ is replaced by ‘Union’;

(2) in Article 4(4) the following sentence is added:

‘As regards requests for access to European Systemic Risk Board documents, Decision ESRB/2011/5 of the European Systemic Risk Board of 3 June 2011 on public access to European Systemic Risk Board documents ^(*), adopted on the basis of Article 7 of Council Regulation (EU) No 1096/2010 of 17 November 2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board ^(**), shall apply.’

^(*) OJ C 176, 16.6.2011, p. 3.

^(**) OJ L 331, 15.12.2010, p. 162.’;

⁽¹⁾ OJ L 80, 18.3.2004, p. 33.

⁽²⁾ OJ L 331, 15.12.2010, p. 162.

⁽³⁾ OJ L 80, 18.3.2004, p. 42.

(3) in Article 8 the references to Article 230 are replaced by references to Article 263 and references to Article 195 by references to Article 228 of the Treaty.

Article 2

This Decision shall enter into force on 18 June 2011.

Done at Frankfurt am Main, 9 May 2011.

The President of the ECB

Jean-Claude TRICHET

IV

(Acts adopted before 1 December 2009 under the EC Treaty, the EU Treaty and the Euratom Treaty)

EFTA SURVEILLANCE AUTHORITY DECISION

No 341/09/COL

of 23 July 2009

on the notified scheme concerning tax benefits for certain cooperatives (Norway)

THE EFTA SURVEILLANCE AUTHORITY ⁽¹⁾,

HAVING REGARD to the Agreement on the European Economic Area ⁽²⁾, in particular Articles 61 to 63 thereof and Protocol 26 thereto,

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

HAVING REGARD to Article 1(2) in Part I and Articles 4(4), 6 and 7(5) in Part II of Protocol 3 to the Surveillance and Court Agreement ⁽⁴⁾,

HAVING REGARD to the Authority's Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement ⁽⁵⁾, and in particular the chapter on business taxation,

HAVING REGARD to Decision No 195/04/COL of 14 July 2004 on the implementing provisions referred to under Article 27 in Part II of Protocol 3 ⁽⁶⁾,

HAVING REGARD to Decision No 719/07/COL of 19 December 2007 to initiate the procedure provided for in Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement with regard to the notified scheme concerning tax benefits for cooperatives,

HAVING CALLED on interested parties to submit their comments ⁽⁷⁾ and having regard to their comments,

Whereas:

I. FACTS

1. PROCEDURE

By letter dated 28 June 2007 from the Norwegian Ministry of Government Administration and Reform, received and registered by the Authority on 29 June 2007 (Event No 427327) and letter from the Ministry of Finance dated 22 June 2007, received and registered by the Authority on 4 July 2007 (Event No 428135), the Norwegian authorities notified the proposed amendments to the rules on taxation of cooperative companies contained in Section 10-50 of the Tax Act, pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement.

After various exchanges of correspondence ⁽⁸⁾, by letter dated 19 December 2007, the Authority informed the Norwegian authorities that it had decided to initiate the procedure laid down in Article 1(2) in Part I of Protocol 3 in respect of the notified scheme on tax benefits for certain cooperatives. By letter dated 20 February 2008 (Event No 465882), the Norwegian authorities submitted their comments to Decision No 719/07/COL to open the formal investigation procedure.

⁽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⁾ Hereinafter referred to as 'Protocol 3'.

⁽⁵⁾ 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 EEA Supplement No 32, 3.9.1994. Hereinafter referred to as 'the State Aid Guidelines'.

⁽⁶⁾ Decision 195/04/COL of 14 July 2004 published in OJ L 139, 25.5.2006, p. 37 and EEA Supplement No 26, 25.5.2006, p. 1 as amended. The updated version of the State Aid Guidelines is published on the Authority's website: <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>

⁽⁷⁾ Published in OJ C 96, 17.4.2008, p. 27 and EEA Supplement No 20, 17.4.2008, p. 44.

⁽⁸⁾ For more detailed information on the correspondence between the Authority and the Norwegian authorities, reference is made to the Authority's Decision to open the formal investigation procedure, Decision No 719/07/COL, published in OJ C 96, 17.4.2008, p. 27 and EEA Supplement No 20, 17.4.2008 p. 44.

Decision No 719/07/COL was published in the *Official Journal of the European Union* and the EEA Supplement thereto ⁽⁹⁾. The Authority called on interested parties to submit their comments thereon.

The Authority received comments from several interested parties ⁽¹⁰⁾. By letter dated 23 May 2008 (Event No 478026), the Authority forwarded these to the Norwegian authorities, which were given the opportunity to react, but decided not to submit further comments.

2. DESCRIPTION OF THE PROPOSED MEASURE

2.1. BACKGROUND

In 1992, the Norwegian authorities introduced a scheme concerning special tax deductions for certain cooperatives. According to the scheme, certain cooperatives within the agricultural, forestry and fisheries sectors as well as consumer cooperatives were entitled to tax deductions on the basis of allocations to equity capital. Other forms of cooperatives were not covered by the scheme. The deduction was limited to maximum 15 % of the annual net income, and made solely from the part of the income deriving from trade with the members of the cooperative. A deduction corresponding to the maximum allowed would imply a reduction from the normal corporate tax rate of 28 % to a rate of 23,8 %. The aim of the scheme was to grant a fiscal advantage to the cooperatives on the basis that they were considered to have a more difficult access to equity capital than other undertakings ⁽¹¹⁾.

The scheme was abolished as of the fiscal year 2005. However, in relation to the State Budget for 2007, the Norwegian authorities proposed to reintroduce the scheme in a slightly amended form ⁽¹²⁾. Hence, the scheme was notified to the Authority.

2.2. OBJECTIVE OF THE SCHEME

According to the notification, cooperatives must be supported due to the public interest in maintaining undertakings based on principles such as democracy, self-help, responsibility, equality, equity and solidarity as an alternative to limited companies. Thus, in order to ensure the public, intangible interest in maintaining the cooperative societies as an alternative to limited companies, there is a need to compensate the cooperatives for the disadvantage they suffer compared with other companies. The objective of the notified scheme is, according to the notification, to offset some of these disadvantages related to capital supply.

⁽⁹⁾ See footnote 8 for the OJ reference.

⁽¹⁰⁾ Section I-5 below.

⁽¹¹⁾ Section 12.2 of the Proposal by the Norwegian Government of 29 September 2006 (Ot.prp. nr. 1 (2006-2007) Skatte- og avgiftsopplegget 2007 - lovendringer).

⁽¹²⁾ Ot.prp. nr. 1 (2006-2007) Skatte- og avgiftsopplegget 2007 - lovendringer.

2.3. THE PROPOSED MEASURE

The notified measure is laid down in a new Section 10-50 of the Tax Act, according to which cooperatives may be entitled to a tax deduction. The text reads as follows:

'[...] deduction may be granted for allocations to the collective equity up to 15 % of the income. Deduction is only granted with regard to income deriving from trade with members. Trade with members and equivalent trade must appear in the accounts and must be substantiated.' ⁽¹³⁾

According to the Norwegian authorities, the expression 'collective equity' does not refer to a balance sheet item of the cooperatives but is a purely fiscal expression. It follows that the collective equity may consist of withheld capital, of bonus funds, which are members' bonus retained in the cooperative in a 'subsequent payment reserve' ⁽¹⁴⁾ and of individualised funds in the form of a bonus which has been transferred to the members' capital accounts in the cooperative ⁽¹⁵⁾.

'Equivalent trade' is defined in paragraph 3 of Section 10-50 of the Tax Act as fishermen's sales organisations' purchasing from members of another fishermen's sales organisation provided that certain conditions are fulfilled, purchase by an agricultural cooperative from a corresponding cooperative with the aim of regulating the market, and purchases imposed by a State authority ⁽¹⁶⁾.

It follows from the proposed provision that a tax deduction is, in general, only granted with regard to income deriving from trade with members. Hence, no deduction is granted in income from trade with others. As stated in the draft Section 10-50 of the Tax Act, it must be possible to determine the trade with members and equivalent trade on the basis of the accounts of the cooperative. Hence, separate accounting for trade with members and trade with third parties is essential. The cooperative must be able to substantiate trade with members and equivalent trade.

⁽¹³⁾ Unofficial translation by the Authority. The original Norwegian text reads as follows: '[...] I tillegg kan det gis fradrag for avsetning til felleseid andelskapital med inntil 15 prosent av inntekten. Fradrag gis bare i inntekt av omsetning med medlemmene. Omsetning med medlemmene og likestilt omsetning må fremgå av regnskapet og kunne legitimeres.'

⁽¹⁴⁾ Section 28 of the Act on cooperatives.

⁽¹⁵⁾ Section 29 of the Act on cooperatives.

⁽¹⁶⁾ The Norwegian authorities have stated that this provision is only relevant for cooperatives whose activities fall outside the scope of the EEA Agreement, cf. letter from the Norwegian authorities of 6 July 2009 (Event No 523765), p. 3. On this basis, the Authority will not go into an analysis of the notion of 'equivalent trade'.

In the notification, the Norwegian authorities estimated that the loss in tax revenue resulting from the scheme would amount to between NOK 35 million and NOK 40 million (approximately EUR 4-5 million) for the fiscal year 2007.

2.4. BENEFICIARIES

The scheme will apply to the cooperatives indicated in paragraphs 2 and 4 to 6 of the proposed Section 10-50 of the Tax Act. It follows from these provisions that the notified scheme mainly includes certain consumer cooperatives and cooperatives active within the agriculture, forestry and fisheries sectors.

Concerning consumer cooperatives, it follows from paragraph (2)a of the proposed Section 10-50 of the Tax Act that only consumer cooperatives deriving more than 50 % of the regular turnover from trade with members are to benefit from the notified scheme.

Furthermore, cooperative building societies which are covered by the Act on cooperative building societies⁽¹⁷⁾ may also benefit from the tax deduction. This constitutes an extension of the scheme compared to the one in force until 2005, cf. Section I-2.1 above.

Cooperatives other than the ones expressly mentioned in Section 10-50 of the Tax Act are not to be covered by the scheme. According to the Norwegian authorities, the selection of eligible cooperatives is based on the assumption that there is a strong need for compensation for extra costs in the sectors covered by the notified scheme. The cooperatives in sectors which will not be covered by the scheme are, according to the Norwegian authorities, in general smaller companies with limited economic activity or non-economic activity.

2.5. DEFINITION OF COOPERATIVES IN NORWEGIAN LAW

A cooperative is defined in Section 1(2) of the Act on cooperatives⁽¹⁸⁾ as an undertaking

'whose main objective is to promote the economic interests of its members by the members taking part in the society as purchasers, suppliers or in some other similar way, when

1. the return, apart from a normal return on invested capital, is either left in the society or divided among the members on the basis of their share of the trade with the group, and

2. none of the members is personally liable for the group's debts, either in whole or for parts which together comprise the total debts.'⁽¹⁹⁾

Furthermore, it follows from Section 3(2) of the Act on cooperatives that the members of a cooperative are not obliged to contribute capital to the cooperative unless the individual member has agreed to this in writing when subscribing for membership or in a separate agreement. This requirement is only set aside if the duty to pay a membership contribution is stipulated in the statutes of the cooperative. In addition, it follows from the same provision that any duty to contribute capital must be limited, either to a certain amount or in some other way.

2.6. THE COOPERATIVE MOVEMENT IN NORWAY⁽²⁰⁾

There are approximately 4 000 cooperatives in Norway with more than 2 million members altogether. The cooperatives operate mainly in agriculture, fisheries, housing and in the consumer sector, but also in other parts of the economy, such as insurance, transport, energy supply, health care, media etc.

The Federation of Norwegian Agricultural Co-operatives (FNAC) includes 14 nationwide organisations involved in activities such as processing, sale and purchasing of agricultural products and goods used for agricultural production (fertilisers, machines etc.), breeding, credit and insurance. The agricultural cooperatives have more than 50 000 individual members (farmers), about 19 000 employees and the annual turnover is over NOK 58 billion (approximately EUR 6 billion). The agricultural cooperatives are owners of some of the most well-known Norwegian brands like TINE (dairy products), Gilde (red meat) and Prior (eggs and poultry). The main objectives of the agricultural cooperatives are to provide channels for processing and marketing of agricultural produce, and to provide good conditions for access to capital and input items to the production on each farm.

According to the Norwegian Raw Fish Act⁽²¹⁾, the Norwegian cooperative sales organisations have an exclusive right to take care of all first-hand marketing of fish and shellfish, except farmed fish. There are six cooperative sales organisations in this sector. The operational area of each organisation is related either to a geographic area and/or to the species. The cooperative sales organisations are owned by the fishermen themselves. In addition to the marketing functions, the sales organisations also have control functions as to the protection of marine resources. The first hand marketing value of fish and shellfish is approximately NOK 6 billion (approximately EUR 620 million). 90 % of all fish and shellfish are exported.

⁽¹⁹⁾ Translation from the website of the Norwegian Co-operative Centre, www.samvirke.org

⁽²⁰⁾ The information in this Section is largely based on the website of the Norwegian Co-operative Centre, a centre for information, documentation and advice concerning cooperatives and owned by the main cooperative organisations in Norway, www.samvirke.org

⁽²¹⁾ Lov 14. desember 1951 No 3 om omsetning av råfisk (Råfiskloven), cf. in particular Section 3.

⁽¹⁷⁾ Lov 6. juni 2003 No 38 Lov om bustadbyggjelag (bustadbyggjelagslova).

⁽¹⁸⁾ Lov 29. juni 2007 No 8 l Lov om samvirkeforetak (samvirkelova).

Coop NKL BA is the central organisation for the Norwegian consumer cooperatives. Coop is a grocery chain that has approximately 1,1 million individual members organised in 140 cooperatives. It operates more than 1 350 stores with an annual turnover of approximately NOK 34 billion (approximately EUR 3,6 billion) and around 22 000 employees. The market share is 24 % of the market for groceries. Coop is also involved in food processing and cooperates with the other Scandinavian cooperative retail organisations with regard to purchasing and processing. The main objectives of the consumer cooperatives are to provide the members with sound and useful goods and services at competitive prices, and at the same time to be an interest organisation for the members in consumer issues.

The Norwegian Federation of Co-operative Housing Associations (NBBL) is a national membership association representing 86 cooperative housing associations, and comprises 772 000 individual members and 378 000 housing units in close to 5 100 affiliated housing cooperatives. Cooperative housing associations vary in size, counting from 100 to 190 000 individual members. Housing cooperatives hold a significant share of the housing market in the cities, in Oslo the market share is close to 40 %, the national average being 15 %. The main objectives are to secure good and suitable dwellings for the members and to work for good and stable conditions for cooperative housing.

2.7. NORWEGIAN RULES ON CORPORATE TAXATION AND THE POSITION AS REGARDS COOPERATIVES

The general corporate tax in Norway is currently 28 %. The tax is applied to the net taxable income of business entities. It also applies when the income is added to the company's equity capital. However, the Norwegian Supreme Court has concluded that share deposits are not taxable income for the receiving company⁽²²⁾. The reason is that the contributions are deemed to have been previously taxed as the contributor's income. Hence, whereas an undertaking has to pay 28 % tax on equity financed through the undertaking's own income, no tax is paid with regard to deposits from the shareholders or the public. It follows that undertakings organised as limited companies etc. may increase their equity capital by receiving non-taxable share deposits from their shareholders or from the public.

Cooperatives, however, do not have this possibility. According to the Norwegian Act on cooperatives, they cannot issue shares to the public or issue other capital certificates or securities. Furthermore, it is considered that the principle of open membership limits the size of capital contributions that the cooperatives can claim from their members.

According to the notification, the obligations and limitations imposed on the cooperatives by law are seen by the

Norwegian authorities as essential and inherent in the cooperative principles. Hence, the Norwegian authorities consider that the lifting of these restrictions would violate fundamental cooperative principles. The Norwegian authorities point out that the Norwegian Act on cooperatives may be stricter on this point than the legislation on cooperatives in other European states. As an example, the Norwegian authorities refer to Article 64 of the EC Regulation on the Statute for a European Cooperative Society⁽²³⁾, according to which the cooperative may provide for the issuing of securities other than shares which may be subscribed both by members and non-members. Nevertheless, the Norwegian authorities consider the restrictions imposed on cooperatives in Norway to be necessary.

3. GROUNDS FOR INITIATING THE PROCEDURE

By Decision No 719/07/COL, the Authority decided to open the formal investigation procedure with regard to the notified scheme. In the opening decision, the Authority's preliminary view was that the scheme constituted State aid within the meaning of Article 61(1) EEA.

Firstly, the Authority considered that the proposed tax benefit for cooperatives confers an advantage on the cooperatives. Secondly, the Authority considered the tax benefit for cooperatives to be selective and had doubts that it would be justified by the nature or general scheme of the Norwegian tax system. On the basis that the scheme would reduce the corporate tax payable by the cooperatives covered, the Authority expressed doubts as to whether the scheme might not distort or threaten to distort competition. Finally, the Authority expressed doubts as to whether the notified measure could be regarded as complying with any of the exemptions set out in Article 61 EEA and therefore be deemed compatible with the State aid rules of the EEA Agreement.

4. COMMENTS OF THE NORWEGIAN AUTHORITIES

The Norwegian authorities argue that the proposed tax deduction does not confer an advantage on the cooperatives. On the one hand, the Norwegian authorities hold that the tax deduction should be considered 'part of a bargain whereby the tax scheme constitutes payments from the State to cooperative companies for adapting to the current legal framework for cooperatives'⁽²⁴⁾. The State thereby safeguards the cooperative form as an alternative to limited companies, which is considered as an intangible benefit in the public interest. On the other hand, the Norwegian authorities argue that the tax deduction should be regarded as compensation for the extra costs incurred by the cooperatives due to the restrictions imposed on them when it comes to access to equity capital, considered as a structural disadvantage for the cooperative. The Norwegian authorities state that it is their assumption that the measure in question merely compensates and counteracts the fundamental disadvantage imposed on the cooperatives when it comes to access to equity capital.

⁽²³⁾ Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) (OJ L 207, 18.8.2003, p. 1).

⁽²⁴⁾ Letter from the Norwegian authorities dated 20 February 2008 (Event No 465882), p. 2.

⁽²²⁾ Rt. 1917 p. 627 and Rt. 1927 p. 869.

With regard to both arguments, the Norwegian authorities state that the scheme is in accordance with the market investor principle. The argument seems to be based on the view that the aid granted under the scheme will not exceed the extra cost involved in operating as a cooperative nor the public benefit of safeguarding the cooperative form.

Furthermore, the Norwegian authorities maintain that the use of a fiscal measure does not prevent the use of the market investor principle, as the form of aid chosen by the State should be irrelevant.

It follows from the practice of the European Courts and the European Commission that the fact that a measure compensates for a disadvantage suffered by an undertaking, does not imply that the measure cannot be regarded as conferring an advantage on the undertaking. According to the Norwegian authorities, this practice does not apply to the present case. All limited liability companies have the possibility to increase their equity by receiving deposits which are non-taxable income for the company. The scheme merely compensates for the disadvantage and puts the cooperatives on an equal footing with other companies. The Norwegian authorities furthermore argue that the present case can be distinguished from the European Commission's decision in the *OTE* case⁽²⁵⁾ since the tax benefit and the extra cost due to the obligation in the present case occur simultaneously. The Norwegian authorities read paragraph 101 in the *OTE* case as indicating that this might be of importance for the qualification as State aid.

Concerning the selectivity of the scheme, the Norwegian authorities state that the scheme results in treating cooperatives as if the equity had been financed by shareholders. The tax benefit enables the receiving cooperative to allocate the same amount as equity without having to pay tax, as if it had received a similar amount as share deposits. Consequently, in the opinion of the Norwegian authorities, the general rule concerning equity deposits is made applicable to the cooperatives.

Moreover, the Norwegian authorities claim that the notified scheme is in accordance with the EEA State aid rules and the principles expressed in the Commission Communication on cooperatives⁽²⁶⁾. The Norwegian authorities in particular refer to Section 3.2.6 of the Commission Communication, according to which specific tax treatment of cooperatives may be welcomed.

⁽²⁵⁾ European Commission's decision in Case C 2/2006 *OTE*.

⁽²⁶⁾ Communication from the Commission to the Council and the European Parliament, the European economic and Social Committee and the Committee of Regions On the promotion on co-operative societies in Europe COM(2004) 18 of 23 February 2004, hereinafter referred to as 'the Commission Communication on cooperatives' or 'the Commission Communication'.

Finally, regarding distortion of competition, the Norwegian authorities argue that the scheme merely counteracts an existing distortion at the expense of the cooperatives, and therefore presumably improves the efficiency of the markets affected.

5. COMMENTS FROM THIRD PARTIES

Following the publication of Decision No 719/07/COL to open the formal investigation procedure with regard to the notified aid to certain cooperatives, the EFTA Surveillance Authority has received comments from a number of third parties.

The comments of the French Government refer, in essence, to the special character of cooperatives, and emphasise that the notified scheme is only intended to compensate the cooperatives for their structural disadvantages.

Cooperatives Europe represents cooperatives across Europe and aims at supporting and developing cooperative enterprises. Initially, the organisation refers to the specific identity of the cooperative, recognised by Community authorities. Cooperatives Europe believes that the specific schemes that cooperatives benefit from should not be compared to the schemes that apply to other forms of enterprises since the schemes are the operational translation of the cooperative principles. Furthermore, Cooperatives Europe argue that specific tax arrangements for cooperatives do not have the objective or the effect of establishing unfair competition, but rather are designed to take into account and to compensate for the limitations that are inherent in the cooperative form in a proportionate way. According to Cooperatives Europe, the scheme is justified by a principle of equality as the cooperatives suffer from certain disadvantages, *inter alia* regarding access to capital. Cooperatives Europe considers that the cooperatives are subject to an autonomous legal scheme which takes their specifics into consideration. It is argued that if a tax scheme specific to cooperatives conforms with the logic of the legal system in the Member State, is a consequence of the modes of operational functioning of the cooperative linked to the cooperative principles and values and is proportional to the limitations imposed by these modes of cooperative functioning, it cannot be considered to be State aid or an advantage but is simply a scheme that stems from a logic of functioning that is different from other forms of enterprise and is justified by an equality of treatment between different forms of enterprises. Finally, Cooperatives Europe argues that the scheme compensates for the disadvantages the cooperatives suffer from and thereby recognises the logic of the cooperative system and its rights to compete on an equal footing.

Kooperativa Förbundet, an organisation for consumer cooperatives in Sweden, supports the arguments submitted by Cooperatives Europe.

Confcooperative — Confederazione Cooperative Italiane is an organisation for Italian cooperatives. It highlights the mutualistic aim of cooperatives and in concluding that the Norwegian legislation is in line with that of other Member States which seek to reduce the disadvantages experienced by cooperatives, especially as regards raising capital, underlines that any excess paid in the coop by members remains the property of the member and thus cannot be taxed in the hands of the cooperative.

Legacoop — Lega Nazionale delle Cooperative e Mutue is an organisation for Italian cooperatives in all sectors. Legacoop refers to the surplus of cooperatives being characterised by the members of the cooperative temporarily renouncing their bonus. The organisation considers that the scheme is in line with the civil and fiscal legislation on European cooperatives, and that the scheme will help reduce the disadvantages of the cooperatives with regard to capital supply.

Coop de France is an organisation for French cooperatives in the agricultural sector. The organisation refers to the European legal framework which has recognised the specific role played by the cooperatives, no matter which sector of the economy they are active in and developed instruments which give them legal safety. Further, the organisation argues that the scheme does not constitute aid but simply compensates the cooperatives for the structural disadvantages inherent in their legal form. Moreover, it is argued that the scheme is within the logic of the system, and hence not selective. This is mainly based on the argument that the capital of the cooperatives is indivisible and consists of non-distributed members' profits. Coop de France also refers to the difficulties for cooperatives when it comes to access to equity capital based on the impossibility to issue shares, the limited number of potential members based on the objective of the cooperative and the impossibility for cooperatives to make use of financial instruments.

Landbrugsrådet is an organisation for cooperatives within the agricultural sector in Denmark. The organisation argues that the scheme creates a level and fair playing field between different types of enterprises by respecting the cooperative nature and the cooperative principles. The scheme does not favour the cooperatives, but adjusts a structural disadvantage.

CECOP-CICOPA-Europe represents the industrial and service cooperatives. The organisation argues that the specific schemes that cooperatives benefit from should not be compared with the schemes that apply to other forms of undertakings, as they are based on the principles that govern the cooperatives. It furthermore argues that when the Authority is comparing the situation for cooperatives with other companies it appears to be establishing a hierarchy between the legal forms, with the cooperative scheme being perceived as an exception. This is not in line with the European Treaty or the Regulation on the Statute for a European company. The organisation, with reference to the Commission Communication on cooperatives, contends that the notified scheme takes into account and compensates for the limitations that are inherent in the cooperative form in a proportionate way.

General Confederation of Agricultural Co-operatives in the EU (COGECA) represents the overall economic interest of agricultural, agri-food, forestry and fishing cooperatives in Europe. The organisation refers to the fundamental role of cooperatives in these sectors, which has been recognised by many EU Member States, and to the fact that cooperatives have embedded concern for community (sustainable development) in their statutes. The organisation expresses worry that uniform tax treatment of cooperatives and other undertakings may result in cooperatives adopting other legal types of organisation and therefore creating a more difficult access to the market for farmers.

CCAE Confederación de Cooperativas Agrarias de España, an organisation for agricultural cooperatives, supports the arguments submitted by COGECA, Coop de France and Cooperatives Europe.

Groupement National de la Coopération is an organisation for the cooperative movement in France. It argues that the beneficial fiscal treatment of cooperatives in France and other European countries is intended to ensure fair competition between cooperatives and other undertakings and does not distort competition. The organisation refers to the distinctive characteristics of the cooperatives, and underlines that cooperatives, in order to exist and evolve, need a certain legal and fiscal framework which takes into account their specifics and the conditions under which they perform their activities. It supports the Norwegian view that the scheme does not confer any advantage on the cooperatives and argues that the scheme will not distort competition as it would not be possible to have identical rules for different forms of undertakings with different characteristics. On this basis, the organisation emphasises that the aid would not be disproportionate.

The Norwegian Standing Committee on Co-operative Affairs (hereinafter referred to as 'the NSCC') is an organisation for Norwegian cooperatives. The NSCC initially states that there is a fundamental difference between cooperatives and other legal forms of undertakings, namely that the relationship between the cooperative and its members is different from the one between a limited liability company and a shareholder. This will also affect the tax measures imposed on cooperatives.

The NSCC first argues that the measure does not constitute State aid as it is justified by the nature or the general scheme of the tax system. In this regard, the NSCC argues that cooperatives build up their equity capital by not paying out bonuses to its members. Normally, such surplus must be paid out to the members of the cooperative, as it constitutes in fact a deferred price correction which does not belong to the cooperative but to the members. If a reimbursement takes place, it will be tax deductible for the cooperative. If the surplus is not reimbursed, it will in fact constitute an equity contribution from the members of the cooperative. It is then within the logic of the system that the surplus should be tax exempt irrespective of whether it is set aside as equity capital or is paid back as reimbursement to members. Moreover, the underlying rationale of avoiding that an amount is taxed twice, is applicable. Just as private placements are tax exempt in the hand of the limited liability company as they have already been taxed in the hand of the shareholder, the equity contribution by the member of the cooperative should be tax

exempt in the hand of the cooperative as it has already been taxed in the hand of the member. On this basis, the NSCC considers that rather than benchmarking the scheme against the rules on income tax, the legal framework should be the rules regarding shareholders contribution to equity capital.

Second, the NSCC argues that the measure does not represent an advantage as it only compensates for structural disadvantages inherent in the legal structure of cooperatives. The NSCC with reference to the opening decision further argues that it is not relevant whether the structural disadvantages are offset by other elements in the regime on cooperatives in Norway, but that the legal test should be whether the particular disadvantage that the measure is aimed at balancing is offset by other measures.

Third, the NSCC claims that the measure is not selective since the different tax treatment of cooperatives and other undertakings reflects the differences pertaining to company law. Therefore, since the tax measure under scrutiny only applies to entities organised as cooperatives it only concerns a legal form of an undertaking which is open to anyone. Hence, the measure is not selective.

II. ASSESSMENT

1. SCOPE OF THE DECISION

As set out in Section I-2.4 above, the potential beneficiaries under the scheme are mainly cooperatives active within the agriculture, fisheries and forestry sectors, certain consumer cooperatives and cooperative building societies.

Article 8 EEA defines the scope of the Agreement. It follows from paragraph 3 of Article 8 that:

'Unless otherwise specified, the provisions of this Agreement shall apply only to:

- (a) products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System, excluding the products listed in Protocol 2;
- (b) products specified in Protocol 3, subject to the specific arrangements set out in that Protocol.'

On this basis, the agriculture and fisheries sectors to a large extent fall outside the scope of the State aid rules of the EEA Agreement.

Hence, this Decision applies to the proposed tax concession for cooperatives, but it does not deal with cooperatives active in the agriculture and fisheries sectors to the extent that the activities of these cooperatives fall outside the scope of the State aid rules of the EEA Agreement.

2. THE PRESENCE OF STATE AID

2.1. INTRODUCTION

Article 61(1) EEA 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, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.'

The Authority recalls that, as a general rule, the tax system of an EFTA State itself is not covered by the EEA Agreement. It is for each EFTA State to design and apply a tax system according to its own choices of policy. However, application of a tax measure, such as the deduction in the corporate tax for certain cooperatives, may have consequences that can bring the tax measure within the scope of Article 61(1) EEA. According to case law⁽²⁷⁾, Article 61(1) EEA does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects.

2.2. PRESENCE OF STATE RESOURCES

In order to constitute State aid within the meaning of Article 61(1) EEA, the aid must be granted by the State or through state resources.

The Authority recalls that, according to settled case law, the definition of aid is more general than that of subsidy, because it includes not only positive benefits, such as subsidies themselves, but also state measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect⁽²⁸⁾.

According to the notified scheme, the cooperatives mentioned in Section 10-50 of the Tax Act will be entitled to a special form of tax deduction. Hence, these cooperatives may deduct allocations to equity capital from their income. The tax deduction implies that the tax payable by the cooperatives covered by the scheme is reduced. The measure entails a loss of tax revenues for the Norwegian State, estimated by the Norwegian authorities to amount to between approximately NOK 35 and 40 million (approximately EUR 4-5 million) for the fiscal year 2007. According to settled case law, a measure by which the public authorities grant to certain undertakings a

⁽²⁷⁾ Case E-6/98 *Norway v EFTA Surveillance Authority* [1999] EFTA Court Report p. 76, paragraph 34; Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnjord, PIL and others and Norway v EFTA Surveillance Authority* [2005] Report of the EFTA Court p. 121, paragraph 76; Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 13; and Case C-241/94 *France v Commission* [1996] ECR I-4551, paragraph 20.

⁽²⁸⁾ See, in particular, Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 38; Case C-501/00 *Spain v Commission* [2004] ECR I-6717, paragraph 90; and Case C-66/02 *Italy v Commission* [2005] ECR I-10901, paragraph 77.

tax exemption which, although not involving a transfer of State resources, places those to whom the tax exemption applies in a more favourable financial situation than other taxpayers constitutes aid granted by the state or through state resources⁽²⁹⁾. Consequently, the Authority finds that state resources are involved in the notified scheme.

2.3. FAVOURING CERTAIN UNDERTAKINGS OR THE PRODUCTION OF CERTAIN GOODS

2.3.1. *Selectivity*

First, the aid measure must be selective in that it favours 'certain undertakings or the production of certain goods'.

The cooperatives eligible under the scheme are undertakings within the meaning of the State aid rules of the EEA Agreement. According to settled case law, the concept of 'undertaking' covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed⁽³⁰⁾.

In order to determine whether a measure is selective, it is appropriate to examine whether, within the context of a particular legal system, that measure constitutes an advantage for certain undertakings in comparison with others which are in a comparable legal and factual situation⁽³¹⁾.

The Authority will hereinafter examine these elements with regard to the tax deduction in favour of certain cooperatives laid down in Section 10-50 of the Tax Act.

Reference framework

In order to classify a tax measure as selective, the Authority must begin by identifying and examining the common or 'normal' regime under the tax system applicable which constitutes the relevant reference framework⁽³²⁾.

In Norway, cooperatives are subject to the generally applicable corporate tax. The objective of the corporate tax is to tax profits (net income) made by companies. However, according to the

proposed Section 10-50 of the Tax Act, certain consumer cooperatives, cooperatives active within the agriculture, fisheries and forestry sectors and cooperative building societies are entitled to a deduction of up to 15 % of their income deriving from trade with their members. Thus, the tax base of these undertakings is reduced, and thereby also their corporate tax. This tax rule deviates from the normal rules on corporate tax payable by undertakings in Norway.

In the notification, the Norwegian authorities argue that the relevant reference system in the present case is the general framework for capital supply. The Authority is of a different opinion. As the tax exemption for certain cooperatives constitutes a derogation from the generally applicable corporate tax, the Authority finds that the relevant reference against which the notified measure has to be judged is the corporate tax system. Hence, the corporate tax constitutes the relevant reference framework against which the derogation must be measured.

Factual and legal situation

Next, the Authority must assess whether, under a particular statutory scheme (in this case the corporate tax), a state measure is such as to favour certain undertakings or the production of certain goods within the meaning of Article 61(1) EEA in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question⁽³³⁾.

Accordingly, the Authority must assess and determine whether any advantage granted by the tax measure at issue may be selective by demonstrating that the measure derogates from that common regime inasmuch as the measure differentiates between economic operators who, in light of the objective assigned to the tax system of the State concerned, are in a comparable factual and legal situation⁽³⁴⁾.

Following the case law mentioned above, the Authority must therefore assess whether under the corporate tax, the 15 % deduction of the cooperatives' income derived from trade with their members favours certain cooperatives within the meaning of Article 61(1) EEA in comparison with other undertakings which are in a legal and factual situation comparable in the light of the objective pursued by the corporate tax.

⁽²⁹⁾ See to that effect Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 14; and Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 132.

⁽³⁰⁾ Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraphs 107 et seq. and the case law cited there.

⁽³¹⁾ Case C-487/06 P, *British Aggregates Association v Commission*, paragraphs 82 et seq.; Case C-409/00 *Spain v Commission* [2003] ECR I-1487, paragraph 47; Joined cases C-428/06 to C-434/06 *UGT-Rioja and others*, not yet reported, paragraph 46.

⁽³²⁾ Cases T-211/04 and T-215/04 *Government of Gibraltar v Commission*, not yet reported, paragraph 143.

⁽³³⁾ Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraphs 28-31.

⁽³⁴⁾ Cases T-211/04 and T-215/04 *Government of Gibraltar v Commission*, not yet reported, paragraph 143 with further references.

As mentioned above, the objective pursued by the corporate tax is to tax profits made by companies.

In this context, the Authority is aware of the specifics of cooperatives. In particular, the Authority notes that according to the Commission Communication on cooperatives, '[c]ooperatives operate in the interest of their members, who are at the same time users, and they are not managed in the interests of outside investors. Profits are received by members in proportion to their businesses with the cooperative, and resources and assets are commonly held, non-distributable and dedicated to the common interests of members. Because personal links among members are in principle strong and important, new membership is subject to approval while voting rights are not necessarily proportional to shareholdings (one man one vote). Resignation entitles the member to repayment of his part and implies reduction of the capital.'⁽³⁵⁾

Consequently, a pure mutual cooperative is defined, firstly, by a specific relationship with the members of the cooperative, meaning that the members are actively involved in the running of the business of the cooperative, and that there is a large extent of interaction between the members and the cooperative reaching beyond a merely commercial relationship. Secondly, the assets of the cooperative are commonly held by the members and the profits are distributed exclusively among the members of the cooperative based on the members' business with the cooperative.

On the basis of the principles set out above, the Authority does not exclude that pure mutual cooperatives and other companies can be considered not to be in a comparable legal and factual situation where the objective of tax on corporate profits is concerned.

However, in the present case, it appears that the pure mutual character of some of the cooperatives covered by the notified scheme is questionable. A large part of the business of certain cooperatives covered by the scheme is not related to trade with the members, but to trade with other clients. In this regard, the Authority refers to the limitation set out in Section 10-50 of the Tax Act whereby only consumer cooperatives with more than 50 % of the regular turnover related to trade with members are to benefit from the notified scheme. In the opinion of the Authority, such prevalently mutual cooperatives are quite different from the pure cooperative model described in the Commission Communication on cooperatives.

In addition, the scheme covers only those cooperatives specified in draft Section 10-50 of the Tax Act, namely certain consumer cooperatives, cooperatives active within the agriculture, fisheries and forestry sectors and cooperative building societies. Only these cooperatives are entitled to a deduction of up to 15 % in the part of their income deriving from trade with their members. Consequently, the tax advantage concerned is accorded on account of the undertaking's legal form as cooperative and of the sectors in which that undertaking carries on its activities. It is therefore clear that the measure is selective in relation to other comparable economic operators.

By applying a different taxation on certain cooperatives' profits from trade with their members depending on their sector of activity, the Authority considers that Section 10-50 of the Norwegian Tax Act differentiates between economic operators who, in the light of the objective assigned to the corporate tax system which is taxation of profits, are in a comparable factual and legal situation.

Justification by the nature and logic of the system

According to well-established case law, the concept of State aid does not refer to state measures which differentiate between undertakings and which are, therefore, *prima facie* selective where that differentiation arises from the nature or the overall structure of the system of which they form part⁽³⁶⁾. The case law of the EFTA Court and of the Community Courts has established that a specific tax measure intended partially or wholly to exempt undertakings in a particular sector from the charges arising from the normal application of the general system can be justified by the internal logic of the tax system if it is consistent with it⁽³⁷⁾.

Therefore, the Authority must determine whether the differentiation between certain cooperatives and other undertakings is none the less not selective because it arises as a result of the nature or general scheme of the system of charges of which it forms part. Hence, whether the differentiations derive directly from the basic or guiding principles of that system⁽³⁸⁾.

⁽³⁶⁾ Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 33; Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 42.

⁽³⁷⁾ Case E-6/98 *Norway v EFTA Surveillance Authority*, cited above, paragraph 38; Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnjford, PIL and others and Norway v EFTA Surveillance Authority*, cited above, paragraphs 84-85; Joined cases T-127/99, T-129/99 and T-148/99 *Territorio Histórico de Alava et al v Commission* [2002] ECR II-1275, paragraph 163; Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365, paragraph 42; Case T-308/00 *Salzgitter v Commission* [2004] ECR II-1933, paragraph 42; Case C-172/03 *Wolfgang Heiser* [2005] ECR I-1627, paragraph 43.

⁽³⁸⁾ Cases T-211/04 and T-215/04 *Government of Gibraltar v Commission*, not yet reported, paragraph 144 with further references.

⁽³⁵⁾ Section 1.1 of the Commission Communication on cooperatives.

It follows from case law that it is for the EEA State which has introduced such a differentiation to show that it is justified by the nature or general scheme of the system in question ⁽³⁹⁾. The Norwegian authorities argue that the tax deduction applicable to certain cooperatives is justified by the nature or general scheme as it implies that the Norwegian system of equity financing for corporations by receiving non-taxable deposits is made applicable also to the cooperatives. In other words, the scheme would be aimed at balancing a disadvantage for the cooperatives which is inherent in their legal form.

In the opinion of the Authority, in the case at hand, the justification provided by the Norwegian authorities that the deduction in the corporate tax rate should be regarded as a compensation for the extra costs incurred by the cooperatives due to their difficult access to capital cannot be considered to fall within the logic of the corporate tax system. Corporate tax is a tax levied on a company's income from normal trade whereas share deposits and other equity deposits are not qualified as income according to Norwegian tax law ⁽⁴⁰⁾. Thus, even if the objective pursued by the Norwegian authorities is laudable, it does not seem to derive directly from the basic or guiding principles of the system in which the measure is embedded, namely the tax system. The Authority recalls that according to consistent case law the objective pursued by state measures is not sufficient to exclude those measures outright from classification as aid for the purposes of Article 61(1) EEA ⁽⁴¹⁾.

Moreover, in the present case, the Authority notes that the notified scheme is not intended to apply to all cooperatives, which in principle should suffer from the same structural disadvantage as pointed out by the Norwegian authorities. On the contrary, the scheme only covers cooperatives in those sectors which are expressly mentioned in the draft Section 10-50 of the Tax Act. The Norwegian authorities have not submitted any arguments showing that the delimitation of the scheme to these cooperatives is in line with the nature and general scheme of the tax system. The preparatory documents to Section 10-50 of the Tax Act simply refers to the cooperatives covered by the scheme as representing the traditional cooperative sectors ⁽⁴²⁾, a consideration which is not relevant in the framework of corporate taxation. Furthermore, according to the Norwegian authorities, the delimitation is based on an assumption that the cooperatives to be covered by the scheme are in more need of the aid than cooperatives in other sectors. However, the Norwegian authorities have neither submitted any objective information supporting their assumption nor any other objective, substantiated justification for this differentiation.

⁽³⁹⁾ Case C-159/01 *Netherlands v Commission* [2004] ECR I-4461, paragraphs 43-47.

⁽⁴⁰⁾ Cf. Section I-2.3 above.

⁽⁴¹⁾ Case C-241/94 *France v Commission* [1996] ECR I-4551, paragraph 21, Case C-342/96 *Spain v Commission* [1999] ECR I-2459, paragraph 23.

⁽⁴²⁾ *Ot.prp. nr. 1 (2006-2007) Skatte- og avgiftsopplegget 2007 - lovendringer*.

In line with case law ⁽⁴³⁾, the Authority considers that the need to take account of certain requirements (in this case the particularities of the cooperatives as organisations), however legitimate, cannot justify the exclusion of selective measures, even specific ones, from the scope of Article 61(1) EEA as account may in any event usefully be taken of the given objectives when the compatibility of the State aid measure is being assessed pursuant to Article 61(3) EEA.

As an additional point, the Authority refers to the comments of the Norwegian Standing Committee on Co-operative Affairs and the observation that a tax exemption for cooperatives could be justified on the basis of double taxation arguments and accordingly fall within the nature and logic of the corporate tax system. However, based on the information available to it, the Authority cannot exclude that there would be situations where the capital would neither be taxed in the hands of the cooperative nor in the hands of the members.

Moreover, with regard to the present case and in the absence of any convincing arguments to the contrary, the Authority is of the opinion that making a favourable tax treatment applicable only for some cooperatives without providing any objective justification for this differentiation cannot be considered to be in line with the logic of the tax system ⁽⁴⁴⁾. Even if the tax measure in question determines its scope on the basis of objective criteria, the fact remains that it is selective in nature ⁽⁴⁵⁾.

Against this background, the Authority considers that the tax deduction applicable to certain cooperatives derogates from the ordinary corporate tax regime, does not seem to be justified by the nature or general scheme of the system, and must therefore be considered selective ⁽⁴⁶⁾.

⁽⁴³⁾ Case C-487/06 P, *British Aggregates Association v Commission*, paragraph 92.

⁽⁴⁴⁾ In this regard, the Authority refers to the European Commission decision in the case concerning a Danish scheme on compensation for CO₂ duty, cf. Case C 41/2006 (ex N 318/2004), not yet published. In paragraph 44 of the decision, the Commission states that the scheme in question only covers some of the undertakings that are in the factual situation that the scheme, according to the Danish authorities, seeks to rectify. The Commission sees this as a derogation from the general logic that the Danish authorities argue should apply and concludes that, therefore, the scheme is not in line with this logic.

⁽⁴⁵⁾ Joined Cases T-92/00 and T-103/00, *Territorio Histórico de Álava - Diputación Foral de Álava and others v Commission* [2002] ECR II-1385, paragraph 58.

⁽⁴⁶⁾ Case C-222/04, *Cassa di Risparmio di Firenze* [2006] ECR I-289, paragraphs 134-138; Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraphs 48-49.

2.3.2. *Advantage*

Second, in order to determine whether an economic advantage has been granted to the cooperatives covered by the scheme, the Authority must assess whether the measure relieves the beneficiaries of charges that they normally bear in the course of their business. The Authority is of the opinion that the question of whether the scheme confers an advantage to the cooperatives covered must be considered in the light of the corporate tax system which applies both to lucrative undertakings and to cooperatives, including those not covered by the scheme.

According to the notified scheme, certain cooperatives are entitled to a deduction of up to 15 % in the part of their income deriving from trade with their members. Thus, the tax base of these undertakings is reduced, and thereby also their corporate tax. As a result, the measure relieves them of charges that are normally borne from their budgets. This tax rule deviates from the normal rules on corporate tax payable by undertakings in Norway.

The Norwegian authorities and several of the third parties who have submitted comments to the opening decision argue that the proposed tax deduction does not confer an advantage on the cooperatives. Firstly, according to the Norwegian authorities, the scheme is in line with the market investor principle and should be considered as payment to the cooperatives for upholding their legal form, which is of public interest. Secondly, the tax deduction is a compensation for the extra costs incurred by the cooperatives due to the restrictions imposed, in particular with regard to access to equity capital, and it does not involve any overcompensation.

First, concerning the market investor principle, the argumentation seems to be based on the view that the aid granted under the scheme will not exceed the extra costs involved for an undertaking in operating as a cooperative (overcompensation) nor the public benefit of safeguarding the cooperatives. The Norwegian authorities argue that the market investor principle applies where the State purchases intangible benefits for the public interest at market price, at least where the intangible benefit for the State is completely external to the interests of the undertaking concerned ⁽⁴⁷⁾.

⁽⁴⁷⁾ The Norwegian authorities refer to the Opinion of Advocate General Fennelly in Case 251/97 *French Republic v Commission* to justify their argumentation. According to the argumentation put forward by the French authorities in this case it is possible to argue, in essence, that when the State purchases goods or services or more intangible benefits in the general public interest at market price, there is no aid element at all, or that there is aid which is, at least potentially, compatible, cf. paragraph 20 of the Opinion. The Advocate General, however, did not follow the argumentation of the French authorities in this case.

The Authority considers that there are several reasons why the market investor principle is not applicable in the present case. Initially, the Authority does not agree with the position of the Norwegian authorities that operating as a cooperative does not involve any advantages for an undertaking. In this regard the Authority refers to the Commission Communication on cooperatives, where the European Commission states, inter alia, that the cooperative model may be 'a means for building or increasing the economic power of Small and Medium-sized Enterprises (SMEs)' ⁽⁴⁸⁾.

Further, the Authority considers that the intangible benefit that the State intends to 'purchase' in the present case is the upholding of the cooperative sector in Norway on the present conditions when it comes to restrictions on access to equity capital. The Authority is of the opinion that it is impossible to apply the market investor principle to this case for the simple reason that no private market investor could ever make a similar transaction to the one that the Norwegian authorities are proposing. In this case the State is not acting as a market investor or undertaking. On the contrary, the State is performing its sovereign and administrative functions, the imposition of taxes being one of the key components of these functions. Hence, the Authority cannot see that the market investor principle is applicable.

The Norwegian authorities have also argued that the scheme does not involve overcompensation and that the aid granted does not exceed the public benefit of safeguarding the cooperatives. The Authority notes that the Norwegian authorities have not submitted any figures or other information in this regard, but merely stated that they assume this to be the case. Therefore, the Authority cannot accept this argument.

Second, the Authority will examine whether it can be concluded that the scheme does not involve an advantage for the cooperatives covered by it on the basis that the aid is granted in order to compensate the cooperatives for structural disadvantages. It has been recognised that structural disadvantages may, in certain specific situations, be offset by aid measures ⁽⁴⁹⁾. The compensation of a disadvantage has been considered not to constitute an advantage in some situations, in particular where former state-owned monopolists are restructured and turned into market players when opening the market for competition. These precedents refer to a factual situation which is different from the one in the present case. Furthermore, neither the case law of the European Courts nor the practice of the European Commission appear to

⁽⁴⁸⁾ Section 2.1.1 of the Commission Communication on Cooperatives.

⁽⁴⁹⁾ Case T-157/01 *Danske Busvognmænd v Commission* [2004] ECR II-917.

support that a measure such as the one notified does not confer an advantage on the undertaking in question merely because it compensates a 'disadvantage' suffered by the undertaking ⁽⁵⁰⁾.

Against this background, the conclusion of the Authority is that the proposed tax concession confers an advantage on the cooperatives covered by the scheme.

2.4. DISTORTION OF COMPETITION AND EFFECT ON TRADE BETWEEN THE CONTRACTING PARTIES

As regards the criteria in Article 61(1) EEA on aid which distorts or threatens to distort competition in so far as it affects trade between Contracting Parties, it follows from case law that it is not necessary to establish that the aid has a real effect on trade between the Contracting Parties and that competition is actually being distorted, but only to examine whether the aid is liable to affect trade and distort competition ⁽⁵¹⁾.

The Norwegian authorities argue that the aim of the scheme is to counter the existing competitive disadvantage for cooperatives when it comes to access to equity capital. On this basis they maintain that the scheme does not distort or threaten to distort competition. The Authority notes that the effect of the scheme is to reduce the corporate tax of the cooperatives covered by the scheme compared to other companies. Thereby, the competitive position of these cooperatives is strengthened. The fact that the cooperatives are subject to certain limitations according to Norwegian law, which are not imposed on inter alia limited companies, cannot be decisive in this regard.

Moreover, where aid granted by the State strengthens the position of an undertaking compared with other undertakings competing in intra-EEA trade, the latter must be regarded as affected by that aid. Conversely, it is not necessary that the recipient undertaking itself be involved in the said trade ⁽⁵²⁾. The proposed tax deduction strengthens the position of the cooperatives in relation to their competitors which are organised differently. The tax deduction applies to all main forms of cooperatives, and at least some of them are also active on markets within the EEA. In this regard, the Authority notes that the consumer cooperative Coop NKL BA has a market share in the market for groceries in Norway of

24 %. Furthermore, Coop NKL BA cooperates with the other Scandinavian cooperative retail organisations with regard to purchasing and processing.

On this basis, the Authority concludes that the notified scheme is liable to distort competition and to affect trade between the Contracting Parties to the EEA Agreement.

2.5. THE COMMISSION COMMUNICATION ON COOPERATIVES

The Norwegian authorities seem to argue that the notified scheme does not constitute State aid as it is in accordance with the principles expressed in the Commission Communication on cooperatives. The Norwegian authorities refer in particular to Section 3.2.6 of the Commission Communication, where the European Commission inter alia states that specific tax treatment of cooperatives may be welcomed. This section reads as follows:

'Some Member States (such as Belgium, Italy and Portugal) consider that the restrictions inherent in the specific nature of co-operative capital merit specific tax treatment: for example, the fact that co-operatives' shares are not listed, and therefore not widely available for purchase, results almost in the impossibility to realise a capital gain; the fact that shares are repaid at their par value (they have no speculative value) and any yield (dividend) is normally limited may dissuade new memberships. In addition it is to be mentioned that co-operatives are often subject to strict requirements in respect of allocations to reserves. Specific tax treatment may be welcomed, but in all aspects of the regulation of co-operatives, the principle should be observed that any protection or benefits afforded to a particular type of entity should be proportionate to any legal constraints, social added value or limitations inherent in that form and should not lead to unfair competition. In addition any other granted "advantages" should not permit the undesirable use of the co-operative form by non bona fide co-operatives as a means of escaping appropriate disclosure and corporate governance requirements. The Commission invites Member States when considering appropriate and proportionate tax treatment for equity capital and reserves of co-operatives, to take good care that such provisions do not create anticompetitive situations (...)'.

However, the Authority notes that in Section 3.2.7 the Commission Communication goes on to state that '[c]ooperatives that carry out economic activities are considered as "undertakings" in the sense of Articles 81, 82 and 86 to 88 of the European Community Treaty (EC). They are therefore subject in full to European competition and state aid rules, and also to the various exemptions, thresholds and de minimis rules.'

⁽⁵⁰⁾ Case 30/59 *Gezamenlijke Steenkolenmijnen* [1961] ECR p. 3, 29-30; Case C-173/73 *Italy v Commission* [1974] ECR 709, paragraphs 12-13; Case C-241/94 *France v Commission* [1996] ECR I-4551, paragraphs 25 and 35; Case C-251/97 *France v Commission* [1999] ECR I-6639, paragraphs 41, 46-47 and the Commission's Decisions in Case C 2/2006 *OTE*, paragraph 92.

⁽⁵¹⁾ Case C-372/97 *Italy v Commission* [2004] ECR I-3679, paragraph 44; Case C-66/02 *Italy v Commission*, paragraph 111 and Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraph 54.

⁽⁵²⁾ Case C-66/02 *Italy v Commission*, cited above, paragraphs 115 and 117, and Case C-148/04 *Unicredito Italiano*, cited above, paragraphs 56 and 58.

On this basis, the Authority is of the opinion that while the specifics of the cooperatives must be taken into account when examining this case, the Commission Communication, read as a whole, cannot be invoked to argue that State aid granted to cooperatives escapes the scope of the State aid rules in the EEA Agreement.

Therefore, the Authority finds that the Commission Communication on cooperatives, read as a whole, does not necessitate any changes to the conclusion that the proposed tax concession confers an advantage on the cooperatives covered by the scheme.

2.6. CONCLUSION WITH REGARD TO THE PRESENCE OF STATE AID

On the basis on the considerations set out above, the Authority has reached the conclusion that the notified scheme concerning tax concessions for certain cooperatives constitutes State aid within the meaning of Article 61(1) EEA.

3. PROCEDURAL REQUIREMENTS

Pursuant to Article 1(3) in Part I of Protocol 3, '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 (...). The State concerned shall not put its proposed measures into effect until the procedure has resulted in a final decision'.

The Norwegian authorities notified the proposed scheme concerning tax benefits for certain cooperatives by letters dated 28 June 2007 and 16 October 2007 and have not implemented the scheme pending a final decision by the Authority.

The Authority can therefore conclude that the Norwegian authorities have respected their obligations pursuant to Article 1(3) in Part I of Protocol 3.

4. COMPATIBILITY OF THE AID

The Authority notes that the Norwegian authorities have, neither in the notification of the scheme nor in their comments to the Authority's opening decision, submitted any arguments concerning the compatibility of the aid. The Authority has nevertheless assessed the compatibility of the notified measure with Article 61 EEA on the basis of the information before it.

The Authority considers that none of the derogations mentioned in Article 61(2) EEA can be applied to the case at hand.

As far as the application of Article 61(3) EEA is concerned, the tax benefit for cooperatives cannot be considered to fall within the scope of Article 61(3)(a) EEA since none of the Norwegian regions qualify for this provision, which requires an abnormally low standard of living or serious underemployment. Nor does the scheme seem to promote the execution of an important

project of common European interest or remedy a serious disturbance in the economy of the Norwegian state, as would be necessary for compatibility on the basis of Article 61(3)(b) EEA.

Concerning Article 61(3)(c) EEA, aid could be deemed compatible with the EEA Agreement if it facilitates the development of certain economic activities or of certain economic areas without adversely affecting trading conditions to an extent contrary to the common interest. The Authority notes that the measure is neither limited to the regions covered by the Norwegian regional aid map nor falls under any of the existing State aid guidelines concerning compatibility with the EEA Agreement on the basis of its Article 61(3)(c).

As no guidelines are directly applicable to the notified scheme, the Authority will assess the compatibility of the scheme directly under Article 61(3)(c) EEA⁽⁵³⁾. Derogations within the meaning of Article 61(3)(c) EEA must be interpreted narrowly⁽⁵⁴⁾ and may be granted only when it can be established that the aid will contribute to the attainment of an objective of common interest, which could not be secured under normal market conditions alone. The so-called 'compensatory justification principle' was endorsed by the Court of Justice of the European Communities in the *Philip Morris* case⁽⁵⁵⁾.

Appreciating the compatibility of State aid is fundamentally about balancing the negative effects of aid on competition with its positive effects in terms of common interest⁽⁵⁶⁾. In order to be declared compatible under Article 61(3)(c) EEA, a State aid scheme must:

- be aimed at a well-defined objective of common interest,
- be well-designed to deliver the objective of common interest, and in that regard, be an appropriate instrument, have an incentive effect, and be proportionate,
- not distort competition and trade in the EEA to an extent contrary to common interest⁽⁵⁷⁾.

⁽⁵³⁾ Case T-288/97, *Regione Autonoma Friuli Venezia Giulia v Commission* [2001] ECR II-1169, paragraph 72.

⁽⁵⁴⁾ Case C-301/96 *Germany v Commission* [2003] ECR I-9919, paragraphs 66 and 105.

⁽⁵⁵⁾ Case 730/79 *Philip Morris v Commission* [1980] ECR I-2671.

⁽⁵⁶⁾ See the Commission's State Aid Action Plan of 7 June 2005, COM(2005) 107, paragraph 11.

⁽⁵⁷⁾ See Commission decision of 24 January 2007 C(2006) 6630, in case N 270/06, paragraph 67.

The Authority must assess whether the objective pursued by the measure is necessary, in line with objectives of common interest and, if so, whether this is the least distortive method of pursuing that objective.

Well-defined objective of common interest

The Norwegian authorities have argued that the ultimate objective of the notified scheme is to ensure that the cooperative form is upheld. The Norwegian authorities argue that facilitating the cooperatives' access to equity capital is essential in order to attain this objective.

The Authority recognises that cooperatives have certain specific features, as set out in the Commission Communication on cooperatives. The Commission Communication states that the promotion of the cooperative model can in principle lead to a more efficient functioning of the economy and have positive social effects. The Commission Communication seems to indicate that in view of the broad equity, social and coordination gains that the cooperative model is considered to provide, and which would not otherwise be available on the market, maintenance of the cooperative model may be viewed as a common interest objective. Furthermore, the possible role of the cooperative model as a means for building or increasing the economic power of SMEs, providing services that lucrative companies would not provide and contributing to the building of a knowledge-based society is underlined⁽⁵⁸⁾. It should be kept in mind, however, that the definition of a cooperative in the Commission Communication seems to be relatively strict, as the Commission Communication in general seems to concern pure mutual cooperatives⁽⁵⁹⁾.

On this basis, the Authority is of the opinion that the scheme is aimed at a well-defined objective of common interest, to the extent that it is aimed at pure mutual cooperatives.

Well-designed scheme

The second step is to assess whether the aid is properly designed to reach the objective of common interest pursued, in this case to ensure that the cooperative form is upheld by facilitating the cooperatives' access to equity capital.

A distinction could be made between pure mutual and non-pure mutual cooperatives, mutuality being the key hallmark of cooperatives. The stronger the cooperative is characterised by mutuality the more the cooperative could be regarded as different from lucrative undertakings. Therefore, the objective

of common interest of upholding cooperatives as defined in the Commission Communication on cooperatives can best be reached by granting aid to cooperatives which are truly mutual.

Concerning the concept of mutual cooperatives, the Authority has doubts as to whether it would be sufficient in order for a cooperative to qualify as a mutual cooperative in the sense of the Commission communication on cooperatives that the cooperative trades mainly with its members. The Authority is of the opinion that the qualification of a cooperative as truly mutual would also depend on a number of other factors, such as the frequency of contacts between the cooperative and the members; the active involvement of the members in the running of the cooperative; the active involvement of the members in the management and decision making of the cooperative; the non-autonomy of membership in the cooperative, but active application and approval from existing members; large part of the bonuses paid to members in proportion to the profits; large parts of benefits reserved for members in comparison to benefits for clients that are not members; etc. In the view of the Authority, an assessment of whether a cooperative is genuinely mutual would have to take into account these and similar criteria.

The Authority notes that some of the cooperatives to be covered by the present scheme are pure mutual cooperatives whereas others are prevalently mutual cooperatives. With regard to consumer cooperatives it is stated in the draft Section 10-50 of the Tax Act that only prevalently mutual consumer cooperatives are covered by the scheme⁽⁶⁰⁾. Thus, in the present case it appears that the pure mutual character of some of the cooperatives covered by the notified scheme is questionable. For instance, a large part of the business of certain cooperatives covered by the scheme, in particular the consumer cooperatives, is not related to trade with the members, but to trade with other clients. Furthermore, due to the size of some of the cooperatives covered, the active involvement of the members in the running of and management of the cooperative will be limited. In addition, membership seems to a large extent to be automatic, at least with regard to consumer and housing cooperatives. Hence, in the Authority's view, the scheme is not designed only to cover cooperatives with a particularly strong mutual identity.

Furthermore, in relation to the assessment of whether the scheme is well designed to reach the objective of common interest, it must be considered whether the targeted activity entails any additional costs which are compensated by the aid. The Authority notes that the Norwegian authorities have not provided any data allowing the Authority to quantify, in a direct or indirect manner, the costs involved for an undertaking in assuming the cooperative form. Hence, it is also not possible for the Authority to assess whether the aid is necessary and proportionate to the objective pursued.

⁽⁵⁸⁾ Section 2.1.1 of the Commission Communication on cooperatives.

⁽⁵⁹⁾ Section II-2.3.1 above.

⁽⁶⁰⁾ This condition is not applicable to other cooperatives, and the Authority has no information as to whether any non-prevalently mutual cooperatives in other sectors are to be covered by the scheme.

On the other hand, the Authority notes positively that the proposed tax deduction will, according to the notification, only be granted with regard to income deriving from trade with members and equivalent trade. Moreover, the notified scheme requires separate accounting for trade with members and trade with other parties in order for cooperatives to receive aid under the scheme.

Nevertheless, for the above mentioned reasons, the Authority has doubts as to whether the notified scheme is well-designed to reach the objective of common interest which is to uphold the cooperative form, and in particular pure mutual cooperatives, by facilitating the access to equity capital.

No distortion of competition and trade in the EEA to an extent contrary to common interest

Finally, it must be assessed whether the potential to distort competition and trade in the European Economic Area is of a nature contrary to the common interest.

Concerning the potential distortion of competition and trade, the Authority notes that the scheme must be classified as operating aid as it relieves the beneficiaries of charges normally borne by undertakings in the ordinary exercise of their commercial activities, in this case, the corporate tax.

Operating aid may only exceptionally be considered compatible with the EEA agreement if it allows fostering a common interest objective that otherwise could not be reached. The Authority questions whether the objective pursued by the Norwegian authorities of upholding the corporate form of cooperatives by facilitating their access to equity capital could not have been reached with other, more proportionate, measures. In particular, the Authority stresses the fact that some of the cooperatives covered by the scheme are large undertakings operating in highly competitive markets within the EEA.

Conclusion

As stated above, the Authority considers that the scheme would be aimed at a well-defined objective of common interest, at least to the extent that it is aimed at pure mutual cooperatives. However, it appears that the pure mutual character of some of the cooperatives covered is not given. Hence, the Authority is of the opinion that the aid cannot be considered to be well targeted. In addition, the Authority is not in a position to assess whether the aid is necessary and proportionate to the objective pursued.

On the basis of the above, the Authority finds that, even though the objective of the scheme can be considered a well-defined objective of common interest, the Norwegian authorities have not demonstrated that the positive effects of the aid will outweigh its negative effects. Therefore, the scheme cannot be considered to be compatible with Article 61(3)(c) EEA.

5. CONCLUSION

On the basis of the foregoing assessment, the Authority considers the notified tax exemption for certain cooperatives to be State aid incompatible with the State aid rules of the EEA Agreement.

The Authority would like to stress that the present decision, as set out in Section II-1 above, does not apply to cooperatives active in the agriculture and fisheries sectors to the extent that the activities of these cooperatives fall outside the scope of the State aid rules of the EEA Agreement,

HAS ADOPTED THIS DECISION:

Article 1

The planned scheme concerning tax exemptions for certain cooperatives constitutes State aid which is incompatible with the functioning of the EEA Agreement within the meaning of Article 61 EEA.

Article 2

The notified scheme may not be implemented.

Article 3

This Decision is addressed to the Kingdom of Norway.

Article 4

Only the English version is authentic.

Done at Brussels, 23 July 2009.

For the EFTA Surveillance Authority

Per SANDERUD
President

Kristján A. STEFÁNSSON
College Member

CORRIGENDA

Corrigendum to Commission Regulation (EU) No 446/2011 of 10 May 2011 imposing a provisional anti-dumping duty on imports of certain fatty alcohols and their blends originating in India, Indonesia and Malaysia

(Official Journal of the European Union L 122 of 11 May 2011)

On page 61, Article 1(2):

for: 'VVF Limited, Sion (East), Mumbai',

read: 'VVF Ltd, Taloja, Maharashtra'.

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