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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.

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II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION (EU) 2016/1698**of 20 February 2014****concerning measures SA.22932 (11/C) (ex NN 37/07) implemented by France in favour of Marseille Provence Airport and airlines using the airport***(notified under document C(2014) 870)***(Only the French text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to those articles and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) On 8 May 2006, the Commission received a complaint, lodged by Ryanair, about unlawful aid due to different airport charges being applied to national flights and international flights respectively. By letter of 21 June 2006, the Commission asked France for information on the points raised by this complaint.
- (2) On 27 March 2007, the Commission received a second complaint, dated 15 March 2007 and lodged by Air France, about unlawful aid granted by the Departmental Council of Bouches-du-Rhône (‘the Departmental Council’) to Marseille Provence Airport, and also about unlawful aid granted by the airport to Ryanair and other airlines. These advantages allegedly involved, in particular, reduced airport charges to encourage flights from the new ‘Marseille-Provence 2’ terminal (‘Terminal mp2’).
- (3) By letter of 27 November 2009, Air France lodged a complaint about unlawful aid granted by several French regional and local airports, including Marseille Provence Airport.
- (4) By letter of 13 July 2011, the Commission informed France that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (‘TFEU’) ⁽¹⁾.
- (5) The Commission invited interested parties to submit their comments on the measures in question within one month of the publication date.
- (6) The Commission received comments on 13 December 2011 from the Marseille-Provence Chamber of Commerce and Industry (‘CCIMP’) and on 15 December 2011 from Air France, Ryanair, AMS, Association of European Airlines and the CCIMP. It forwarded these comments to France by letter of 10 February 2012. France was given the opportunity to respond to them within one month. The Commission received comments from France by letter of 12 March 2012.

⁽¹⁾ OJ C 334, 15.11.2011, p. 8.

- (7) It also received additional comments from Ryanair dated 13 April 2012, 10 April 2013, 20 December 2013, and 17 and 30 January 2014. These additional comments were forwarded by letter to France on, respectively, 13 July 2012, 3 May 2013, 9 January 2014 and 4 February 2014. By letters of 17 July 2012, 4 June 2013, 29 January 2014 and 5 February 2014, France informed the Commission that it had no response to make.
- (8) France sent additional information to the Commission by letters of 26 March 2012, 10 April 2012, 20 September 2012, 30 October 2013 and 24 December 2013 after this was requested by the Commission by letters of 23 February 2012, 12 June 2012 and 20 November 2013.

2. DETAILED DESCRIPTION OF THE FACTS

2.1. THE PARTIES CONCERNED

2.1.1. MARSEILLE PROVENCE AIRPORT

- (9) Marseille Provence airport is one of the largest French airports, after those of Paris, Nice and Lyon. In 2012, the airport handled 8 295 479 passengers.

Table 1

Development in the number of passengers

	2005	2006	2007	2008	2009	2010	2011	2012
Passenger traffic mp1	5 859 480	6 008 466	6 028 292	5 907 174	5 619 879	5 799 435	5 990 703	6 483 863
Passenger traffic mp2	0	107 478	934 481	1 058 703	1 670 240	1 722 732	1 372 164	1 811 616
Total traffic	5 859 480	6 115 944	6 962 773	6 965 877	7 290 119	7 522 167	7 362 867	8 295 479

Source: France's submission of 24 December 2013

2.1.2. MARSEILLE-PROVENCE CHAMBER OF COMMERCE AND INDUSTRY, CONCESSION-HOLDER FOR MARSEILLE PROVENCE AIRPORT

- (10) In France, chambers of commerce and industry ('CCI') are public administrative bodies. They represent the general interests of trade, industry and services before public authorities. Their tasks and powers are laid down by law ⁽²⁾ and they come under the administrative supervision ⁽³⁾ of the government, through the regional prefect. The supervisory authority has automatic access to all general meetings of the chambers of commerce and industry and can have one or more items added to the agenda. The supervisory authority can, where applicable, suspend or dismiss a member of the CCI. At the very least, decisions on the budget, use of debt or signature of agreements with third parties are enforceable only after approval by the supervisory authority ⁽⁴⁾. The CCIMP manages its subsidiaries, in particular Marseille Provence Airport and several training bodies. Its subsidiaries do not have their own legal personality ⁽⁵⁾. However, separate accounts are kept for the airport activities. Acts are enforceable only if they have been addressed to the supervisory authority.

⁽²⁾ Act No 2005-882 of 2 August 2005 in favour of small and medium-sized enterprises.

⁽³⁾ Under French law, administrative supervision is a form of power exercised by one legal person governed by public law over another. Regional and local chambers of commerce and industry are supervised by the regional prefect, assisted by the regional public finance officer. In accordance with the Constitution and the law, administrative supervision concerns only control of the legality of acts adopted by the legal person under supervision.

⁽⁴⁾ Articles R.712-2 to R.712-11-1 of the Commercial Code.

⁽⁵⁾ See http://www.ccimp.com/ccimp/nous_connaitre/une_structure_publique

- (11) Since 1934 the CCIMP has managed Marseille Provence Airport under a development, maintenance and operation concession granted by the French State, which owns the airport. In 1987 this concession was renewed for 30 years ⁽⁶⁾.

2.1.3. THE ECONOMIC ADVISORY COMMITTEE OF MARSEILLE PROVENCE AIRPORT

- (12) The Departmental Council of Bouches-du-Rhône, the Provence-Alpes-Côte d'Azur Regional Council and the Marseille Provence Métropole Urban Community are consulted on the airport's management within the framework of the airport's Economic Advisory Committee ('Cocoéco'). This committee's task is to give opinions on the development of investment, the airport's operation and charges for services provided by the airport.
- (13) According to the Civil Aviation Code, this committee meets at least once a year to give an opinion on the rules for establishing and applying charges for airport services at the aerodrome in question, as well as on airport investment programmes. It can be consulted on any matter relating to the services delivered by the airport operator.
- (14) Cocoéco consists of a users panel and an operators panel, with the latter comprising the President of the Provence-Alpes-Côte d'Azur (PACA) Regional Council or his or her representative, the President of the Departmental Council of Bouches-du-Rhône or his or her representative, and the President of the Marseille Provence Métropole Urban Community or his or her representative.

2.2. THE NEW 'LOW-COST' TERMINAL MP2

2.2.1. JUSTIFICATION FOR THE CONSTRUCTION OF TERMINAL MP2

- (15) Following the loss of over a million passengers since 2001, mainly due to competition from the TGV Méditerranée high-speed railway line between Marseille and Paris, the attacks of 11 September 2001 and the bankruptcies of several airlines (Sabena, SwissAir, etc.), Marseille Provence Airport was looking to revitalise its traffic and redirect its development towards European destinations. To this end, in 2004 the airport decided to set up a 'low-cost' terminal.
- (16) The CCIMP therefore decided to convert the former cargo terminal No 1 into this new terminal. This building was inexpensively refurbished to handle low-cost customers. Work began in December 2005 and Terminal mp2 started operating in September 2006.
- (17) The distribution of the number of passengers (actual figures) between Terminals mp1 and mp2 from 2006 to 2013 is indicated in the table in recital 9.

2.2.2. COMPANIES USING THE NEW TERMINAL MP2

- (18) To assess the interest of airlines in using Terminal mp2, in 2004 the CCIMP launched a call for projects aimed at the airlines. Air France, Ryanair and easyJet responded. The total volume of the proposals made by these airlines did not exceed the terminal's planned capacity and no selection was therefore necessary.
- (19) Ryanair is the main user of Terminal mp2, but France has also mentioned bmibaby.com, Condor, easyJet, Jet4you.com and Myair.com.
- (20) On 12 July 2004 Air France submitted an application to the CCIMP with regard to Terminal mp2. It indicated that 'La Navette' shuttle passengers (Marseille/Paris-Orly connections) could potentially use Terminal mp2. Air France proposed a schedule of 19 flights per day from Monday to Friday, with 14 flights on Saturdays and 18 flights on Sundays to Paris-Orly. Negotiations between Air France and the CCIMP with regard to transferring

⁽⁶⁾ Decree of 22 July 1987 granting the development, maintenance and operation concession for Marseille-Marignane aerodrome to the Marseille Chamber of Commerce and Industry, Official Gazette of the French Republic of 29 July 1987, p. 8487.

the shuttle service failed. For Air France, there were two main obstacles: the restriction of Terminal mp2 traffic to 'point-to-point' flights, and the fact that the terminal was set to handle only national and intra-EU flights.

- (21) According to the information provided by France, all airlines wanting to use Terminal mp2 were able to do so.

2.3. MEASURES UNDER INVESTIGATION

- (22) The opening decision investigated the following measures:

- (a) over the 2001-2010 period, an investment subsidy of EUR 24,2 million to the CCIMP, including a subsidy for the construction of Terminal mp2, amounting to EUR 7,577 million;
- (b) over the 2001-2010 period, financial flows amounting to EUR [...] (*) million between the CCIMP and the general arm of the CCI;
- (c) setting of the passenger charge amount for Terminal mp2;
- (d) reduced passenger charges for national flights;
- (e) reduction of airport charges in connection with the creation of new routes;
- (f) reduction of the overnight parking charge;
- (g) financing of marketing activities;
- (h) agreement to purchase advertising space concluded with Airport Marketing Services without prior publicity or competitive tendering;
- (i) profitability of Terminal mp2 revealed by the business plan presented by the CCIMP.

2.3.1. INVESTMENT SUBSIDIES FOR THE CCIMP

- (23) According to the information available to the Commission, the investment in constructing the new Terminal mp2 was funded through a EUR 7,577 million subsidy from the Departmental Council of Bouches-du-Rhône.
- (24) In addition, over the 2001-2010 period, the CCIMP received investment subsidies from the Departmental Council, Regional Council, Marseille Provence Métropole, State (Directorate-General for Civil Aviation — 'DGAC' — part of the Ministry of Ecology, Sustainable Development and Energy) and the European Regional Development Fund (ERDF), which totalled EUR 16,624 million. It received three subsidies from the Departmental Council in order to extend and restructure the airport, which were respectively EUR 1,519 million, EUR 210 000 and EUR 2,997 million. The Regional Council granted it EUR 3,616 million to extend and develop the airport and EUR 255 000 to develop the cargo area. Marseille Provence Métropole granted it a subsidy of EUR 889 000 to develop international traffic. The State (DGAC) funded the screening of hold baggage to the tune of EUR 464 000, as well as the enhanced screening of baggage and the purchase of baggage screening equipment at EUR 5,032 million. Lastly, the ERDF subsidised the development of air cargo (cargo aircraft parking areas, cargo area road, redevelopment of cargo terminals, servicing of the area) in the amount of EUR 1,520 million.
- (25) Under Articles 2(1^o)(b) and 15(1^o) of the schedule of conditions applicable to the Marseille aerodrome concession, the concession-holder must finance investments.

2.3.2. FINANCIAL FLOWS BETWEEN THE CCIMP AND THE GENERAL ARM OF THE CCI

- (26) Between 2001 and 2010, the financial flows between the CCIMP and the general arm of the CCI appear to have totalled EUR [...] * million.

(*) Information covered by professional secrecy.

2.3.3. REDUCED PASSENGER CHARGES FOR USERS OF TERMINAL MP2

- (27) The passenger charges vary depending on the terminal used by the airlines. They are lower for those using the 'low-cost' Terminal mp2, and higher for those using Terminal mp1 (Halls 1-4). These charges are decided by the CCIMP. Air France challenged the original charges at Marseille Provence Airport for 2006, 2007 and 2008 and these were annulled by the Council of State.
- (28) On 7 May 2008 the Council of State annulled ⁽⁷⁾ the approved passenger charges applicable to Terminal mp2 at Marseille-Provence airport as from 1 June 2006, as well as those applicable from 1 January 2007, due to the accounting information used to calculate the charge not providing sufficient justification. In this case, the Council of State did not annul the passenger charges applicable to the main terminal.
- (29) On 26 December 2008 the Council of State annulled the passenger charges applicable to the main terminal and to Terminal mp2 at Marseille-Provence airport as from 1 January 2008.
- (30) In a judgment of 15 May 2009, the Council of State upheld the refusal by the competent ministers to approve the charges applicable to Terminal mp2 as from 1 January 2009.
- (31) Following the annulment of these charges, the DGAC commissioned the consultancy firm Mazars to carry out a study, delivered in November 2008, on the methods for allocating costs and revenues and on the charges at the two terminals. Based on this audit, the CCIMP decided on new passenger charges that were applicable retroactively. These retroactive charges applied to Terminal mp1 (Halls 1 to 4) for 2008, and to Terminal mp2 for 2006 to 2008. According to the CCIMP, these new charges were set such that the passenger cost coverage rates ⁽⁸⁾ were similar for Terminals mp1 and mp2.
- (32) By decision of 25 May 2009, the CCIMP set the passenger charges applicable from 1 August 2009. As the supervisory authorities objected to the charges proposed by the CCIMP as from 1 July 2010, the charge from 1 August 2009 continued to apply.
- (33) On 17 July 2009 Air France lodged an application with the Council of State seeking annulment of the CCIMP's decision of 25 May 2009 in so far as it set the passenger charges applicable retroactively to Terminals mp1 and mp2 as from 1 January 2008 and also the passenger charges applicable from 1 August 2009.
- (34) On 17 July 2009 Air France also lodged an interim application. On 28 July 2009 the Council of State suspended payment of 20 % of the passenger charge due for 2008 and from 1 July 2009. Pending a judgment on the main action, this suspension was applied to the charges renewed in 2010 and from 1 January 2011.
- (35) On 14 June 2010 Air France lodged an application with the Council of State seeking annulment of the CCIMP's decision of 2010, which renewed the previous charges as from 1 July 2010.
- (36) On 27 July 2011 the Council of State ⁽⁹⁾ annulled the CCIMP's decision of 25 May 2009, which set the passenger charges for Terminal mp2 for 2008, 2009 and from 1 August 2009, on the basis that these charges were calculated taking into account a subsidy of EUR 2,4 million granted by the Departmental Council of Bouches-du-Rhône to fund part of the mp2 terminal construction work, of which Marseille Provence Airport was the direct beneficiary and the airlines were the indirect beneficiaries. According to the Council of State, this decision resulted in unlawfully granted State aid that vitiated the CCIMP's decision by unlawfulness. The Council of State also ruled that the fact of the charges for Terminal mp2 being annulled had no effect on the lawfulness of the

⁽⁷⁾ The Commission understands that the Council of State judgment had the effect of annulling the charges *ex tunc*, i.e. from their entry into force. After being annulled, these charges were therefore deemed never to have existed. The Commission understands that, in the absence of new approved charges, Article 224-4-1-II of the Civil Aviation Code provides that the previous charges (applicable before 1 June 2006) apply.

⁽⁸⁾ Coverage rate by the airport charges in both cases of $[50-80] \times \%$ on average from 2007-2012, and overall coverage rates of $[100-150] \times \%$ (mp1) and $[100-150] \times \%$ (Terminal mp2) on average (including non-aeronautical revenues from the car parks, shops and rental companies).

⁽⁹⁾ Council of State, 27 July 2011, Air France et al., No 329818, 340540.

charges set for Terminal mp1, which it underlined were justified by precise accounting studies. The Council of State stated in its decision that it was apparent from the evidence on record that communication costs of around EUR 800 000, which, according to the applicants (Air France and Britair), should have been charged only to Terminal mp2, had in fact been charged in full to overheads and were therefore split between the terminals according to a formula that had not been proven as being vitiated by a manifest error of assessment. The Council of State therefore confirmed the passenger charges for Terminal mp1. In the same decision, the Council of State annulled the landing charge for 2009 on the ground that it covered nearly three times the costs of providing this service and accounted for over a quarter of the total revenue from the airport charges. It did not therefore allow for limited offsetting between the revenue from this charge and the revenue from other charges, as required by national law ⁽¹⁰⁾. Lastly, the Council of State noted that the applicants had withdrawn their request for annulment of the traffic development incentive measures.

- (37) On 15 December 2010 Air France lodged an application with the Council of State seeking annulment of the CCIMP's decision of December 2010, which renewed the previous charges as from 1 July 2011. Air France eventually withdrew in 2011 all its actions brought at national level.
- (38) Throughout the period, the charges for Terminal mp2 were 57 % to 66 % lower for national traffic and 66 % to 80 % lower for intra-EU flights ⁽¹¹⁾ compared with the charges for Halls 1-4, respectively for national traffic, intra-EU traffic and international traffic.

2.3.4. REDUCED PASSENGER CHARGES FOR NATIONAL FLIGHTS

- (39) The passenger charges applicable for passengers departing from Halls 1-4 at the airport have traditionally differed according to the destination of flights, with one charge for national flights, one charge for flights to destinations within the European Union, and one charge for international flights.
- (40) The charges applicable in 2006 and 2007 were originally set by a CCIMP decision of 26 July 2006. The charges were significantly lower for national flights, with a difference of over 50 %.
- (41) Following a complaint by Ryanair, infringement proceedings were initiated. France informed the Commission in its note of 2 August 2007 that it had 'reminded the operator on numerous occasions that it must end the difference between charges according to the destination of flights as this could not be justified by a difference in costs'.
- (42) New charges were adopted for 2006 and 2007 and the differentiation in question was abandoned for the future.

2.3.5. REDUCTION OF CERTAIN AIRPORT CHARGES IN CONNECTION WITH THE CREATION OF NEW ROUTES

- (43) To encourage the creation of new routes or improvements in flight schedules, preferential charging conditions can be granted to airlines. This discount applies to the landing, lighting and parking charges for passenger flights and to the landing and lighting charges for cargo flights.
- (44) An initial arrangement for the reduction of airport charges was introduced by the CCIMP by decision of 7 September 2004 and came into force on 1 March 2005. These measures were referred to the airport's Cocoéco for an opinion during its meeting of 6 December 2004 ⁽¹²⁾. This arrangement was applied until 31 July 2009.

⁽¹⁰⁾ Article L.224-2 of the Civil Aviation Code states that the overall income from these charges cannot exceed the cost of the services provided at the airport.

⁽¹¹⁾ Up to 31 December 2007, there were different charges for national, EU and international destinations from Terminal mp1. There was no differentiation for Terminal mp2. From 1 January 2008 (and for the 2006 and 2007 retroactive charges), there have been different charges for Schengen EU/non-Schengen EU/International for Terminal mp1 and National + EU/International for Terminal mp2.

⁽¹²⁾ Air France's representative on Cocoéco did not vote against the introduction of the start-up aid (see Air France's complaint of 27 March 2007, p. 14).

- (45) The discount applied was 90 % in the first year of operation and 50 % in the second year. These discounts were only granted for a new route meeting the following conditions ⁽¹³⁾.
- the new route had to be operated to an airport without a regular service when the route was created;
 - the new route had to be operated to an airport at least 75 km away from an airport already served or with a substantially different catchment area from that of an airport already served;
 - the route's destination could not be within a 160 km radius of a destination served during the previous 12 months by the same airline, one of its subsidiaries, an airline belonging to the same group or an airline connected by commercial agreements (in particular franchise, code-sharing to said destination, etc.);
 - the route had to be operated at least once a week for a minimum of two consecutive months;
 - during the period that an airline was benefiting from the above reductions due to operating to a given destination, if one or more other airlines decided to operate a route to this same destination, the latter would benefit from the same measure for the same timescale as that set for the first airline.
- (46) The discounts were granted to airlines operating from both Terminal mp1 and Terminal mp2.
- (47) In a judgment of 30 June 2009, Marseille Administrative Court allowed Air France's application seeking annulment of the charge reduction arrangement adopted in 2005. The CCIMP did not appeal against this judgment as, in the meantime, the incentive arrangement had been partly renewed based on a new charging decision. Air France and its subsidiaries Britair et Regional then lodged an action for annulment with the Council of State against the CCIMP's decision setting the charges for 2008 and 2009, which included not only the aeronautical charges but also the arrangement incentivising the creation of new routes. This action for annulment was accompanied by an interim application for suspension, which the Council of State, in an interim ruling of 28 July 2009, partly allowed by ordering, in particular, the suspension of this incentive arrangement. In its decision on the main action of 27 July 2011 ⁽¹⁴⁾, the Council of State noted that the applicants had withdrawn their requests for annulment of the traffic development incentive measures for 2009 and 2010.
- (48) From 1 February 2010 to 31 October 2011, the new discount in the landing, lighting and parking charges was applied to the benefit of all airlines meeting the objective conditions for this to be granted.
- (49) The discount applied was:
- 60 % in the first year of operation;
 - 45 % in the second year of operation; and
 - 20 % in the third year of operation.
- (50) These discounts were only granted for a new route meeting the following conditions ⁽¹⁵⁾:
- passenger flights and cargo flights were eligible;
 - the new route had to be operated at least once a week for a minimum of four consecutive months;
 - the new route had to be operated to an airport at least 50 km away from an airport already served or with a substantially different catchment area from that of an airport already served;
 - the new route could not have been operated during the previous 18 months by the same airline, one of its subsidiaries, an airline belonging to the same group or an airline connected by commercial agreements.

⁽¹³⁾ Air France sent a copy of the conditions to the Commission.

⁽¹⁴⁾ Council of State, 27.7.2011, Air France et al., No 329818, 340540.

⁽¹⁵⁾ Air France sent a copy of the conditions to the Commission.

- (51) In the event of seasonal suspension, the discount was re-applied when the route's operation resumed, as if it had never been suspended: the period of interruption was included in the discount period. This incentive measure applied to both terminals and all airlines at Marseille Provence Airport.

2.3.6. FREE OVERNIGHT PARKING

- (52) In its submission of 28 December 2010, the CCIMP mentions the introduction of the 'waived overnight parking charge' measure as from 1 February 2010. As a result, parking between 22.00 and 06.00 is free under the following conditions:

- passenger transport activity;
- five weekly frequencies to the same destination during a minimum IATA season;
- aircraft parking for at least six consecutive hours between 22.00 and 06.00.

- (53) This incentive measure applied to both terminals and all airlines at Marseille Provence Airport.

2.3.7. FINANCING OF MARKETING ACTIVITIES

- (54) By decision of 21 November 2005, the CCIMP introduced a financial incentive arrangement for the creation of new routes by partly paying the specific marketing and promotional costs incurred for media approved by Marseille Provence Airport. Under this arrangement, the beneficiary airline had to provide proof of the expenditure on promoting this route. The aid amount could not exceed 50 % of the proven expenditure.
- (55) The decision to introduce a 'marketing' payment was made, without prior authorisation by France, before the publication of the Communication from the Commission — Community guidelines on financing of airports and start-up aid to airlines departing from regional airports ('the 2005 Guidelines') ⁽¹⁶⁾. By letter of 22 August 2006, France asked the CCIMP to end this arrangement no later than 1 June 2007 on the basis that this type of 'marketing' payment did not meet the criteria laid down by the 2005 Guidelines.
- (56) The CCIMP confirmed that the marketing expenditure contribution initially envisaged had not been applied, except for one contribution [of less than EUR 300 000]* to bmibaby.

2.3.8. AGREEMENT TO PURCHASE ADVERTISING SPACE WITH AMS

- (57) On 19 May 2006 the CCIMP concluded, for a term of five years, without prior publicity or competitive tendering, an agreement to purchase advertising space with the company Airport Marketing Services ('AMS'), a wholly-owned subsidiary of the airline Ryanair.
- (58) According to the provisions of this agreement, the CCIMP was to pay AMS:
- EUR [...] per month between November 2006 and October 2007,
 - EUR [...] per month between November 2007 and May 2008,
 - EUR [...] per month from June 2008.
- (59) It was indicated in the Cocoéco decision of 18 February 2009 on the charges that were set in the decision of 25 May 2009 that 'the cost of the AMS agreement over the agreed term, i.e. October 2006-October 2011, is EUR [...]*, i.e. EUR [...] per year'.

⁽¹⁶⁾ Communication from the Commission — Community guidelines on financing of airports and start-up aid to airlines departing from regional airports (OJ C 312, 9.12.2005, p. 1).

- (60) The information provided by France also allows the cost of the AMS agreement to be determined, as indicated in Table 2:

Table 2

Costs of the AMS agreement according to the information provided by France (EUR '000)

2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*

- (61) According to the CCIMP, the objective of this agreement was to publicise Marseille as a destination in order to attract high passenger numbers. This would ensure the sustainability of Terminal mp2 and a good return on the services offered by the airport operator.
- (62) In this respect, the CCIMP considered that the pursuit of this objective relied on a combination of two factors:
- a high volume of internet users;
 - European internet users open to the low-cost model.
- (63) The CCIMP justifies the conclusion of this agreement with AMS by the fact that only the latter's website met the CCIMP's needs in 2006, as it offered the following services:
- a unique and exclusive Ryanair ticket marketing system, with Ryanair being the only operator to undertake to establish a significant aircraft base at the new Terminal mp2;
 - a large audience of internet users targeted by the CCIMP's promotional policy;
 - marketing services appropriate to the purchase of flight tickets to Provence as a destination.
- (64) The complainant takes the view that this agreement concluded with AMS represents aid to Ryanair in order to attract the latter to Marseille Provence Airport. In this respect, it provides evidence in support of its position, based on the preparatory dossier for the CCIMP 'airport advisory committee' meeting on 15 November 2005.

2.3.9. BUSINESS PLAN FOR TERMINAL MP2 AND APPLICATION OF THE MARKET ECONOMY OPERATOR PRINCIPLE

- (65) In November 2004 the CCIMP drew up a business plan to prove the profitability of Terminal mp2. This plan was updated in 2005. Further updates of this business plan were assessed by PricewaterhouseCoopers (PwC) at the request of Air France in February 2005, November 2005 and May 2006.
- (66) The business plan submitted by France compares, for the 2004-2020 period, a scenario with Terminal mp2 and a scenario without Terminal mp2. According to France, the total of the annual cash flows for the 2004-2020 period and the net book value in 2020 are:
- EUR [...]* million in the scenario without Terminal mp2;
 - EUR [...]* million in the scenario with Terminal mp2.
- (67) France therefore concludes that the scenario with Terminal mp2 is EUR [...]* million more beneficial than the scenario without Terminal mp2, which would correspond to a rate of return of [...]* %.

- (68) The business plan also contains a sensitivity analysis for different traffic and charging assumptions. The 'traffic' scenarios studied were a scenario 'without transfer of the Air France shuttle' and a 'lower growth in Terminal mp2 traffic' scenario. The 'charging' scenarios studied involved charges of EUR [...] * and EUR [...] * per passenger for Terminal mp2.
- (69) The business plan was updated in 2005. On this occasion, three scenarios were simulated as follows:
- **First simulation:** the 2005 traffic forecasts became the basis for the calculations, transfer of the Air France shuttle to Terminal mp2 was no longer included in the base scenario, and the calculations were made for the 2005-2021 period. Based on these assumptions, the internal rate of return was put at [in excess of 7,5 %]*.
 - **Second simulation:** the internal rate of return was set at 7,5 % and the number of passengers corresponding to this internal rate of return was calculated. The simulation concluded that the number of passengers over the 2007-2021 period could be 1,32 million less than in the first simulation.
 - **Third simulation:** if Terminal mp2 traffic in 2010 was only 1 million passengers (instead of the 1,65 million used in the first simulation), what additional charges would have to be applied per passenger from 2011 to maintain an internal rate of return of 7,5 %? The simulation concluded that the charges would need to be increased by EUR [...] *.
- (70) The assessments made by PwC at the request of Air France in the action before the Council of State involve simulations from February 2005, September 2005 and May 2006 produced by the CCIMP and aimed at establishing the internal rate of return and net present value (NPV) of the Terminal mp2 project based on expected cash flows. In this respect, PwC makes several remarks and criticisms about the business plan in question.

3. FRANCE'S COMMENTS

3.1. INVESTMENT SUBSIDIES FOR THE CCIMP

3.1.1. SOME OF THE SUBSIDIES GRANTED ARE SUBJECT TO LIMITATION

- (71) France contests the Commission's view that the EUR 7,577 million allocated between 2005 and 2007 for construction of Terminal mp2 and the EUR 16 million granted from 2001 for investment in the airport constitute in their entirety State aid that may be analysed by the Commission.
- (72) Pursuant to Article 15 of Council Regulation (EC) No 659/1999 ⁽¹⁷⁾, France maintains that the subsidies indicated below in Table 3 are subject to limitation:

Table 3

Body	Date and signature of agreement	Description of subsidy	Total amount paid (EUR '000)
Departmental Council	14 December 1999	Work to extend and restructure the airport facilities	3 064
Regional Council	24 October 1997	Work to extend and develop the airport	8 032
Regional Council	8 July 1994	Development of the cargo area	1 372

⁽¹⁷⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

Body	Date and signature of agreement	Description of subsidy	Total amount paid (EUR '000)
State	26 April 2000	Upgrading of instruction and information signs	290
State	23 June 1999	Screening of hold baggage	579

- (73) France maintains that the subsidies subject to limitation cannot be included in a recovery order and are therefore necessarily excluded from the scope of the Commission's investigation.

3.1.2. SOME OF THE SUBSIDIES GRANTED WERE USED TO FUND NON-ECONOMIC ACTIVITIES AND INFRASTRUCTURES AND DO NOT THEREFORE CONSTITUTE STATE AID

- (74) France maintains that some subsidies were used to fund activities or infrastructures connected with the exercise of powers in respect of public safety, firefighting and operational safety, namely:

- the subsidy granted by the State on 19 December 2001, given that this was allocated to improve the aviation safety arrangements, and in particular to finance the random search of a certain percentage of hand baggage, the systematic inspection of staff entering restricted areas and the acceleration of the hold baggage screening programme to achieve a rate of 100 % by the start of the second half of 2002, in a total amount of EUR 5 032 000;
- the subsidy granted by the Departmental Council on 27 September 2002, given that this was allocated to cable runway 2, improve the computer backup room and a space within the TFE building, renovate the façade of the technical unit within the air navigation premises, replace the central low-voltage distribution board at substation B, and upgrade the terminal alarm system and the fire safety system in the computer room, in a total amount of EUR 209 885;
- the subsidy granted by the Departmental Council on 26 April 2003, given that this was allocated to renew the lighting equipment, enlarge and improve access to the car park, reconfigure the border police booth, create a care unit, improve the perimeter road in the southern zone, replace fan coil units, install a CCTV camera network, and replace the boiler in the TFE building, the firefighting system in the western zone and the digital protection equipment, in a total amount of EUR 2 111 542,82;
- the subsidy granted by the Departmental Council on 19 May 2005 to partly finance Terminal mp2, which was partly allocated to fund non-economic infrastructures in a total amount of EUR 2 273 258,64. France points out that the tasks identified as being non-economic are carried out within an area representing 16,96 % of Terminal mp2 and considers that an equivalent part of the work involved the areas allocated to these tasks. France consequently maintains that 16,96 % of the cost of the work after deducting the investments associated with the non-economic activities, i.e. EUR 1 416 238,75, must also be deducted from the Commission's assessment;
- the subsidy granted by Marseille Provence Métropole on 26 July 2004, given that this was allocated to runway lighting, in an amount of EUR 72 095;
- the ERDF subsidy granted on 22 August 2002, given that this was allocated to carry out lighting work in the cargo aircraft parking areas, in a total amount of EUR 587 350,53.

- (75) According to France, the sums concerned must be deducted from the amount assessed by the Commission.

3.1.3. COMPATIBILITY OF THE INVESTMENT SUBSIDIES WITH THE 2005 GUIDELINES

- (76) France maintains that, under the principle of protection of legitimate expectations, the Commission must assess whether the subsidies granted before publication of the 2005 Guidelines constitute State aid under the guidelines on State aid in the aviation sector of 10 December 1994, and consequently conclude that these subsidies do not constitute State aid.

- (77) In the alternative, France takes the view that the subsidies granted are compatible with the 2005 Guidelines.

3.1.3.1. Compatibility of the Departmental Council subsidy for investment in Terminal mp2

- (78) France maintains that this subsidy meets a clearly defined objective of general interest involving the creation and maintenance of direct jobs in a region with an unemployment rate higher than the national average, regional economic development in an area eligible for regional aid under the derogation in Article 107(3)(c) TFEU, airport capacity-building given a risk of saturation ⁽¹⁸⁾, and improvement of local connectivity in relation to new traffic that was not served by the TGV line or Terminal mp1 and that benefited from the increased number of destinations served.
- (79) France takes the view that the infrastructure was necessary and proportional to the objectives pursued. Although part of Terminal mp1 had overcapacity after 2001, Terminal mp2, which was a new product offering a different service, was created as a complementary offer to that of the main terminal. Moreover, given the traffic forecasts, Marseille Provence Airport needed to confront congestion problems that would have necessitated the opening of new departure areas in 2008 and 2018. According to France, construction of Terminal mp2 enabled the necessary infrastructure improvements to be postponed (to 2016 and after 2020), while offering better prospects for profitability. In addition, the new Terminal mp2 was in direct line with the airport's strategy of attracting low-cost airlines, which could not have established themselves at Terminal mp1 given its significantly higher charges and the fact that it does not lend itself to the need for the rapid boarding and disembarkation of passengers. France maintains that in 2007, the first full year of operation of Terminal mp2, the terminal's usage rate was 68 %, which proves that there was no real overcapacity. It adds that the spare capacity of Terminal mp1 from 2007 to 2011, linked to the creation of Terminal mp2, allowed Air France's new needs to be met in terms of opening its base on 2 October 2011 for the creation of 13 new routes and an increase in frequencies. Lastly, the construction of Terminal mp2 within a former cargo terminal, as also the reduced comfort offered to passengers at this terminal, have enabled the investment and maintenance costs to be minimised.
- (80) France maintains that the long-term prospects for the use of Terminal mp2 are satisfactory. The construction of this terminal was in line with the desire to develop new traffic at the airport, which was not served by Terminal mp1 and which enabled the airport to avoid opening routes already served by the TGV. The increase in the number of destinations offered, from 100 in 2005 to 119 in 2010, has further boosted the attractiveness of this new service, and therefore its long-term prospects for use. France underlines that the traffic forecasts for Terminal mp2, which have been confirmed by real traffic figures for 2007 to 2010, indicate that 50 % of its capacity should be in use after five years. Lastly, the increase in Air France traffic from Terminal mp1 as of 2 October 2011 proves that the additional capacity provided by Terminal mp2 does not constitute competition for the main terminal, but an asset for the airport, having enabled it to respond favourably to Air France's demand.
- (81) France maintains that the subsidies granted have had only a limited effect on intra-Community trade. As regards Avignon Airport, which is less than 60 minutes away from Marseille Provence Airport, France observes that the low-cost traffic at this airport has remained stable since 2007, that further improvements have been made to the airport since 2007, with new routes having been opened, and that none of the destinations served are accessible from Marseille Provence Airport. If the area is expanded to include Nîmes and Toulon Airports, France notes that these fall under the category of small regional airports and do not therefore have the same vocation as Marseille Provence Airport, where the traffic exceeds 5 million passengers. The fact that the destinations served are not all (except for London and Brussels) accessible from Marseille Provence Airport proves that there is no competition between these airports.
- (82) France maintains that the Departmental Council subsidy was necessary to achieve the break-even point usually demanded by operators. As the May 2006 business plan indicated an internal rate of return of [...] % if the Departmental Council subsidy were deducted, France maintains that the project's profitability would have been reduced to [...] % in the absence of this subsidy. France also maintains that the subsidy was proportional as it enabled a satisfactory internal rate of return to be achieved, in the absence of a less onerous option that would have allowed the same results to be achieved. It points out that the work on the terminal was subject to public

⁽¹⁸⁾ Communication from the Commission — an action plan for airport capacity, efficiency and safety in Europe, COM(2006) 819 final, not published in the OJ.

procurement, which may confirm that the costs were minimised. Lastly, France notes that the subsidy granted covered only 50 % of the total amount of the Terminal mp2 project, i.e. 80 % of the work in respect of aircraft and 30 % of the work in respect of the terminal.

3.1.3.2. *Compatibility of the ERDF subsidies of 22 August 2002 for the development of air cargo*

- (83) As a preliminary point, France notes that part of the subsidy was for investments in non-economic activities and that only the remainder of the aid granted therefore needs to be recognised as compatible with the TFEU rules ⁽¹⁹⁾.
- (84) France points out that the application for financing for Marseille Provence Airport was made to the ERDF under the programming for Objective 2 of the Structural Funds for the 2000-2006 period, for which the Provence-Alpes-Côte d'Azur region was eligible, and which was approved by the European Commission on 22 March 2001.
- (85) According to France, the aid granted met a clearly defined objective of general interest: optimisation of the existing infrastructure in order to develop the cargo activity, in response to the fall in tonnage transported and in connection with the pool of jobs provided by the airport ⁽²⁰⁾ in an area affected by a particularly high unemployment rate.
- (86) France maintains that the infrastructure concerned was necessary and proportional to the objective. It explains that this infrastructure involved the construction of a new ring road and roundabout to manage road traffic flows with a view to increased traffic, redevelopment of the cargo terminals in premises left vacant, creation of aircraft parking areas close to the cargo terminals to reduce handling time, and expansion of the cargo area to increase its attractiveness.
- (87) France maintains that the traffic results ⁽²¹⁾ prove that the infrastructure had satisfactory long-term prospects for use, and points out that the infrastructure is available to all operators.
- (88) Lastly, France maintains that a subsidy justified by the need to develop an area facing structural difficulties, and which financed only 28 % of the total project cost, could not have affected intra-Community trade. It believes that the project financing cannot be called into question as the ERDF eligibility criteria were met. France underlines that the financing granted helped to improve road access to the airport infrastructure and remedy the issues preventing the free movement of goods.

3.1.3.3. *Compatibility of the subsidy of 26 June 2003 for the extension and restructuring of the airport*

- (89) As a preliminary point, France notes that part of the subsidy was for investments in non-economic activities and that only the remainder of the aid granted, i.e. EUR 888 457,18, therefore needs to be recognised as compatible with the TFEU rules.
- (90) France maintains that this subsidy met a clearly defined objective of general interest involving the economic development of the Bouches-du-Rhône department and Provence.
- (91) France believes that the investments concerned were necessary and proportional to that objective as they aimed to increase the number of hourly aircraft movements by renovating runway 1, constructing ramps and creating quick exits.

⁽¹⁹⁾ The Commission highlights an inconsistency in France's response, which claims that the aid amount to be subject to a compatibility analysis is first EUR 932 649 (p. 26) and then EUR 980.

⁽²⁰⁾ France explains that an impact study conducted by the CCIMP concluded that the airport's cargo activities accounted for 582 jobs in 2000 and 614 jobs in 2009.

⁽²¹⁾ France explains that cargo traffic increased by 20,86 % between 2005 and 2010, and totalled 52 179 tonnes in 2010.

- (92) France maintains that the investments were essential in order to handle additional traffic. As a result, the work carried out increased the runway capacity to 140 000 commercial aircraft movements per year. However, in its response, France cites traffic targets of 113 909 movements in 2015 and 122 449 movements in 2020. The improvements made therefore meant that runway capacity work would not have to be envisaged for the next 10 years, while benefiting from satisfactory medium-term prospects for use according to France.
- (93) France confirms that the infrastructure is accessible to all users and maintains that the only commercial airport less than 60 minutes away by road is Avignon Airport. As this is a Category D airport, with which Marseille Provence Airport is not in competition, the aid in question has not affected intra-Community trade.

3.1.3.4. *Compatibility of the subsidy of 26 July 2004 for the development of the airport*

- (94) As a preliminary point, France notes that part of the subsidy was for investments in non-economic activities and that only the remainder of the aid granted, i.e. EUR 816 535, therefore needs to be recognised as compatible with the TFEU rules.
- (95) France maintains that this subsidy met a clearly defined objective of general interest involving the development of the Marseille metropolis and region, by consolidating national traffic and developing international traffic at Marseille Provence Airport, as well as its rail connection.
- (96) France asserts that meeting this objective necessitated the work carried out, namely an increase in the capacity of Hall 1 and its upgrading in line with international standards, optimisation of runway 1 and reconstruction of runway 2, and construction of a railway station accessible to the TGV.
- (97) France maintains that the increase in passenger traffic proves that these facilities have satisfactory long-term prospects for use. It adds that the planned construction of the railway connection could only increase use of the airport.
- (98) According to France, the infrastructure is accessible to all users without discrimination. It underlines that the allocation of the halls to national, Schengen and international flights is necessary for the smooth management of passenger flows in line with the rules on border control, and that the location of flights at one or other of the terminals does not alter the fact that all airlines are free to access both terminals according to the flights that they operate.
- (99) France notes its belief that the work carried out has not affected intra-Community trade, given the absence of any airport in the same category located within the same area of activity, and it also stresses that the investments covered by the subsidy of 26 July 2004 were not directly intended to increase the airport's capacity.
- (100) France maintains that the conditions for the granting of the subsidy in question were such that they guaranteed compliance with the principle of proportionality ⁽²²⁾. It notes that the public authority's commitment was limited to EUR 1 million over three years.

3.2. MARKET ECONOMY OPERATOR TEST APPLIED TO TERMINAL MP2

- (101) France maintains that PwC's criticism that deducting a proportion of the investment subsidy from the depreciation of the Terminal mp2 infrastructure distorts the market economy operator test is unfounded. According to France, the accounting rules in force require equipment subsidies attributable to future years to be deducted from the net book values of fixed assets. Moreover, the treatment of subsidies has been the same for Terminals mp1 and mp2, which have both benefited from a subsidy amounting to 30 % of the cost of the work

⁽²²⁾ The agreement concluded between the CCIMP and the Marseille Provence Métropole Urban Community stipulated that the public authority's contribution was set in line with the investment programmes proposed by Marseille Provence Airport and accepted by the authority, that the funds were strictly intended to cover expenditure validated in this way, that the annual public contribution was limited to the expenditure actually incurred by the airport in the year, that each call for funds was to be accompanied by a summary statement of the expenditure, and that the CCIMP was to keep at the authority's disposal all the invoices for the work.

on the terminal. Lastly, if the gross flows had been taken into account in the basis for the passenger charge costs, this would have led the operator to invoice users for costs that it had not actually incurred. More broadly, as France has judged that the subsidy received from the Departmental Council was compatible with French and EU law, it considers that the CCIMP acted as a market economy operator by not including, in the business plan produced, any costs that it may not have actually incurred.

- (102) As regards the inclusion in the business plan of the net book value (NBV) amount of the investments made during the period according to the cash flow taken into account, France asserts that this simply expresses, in accounting terms, the provisions of the schedule of conditions of the 1987 concession agreement. France maintains that this type of provision is common in concession agreements and seeks to take account of the respective durations of the investment project and concession agreement.
- (103) To justify the value of 7,5 % used to reflect the weighted average cost of capital (WACC), France maintains that this is consistent with the average estimate of the WACC for French airports ⁽²³⁾, although it is slightly higher due to the airport's regulated scope and due to the fact that the estimate was made in a period (2004) prior to the referenced estimates. France points out that the Mazars consultancy uses, in its study, the same WACC assumption as the operator of Marseille Provence Airport.
- (104) France maintains that the Commission has wrongly highlighted the absence of any increase in external costs associated with modulations for objectives of general interest (incentive for the creation of new routes), as these modulations were in fact taken into account, not in the costs, but as discounts on the landing, lighting and parking charges in all the cases studied. France adds that these modulations benefited users of both Terminal mp2 and Terminal mp1 and that their application between 2005 and 2010 reveals that, overall, the discounts granted were balanced between the two terminals (EUR [...] million for Terminal mp1 and EUR [...] million for Terminal mp2). France has also submitted a business plan produced *ex post* for the years 2005-2010, which confirms that the business plans presented in September 2005 and May 2006 were based on forecast figures close to the actual figures, and that the profitability of Terminal mp2 has proved to be better than that envisaged at the time of the investment decision.

3.3. OPERATING CONTRIBUTION GRANTED TO THE CCIMP

- (105) With regard to the contributions totalling EUR [...] million paid by public authorities to the CCIMP, France maintains that they do not constitute operating subsidies, but rather compensation for services rendered by the general arm of the CCI to Marseille Provence Airport. France explains that, given the accounting separation between the airport arm of the CCI and its other arms, the sums covered by this Decision correspond to the rebilling of services rendered by the general arm to the airport, and therefore constitute contributions corresponding to services billed for the 2001-2010 period.
- (106) France highlights that a certificate issued by the CCIMP's auditor confirms the absence of financial flows from the central services of the CCIMP to Marseille Provence Airport.
- (107) France has also explained how the airport tax system works in order to show that there is no State aid involved in this mechanism. France states that the airport tax is provided for in Article 1609 *quater* of the General Tax Code (*code général des impôts* — CGI), which stipulates that it is collected for the benefit of public or private persons operating aerodromes, that it is payable by any public air transport undertaking and that it is exclusively used to reimburse costs incurred by airport operators in carrying out sovereign tasks such as fire-rescue-safety services, control of bird hazards and security. France further states that the airport tax amount is set annually, airport by airport, according to the services provided under the regulations in force and the expected trends in traffic figures, costs and other income received by the operator. Aerodrome operators therefore produce an annual declaration of costs and traffic, which is sent to the local civil aviation safety directorate for validation. The tax is calculated by the national government's Directorate-General for Civil Aviation, based on the cumulative results from previous years.
- (108) France disputes the finding that this mechanism could involve elements of State aid. First of all, it underlines that this general system is applicable to all French airports according to the same rules.

⁽²³⁾ The decisions of the airport's advisory committee produced by France refer, in the case of ADP, to a WACC of 5,8 % to 6,5 % for the 2006-2010 period and 6,2 % to 6,8 % for the 2011-2015 period, and to a WACC of 6 % to 6,5 % in the case of Toulouse Airport for the 2009-2013 period.

- (109) It further states that, given the fact that the tax rate is set according to forecast cost and traffic figures, it is difficult to ensure that the tax revenue perfectly matches the costs in any given year, but disputes that there may be overcompensation.
- (110) France points out in this respect that airport operators are reimbursed for costs only *ex post* according to the depreciation charge and that, when a positive balance is recorded, this is added to the cumulative accounts from previous years and carries financial charges payable by the operator, which gives rise to a tax adjustment in the following year. France notes that the airport tax system has been in overall deficit for a number of years (by around EUR 110 million at the end of 2010), meaning that part of the safety and security costs borne by airports is not compensated, with this part being allocated to financial costs payable by the State. France underlines that tax increases occurring *ex post* have to take account of the effects on airlines, which prevents the deficit from being clawed back too quickly.
- (111) Lastly, France refers to the 'reset' mechanism that applies if an airport operator changes, which requires the operator to reimburse any positive balance recorded at the end of its term.
- (112) With regard to Marseille Provence Airport, France states that the cumulative deficit in the airport tax system was EUR 2,7 million at the end of 2000, that the balance was restored in 2010 with a tax rate set at EUR 8,20 and that the rate for 2011 was adjusted downwards (EUR 7,774) so that a surplus was not generated.

3.4. SETTING OF PASSENGER CHARGES FOR TERMINALS MP1 AND MP2

- (113) France maintains that the differentiation in charges between Terminals mp1 and mp2 is in line with the provisions of Directive 2009/12/EC of the European Parliament and of the Council ⁽²⁴⁾ and points out that Terminal mp2 is open to all airlines. It explains that this differentiation in charges between Terminals mp1 and mp2 is due to the underlying cost difference between the passenger functions of these terminals. France states that, in its decision of 26 July 2011, the Council of State accepted that the charges for Terminal mp1 were valid, which, according to France, therefore means that it incidentally accepted the validity of the accounting rules allocating the costs and revenues between Terminals mp1 and mp2. Lastly, France stresses that, due to the 'single till' principle that is applied at Marseille Provence Airport, the difference between the cost price of the passenger charge and the actual passenger charge consists of non-aeronautical resources specific to the terminal in question, which a prudent operator would take into account when determining the charge applicable to the terminal.
- (114) France disputes that the CCIMP took into account only the additional costs that were directly linked with the commissioning and operation of Terminal mp2. It alleges that, as the two terminals are geographically separated, it is possible to separate out all the investments needed for Terminal mp2, i.e. EUR 8,95 million. France notes that the cost structure of an airport essentially consists of fixed costs.
- (115) France then details the elements used to determine the operating costs attributed to Terminal mp2:
- as Terminal mp2 represents only 8,9 % of the airport's total terminal area, it accounts for only 9,8 % of the total for the 'tax and insurance' cost item;
 - as the servicing and maintenance costs essentially involve the repair of mechanical parts such as lifts, travellers and escalators, the simplified-service terminal, which does not have any travellers or escalators, accounts for only 5 % of the 'servicing and maintenance' cost item;
 - as Terminal mp2 is new and better insulated, has a significantly lower ceiling height than Terminal mp1 and represents 8,9 % of the airport's terminal area, it accounts for only 8,6 % of the 'fluids' (energy) costs;
 - 7,8 % of the cleaning costs are allocated to Terminal mp2, given the proportion of the area occupied (8,9 %) and the floor covering (tiling in Terminal mp2, carpeting in Terminal mp1), with an identical cleaning frequency in the two terminals;

⁽²⁴⁾ Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges (OJ L 70, 14.3.2009, p. 11).

- the creation of Terminal mp2 has not resulted in any additional staff costs, except for one hiring at the terminal coordination unit (*poste de coordination de l'aérogare* — PCA) in 2007, one hiring at the operational coordination unit (*poste de coordination d'exploitation* — PCE) and one hiring at the information office (*bureau d'information* — BI) in 2010, which are shown in the table produced by France, with the latter having also detailed in its response the formulas used to allocate the operating costs between the two terminals.
- (116) France therefore maintains that, as the operating costs were allocated at constant staffing levels, the costs allocated to Terminal mp2 are as economical with regard to the passenger charge as for Terminal mp1. France further notes that the costs allocated to Terminal mp2 in fact correspond to the additional costs that would have been borne by Terminal mp1 if the second terminal had not been constructed (Annex 44 and Annex 25).
- (117) France also disputes PwC's conclusion that investments not directly allocated to the terminals must be indirectly allocated, and details the investments that are not included in the passenger charge and how they are taken into account in the accounting plan (investments in buildings separate from the terminals for which separate rental income is received, one-off investments to replace obsolete facilities that are allocated to specific cost centres, and road infrastructure, IT and walkway investments that are allocated to a specific cost centre and, where applicable, included in the overheads). France further disputes PwC's argument that, as Terminal mp2 passengers may use the facilities of Terminal mp1, 10 % of Terminal mp1's depreciation should be allocated to Terminal mp2. It maintains that the clear separation between the airport's infrastructures makes this use very unlikely, that this would involve allocating an area equivalent to the total area of Terminal mp2, and that this would require the commercial revenues of Terminal mp1 to be allocated in the same proportion to Terminal mp2, i.e. a reduction in the margin of the main terminal of EUR [...] million.
- (118) France further underlines that the traffic assumptions used by PwC in its 2006 and 2007 reports are based on forecasts from the November 2004 business plan and do not take account of the downgrading of the traffic figures in the September 2005 and May 2006 business plans, following Air France's decision not to transfer its shuttle service to Terminal mp2, and the six-month delay in the decision to open the new terminal, which significantly reduced the traffic in 2006 and 2007. France disputes the finding in the PwC report that Terminal mp1's traffic was 'cannibalised' by Terminal mp2. It stresses in this respect that Air France did not in the end implement its plan to transfer the Orly shuttle flights to Terminal mp2 and that Air France's traffic over the 2008-2011 period remained stable for each of the two destinations for which Ryanair operated competing routes from Terminal mp2 from 2009 onwards.
- (119) France maintains that, as PwC's arguments are unfounded, the charge of EUR 3,84 per passenger is also unfounded, and points out that this is higher than the charge applied to Terminal mp1 in 2007.
- (120) France notes that, following annulment by the Council of State of the charges applied to Terminal mp2 for 2006, 2007 and 2008 and the charges applied to Terminal mp1 for 2008, the airport operator set new charges for each of the terminals. The justification for an increase in the charges at Terminal mp2 lies in the requirement imposed by the regulator (Ministers for the Economy and Civil Aviation) for the AMS advertising agreement costs to be allocated to this terminal alone, without the formulas for allocating costs between the terminals having been called into question.
- (121) According to France, the CCIMP set the charges at a level to achieve an identical cost coverage rate for each terminal (i.e. [...] %). France maintains that Directive 2009/12/EC provides that the level of airport charges may be differentiated according, inter alia, to their costs and that, to ensure that this differentiation in charges is justified by a difference in costs, the coverage rate of these costs by the passenger charge for each terminal should be equivalent. France adds that this coverage rate can be less than 100 % if the 'single till' regulation regards the overall economic equilibrium of the airport as including non-aeronautical revenues. France notes that the Mazars consultancy estimated in its report that, for 2007, the coverage of passenger costs by the income from the passenger charge was [...] % for Terminal mp1 and [...] % for Terminal mp2.
- (122) France concludes that the passenger charges at Terminal mp2 cannot constitute an economic advantage in favour of an undertaking pursuant to Article 107(1) TFEU as they were set in relation to the costs involved in constructing and operating Terminal mp2, that the difference between the passenger charges for using each of the terminals is objective, transparent and justified by the costs allocated to each terminal, and that the differentiation is, in this respect, expressly provided for by Article 10 of Directive 2009/12/EC.

- (123) The selectivity of the measure is also not proven in this case, as the charges were applicable without distinction to any airline using Terminal mp2.
- (124) As regards the reduced passenger charges for national flights, France states that the Order of 16 October 2009 thereafter prohibited any differentiation in charges for countries in the Schengen area and notes that, in its decision of 28 January 2009, the Commission considered that it was not necessary to propose additional measures.

3.5. REDUCTIONS IN THE CHARGES FOR CREATING NEW ROUTES

- (125) As a preliminary point, France maintains that all state airports and a very large number of decentralised airports in France agree to the modulation of charges for airlines, as assessed by the Commission in recitals 116 to 137 of its opening decision.
- (126) It adds that these measures are intended to encourage the creation of new air routes. They meet an objective of general interest involving improvement of the area's service and connectivity, regional development and integration in the European market.
- (127) According to France, the claimed objective of general interest must be taken into account by the Commission in its analysis of the compatibility with European law of the aid granted in this respect.
- (128) France also maintains that the modulation of charges is annually approved by the State through an approval procedure applicable to all state aerodromes, which ensures that the measures are non-discriminatory. According to France, the annual approval procedure for charges is therefore sufficient to meet the requirement that the Member State must have an appeal mechanism to remedy any discrimination in the granting of aid, which is one of the compatibility criteria for the aid under investigation.
- (129) France points out that the national law (Article R.224-2-2 of the Civil Aviation Code) establishing the possibility of the modulation of charges requires the person responsible for setting charges to define monitoring indicators corresponding to the objective of general interest pursued. France maintains that the monitoring indicators chosen ensure each year that the measure is being correctly implemented and identify any needs for adjustment, and are sufficient to meet the aid compatibility criterion involving the existence of a penalty mechanism if a carrier fails to fulfil its undertakings towards the airport.
- (130) France explains that the assessment of the modulation of charges, since 2005 when this system came into operation, has been regularly included in the dossiers for Cocoéco meetings, which proves that the measures granted have been made public to representatives of airport users, and is sufficient to meet the aid compatibility criterion involving publication of the measures concerned.
- (131) France underlines that the modulation of charges under review complies with the provisions of Directive 2009/12/EC allowing Member States to modulate airport charges for issues of public and general interest. France therefore concludes that the airport operator is not required to act as a market economy operator when applying such a modulation. It stresses that other modulations of charges for issues of general interest exist under French law, particularly environmental issues, such as the modulation of the landing charge according to the aircraft category and the time of day in relation to noise pollution.
- (132) France disputes that such measures constitute start-up aid and maintains that they aim to internalise certain components of public interest (offsetting of environmental damage, improvement of local connectivity, etc.), which would not otherwise be taken into account in the charges.
- (133) France maintains that a business plan showing that the modulations granted are not profitable would not, however, mean that the operator should not grant those modulations as this business plan would not take account of the externalities generated by those measures, such as savings made in terms of pollution and noise emissions or improvement of local connectivity and service. According to France, the difficulty in putting a monetary value on those externalities has meant that a different assumption has been used for these incentive measures under Directive 2009/12/EC.

- (134) France rejects the Commission's methodological approach, which involves applying the market economy operator test, as it claims that this is inappropriate for analysing measures where the object is allow the public interest to benefit from positive externalities.
- (135) France maintains that the information produced in recital 124 of the Commission's opening decision is incorrect. The charges indicated refer to a variable part of the landing charge per passenger. In reality, the variable part of the landing charge is calculated based on the number of tonnes of the aircraft and not on the number of passengers.
- (136) In the alternative, France maintains that the modulated charges for creating new routes are economically profitable for Marseille Provence Airport. With its response, France has produced an *ex post* study of the profitability of the measures granted. According to France, the calculations made using commercial revenues from 2008 prove that the average discount granted for a route operated using the type of aircraft that use Terminals mp1 and mp2 is less than the revenues generated by the revenues allocated to each of these terminals, and results in a net income of EUR [...] per passenger for Terminal mp1 and EUR [...] per passenger for Terminal mp2. France maintains that 83 % of the traffic created by this measure continued after the three years, resulting in additional profit. France states that a further profitability study on the modulations approved by Cocoéco on 6 December 2004 was conducted using the September 2005 business plan, updated in May 2006, based on a 67-tonne B737 aircraft using Terminal mp2 and an A319 aircraft using Terminal mp1. Two traffic assumptions were studied: in the first, the increase in traffic from the third year of the modulations stemmed only from an increase in frequencies on existing routes; in the second, the increase in traffic stemmed exclusively from the new routes. The first assumption results in a net income/turnover ratio of [...] % and an NPV of EUR [...]; the second assumption gives a net income/turnover ratio of [...] % and an NPV of EUR [...].
- (137) France maintains that the modulations were non-discriminatory and were applied to all airlines meeting the eligibility conditions. It therefore disputes that the measure can be characterised as State aid under the selectivity criterion.
- (138) France points out that, in its decision on Manchester Airport ⁽²⁵⁾, cited in its Charleroi decision ⁽²⁶⁾, the Commission recognised that the granting of reductions on landing charges constituted a measure of limited duration and formed part of an arrangement open to all airlines starting a new route from Manchester, such that it precluded any distortion of competition and fell outside the scope of Article 107 TFEU. France therefore concludes that an arrangement accessible to all airlines and granted for a limited duration falls outside the scope of Article 107 TFEU.
- (139) France presents the modulated charge arrangement in force from 15 February to 31 July 2009 and explains that 24 airlines benefited from this. It notes that the arrangement was annulled by Marseille Administrative Court in its judgment of 30 June 2009, on the ground that the modulation was too large, and was replaced from 1 February 2010 by an arrangement under which the proposed discount rates were reduced and the conditions for granting these discounts were made stricter. France maintains that the conditions laid down by the Manchester decision were met in the case of both modulated charge arrangements, with the modulations in question not falling within the scope of Article 107 TFEU. According to France, the Commission therefore wrongly examined, in its opening decision, the modulations in question with regard to the market economy operator principle.

3.6. REDUCTIONS GRANTED ON THE OVERNIGHT PARKING CHARGE

- (140) France maintains that this discount was introduced, like the one for new routes, for general interest issues. Modulation of the overnight parking charge enabled Marseille Provence Airport to increase flight flows at the start and end of the day, ensuring that optimum use was made of the infrastructure. France underlines that the impact of this measure was limited to [...] % of the parking charge turnover, excluding the effects of modulations for creating new routes.
- (141) France states that, in its view, modulations for general interest issues should not be assessed strictly in terms of their profitability. However, it also points out that compliance with the market economy operator principle has been proven in this case, based on the 'calculation of additional costs generated by overnight parking' study

⁽²⁵⁾ Decision of 14 June 1999 on State aid NN 109/98 — *United Kingdom (Manchester Airport)*.

⁽²⁶⁾ Commission Decision 2004/393/EC of 12 February 2004 concerning advantages granted by the Walloon Region and Brussels South Charleroi Airport to the airline Ryanair in connection with its establishment at Charleroi (OJ L 137, 30.4.2004, p. 1).

[illegible]

- (142) Based on a study conducted using the 2008 accounts, the variable costs of the overnight parking charge were EUR [...] per aircraft per night, with the 2004 estimate being EUR [...]*. In the case of a B737-800 with a load factor of 80 %, these costs represent EUR [...] per passenger and, in the case of an A319 with a load factor of 70 %, they are EUR [...] per passenger. However, based on the accounts submitted to Coccoéco on 18 February 2009, the shop and parking activities covered [between 100 % and 150 %] of the passenger costs for Terminal mp1, i.e. a net margin of EUR [...] per passenger, and [between 100 % and 150 %] of the passenger costs for Terminal mp2, i.e. a net margin of EUR [...] per passenger. These net margins broadly covered the additional costs of the overnight parking.
- (143) Lastly, France points out that the Commission did not make any criticism of the airport charges system organised at Charleroi Airport.

3.7. FINANCING OF MARKETING ACTIVITIES

- (144) As regards the aid scheme established by the CCIMP decision of 21 November 2005, which resulted in a single payment [of less than EUR 300 000] to bmibaby, France states in its submission of 28 December 2010 that this amount, even if it did constitute State aid, would in any event be covered by Commission Regulation (EC) No 1998/2006 ⁽²⁷⁾ (*de minimis* aid). Furthermore, it stresses that, following the announcement of this company's sale, the CCIMP may not have been able to obtain a sworn statement regarding aid received from other European airports.

3.8. AGREEMENT TO PURCHASE ADVERTISING SPACE WITH AMS

- (145) As regards the agreement to purchase advertising space concluded with AMS on 19 May 2006, France maintains that this agreement was awarded, in accordance with public procurement regulations, without any prior competition due to the existence of a single supplier.
- (146) France notes that the promotional policy has a direct effect on an airport infrastructure's profitability due to the revenues generated through airport and non-aeronautical charges. It explains that the advertising carried out by airlines is insufficient and underlines that, in 2006, AMS was the only service-provider offering the combination of a unique and exclusive Ryanair ticket marketing system, with Ryanair being the only airline to undertake to establish an aircraft base at the new Terminal mp2, a large audience of internet users targeted by the promotional policy, and marketing services appropriate to the purchase of flight tickets to Provence as a destination.
- (147) France maintains that the CCIMP acted as a market economy operator by concluding the agreement with AMS, such that this agreement does not contain any form of aid.
- (148) France firstly considers that the agreed price was in line with market practices, particularly given the results of the prior comparative study conducted using the viamichelin.com website. France therefore disputes that the marketing services were provided by AMS under preferential conditions and points out that the European Commission, in its decision on Ostend Airport ⁽²⁸⁾, accepted that the promotional programme involving a tour operator's catalogue did not constitute State aid.
- (149) Moreover, France maintains that the marketing services agreement concluded with AMS represented a profitable investment for Marseille Provence Airport, particularly with regard to the development of Terminal mp2. France explains that the terms of the agreement were determined based on a profitability study of the financial margins generated by a flight operated by Ryanair, which was conducted prior to the agreement being concluded and which has been produced in support of its claims. This study showed that the contractual arrangement would become profitable from the fourth year of operation, with a margin of EUR [...] per flight after advertising. France emphasises that the same study shows that the profitability of all the modulations for the creation of new routes and the AMS agreement, with regard to Ryanair flights alone in the 2007-2021 period, results in an

⁽²⁷⁾ Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ L 379, 28.12.2006, p. 5).

⁽²⁸⁾ Commission Decision 98/337/EC of 21 January 1998 concerning aid granted by the Flemish Region to the company Air Belgium and the tour operator Sunair in connection with the use of Ostend Airport (OJ L 148, 19.5.1998, p. 36).

average profit margin ([...]* %) that is in line with the standard profitability in the sector, estimated by the European Commission at 7,31 % in its decision on Bratislava Airport ⁽²⁹⁾.

- (150) The profitability simulation updated using actual traffic figures and costs audited by the Mazars consultancy indicates a profit margin from the third year of EUR [...]* per flight.
- (151) France points out that the costs associated with the AMS agreement were taken into account in the September 2005 business plan, updated in May 2006, which indicated an overall profitability for Terminal mp2 [in excess of 7,5]* % over the 2005-2021 period. Based on the 2006 charges, the average net income/turnover ratio of the AMS agreement in relation to Ryanair traffic was [in excess of 7,5]* % and the NPV was EUR [...]* million.
- (152) France further maintains that, taking into account not only the revenue from airport charges, non-aeronautical charges and airport tax, but also the revenue from other charges, the margin per outbound passenger was calculated, before the agreement was signed ⁽³⁰⁾, at EUR [...]*. With the estimated average amount of the marketing measures (including AMS in particular) being EUR [...]* per outbound passenger, the net margin of the marketing costs was therefore EUR [...]* per passenger. According to France, it should therefore be concluded that each passenger at Terminal mp2 was financially beneficial to the airport.
- (153) As a result, between 2006 and 2012 the airport recorded an average billing rate per passenger between EUR [...]* per passenger and EUR [...]* per passenger, with a seven-year average slightly below expectations, but still sufficient at EUR [...]* per passenger.
- (154) France adds that the agreement concluded with AMS contained various undertakings on the part of Ryanair with regard to the number of aircraft based at Marseille Provence Airport and the number of daily frequencies and passengers per year.
- (155) Accordingly, adding the costs of the AMS agreement per Ryanair passenger to the total incremental cost per Ryanair passenger results in a total cost of EUR [...]* per passenger, with the incremental margin associated with Ryanair's presence, taking into account the costs associated with the AMS agreement, therefore sitting at a satisfactory level of EUR [...]* per passenger.
- (156) Lastly, France maintains that Marseille Administrative Court, in an interim ruling of 20 October 2009, found that the annual amounts stipulated by the agreement concluded with AMS, when compared with the services to be provided by the latter and the size of the audience reached by the promotional arrangement, were not devoid of purpose or an adequate quid pro quo.

3.9. BUSINESS PLAN FOR TERMINAL MP2 AND APPLICATION OF THE MARKET ECONOMY OPERATOR PRINCIPLE

- (157) France maintains that the market economy operator criterion is met where the policy adopted by the airport has positive financial effects on the airport's operation. To this end, the analysis should be based on multiannual business plans in the light of certain criteria such as the net present value (NPV) and internal rate of return (IRR), accompanied by sensitivity tests. In this respect, two principles underlie the analysis of the airport's investments: 'genuine' cash flows must be used, and the effect of time must be taken into account by updating those cash flows.
- (158) France considers that the construction of Terminal mp2 has had the following effects in particular:
- Certain costs have been pooled between the two terminals, thus reducing the costs of the main terminal.
 - Certain investments with a cost affecting the IRR have been postponed, such as the construction of the Europe check-in area and the Europe/International departure hall.

⁽²⁹⁾ Commission Decision 2011/60/EU of 27 January 2010 on State aid C 12/08 (ex NN 74/07) — Slovakia — Agreement between Bratislava Airport and Ryanair (OJ L 27, 1.2.2011, p. 24).

⁽³⁰⁾ Airport advisory committee meeting of 15 November 2005.

- (159) The pooling of costs and the delay of certain investments as a result of the new Terminal mp2 have had an effect on the charges adopted for the latter and the turnover included in the IRR calculation.
- (160) France therefore takes the view that the approach adopted by the airport corresponds to the choice that would have been made by a private operator. Accordingly, it considers that the analysis conducted by PwC is incorrect in so far as the latter criticises France for not having produced a business plan 'built on assumptions specific to mp2', although this phrase is not explained by PwC. France notes in this respect that the allocation of costs between the various users of the different terminals is covered by the airport's differentiated charges analysis, and not by the profitability study for the new terminal project.

4. COMMENTS BY THIRD PARTIES

4.1. AIR FRANCE

4.1.1. INVESTMENT SUBSIDIES FOR THE CCIMP

- (161) Air France maintains that, although the subsidies granted for upgrading the airport's infrastructure have benefited all carriers present at Marseille Provence Airport, the investment subsidies specifically for Terminal mp2 have had the potential to distort competition between the airlines using each of the two terminals.
- (162) Air France disputes the Commission's assessment in the opening decision that access to Terminal mp2 has been equal and non-discriminatory. The CCIMP's decision to reserve Terminal mp2 for 'point-to-point' traffic would have forced Air France, which also operates international flights and in particular carries connecting passengers, to split its operations from Marseille between the two terminals, as a result of which Air France refrained from using Terminal mp2. According to Air France, the launch in October 2006 of international flights operated by Ryanair from Terminal mp2 proves the preferential treatment given to this operator by the CCIMP. Moreover, Air France notes that Terminal mp2 offered services only for aircraft with fewer than 200 seats, which excluded the Airbus A321, and that an application was lodged by Air Méditerranée with Marseille Administrative Court seeking recognition of the arbitrary and discriminatory nature of this clause in the rules governing use of Terminal mp2.
- (163) Air France maintains that the eligibility conditions for Terminal mp2 imposed initially by the CCIMP seem to have been solely intended to prevent it from seeking to use the new terminal, even though the economic equilibrium of the platform would have no doubt been assured if Air France could have transferred all its operations to Terminal mp2, where the level of charges was significantly lower.

4.1.2. OPERATING SUBSIDIES FOR THE CCIMP

- (164) Air France claims that the level of airport tax, collected on behalf of the State but paid back in full to the airport operator, may not have corresponded to the costs actually incurred by the airport in financing measures falling under the responsibility of the public authorities, and may therefore have constituted an operating subsidy for Marseille Provence Airport.

4.1.3. AID GRANTED BY MARSEILLE PROVENCE AIRPORT TO CERTAIN AIRLINES

4.1.3.1. *Reduced passenger charges for national flights*

- (165) Air France does not dispute the Commission's finding in its opening decision that the creation of a low-cost terminal may meet a market demand. However, Air France notes that the airport operator must ensure that this project is profitable.
- (166) Air France disputes the Commission's assertion that it seems normal for a private airport operator to try and demand higher charges for the transport of passengers of those airlines that choose to offer a more comfortable

service, whose customers are characterised as having a greater 'willingness to pay'. Air France maintains that it has played no part in determining the service quality level offered in the 'comfortable' terminal, and wonders whether the criteria applied by the airport operator for access to the new terminal dedicated to the new low-cost operators have been truly non-discriminatory. Air France claims that airlines having historically used certain terminals are often captives of these infrastructures. Air France takes the view that, as airport operators have a monopoly over their airports, they can unfairly increase their charges to such captive customers in order to offer lower charges to customers using the low-cost terminals, with the latter being capable of easily moving their operations from one airport platform to another.

- (167) Air France considers that the charges applied at Marseille Provence Airport stem from accounting treatment choices that have the sole logic of favouring those airlines using Terminal mp2. According to Air France, the method of allocating the overheads allows the passenger charge applicable to Terminal mp2 to be artificially reduced. Air France would like the Commission to include in its reasoning the fact that airports are 'essential infrastructures' as far as airlines are concerned and that, as a result, an airport operator must apply charges reflecting the cost of the service provided (obligation also imposed by Directive 2009/12/EC).
- (168) Air France underlines that, to its knowledge, the CCIMP has never taken any steps to recover the additional charges due as a result of the retroactive reassessment of the passenger charges at Terminal mp2. Air France notes that, although, through its interim ruling of 28 July 2009, the Council of State suspended payment of 20 % of the passenger charge applied to Terminal mp1, the CCIMP did not, however, increase the passenger charge applicable to Terminal mp2. Air France points out that, as the Council of State did not annul the charges applicable to Terminal mp1 (decision of 27 June 2011), the entire 20 % suspended under the interim ruling was eventually paid to the CCIMP.
- (169) Air France notes that, in an earlier decision ⁽³¹⁾, the Commission concluded that an aid scheme involving a system for differentiating between airport charges according to the flight destination (national/international) was incompatible with the internal market. Air France points out that, as France took steps to abolish this system, the Commission did not want to adopt any further appropriate measures. Air France therefore concludes that the Commission's earlier decision means that any new investigation into this aid scheme is pointless.

4.1.3.2. *Charges in relation to new routes*

- (170) Although Air France accepts that every airport has to adopt this type of approach, the airline points out, however, that the airport must prove that it has acted as a market economy operator. In this respect, it must prove that the measure aims to achieve an eventual return on investment. The objective must therefore be to improve its own revenues and not to increase the region's tourist numbers.
- (171) Air France adds that, in order to be acceptable, this type of measure must be transparent, non-discriminatory, degressive and time-limited so that it does not constitute public financing of the operating costs of the carrier benefiting from the measure.

4.2. RYANAIR

4.2.1. INVESTMENT SUBSIDIES FOR THE CCIMP

- (172) Ryanair maintains that the investment subsidies granted for the construction of Terminal mp2 reflect the conduct of a market economy operator.
- (173) According to Ryanair, the Commission's analysis should take into account the non-aeronautical revenue generated by Terminal mp2 through vehicle rentals, car park charges and additional commercial revenue generated by sales to Terminal mp2 passengers, who are likely to go to the shops in the main terminal, which is situated less than one minute's walk from Terminal mp2. Ryanair concludes that the non-aeronautical revenue generated by Terminal mp2 passengers makes a significant contribution to the profitability of the main terminal.

⁽³¹⁾ Commission Decision of 28 January 2009 on State aid E4/2007, C(2009) 184 final.

- (174) The airport's closure, which would have resulted in additional costs (redundancy and decontamination costs, opportunity costs of investments already made) when the airport's sale price was likely to be low if not negative, was not an economically appropriate alternative in 2006.
- (175) The strategy pursued by the airport, which has increased traffic and revenues and reduced the airport's unused capacity, has helped to improve its market value. Ryanair maintains that the assets of Terminal mp2 and the investments made could increase the value in the event of a sale, contrary to PwC's argument.

4.2.2. SETTING OF THE PASSENGER CHARGES FOR TERMINAL MP2

- (176) Ryanair maintains that the decision setting the passenger charge applicable to Terminal mp2 is not imputable to the State, in accordance with the criteria explained by the *Stardust Marine* judgment ⁽³²⁾. Ryanair underlines that the CCIs are regarded by French law as belonging to a specific category of public entities, characterised by a lack of subordination to the State ⁽³³⁾. Ryanair therefore challenges the Commission's view, which simply presumes that the measures in question are imputable to the State due to the fact that the CCIMP is under state control, and points out that the Commission should examine, in each case, the specific circumstances determining whether or not the measure is imputable to the State.
- (177) Ryanair adds that, in the case of the CCIMP, France could not have initiated, or acted in such a way as to encourage, the adoption by the airport of the measures in question. Ryanair maintains that, on the contrary, the DGAC repeatedly rejected the charges adopted by the CCIMP ⁽³⁴⁾.
- (178) In the alternative, Ryanair maintains that the passenger charges for Terminal mp2 were set in accordance with the market economy operator test. Ryanair claims that, in its analysis, the Commission did not correctly apply the prudent operator test, as required by the Court of Justice ⁽³⁵⁾, for a number of reasons.
- (179) Firstly, the Commission omitted to make a primary comparison between the charges applicable at Marseille Provence Airport and the market price. Ryanair has submitted a study that maintains that the market price for airport services can be established on the basis of a comparison with the prices paid at comparable private airports throughout Europe. The airline uses a comparison with Luton, East Midlands, Prestwick and Liverpool airports. It alleges that those airports are operated without State aid or public intervention and that the prices that it pays at those airports are, on average, three times lower than those at Marseille Provence Airport. Ryanair therefore concludes that the price that it pays at Marseille Provence Airport for the airport services is not below the market price for those services and that the price paid does not therefore include elements of State aid.
- (180) Secondly, the Commission included sunk costs in its calculations, instead of basing its assessment on incremental costs alone. Ryanair notes in this respect that Marseille Provence Airport was constructed in 1922 and was used in particular, before the liberalisation of air transport, for regional traffic funded by the State in the form of a public service and as a base for forest firefighting aircraft. Ryanair adds that, in order to address the drop in traffic recorded between 2001 and 2003, the airport implemented a strategy to open up to low-cost airlines by creating a terminal specifically designed for their use. Ryanair points out that, for a number of years, it has accounted for over 40 % of the traffic at Terminal mp2. Ryanair maintains that regional airports are less attractive to airlines, which can legitimately expect to negotiate lower charges with the airport given the high volume of passengers that they bring. Ryanair notes that, when deciding on the existence of aid, the Commission is required to take into account the situation that prevailed at the time when the measure was granted to the beneficiary. Ryanair maintains in this case that, on the date when it started to operate from Marseille Provence Airport, given the contractual undertakings that it had made regarding the volume of passengers carried, the airport operator could legitimately have expected a significant increase in traffic due to Ryanair's presence at the airport. Ryanair asserts that, as the economic situation at small regional airports with overcapacity is different

⁽³²⁾ Judgment in *France v Commission*, C-482/99, EU:C:2002:294.

⁽³³⁾ In support of this argument, Ryanair cites the Council of State's opinion of 16 June 1992, No 351 654.

⁽³⁴⁾ Ryanair refers in this respect to paragraphs of the opening decision on the non-recovery by the CCIMP of reimbursements resulting from the application of the retroactive charges, France's repeated requests for the reduced charges for national flights to be ended, and the introduction by the CCIMP of marketing aid without France's prior authorisation.

⁽³⁵⁾ Ryanair refers to the judgment in *Ryanair v Commission*, T-196/04, EU:T:2008:585.

from that analysed by the Court of Justice in the Charleroi judgment, the cost analysis, if applicable to them, must be adapted. Taking into account only the incremental costs and revenues associated with the agreements concluded with Ryanair would reflect the conduct of a prudent market economy operator. Ryanair adds that the costs associated with investments made before its arrival and fixed operating costs must not be taken into account. Ryanair further states that whether the airport in general is profitable or loss making is irrelevant in terms of the existence of aid for the benefit of the airline.

- (181) Ryanair maintains that the cost analysis conducted by the Commission for the prudent operator test is incorrect as it fails to take account of the service level offered at Terminal mp2, which is below the level of the services offered to traditional airlines and is therefore in line with the applicable level of charges. Ryanair asserts that Terminal mp2 offers only basic infrastructures ⁽³⁶⁾ and has a considerably smaller area per passenger compared with the main terminal (1,66 m² as opposed to 6,06 m²). Ryanair argues that low-cost airlines should not pay charges for services that they do not use, or that they use to a lesser extent than traditional airlines ⁽³⁷⁾. Ryanair points out that it applies baggage fees to encourage its passengers not to check luggage, which has had the result that only one-third of Ryanair passengers check baggage. Moreover, Ryanair passengers take their baggage themselves from the check-in desks to security, which eliminates the need for any infrastructure at the terminal. By comparison, Ryanair notes that Air France makes extensive use of the ground handling services associated with baggage at the airport.
- (182) Ryanair maintains that its aircraft are the largest operating at Marseille Provence Airport, which means that the airport does not have to incur the opportunity costs associated with the operation of small aircraft in relation to the number of passengers carried. Ryanair stresses that it operates on the basis of 25-minute rotations, whereas the traditional airlines, such as Air France, have rotation times between 45 and 60 minutes. A reduced rotation time limits the amount of time that ground areas are used by aircraft and passengers. Ryanair also notes that the criteria for using Terminal mp2 include the requirement to use C-type aircraft that can accommodate up to 200 seats and operate with reduced rotation times.
- (183) Lastly, Ryanair criticises the fact that the Commission has not taken into account in its decision the positive externalities associated with Ryanair's presence at the airport, namely the fact that the infrastructure's value has increased due to its presence, bearing in mind the risks inherent in operating the initial routes from the airport. Moreover, Ryanair claims that the presence of an airline at an airport creates a ripple effect leading to an increase in passenger numbers at that airport, and therefore an improvement in its commercial and transport infrastructures, which makes the airport more attractive. Ryanair underlines that it contractually undertook to carry a certain number of passengers to and from Marseille Provence Airport, which has therefore helped to generate these externalities, as apparently proven, firstly, by the increase in traffic at the airport, and particularly at Terminal mp2, and secondly by the increase in the number of airlines operating from the airport. Ryanair also highlights that this type of undertaking means that it is the airline that bears all the risk associated with operating the route, which proves that the airport is in a position to accept a lower rate of return than it would have required in the absence of such undertakings.
- (184) Ryanair encourages the Commission to adopt the 'single till' approach in its analysis, which involves taking joint account of both the aeronautical revenue and the commercial revenue generated by the presence of an airline at an airport. Ryanair notes in this respect that it carries more passengers per flight than Air France and that it operates 'point-to-point' flights where the passengers, in its opinion, are more likely to generate commercial revenue than transit passengers. Ryanair underlines that, since it started operating at Marseille Provence Airport, numerous businesses and several vehicle rental companies have set up in Terminal mp2 and that the non-aeronautical revenue generated by these activities contributes to the terminal's profitability.
- (185) Ryanair argues further that the fact that the charges set for Terminal mp2 meet the market economy operator test proves that there has been no redistribution to Ryanair of the public resources allocated to the airport operator. Even if it is proven that the airport has benefited from aid, Ryanair claims that it cannot be concluded that it has been the final beneficiary of that aid.

⁽³⁶⁾ Ryanair points out that Terminal mp2 does not have the following: expensive marble flooring, suspended ceilings, monitors above departure gates, system for transporting baggage to the main hall, luggage trolleys, waiting rooms, information desk, escalators and travellers, telescopic bridge.

⁽³⁷⁾ In support of this statement, Ryanair cites the UK CAA decision of 27 May 2011 on the complaint made by Ryanair about a charge applied in a discriminatory manner at Gatwick Airport.

- (186) Next, Ryanair maintains that the charges applied at Terminal mp2 are not in any way selective, as the Commission has not proven that Ryanair has benefited from more favourable conditions than other airlines at Marseille Provence Airport. Ryanair underlines that it is not enough to find that different levels of charges are applied to different airlines in order to reach this conclusion, but that the Commission should take account of the cost of the services offered to each airline by the airport as well as the positive externalities and non-aeronautical revenue generated by each airline. Ryanair notes that its business model means that it carries, on each flight, a higher number of passengers than other airlines and that this saving made by the airport in the opportunity costs thus avoided must be reflected in the level of charges applied to Ryanair.
- (187) Lastly, Ryanair claims that the differentiation of charges between national flights and international flights constitutes abusive discrimination pursuant to Article 102 TFEU as it results from a decision made by the airport, given its dominant position in terms of the infrastructure's availability. Ryanair maintains that the services provided to passengers do not fundamentally differ according to their destination (domestic, national or international flight) and that the checking of international passengers' travel documents is a state responsibility and should not therefore be funded through the airport charges. Ryanair regrets that France has not extended the finding made on the differentiation between national flights and Schengen flights to non-Schengen flights, which has resulted in the application of a charge that is 56 % higher than at the main terminal. Ryanair also maintains that this differentiation mechanism constitutes State aid. Ryanair points out that Air France and its affiliated companies operate most of the domestic flights and therefore benefit from the system of differentiated charges. Consequently, Ryanair asks the Commission to include, in the measures covered by this investigation, the advantage granted to Air France resulting from the differentiation of charges between Schengen flights and non-Schengen flights so that it can seek damages before the French courts.
- (188) Ryanair has submitted additional information on the subject of AMS and the analysis to be conducted by the Commission. Ryanair maintains that the existence of aid in the AMS agreement should be assessed separately from the other measures. However, if the Commission decides to assess this together with the conditions from which Ryanair has benefited at the airport, Ryanair has submitted an economic analysis and concludes on this basis that the AMS agreement would have been profitable for the airport in the short term.

4.3. CCIMP

4.3.1. INVESTMENT SUBSIDIES FOR THE CCIMP

- (189) The CCIMP agrees with France's arguments that the subsidies subject to limitation and the subsidies allocated to finance non-economic activities cannot be classed as State aid. In any event, the public financing granted before the 2005 Guidelines entered into force does not constitute State aid on the basis of the 1994 Communication. In the alternative, the subsidies constituting State aid are compatible with the TFEU rules, in particular on the basis of Article 107(3)(c) TFEU. The CCIMP agrees with France's view on the compatibility of the aid under investigation with the conditions laid down by the guidelines, in particular the conditions of proportionality and necessity.
- (190) The CCIMP underlines the direct and indirect economic impact of the new terminal in the Marseille region and its role in reducing congestion at the central airports, ensuring European territorial cohesion and airport capacity-building given the risks of saturation ⁽³⁸⁾.
- (191) The CCIMP considers that the development of a new terminal was essential to attract low-cost airlines that rarely operate from traditional infrastructures, which have characteristics that do not fit with their business model. The CCIMP states that only the creation of a low-cost terminal could meet the requirements of the low-cost airlines in terms of airport charges, under conditions of transparency and non-discrimination.

4.3.2. OPERATING SUBSIDIES GRANTED TO THE CCIMP

- (192) The CCIMP explains, in line with the comments made by France, that the financial flows totalling EUR [...] million involved contributions paid to the CCI's general arm for services rendered. It stresses that there was no financial transfer of resources from the CCI to Marseille Provence Airport. It notes that, like any other business in the region, Marseille Provence Airport must pay the tax to cover the costs of chambers of commerce and industry, which totalled EUR 213 553 in 2010.

⁽³⁸⁾ See footnote 18.

4.3.3. SETTING OF THE PASSENGER CHARGES FOR TERMINAL MP2

- (193) The CCIMP points out that the low-cost Terminal mp2 offers simplified services, which allows differentiated charges to be applied, and confirms that all costs were taken into account when setting those charges. The CCIMP therefore concludes that Marseille Provence Airport is able to invoke the prudent operator principle to justify the existence of differentiated charges at each of the terminals.
- (194) The CCIMP takes the view that the 'contributory' method used to calculate the rate of return of Terminal mp2 is the only one that can take into account the transfer of an airline from one terminal to the other, with economies of scale resulting in stability of the costs concerned, whereas their distribution by terminal would have led to a reduction at the main terminal. It notes that the construction of Terminal mp2 resulted in certain costs being pooled between the two terminals, which had the effect of reducing costs at the main terminal, and certain investments being postponed (delay of the construction of the Europe check-in area and the Europe/International departure hall).

4.3.4. INCENTIVE MEASURES FOR THE LAUNCH OF NEW ROUTES

- (195) The CCIMP states that it adopted a development plan intended to increase the number of passengers at the airport, particularly through the launch of new routes. According to the CCIMP, the incentive measures were designed to achieve that objective, in line with the normal practice of airport operators, as apparently accepted by the Commission in its decision on Manchester Airport ⁽³⁹⁾. The CCIMP believes that the arrangement introduced must be regarded as a commercial practice excluding any aid pursuant to Article 107 TFEU, given that the arrangement was open, non-discriminatory and applied for a limited time based on objective criteria.
- (196) The CCIMP further maintains that this arrangement cannot be classed as aid because a prudent operator acting under normal market economy conditions could have taken the same approach. The CCIMP states that the modulations adopted were intended to maximise the airport's profitability and were based on a business plan contained in the preparatory dossier submitted to the Cocoéco meeting of 14 September 2009. The update of this study, as explained in France's response, confirms the profitability of the measures.
- (197) The CCIMP adds that, when its conduct is assessed in the light of normal market practices, the arrangement introduced remains reasonable.

4.3.5. MARKETING AID — AGREEMENT CONCLUDED WITH AMS

- (198) The CCIMP maintains that it acted as a market economy operator by concluding the agreement with AMS. It states that it paid a price that was clearly proportionate and reasonable given the services provided and practices in the sector, and disputes the relevance of the study submitted by Air France, which covers only general websites. The CCIMP notes that, conversely, products advertised on the Ryanair website reach a large audience of internet users looking for flight tickets.
- (199) The CCIMP explains that, as the objective was to increase traffic at Terminal mp2, and more specifically international passenger traffic with high purchasing power, only a targeted advertising action was appropriate. According to the CCIMP, only the Ryanair website offered maximum visibility and efficiency of the advertising.
- (200) The CCIMP notes that the annual cost of the AMS agreement according to the number of passengers carried was in the order of EUR [...] in 2010.

⁽³⁹⁾ Decision of 14 June 1999 on State aid NN 109/98 — *United Kingdom (Manchester Airport)*.

4.4. ASSOCIATION OF EUROPEAN AIRLINES

4.4.1. SUBSIDIES GRANTED TO THE CCIMP

- (201) The Association of European Airlines (AEA) states that it supports all measures likely to contribute to regional development, but that subsidies granted to small regional airports must not have the effect of distorting competition. According to the AEA, the aviation sector should be regarded as a business sector in which any intervention, whether regulatory or financial, may cause distortions of competition. Subsidies granted to small regional airports are therefore acceptable only in so far as they benefit all users without discrimination and do not create distortions between airports situated within the same catchment area.
- (202) The AEA maintains that a binding framework should be adopted at European level for the aviation sector as a whole in order to prevent uncontrolled subsidies and guarantee a competitive environment between economic operators. This should be based on the principle of infrastructure aid being assessed according to demand, and should not encourage the shift of traffic to regions where demand is less dynamic.

4.4.2. DIFFERENTIATION OF CHARGES AT TERMINAL MP2

- (203) The AEA supports the idea that an airport can differentiate between its infrastructures according to the services offered to users. However, the AEA maintains that, in this scenario, the airport must observe the principles of transparency and cost-relatedness when calculating charges. In practice, the AEA suggests that a distinction should be made between, on the one hand, costs associated with using common infrastructures and, on the other hand, costs associated with using specific infrastructures. According to the AEA, all airlines should pay the same charges for using the central infrastructures (runways, parking, aviation safety equipment, security checks, baggage handling, and environmental and noise pollution taxes, where applicable). The terminal and handling charges may vary from one terminal to another, depending on the quality of the services offered to airlines, and must be determined based on the costs incurred.
- (204) The AEA also maintains that access to terminals with reduced services should not be limited to low-cost airlines, but should be open to all airlines in accordance with the principle of non-discrimination.
- (205) To ensure that there is no distortion of competition between airlines at the same airport, the AEA underlines that airport operators must not increase charges at the main terminal to offset the costs associated with the reduced-services terminal.

4.4.3. START-UP AID

- (206) The AEA maintains that the airlines are the real beneficiaries of these arrangements, with the regional airports benefiting only indirectly. The AEA considers that such aid should not be granted for routes that are already operated by another airline. According to the AEA, a route should not be regarded as 'new' where an identical route is already being operated from an airport situated within the same catchment area. The AEA states that, ideally, airports less than 100 km away or 120 minutes by TGV should be regarded as located within the same catchment area.
- (207) The AEA takes the view that three years is an extraordinarily long time for start-up aid. The AEA maintains that the viability of a route becomes clear after just a few months, and at most after a year. The AEA stresses that the aid should not cover recurrent operating costs, such as aircraft depreciation, aircraft leasing costs or use of airport infrastructures.
- (208) According to the AEA, it should not be possible for start-up aid to be combined with other aid granted to operate the same route. The AEA maintains that penalties should be imposed on carriers failing to comply with contractual undertakings. The AEA stresses that aid granted in the aviation sector must always be restrictive and can be authorised only on the basis of a case-by-case examination.

- (209) The AEA maintains that aid must be granted only on the basis of a transparent and non-discriminatory procedure. The conditions under which start-up aid is granted should be published in the *Official Journal of the European Union*. In addition, the AEA states that each financial contribution granted by a local authority to a regional airport should be notified to the Member State concerned, at least three months before it enters into force, so that the latter can decide whether this should be notified to the European Commission. In the event of notified aid, the AEA underlines that local authorities should be reminded that any payment of aid before approval by the European Commission may be regarded as unlawful aid.

4.5. AIRPORT MARKETING SERVICES

- (210) Firstly, AMS maintains that the decision to conclude the agreement of 19 May 2006 was not imputable to the French State. AMS highlights that, although consultation of the State through Cocoéco before any decision is taken on airport charges is a relevant indicator of the imputability of these decisions, the same cannot be said for the decision on the purchase of marketing services. AMS claims that the purchase of marketing services was not in any way linked with the decisions on the applicable airport charges, and did not differ from any other purchase of advertising space. AMS also notes that the organic criterion used in the Commission's analysis to establish the imputability to the State of the decisions of the Chamber of Commerce and Industry is insufficient with regard to the requirements set out by the *Stardust Marine* judgment ⁽⁴⁰⁾.
- (211) Secondly, AMS maintains that the conclusion of the agreement to purchase marketing services reflected the conduct of a market economy operator. AMS stresses that this agreement is similar to those concluded with private airports such as Liverpool or Oslo Rygge, which undoubtedly acted as market economy operators. AMS explains that it does not discriminate between public and private airports and that the rates applied are public and easily accessible on its website.
- (212) In the alternative, AMS maintains that the rates applied were in line with market prices. AMS explains that the rates were set based on a study conducted in 2004 by Mindshare, a subsidiary of WPP and a marketing services company, at Ryanair's request. AMS adds that partners such as Hertz and NeedaHotel purchase available space on the website to promote their own services, and that the agreements concluded with those operators allow a better assessment to be made of the market price. Lastly, AMS states that it has developed a rate offer based on a standard method of calculating online advertising exposure in order to value the exposure offered on the Ryanair website. Rates are set based on the costs per thousand page views, and the volume of hits determines a price range for most of the advertising services offered.
- (213) AMS maintains that Air France has submitted a comparison between the AMS price offer when the agreement was signed, i.e. in 2006, and the Viamichelin price offer for 2011, whereas Marseille Provence Airport duly based its comparison on the Viamichelin price offer for 2006. Given that price offers for marketing services generally increased over this six-year period, AMS considers that the comparisons made by Air France are not relevant.
- (214) AMS maintains that particularly advantageous commercial conditions were offered to Marseille Provence Airport. In this respect, AMS points out that the rates were frozen between 2006 and 2011 based on the number of visitors to the Ryanair website in April 2005, whereas in reality this number increased from 0,65 million per day in 2005 to 1,2 million per day in 2011. In addition, the number of recipients on the mailing list was frozen at the number recorded in April 2005, whereas it actually increased from 1,2 million to 2,6 million. AMS stresses that Air France's comparison does not take account of these factors in relation to the volume of hits, which means that its comparison is incorrect.
- (215) AMS notes that the number of visitors to the Viamichelin website is less than the number visiting the Ryanair website, and that the Viamichelin website is not well known outside France. AMS considers that this website is not therefore suited to promoting an airport at European level, which is supported by the fact that no airport has used its services to date. AMS emphasises that the Lonely Planet website is an Australian site that is not well known in Europe and that generates a volume of hits well below that of the Ryanair website. Lastly, AMS stresses that websites that are not linked to airlines are unsuitable as they do not allow the visitor to reserve a flight ticket

⁽⁴⁰⁾ Judgment in *France v Commission*, C-482/99, EU:C:2002:294, paragraphs 52 and 58.

at the same time. AMS considers that the rates for marketing services on the Air France, British Airways and Expedia websites are higher than those applied on the Ryanair website, despite a lower volume of hits.

- (216) AMS also disputes the suggestion that Ryanair forced Marseille Provence Airport to conclude the marketing services agreement. AMS maintains that it is not in its interest to force the sale of space on the Ryanair website, which constitutes a limited resource for which there is significant demand.
- (217) AMS claims that the presence of advertising links on the Ryanair website attracts the attention of airport operators or owners and, by indicating the presence of a regular airline and the associated non-aeronautical revenue, increases the intrinsic value of airports in the eyes of potential buyers.
- (218) AMS maintains that the Commission recognised, in its Bratislava decision, the value of marketing services ⁽⁴¹⁾.
- (219) Lastly, AMS claims that the 2005 Guidelines do not apply to relations between an airport and a marketing services provider.

5. COMMENTS BY FRANCE ON THE COMMENTS BY THIRD PARTIES

- (220) In its comments on the third-party comments, France maintains that Air France's contribution contains several false allegations.
- (221) France notes that, contrary to what Air France says, access to Terminal mp2 is equal and non-discriminatory.
- (222) France makes clear that Marseille Provence Airport cannot be criticised for not having anticipated the opening up of Terminal mp2 to non-Schengen international flights, as this was envisaged only after the Open Skies Agreement was signed between Morocco and the European Union on 29 December 2006. France notes that, until that point, the studies on traffic development prospects were limited to essentially intra-Schengen development prospects and that the initial set-up of Terminal mp2 therefore did not provide for infrastructure for border control systems, which would have represented an unnecessary additional cost. France further stresses that Air France, which maintains that this inability to operate international flights from Terminal mp2 was specifically designed to prevent it from accessing this terminal, still does not operate flights from Terminal mp2, despite this having been opened up to international traffic.
- (223) France notes that the rules for accessing Terminal mp2 are governed by comfort and safety considerations established by the airport, such as the limited size of the departure gates. France points out that the application lodged by Air Méditerranée before Marseille Administrative Court on the subject of access to Terminal mp2 was dismissed by that court ⁽⁴²⁾.
- (224) France disputes Air France's assertion that Terminal mp2 would not have achieved economic equilibrium if Air France had been able to transfer all its operations to a terminal where the charges were significantly lower than those applied at the main terminal. According to France, this assertion is contradicted by the fact that the airport included, in its initial business plan, the assumption that the Air France shuttle would be transferred to Terminal mp2. France considers that Air France is actually criticising Terminal mp2 for its level of service, which does not meet its customers' expectations. France notes in this respect that the differentiation of airport services, and of the charges associated with each of those services, is permitted by European and national law.
- (225) Lastly, France repeats its view that the Council of State, in its decision of 26 July 2011, did not condemn the method of allocating costs between Terminals mp1 and mp2, but confirmed, with regard to the charges at

⁽⁴¹⁾ Decision 2011/60/EU, recital 114.

⁽⁴²⁾ Marseille Administrative Court, interim ruling No 1101332 of 17 March 2011, in which the Court ruled that the situation did not pose a sufficiently serious and immediate threat to a public interest to warrant the urgency. It therefore dismissed the suspension request and the main action continued.

Terminal mp1, that these had been established according to 'a calculation method justified by precise accounting studies'. France disputes Air France's comment that the CCIMP should have increased the passenger charge at Terminal mp2 following the interim ruling of 28 July 2009, given the absence of a judgment on the main action, and notes that the airport substantially reviewed its charging structure following the decision of 26 July 2011.

6. ASSESSMENT OF THE MEASURES IN FAVOUR OF THE CCIMP — EXISTENCE OF AID

6.1. EXISTENCE OF POTENTIAL INVESTMENT AID GRANTED TO THE CCIMP

- (226) In accordance with Article 107(1) of the Treaty, State aid rules apply only where the beneficiary is an 'undertaking'. The Court of Justice of the European Union has consistently defined undertakings as any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed ⁽⁴³⁾. Any activity consisting in offering goods and services on a given market is an economic activity ⁽⁴⁴⁾. The economic nature of an activity as such does not depend on whether the activity generates profits ⁽⁴⁵⁾.
- (227) The activity of airlines consisting in the provision of transport services to passengers and/or businesses constitutes an economic activity. In its *Aéroports de Paris* judgment, the Court of Justice ruled that the operation of an airport consisting in the provision of airport services to airlines and the various service providers was also an economic activity. In its *Leipzig/Halle Airport* judgment, the General Court confirmed that the operation of an airport is an economic activity, from which the construction of airport infrastructure is indissociable.
- (228) As far as past financing measures are concerned, the gradual development of market forces in the airport sector does not allow for a precise date to be determined, from which the operation of an airport should without doubt be considered an economic activity. However, the General Court has recognised the changing nature of airport activities. In its *Leipzig/Halle Airport* judgment, the General Court held that it was no longer possible to exclude the application of State aid rules to airport infrastructure as of 2000. Consequently, from the date of the *Aéroports de Paris* judgment (12 December 2000), the operation and construction of airport infrastructure must be considered as falling within the ambit of State aid control.
- (229) Conversely, before the *Aéroports de Paris* judgment, public authorities could legitimately consider that the financing of airport infrastructure did not constitute State aid and, accordingly, that such measures did not need to be notified to the Commission. It follows that the Commission cannot now bring into question, on the basis of State aid rules, financing measures granted before the *Aéroports de Paris* judgment.
- (230) Nevertheless, although measures that were granted before any competition developed in the airport sector did not constitute State aid when adopted, they may be considered such pursuant to Article 1(b)(v) of Regulation (EC) No 659/1999 if the conditions of Article 107(1) TFEU are met.
- (231) The Commission points out that the following subsidies were granted before the *Aéroports de Paris* judgment (i.e. before 12 December 2000). It therefore concludes that it does not have the power to examine them under the State aid rules.

— Departmental Council subsidy of 14 December 1999 for EUR 3 064 000,

— Regional Council subsidy of 24 October 1997 for EUR 8 032 000,

— Regional Council subsidy of 8 July 1994 for EUR 1 372 000,

⁽⁴³⁾ See Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11.1.2012, p. 4, part 2.1) and associated case-law, in particular judgment in *Pavlov and Others v Stichting Pensioenfonds Medische Specialisten*, C-180/98 to C-184/98, EU:C:2000:428.

⁽⁴⁴⁾ Judgments in *Commission v Italy*, C-118/85, EU:C:1987:283, paragraph 7; *Commission v Italy*, C-35/96, EU:C:1998:303, paragraph 36); and *Pavlov and Others*, paragraph 75.

⁽⁴⁵⁾ Judgments in *Van Landewyck*, 209/78 to 215/78 and 218/78, EU:C:1980:248, paragraph 88; *FFSA and Others v Commission*, C-244/94, EU:C:1995:392, paragraph 21; and *MOTOE v Elliniko Dimosio*, C-49/07, EU:C:2008:376, paragraphs 27 and 28.

- State subsidy of 26 April 2000 for EUR 290 000,
- State subsidy of 23 June 1999 for EUR 579 000.

(232) The Commission will therefore limit its examination to the following subsidies:

Table 5

Subsidy	Total amount of investment (EUR '000)	Total amount paid (EUR '000)
Departmental Council 27.9.02	2 098	209
Departmental Council 26.6.03	8 920	3 000
Departmental Council 19.5.05	15 580	7 600
Marseille Provence Métropole 26.7.04	16 124	889
French State 19.12.01	NK	5 032
ERDF 22.8.02	5 280	1 520
Total	48 002	18 250

(233) Under Article 107(1) TFEU, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

6.1.1. ECONOMIC ACTIVITY AND CONCEPT OF UNDERTAKING

(234) In this respect, the Commission points out that the infrastructure concerned by this Decision is commercially operated by the CCIMP, which is the airport operator and which invoices the costs to users of that infrastructure. Consequently, at least as far as the airport's operation is concerned, the CCIMP is an undertaking within the meaning of EU competition law.

(235) However, irrespective of the legal status of an airport operator, its activities are not necessarily all of an economic nature. It is therefore necessary to distinguish between its activities and to establish to what extent its activities are of an economic nature ⁽⁴⁶⁾.

(236) The Court of Justice has held that activities that normally fall under State responsibility in the exercise of its official powers as a public authority are not of an economic nature and do not fall within the scope of the rules on State aid. Such activities normally include safety, air traffic control, police and customs ⁽⁴⁷⁾.

⁽⁴⁶⁾ Judgment in *SAT Fluggesellschaft mbH v Eurocontrol*, C-364/92, EU:C:1994:7.

⁽⁴⁷⁾ Judgment in *Diego Cali & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG)*, C-343/95, EU:C:1997:160. Commission Decision N 309/2002 of 19 March 2003, Aviation security — compensation for costs incurred following the attacks of 11 September 2001. Commission Decision N 438/2002 of 16 October 2002, Aid in support of public authority functions in the Belgian port sector.

- (237) The Commission therefore considers that, in the absence of a legal obligation for airports to bear the cost of financing these activities and the associated infrastructure, the assumption of this cost by the State does not normally constitute State aid ⁽⁴⁸⁾.
- (238) In the present case, it seems that a distinction needs to be made between the activities concerned as follows.
- (239) With regard to the costs of carrying out sovereign tasks, the costs of public safety and security tasks should be recognised as stemming from non-economic activities.
- (240) First and foremost, those activities intended to ensure public safety within the airport, in so far as they aim to prevent the perpetration of unlawful acts and in particular to combat terrorism, should be recognised as such. In this respect, the costs of policing tasks and ensuring the presence of the marine fire service (*Marins-Pompiers*) from the city of Marseille stem from such activities. The same is true for the customs tasks.
- (241) With regard to activities connected with public safety within the airport, these are intended to ensure the protection of people and property. The same is true where the property in question is public property, as in this case. It should in particular be noted that the following activities fall within this task in this case:
- screening of hold baggage;
 - access control to the restricted area;
 - screening of passengers and cabin baggage;
 - automated border controls through biometric identification;
 - video surveillance.
- (242) However, public financing of non-economic activities necessarily linked to the carrying out of an economic activity must not lead to undue discrimination between airlines and airport operators. In fact, although it is normal in a given legal system for some airlines or airport operators to assume certain costs, while others do not, the latter benefit from an advantage even if those costs are linked to activities that, as such, are regarded as non-economic. The legal framework applicable to the airport operator therefore needs to be analysed in order to determine whether, under that legal framework, airport operators or airlines should bear the costs resulting from carrying out certain activities that may not be profitable in themselves, but that are inherent in the pursuit of other economic activities.
- (243) In this regard, the Commission points out that, under French law ⁽⁴⁹⁾, airport operators do not in principle have to finance, from their own funds, the infrastructure and equipment needed for those activities.
- (244) Conversely, the mandatory nature of an activity due to existing legislation is not enough by itself to class a task as a non-economic activity. In this respect, the costs of bringing infrastructure into compliance with laws and standards on fire prevention, in particular the costs of fire detection systems and devices in premises, cannot be regarded as falling within a sovereign task as they are common to all undertakings. Every undertaking must ensure compliance with fire safety standards and bear the associated costs. The same is true with regard to operating safety, even though this may be imposed by the schedule of conditions for the concession. These are costs that every undertaking must normally bear in carrying out its activity.
- (245) It therefore follows from the above that only the activities described in Table 6 as non-economic can benefit from public financing escaping the application of the State aid rules.

⁽⁴⁸⁾ Commission Decision N 309/2002 of 19 March 2003, Aviation security — compensation for costs incurred following the attacks of 11 September 2001. See Commission Decision N 620/2006 of 7 March 2007, Development of Memmingen/Allgäu Regional airport — Germany (OJ C 133, 15.6.2007, p. 8).

⁽⁴⁹⁾ Article L.6332-2 of the Transport Code stipulates that 'The policing of aerodromes ... shall be ensured ... by the state representative in the department'. According to Council of State opinion No 381.644 of 2 September 2008, general interest tasks or sovereign tasks are 'the exclusive responsibility of the State, which, in order to ensure that it has part of the resources necessary, may establish taxes, such as the "airport tax"'. Double financing by investment aid and the 'airport tax' is excluded.

Table 6

Subsidy	Date	Cost of non-economic activities (EUR)				Cost of economic activities (EUR)
		Public safety		Public security		Compliance with legislation and/or operating safety
		Police and customs	Fire service	Video surveillance, screening and control	Access to public property	
Departmental Council	27 September 2002	0	0	0	0	1 118 537,45
Departmental Council	26 June 2003	259 786,3	0	89 883,11	129 022,39	1 632 851,02
Departmental Council	19 May 2005	94 192,24	0	105 228,51	203 702,13	1 870 135,77
Marseille Provence Métropole	26 July 2004	0	0	0	0	72 095,00
ERDF	22 August 2002	0	0	0	0	0
French State	19 December 2001	5 032 000	0	0	0	0

- (246) The above comments together with Table 6 therefore allow a table (Table 7) to be produced that summarises the investment aid received by Marseille Provence Airport and covered by this procedure:

Table 7

Subsidy	Total amount of investment (EUR '000)	Total amount paid (EUR '000)	Amount for non-economic activities (EUR '000)	Remainder after deducting non-economic activities (EUR '000)	Subsidy rate less non-economic activities (%)
Departmental Council 27.9.02	2 098	209	0	209	10
Departmental Council 26.6.03	8 920	3 000	478	2 522	28
Departmental Council 19.5.05	15 580	7 600	403	7 197	46
Marseille Provence Métropole 26.7.04	16 124	889	0	889	6
French State 19.12.01	NK	5 032	NK	0	NK
ERDF 22.8.02	5 280	1 520	0	1 520	29
Total	48 002	18 250	5 913	12 337	26

6.1.2. STATE RESOURCES AND IMPUTABILITY

- (247) The Departmental Council granted the CCIMP subsidies financed through resources of the department of Bouches-du-Rhône, which is a decentralised local authority. The resources of local authorities are State resources under Article 107 TFEU ⁽⁵⁰⁾.
- (248) The same is true for the subsidies received from the Marseille Provence Métropole Urban Community.
- (249) The DGAC subsidies came directly from central government.
- (250) The development of air cargo was partly financed by ERDF resources, which constitute State resources as they are granted under the control of the Member State concerned ⁽⁵¹⁾.
- (251) Given that the authorities that granted the subsidies form part of the public administration and that the final decisions on the use of ERDF funds are made by France, these subsidies are imputable to the French State.
- (252) In conclusion, the subsidies covered by this Decision were granted using State resources and are imputable to the State.

6.1.3. SELECTIVE ADVANTAGE FOR THE CCIMP

- (253) To determine whether a state measure constitutes aid to an undertaking, it must be determined whether the company in question enjoys an economic advantage enabling it to avoid costs that would otherwise have been borne by its own financial resources or whether it enjoys an advantage which it would not have received under normal market conditions ⁽⁵²⁾.
- (254) According to Court of Justice case-law, an airport operator should bear the costs of operating the airport, including the infrastructure costs ⁽⁵³⁾.
- (255) In this respect, it should be noted, however, that capital placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions cannot be regarded as State aid ⁽⁵⁴⁾.
- (256) It should therefore be examined whether the Departmental Council acted as a market economy operator in its decision to participate in financing the construction of Terminal mp2.
- (257) France maintains that the CCIMP acted as a market economy operator by including, in the business plan for the construction of Terminal mp2, the net investment flows of the subsidy received from the Departmental Council. As a result, France assesses that Terminal mp2 was profitable for the airport operator, which did not bear all the construction costs. However, it does not prove that the investment was profitable for the grantor of the aid, namely the Departmental Council.
- (258) Consequently, according to France, there is nothing to prove that the Departmental Council, as grantor of the subsidy, expected the investments made in Marseille Provence Airport to be profitable.

⁽⁵⁰⁾ Judgment in *Région Nord-Pas-de-Calais*, T-267/08 and T-279/08, EU:T:2011:209, paragraph 108.

⁽⁵¹⁾ With regard to the qualification of ERDF resources as State aid, see the Commission Decision in Case N 514/2006 *South Yorkshire digital region broadband project*, recital 29, and the Commission Decision in Case N 44/2010, *Development of infrastructure on Krievu Sala for relocation of port activities out of the city center*, recitals 69 to 70.

⁽⁵²⁾ Judgment in *France v Commission*, C-301/87, EU:C:1990:67, paragraph 41.

⁽⁵³⁾ Judgment in *Freistaat Sachsen and Others v Commission*, T-443/08 and T-445/08, EU:T:2011:117, paragraph 107.

⁽⁵⁴⁾ Judgment in *France v Commission*, C-482/99, EU:C:2002:294, paragraph 69.

- (259) France also maintains ⁽⁵⁵⁾ that, by granting a subsidy to finance Terminal mp2, the Departmental Council acted to achieve an objective of general interest involving support for local jobs, regional development and improved local connectivity.
- (260) However, the conduct of a market economy operator is guided by prospects of profitability ⁽⁵⁶⁾. The market economy operator test will normally be satisfied where the structure and future prospects for the company are such that a normal return, by way of dividend payments or capital appreciation by reference to a comparable private undertaking, can be expected within a reasonable period. In this context, all social, regional-policy and sectoral considerations should be left aside ⁽⁵⁷⁾.
- (261) As a result, any positive effects on the economy of the region surrounding the airport cannot under any circumstances be included in this evaluation, which is aimed at determining whether or not the intervention conceals elements of aid ⁽⁵⁸⁾.
- (262) France has not invoked anything else that could prove that the Departmental Council intended to act as a prudent investor by granting the subsidies in question. It follows that the Departmental Council, which did not have valid expectations of the planned investments being profitable, did not act as a market economy operator in its decision to grant a subsidy to Marseille Provence Airport to finance the second terminal.
- (263) France does not maintain that the other public authorities that participated in financing the infrastructure of Marseille Provence Airport through their subsidies acted as market economy operators in their decision-making. There is also nothing in the records to prove that this may have been the case.
- (264) It follows that the subsidies granted by the Departmental Council, Marseille Provence Métropole, the French State and the ERDF gave the CCIMP an advantage that it would not have obtained under normal market conditions.
- (265) In this case, the Commission observes that the investment subsidies benefited the CCIMP alone, and no other airport operators or other undertakings in other sectors. The measure is therefore selective within the meaning of Article 107(1) TFEU.

6.1.4. EFFECT ON COMPETITION AND INTRA-COMMUNITY TRADE

- (266) As the operator of Marseille Provence Airport, the CCIMP is in competition with other airport platforms serving the same catchment area within 100 km or 60 minutes. In this respect, the Commission notes in particular that Avignon and Nîmes airports are located within that area. More specifically, the Commission notes that Nîmes Airport and Toulon-Hyères Airport are respectively 98 km and 113 km from Marseille Provence Airport and that those airports also offer flights to Brussels-Charleroi, Fez and London. Furthermore, like Marseille Provence Airport, Nîmes Airport is also served by Ryanair. Aid granted to the CCIMP therefore risks distorting competition. As the airport services market and the air transport market are open to competition within the EU, aid also risks affecting trade between Member States. In addition, there is competition between the airport operators responsible for operating those airports and, consequently, aid granted to the CCIMP may reinforce its position on that market. Furthermore, airports situated outside this catchment area are also in competition given that airlines, and particularly low-cost airlines, choose their destinations from among the various airports in Europe and beyond.

6.1.5. CONCLUSION ON THE EXISTENCE OF AID

- (267) For these reasons, the investment subsidies totalling EUR 12,337 million granted by various public authorities to finance the investment at Marseille Provence Airport, including the subsidy of EUR 7,197 million granted by the Departmental Council for the construction of Terminal mp2, constitute State aid within the meaning of Article 107(1) TFEU.

⁽⁵⁵⁾ France argues in the alternative that the subsidy granted by the Departmental Council to finance Terminal mp2 constitutes aid compatible with the Treaty stipulations.

⁽⁵⁶⁾ Judgement in *Alitalia v Commission*, T-296/97, EU:T:2000:289, paragraph 84; judgement in C-305/89 cited above, paragraph 20.

⁽⁵⁷⁾ See, in this respect, the 2005 Guidelines, point 46.

⁽⁵⁸⁾ See judgement in *Neue Maxhütte Stahlwerke GmbH and Lech-Stahlwerke GmbH v Commission*, T-129/95, T-2/96 and T-97/96, EU:T:1999:7, paragraph 120. See also judgement in *Belgium v Commission*, 40/85, EU:C:1986:305, paragraph 13.

6.2. EXISTENCE OF POTENTIAL OPERATING AID GRANTED TO THE CCIMP

6.2.1. FINANCIAL FLOWS BETWEEN MARSEILLE PROVENCE AIRPORT AND THE CCI

- (268) France states that the financial flows totalling EUR [...] million between 2001 and 2010 do not constitute a subsidy granted to the CCIMP, but a contribution paid by the airport to the CCI's general arm for services billed, based on the costs incurred by the general arm ⁽⁵⁹⁾. France maintains that Marseille Provence Airport never benefited from financial aid from the CCI's general arm. France has submitted a certificate issued by the CCIMP's auditor, which confirms the reliability of the accounting information provided. There is nothing in the records to prove otherwise. On that basis, it seems that the services were billed according to the actual costs.

6.2.2. POTENTIAL AID RESULTING FROM THE AIRPORT TAX SYSTEM

- (269) Under French law, the airport tax system is intended to finance sovereign tasks such as safety, fire and rescue services, security (screening of hold baggage, access control, screening of passengers and cabin baggage) and automated border controls.
- (270) The Commission must check that this redistribution mechanism cannot lead to overcompensation that may be regarded as aid, particularly as this mechanism depends on the number of passengers.
- (271) However, the system set up by Article 1609 *quater* of the General Tax Code and by the Interministerial Order of 30 December 2009 on returns to be submitted by airport operators to establish the passenger rate of the airport tax, as amended in 2012, aims to prevent any overcompensation by combining a calculation system based on costs incurred with possible *ex post* corrections.
- (272) As a result, the airport tax is calculated as follows: the airport covers the costs of the tasks as defined by the relevant texts and then submits a return indicating these costs and the traffic figures to the local office of the DGAC for checking and certification under the legislation in force. The central administration of the DGAC then carries out a second check, which includes previous years. The rates are then set by interministerial order on an airport-by-airport basis according to the costs incurred by each airport in carrying out the relevant sovereign tasks.
- (273) In addition, the tax calculation is also based on a multiannual forecast of costs and traffic, with adjustment mechanisms from one year to the next. *Ex post* checks also enable any overcompensation to be corrected.
- (274) It follows that, as the proceeds from the tax are effectively used to pay for the sovereign tasks and as Marseille Provence Airport receives an amount not exceeding the costs incurred in carrying out these tasks, there can be no selective advantage benefiting the airport. The airport tax paid to the CCIMP cannot therefore constitute State aid within the meaning of Article 107(1) TFEU.

6.3. COMPATIBILITY OF THE INVESTMENT AID WITH THE INTERNAL MARKET

- (275) The Commission has assessed whether the aid may be considered compatible with the internal market. Article 107(3) TFEU provides for certain exceptions to the general prohibition on aid set out in paragraph 1 of the same article. In this regard, the 2005 Guidelines provide a framework for assessing whether aid to airports may be considered compatible with the internal market pursuant to Article 107(3)(c).
- (276) According to point 61 of the 2005 Guidelines ⁽⁶⁰⁾, financing aid for airport infrastructure may be declared compatible, in particular pursuant to Articles 107(3)(a), (b) or (c) and 93(2), where:
- (i) the construction and operation of the infrastructure meet a clearly defined objective of general interest (regional development, accessibility, etc.);

⁽⁵⁹⁾ According to France, the services provided by the general arm to the airport arm consisted of administrative and organisational work, human resources management and legal expertise.

⁽⁶⁰⁾ For details on the *ratione temporis* assessment under the 2005 Guidelines, the Commission refers to paragraphs 218 to 222 of its opening decision.

- (ii) the infrastructure is necessary and proportional to the objective which has been set;
- (iii) the infrastructure has satisfactory medium-term prospects for use, in particular as regards the use of existing infrastructure;
- (iv) all potential users of the infrastructure have access to it in an equal and non-discriminatory manner;
- (v) the development of trade is not affected to an extent contrary to the Community interest.

In addition to meeting these criteria, the necessity of the aid must be established ⁽⁶¹⁾. The aid amount must be limited to what is necessary to achieve the objective which has been set.

6.3.1. COMPATIBILITY OF THE INVESTMENT AID FOR FINANCING TERMINAL MP2

- (i) The construction and operation of the infrastructure meet a clearly defined objective of general interest (regional development, accessibility, etc.)
- (277) According to the schedule of conditions for the Marseille Provence aerodrome concession, the concession-holder is responsible for and must finance the construction of infrastructure. As the airport operator decided on and incurred the investment costs, this therefore involves investment aid in favour of that operator.
- (278) According to France, Marseille Provence Airport was going to face congestion problems in the more or less short term. The business plan produced in November 2004 determined that Marseille Provence Airport would be saturated by 2007 with regard to the check-in desks and by 2016 with regard to the departure areas, if no changes were made. The first objective was therefore to tackle the terminal's saturation in the short term, given the expected increase in air traffic.
- (279) The second objective was to boost the region's economic development through better use of the airport and increased air traffic. To this end, the development of a complementary service to that offered at Marseille Provence Airport, in line with the airport's strategy which had identified the need to attract low-cost airlines, was regarded as a way of developing the airport's activity. On the one hand, the construction of Terminal mp2 was essential in order to offer different services, not yet available in the region, to the low-cost airlines. This terminal was specifically designed to match this new function of the airport as closely as possible. Terminal mp2 therefore meets a different need for customers who are prepared to accept a simplified service level in order to benefit from lower costs. Airlines wanting to offer such simplified services could not have based themselves at Terminal mp1, where the airport charges were significantly higher, in line with the better quality of its infrastructure and the higher level of its costs. This level of charges would necessarily have been reflected in the price of the flight tickets. The demand for this type of simplified service is sensitive to any increase in costs. On the other hand, the operating conditions at Terminal mp1 did not lend themselves to the need for rapid boarding and disembarkation of passengers.
- (280) France maintains that the project was expected to have a significant impact on the region's economic and social development, particularly in terms of stimulating employment, even though the loss of traffic from Terminal mp1 would result in the loss of jobs.
- (281) The construction of Terminal mp2 was therefore in line with the Commission's 2007 action plan for airport capacity, efficiency and safety in Europe ⁽⁶²⁾, which notes that 'given the expected traffic evolution, Europe will face an ever growing gap between capacity and demand' for airports and concludes that this 'capacity crunch at airports poses a threat to the safety, efficiency and competitiveness of all actors involved in the air transport supply chain' ⁽⁶³⁾. According to this action plan, it is not only necessary to make more efficient use of existing infrastructure, but also to provide 'support for new infrastructure'. The Commission notes the importance of regional airports in managing this shortage of capacity.

⁽⁶¹⁾ Commission Decision of 18 February 2011 on State aid NN 26/2009 — Greece — Ioannina airport development, recitals 69 and 70.

⁽⁶²⁾ COM(2006) 819 final.

⁽⁶³⁾ Action plan, paragraph 7 and box on page 3.

(282) In the light of the above, it must be said that the construction and operation of Terminal mp2 meet clearly defined objectives of general interest such that this compatibility criterion is met in this case.

(ii) The infrastructure is necessary and proportional to the objective which has been set

(283) Given the traffic forecasts, the airport operator envisaged two platform development scenarios in order to tackle the saturation problems identified at the check-in desks and departure areas. The business plan produced in November 2004, and updated in September 2005 and May 2006, proves that the scenario involving construction of a new low-cost terminal offered better prospects for profitability. Furthermore, taking into account the aid granted by the Departmental Council, the September 2005 business plan, updated in May 2006, comes to the conclusion that the plan to construct Terminal mp2 offered a better return than the alternative plan for developing the platform, given the traffic assumptions ⁽⁶⁴⁾. The construction of Terminal mp2 was therefore the option best suited to achieving the objective of solving the airport's saturation problems while increasing traffic at Marseille Provence Airport.

(284) Moreover, Terminal mp2 was constructed by reconditioning the former unused cargo terminal, which therefore meant that the existing infrastructure was optimised.

(285) Lastly, Terminal mp2 was specifically designed to offer the low-cost airlines a service level compatible with their business model, whereas Terminal mp1 seemed unsuited to this type of traffic, particularly due to the lack of contact stands and airbridge operation times incompatible with the rotations of under 30 minutes that are a factor in the business models of low-cost airlines. Conversely, Terminal mp2 was designed to allow passengers to walk from the departure hall to the aircraft parking areas. The design of Terminal mp2 therefore made this project specifically suited to low-cost airline traffic, identified as being the essential factor in the strategy to increase traffic at Marseille Provence Airport and to develop the economic activities and regional employment directly and indirectly associated with that traffic.

(286) The other option to prevent the airport's saturation was to expand the existing Terminal mp1. Given the nature of this project, its costs had to be limited as far as possible. The construction of Terminal mp2 was chosen as being the cheaper option that could also result in a larger increase in traffic.

(287) For these reasons, it can be concluded that the infrastructure in question is necessary and proportional to the objectives which have been set.

(iii) The infrastructure has satisfactory medium-term prospects for use, in particular as regards the use of existing infrastructure

(288) The November 2004 business plan estimates the capacity of the low-cost terminal's check-in and departure halls at 3,8 million passengers and provides low-cost traffic projections for the 2005-2021 period. These projections indicate that 50 % of the capacity of Terminal mp2 was expected to be used from 2012, rising to 89 % by 2021. The traffic estimates on which this business plan was based have been corroborated by the actual traffic at Terminal mp2 between 2006 and 2010.

Table 8

Years	Estimated traffic (PAX)	Actual traffic	Capacity utilisation rate — estimated (**) (%)
2006	250 000	107 418 (*)	6,58
2007	900 000	934 481	23,68

⁽⁶⁴⁾ The scenario without construction of the new terminal gave a total cumulative cash flow over the period of EUR [...]*, whilst the scenario with construction of Terminal mp2 gave a total cumulative cash flow over the period of EUR [...]*. The differential between the two scenarios resulted in an IRR of [...]* %.

Years	Estimated traffic (PAX)	Actual traffic	Capacity utilisation rate — estimated (**) (%)
2008	1 200 000	1 059 663	31,58
2009	1 450 000	1 670 240	38,16
2010	1 650 000	1 730 000	43,42
2011	1 850 000	1 372 164	48,68
2012	2 050 000	1 811 616	53,94

(*) The limited traffic in 2006 is explained by the late opening (October 2006) of Terminal mp2.

(**) Total capacity: 3,8 million passengers.

- (289) In addition, as Terminal mp1 and Terminal mp2 offer different services, the assessment of the prospects for use of Terminal mp2 must not be based on the traffic developments recorded at the main terminal. In any event, the actual traffic for 2006 to 2010 reveals that the capacity utilisation rate of Terminal mp1 remained stable after the second terminal opened.

Table 9

Years	Actual traffic	Capacity utilisation rate — actual (*) (%)
2006	6 008 466	69,86
2007	6 028 292	70,09
2008	5 907 174	68,68
2009	5 619 879	65,34
2010	5 799 435	67,43
2011	5 990 703	69,65
2012	6 483 863	75,39

(*) Total capacity: 8,6 million passengers.

- (290) Consequently, the new infrastructure has good medium-term prospects for use, in particular as regards the use of existing infrastructure.

(iv) All potential users of the infrastructure have access to it in an equal and non-discriminatory manner

- (291) According to the information submitted by France and particularly the rules governing use of Terminal mp2, which the Commission has already reproduced in its opening decision, all potential users (airlines) have access to the new infrastructure in an equal and non-discriminatory manner.

(v) The development of trade is not affected to an extent contrary to the Community interest

- (292) The aid intensity does not exceed 50 % of the eligible costs. Although Marseille Provence Airport is the only Category B airport in the catchment area, the Terminal mp2 traffic corresponds to point-to-point routes that can also be established at small regional airports. Avignon Airport is around 75 km away, with a journey time of 45 minutes, and Nîmes Garons Airport is around 100 km away, with a journey time of 60 minutes. Toulon Airport is 113 km from Marseille Provence Airport, and therefore potentially also within the same catchment area.

- (293) However, it does not appear from the available information that the opening of Terminal mp2 may have held back the development of these airports or affected the development of trade to an extent contrary to the common interest.

(vi) Necessity of the aid

- (294) According to the business plan estimates, the terminal's construction would not have been profitable without the aid. The aid was therefore necessary at the time when the investment decision was taken, because a private investor would not have constructed the terminal without State support. Moreover, given the limited intensity of this aid, the Commission considers that this is not disproportionate.

6.3.2. COMPATIBILITY OF THE ERDF SUBSIDY FOR THE DEVELOPMENT OF AIR CARGO

(i) The construction and operation of the infrastructure meet a clearly defined objective of general interest ⁽⁶⁵⁾.

- (295) The subsidy granted was intended to develop the cargo transport activity at Marseille-Provence Airport and thus stimulate job-creating economic activities in an area with an unemployment rate significantly higher than the national average.
- (296) The aid granted by the ERDF was included in the 'Objective 2' programming document of the Structural Funds for the 2000-2006 period, which concerned those regions facing structural difficulties and needing support with their economic and social conversion ⁽⁶⁶⁾.
- (297) The subsidy granted by the ERDF to develop the cargo activity at Marseille Provence Airport therefore met a clearly defined objective of general interest.

(ii) The infrastructure is necessary and proportional to the objective which has been set

- (298) It is clear from the available information that the cargo tonnages transported fell sharply at Marseille Provence Airport in 1997 and then again in 2008. Support to maintain the cargo activity was therefore envisaged in order to optimise the existing infrastructure, particularly the runway and ground areas around the runway, which had significant spare capacity, especially at night.
- (299) The improvements made involved securing road flows, redeveloping the vacant cargo terminals, creating aircraft parking areas as close as possible to the cargo terminal in order to reduce handling times, and enlarging plots in order to improve the attractiveness of the area.
- (300) Marseille Provence Airport carried out the work described at a total cost of EUR 5 280 000. The subsidy received, which totalled EUR 1 520 000, therefore represented only 28,79 % of the project's total financial envelope. Moreover, Article 5 of the agreement of 22 August 2002 between Marseille Provence Airport and the Prefecture of the PACA region stipulated that the Community aid would be paid only on production of evidence of the progress of work and subject to the co-financing agreed under the financing plan being effectively respected.

⁽⁶⁵⁾ The Commission applies the same compatibility criterion to cargo transport, see Commission Decision of 23 July 2014 in Case No SA.30743 (11/C) (ex N 138/10) — Germany — Financing of infrastructure projects at Leipzig/Halle airport (OJ C 284, 28.9.2011, p. 6), recital 128.

⁽⁶⁶⁾ Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (OJ L 161, 26.6.1999, p. 1), Article 1.

(301) It must be concluded that the infrastructure is necessary and proportional to the objective of general interest which has been set.

(iii) The infrastructure has satisfactory medium-term prospects for use, in particular as regards the use of existing infrastructure

(302) Although Marseille Provence Airport saw its cargo traffic fall after the withdrawal of Aéropostale (main cargo customer) and due to the lack of hold space on the Marseille-Orly shuttle, the development of a cargo platform to the Maghreb was designed to maintain the local jobs directly linked with this activity while optimising the available infrastructure.

(303) The traffic results show that the tonnage transported rose by over 20 % between 2005 and 2010.

(304) The new infrastructure therefore has good medium-term prospects for use, in particular as regards the use of existing infrastructure, which will be optimised by the planned work.

(iv) All potential users of the infrastructure have access to it in an equal and non-discriminatory manner

(305) According to the available information, no operating rules limit access to the cargo infrastructure. The cargo area is open to express cargo operators, ground handling service operators, cargo companies and road hauliers.

(306) It therefore follows that all users have access to the cargo infrastructure in an equal and non-discriminatory manner.

(v) The development of trade is not affected to an extent contrary to the Community interest

(307) The aid granted to the cargo activity development project is limited to 28 % of the total cost of the work. Moreover, this project has helped to develop the European transport system and boost economic development.

(308) Consequently, it can be concluded that the development of trade is not affected to an extent contrary to the common interest.

(vi) Necessity of the aid

(309) The investment decision was made in the context of the new Paris-Marseille TGV line that was opened in 2000 and the reduction in air traffic after 11 September 2001. The financial capacity of Marseille Provence Airport also steadily and significantly declined from 2000 to 2003. The CCIMP therefore had to respond to the erosion in passenger and cargo traffic. Costly work was planned for the 2005-2006 period in order to renovate the two runways. Under these circumstances, although the project's profitability was not excluded, the return on investment would have been more uncertain, particularly over a reasonable period. It is therefore likely that, without the ERDF subsidy, the airport, which was concerned about the drop in passenger traffic, would have delayed, if not cancelled, its investments in the cargo activity.

(310) Given the prevailing market conditions at the time when the aid was granted, namely variable cargo volumes at the airport, a high level of risk and uncertain prospects for profitability in a newly liberalised market, a private investor would not, in all likelihood, have invested in the development of cargo transport at Marseille Provence Airport. The aid was therefore necessary to meet the objective set. Furthermore, given the limited intensity of the aid, the Commission considers that this was not disproportionate to the achievement of that objective.

6.3.3. COMPATIBILITY OF THE DEPARTMENTAL COUNCIL SUBSIDIES OF 27 SEPTEMBER 2002 AND 26 JUNE 2003 AND OF THE MARSEILLE MÉTROPOLE PROVENCE URBAN COMMUNITY SUBSIDY OF 26 JULY 2004 FOR THE EXTENSION, RESTRUCTURING AND DEVELOPMENT OF THE AIRPORT

- (i) The construction and operation of the infrastructure meet a clearly defined objective of general interest (regional development, accessibility, etc.)
- (311) The 2002 and 2003 subsidies were for work to renovate the main runway and slab joints in the aircraft parking areas, construct ramps and create quick exits to allow the number of hourly movements to be increased and thus optimise use of the existing infrastructure. It is clear from the information provided by France that the airport's two runways had not seen any changes between 1980 and 2000, even though the number of commercial movements had risen from 46 603 to 100 047. The objective of this measure was therefore to tackle the imminent saturation of the airport's airside areas.
- (312) The 2004 subsidy helped to finance an increase in the capacity of Hall 1, the optimisation of runway 1 and the reconstruction of runway 2. These improvements were deemed necessary to allow Marseille Provence Airport to cope with a significant increase in European traffic, given the forecast rise in passenger numbers ⁽⁶⁷⁾.
- (313) The construction of a railway station accessible by the TGV was intended to improve coordination between the various transport modes.
- (314) In line with its findings in relation to the construction of Terminal mp2, the Commission concludes that the extension, restructuring and development of the airport meet objectives of general interest that involve ensuring the continuity of air traffic and its future development.
- (ii) The infrastructure is necessary and proportional to the objective which has been set
- (315) The work undertaken was necessary to increase and maintain the airport's airside capacity, solve the existing bottlenecks and optimise the connection with the high-speed train network.
- (316) Moreover, the Departmental Council subsidy represented 9,5 % of the cost of the work carried out and 7 % of the initial capital programme. The Marseille Métropole Provence Urban Community subsidy represented 6,2 % of the cost of the work carried out and 5,6 % of the cost of the planned work programme.
- (317) It must be concluded that the infrastructure is necessary and proportional to the objective of general interest which has been set.
- (iii) The infrastructure has satisfactory medium-term prospects for use, in particular as regards the use of existing infrastructure
- (318) The improvements financed were deemed necessary to accommodate additional traffic. It is clear from the available figures that the number of passengers carried at Marseille Provence Airport rose by over 25 % between 2006 and 2012. In addition, the runway capacity now apparently stands at 140 000 movements per year. According to projections in the Noise Exposure Plan report appended to the Prefectural Order of 4 August 2006, the airport traffic target for 2015 will be achieved with 113 909 movements and the 2020 target with 122 449 movements. As a result, improving the runways and access and exit ramps means that the airport can handle the traffic projections to 2020, with the infrastructure therefore having satisfactory prospects for use.
- (iv) All potential users of the infrastructure have access to it in an equal and non-discriminatory manner
- (319) It is clear from the available information that all potential users of the infrastructure have access to it in an equal and non-discriminatory manner.

⁽⁶⁷⁾ The partnership agreement concluded on 14 May 2004 between Marseille Provence Airport and the Marseille Métropole Provence Urban Community projects an increase in national traffic of 5 % per year and in international traffic of nearly 10 % per year between 2003 and 2006.

(v) The development of trade is not affected to an extent contrary to the Community interest

- (320) As indicated in recitals 293 and 308, the development of traffic at Marseille Provence Airport has not affected the activity of airports situated within the same catchment area and the development of trade is not affected to an extent contrary to the common interest.

(vi) Necessity of the aid

- (321) The investment decision was made in the context of the new Paris-Marseille TGV line that was opened in 2000 and the reduction in air traffic after 11 September 2001. The financial capacity of Marseille Provence Airport also steadily and significantly declined from 2000 to 2003. The CCIMP therefore had to respond to the erosion in passenger and cargo traffic. The intensity of this aid was limited to 13 % ⁽⁶⁸⁾. As the airside investments could not have been avoided, in the absence of the subsidy, the programme would have necessarily been reduced by over EUR 3 million, most likely taken from the internal improvements of Hall 1, such as those intended to provide space for tour operators, enable airlines to have ticket sale counters or create shops. However, these are the investments that have allowed foreign airlines and tour operators to be accommodated and commercial revenues to be increased.
- (322) Given the prevailing market conditions at the time when the aid was granted, namely a lack of experience and initiative among private operators with little inclination to invest in airport infrastructure, a high level of risk and uncertain prospects for profitability in a newly liberalised market, a private investor would not, in all likelihood, have invested in the reconstruction of airport infrastructure or in a TGV connection at Marseille Provence Airport. The aid was therefore necessary to meet the objective set. Furthermore, given the limited intensity of the aid, the Commission considers that this was not disproportionate to the achievement of that objective.

7. ASSESSMENT OF THE MEASURES IN FAVOUR OF AIRLINES USING THE AIRPORT — EXISTENCE OF AID

7.1. POTENTIAL AID GRANTED THROUGH THE REDUCED PASSENGER CHARGE FOR NATIONAL FLIGHTS

- (323) In an earlier decision ⁽⁶⁹⁾, the Commission concluded that an aid scheme existed in favour of airlines operating routes with a national destination, which was incompatible with the internal market. France took steps to abolish this scheme.
- (324) The extract from the 2007 Cocoéco deliberations produced by France shows that the passenger charges applicable to national flights and to flights to EU countries that are members of the Schengen Area were aligned at Marseille Provence Airport from 1 January 2008.
- (325) The Commission therefore considers that this abolished measure does not need re-investigation.

7.2. POTENTIAL AID TO AIRLINES USING THE AIRPORT THROUGH THE DIFFERENTIATION OF AIRPORT CHARGES AND POTENTIAL AID TO RYANAIR AND AMS THROUGH THE MARKETING AGREEMENT

7.2.1. STATE RESOURCES AND IMPUTABILITY

- (326) In order to ascertain whether the resources of the CCIMP constitute State resources, the Commission notes that a public administrative institution (*établissement public à caractère administratif*) constitutes an independent public body that, nevertheless, forms part of the organisation of the public administration and is therefore subject to very close supervision by other public authorities.

⁽⁶⁸⁾ Weighted average.

⁽⁶⁹⁾ See footnote 31.

- (327) Moreover, the general budget of the CCIs is funded by tax revenue collected from companies entered in the trade and companies register.
- (328) In addition, the CCIs come under the category of public authorities pursuant to Commission Directive 2000/52/EC ⁽⁷⁰⁾, they constitute contracting authorities pursuant to Directive 2004/18/EC of the European Parliament and of the Council ⁽⁷¹⁾ or, as applicable, contracting entities pursuant to Directive 2004/17/EC of the European Parliament and of the Council ⁽⁷²⁾, and their purchasing is subject to public procurement procedures.
- (329) According to General Court case-law, those arrangements are part of the internal organization of the public sector, and the existence of rules for ensuring that a public body remains independent of other authorities does not call into question the principle itself of the public nature of that body. Community law cannot permit the rules on State aid to be circumvented merely through the creation of autonomous institutions charged with allocating aid ⁽⁷³⁾. Under French law, the CCIs are intermediate state authorities. Their acts are therefore, in any event, imputable to the French State, as they form an integral part of the latter. As the CCIs form part of the public administration and are subject to close supervision by other public authorities (see recital 10), the Commission considers that the decisions of these public entities are necessarily imputable to the State. Their situation therefore differs from that of public undertakings. In the case of the CCIs, imputability does not need to be established, as was the case in the *Stardust Marine* judgment, on the basis of another public authority associated with the decision-making process of a public undertaking, as also confirmed by the numerous public interest tasks entrusted to them by law.
- (330) Furthermore, even if the Commission had to establish the imputability to the State of CCIMP decisions while regarding the CCIMP as a simple public undertaking, it would have a number of factors allowing this imputability to be established.
- (331) First of all, the CCIMP is subject to close administrative supervision, as explained in Section 2.1.2. In particular, the CCIMP's decisions on airport charges must be approved by the supervisory authority in order to be enforceable. Moreover, the Cocoéco that consists of the Departmental Council of Bouches-du-Rhône, the Provence-Alpes-Côte d'Azur Regional Council and the Marseille Provence Métropole Urban Community is consulted on each occasion, prior to the introduction of new airport charges, and approves those charges.
- (332) It is therefore highly unlikely that the Cocoéco would not also have approved the decision to sign the marketing services agreement with AMS, or at least that it was not involved in that decision. Although it may not have given a formal opinion on that agreement, it approves the overall balance of the airport's resources, by supervising the airport charges. The decisions on airport charges and on the marketing services agreement signed with AMS should in fact be assessed together.
- (333) Moreover, the CCIMP has concluded several partnership agreements ⁽⁷⁴⁾ with the authorities concerned so that the latter assume financial responsibility for some of the programmes of investment in the airport infrastructure. In return for this financial participation, Marseille Provence Airport has undertaken to pursue a dynamic commercial policy designed to maximise development of national and international air routes ⁽⁷⁵⁾. It is stipulated that this policy must be conducted 'in consultation with the Departmental Council'. The latter can therefore ask the airport to provide it with studies on the development of air traffic and on the prospects for developing new routes.
- (334) Furthermore, as a general point, it has been maintained by both France and the CCIMP that the development strategy adopted by Marseille Provence Airport had objectives of general interest involving the economic dynamism of the surrounding region and the creation of jobs. These are objectives in which the local authorities have a direct interest, as indicated in the agreements concluded with the CCIMP ⁽⁷⁶⁾.

⁽⁷⁰⁾ Commission Directive 2000/52/EC of 26 July 2000 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings (OJ L 193, 29.7.2000, p. 75).

⁽⁷¹⁾ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114).

⁽⁷²⁾ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134, 30.4.2004, p. 1).

⁽⁷³⁾ Judgment in *Air France v Commission*, T-358/94, EU:T:1996:194, paragraph 62.

⁽⁷⁴⁾ Agreements concluded with the Departmental Council on 3 October 2002, 5 September 2003 and 19 May 2005 and with the Marseille Provence Métropole Urban Community on 14 May 2004.

⁽⁷⁵⁾ Agreements of 5 September 2003 and 19 May 2005.

⁽⁷⁶⁾ See, for example, in the preamble to the agreement of 19 May 2005.

- (335) It also appears, in the light of recital 10, that the CCIs are integrated within the structure of the public administration, that they pursue their economic activities under very special conditions that are in no way comparable with the conditions for private operators, that their legal status is governed by public law, and that the supervision of their management by the public authorities is extensive.
- (336) In the light of the above, it must therefore be concluded that the airport charging measures and the marketing services agreement concluded with AMS were financed through State resources and that their financing is imputable to the State.

7.2.2. SELECTIVE ADVANTAGE FOR THE AIRLINES OPERATING AT MARSEILLE PROVENCE AIRPORT

- (337) In order to ascertain whether a State measure constitutes aid, it must be determined whether the undertaking received an economic advantage enabling it to avoid having to bear costs that would normally have had to be met out of its own financial resources or whether it received an advantage that it would not have received under normal market conditions.
- (338) The Commission points out in this respect that regional development considerations cannot be taken into account when applying the market economy operator test.

Application of the benchmarking approach

- (339) Ryanair maintains that, in order to rule out the existence of an economic advantage that may not have been obtained under normal market conditions, the charges in the 1999 agreements must be compared with airport charges applied at other European airports to low-cost airlines.
- (340) The Commission does not rule out this approach on principle. However, the identification of a benchmark requires first that a sufficient number of comparable airports providing comparable services under normal market conditions can be selected.
- (341) In this respect, the Commission notes that, when the 1999 agreements were signed, EU airports were regarded by many as forming part of a public administration pursuing social and regional objectives and were therefore funded by public authorities, whatever their profitability. In fact, a majority of EU airports is still currently benefiting from public funding to cover investment and operating costs. Therefore, the Commission considers that these airports' charges tend not to be determined with regard to market considerations, and in particular sound *ex ante* profitability prospects, but essentially with regard to social or regional considerations.
- (342) The Commission further notes that, even though some airports are privately owned or operated without social or regional considerations, their charges may be heavily influenced by the charges applied by the majority of publicly subsidised airport operators, as these latter charges are taken into account by airlines during their negotiations with the privately owned or operated airports.
- (343) In the present case, the airports used as benchmarks received public funding before their privatisation, and even afterwards. Accordingly, Luton Airport, which is publicly owned, started to be operated by a private company after having received an investment of GBP 80 million under a public-private partnership. Liverpool Airport has benefited in particular from co-financing under the EU Structural Funds, and the loss-making Prestwick Airport was recently renationalised for the symbolic sum of GBP 1. Moreover, it is not clear whether the cost of the existing infrastructure was taken into account when these reference airports were privatised. Lastly, the comparability of the figures in the Oxera study is limited by the fact that the charges paid at Marseille Provence Airport do not take account of the marketing agreement with AMS, whereas the charges indicated for all the other airports are net of any contribution by the airport to Ryanair's marketing activities.
- (344) Under those circumstances, the Commission is unable to identify an appropriate benchmark for establishing a genuine market price for the services provided by the airport operator.

Profitability analysis

- (345) In the absence of a clearly defined benchmark, the Commission considers that the *ex ante* incremental profitability analysis is the relevant criterion for assessing the agreements proposed or concluded by airport operators with individual airlines. In this context, the measures under investigation form part of the airport's overall strategy leading to profitability, at least in the long term.
- (346) The Commission considers that setting different charges is a normal commercial practice. However, this practice must be justified by commercial considerations in order to satisfy the market economy operator test ⁽⁷⁷⁾.
- (347) France argues that Marseille Provence Airport acted rationally, and supports its statement with the airport's *ex ante* calculations.
- (348) In order to assess this criterion, the Commission will take account of both the aeronautical revenue (airport charges) and the revenue from the airport's non-aeronautical activity (shops, car parks, etc.).

7.2.2.1. Reductions in the charges for creating new routes

- (349) The CCIMP introduced two different schemes of reduced charges to encourage the creation of new air routes. On 6 December 2004 the Cocoéco voted to create a reduction of 90 % in the first year and 50 % in the second year on the landing, lighting and parking charges for passenger flights. This scheme applied from 15 February 2005 to 31 July 2009.
- (350) As regards this first measure, France maintains that an *ex ante* profitability study of 8 December 2004 estimated, on the one hand, the annual reduction for existing routes, or for routes that would have been created without this measure, at EUR [...] * and, on the other hand, the additional costs of supplying crews and car parking at an extra EUR [...] * per year. Only 20 % of the new routes were presumed to continue for a third year, equivalent to an amount of EUR [...] *. The revenue from new routes created was estimated at EUR [...] *. The assumptions made in the original study seemed realistic at that time.
- (351) Given that the airport had a positive margin and as this measure did not require any initial investment, the Commission concludes that it satisfies the market economy operator test.
- (352) As regards the reduction applicable from 15 February 2005 to 31 July 2009, France has produced the Cocoéco meeting records of 14 September 2009 according to which, on the one hand, 83,1 % of the reductions benefited routes that continued after the end of the reductions and, on the other hand, the modulation did not involve any capacity investment.
- (353) Lastly, the economic impact study on the modulation proposed during that Cocoéco meeting concluded that, for every passenger taking a flight benefiting from the modulated charges, the average margin over the three years that the measure applied was positive:

— for mp1: EUR [...] * – EUR [...] * = EUR [...] *

— for mp2: EUR [...] * – EUR [...] * = EUR [...] *

- (354) This result showed that the initial *ex ante* calculations were in fact very conservative. In particular, well over 20 % of the new routes continued after the end of the initial reductions. Consequently, when the business plans were updated and subsequent studies were carried out, the assumptions were updated to take account of the initial experience gained with this measure.

⁽⁷⁷⁾ See Decision 2011/60/EU and Commission Decision 2013/664/EU of 25 July 2012 on measure SA.23324 — C 25/07 (ex NN 26/07) — Finland — Finavia, Airpro and Ryanair at Tampere-Pirkkala airport (OJ L 309, 19.11.2013, p. 27).

- (355) Based on this experience, a second incentive scheme for new routes was adopted on 18 September 2009 and came into force on 1 February 2010. This scheme granted a reduction of 60 % in the first year of operation of a new route, 45 % in the second year and 20 % in the third year. It also aimed to generate a profit margin. Based on the above calculations, the profitability of this second scheme was also plausible. This scheme was gradually withdrawn and finally ended on 31 October 2011.
- (356) The Commission therefore concludes that this measure also satisfies the market economy operator test, as it was expected to make additional profits.

7.2.2.2. *Free overnight parking*

- (357) From 1 March 2005 to date, parking between 22.00 and 06.00 has been free for passenger aircraft, for five weekly frequencies to the same destination during a minimum IATA season and for aircraft parking for at least six consecutive hours between 22.00 and 06.00. This measure applies in a non-discriminatory manner to both terminals and to all airlines.
- (358) According to France, overnight parking at the airport allows airlines to board passengers for the first slot in the morning and to land right at the end of the day, which, for medium-haul flights, means that four rotations a day can be accommodated instead of three.
- (359) France maintains that a study conducted as part of the 2004 accounts proves the *ex ante* profitability of this measure for the airport operator.
- (360) This study was based on the assumption that, for Terminal mp1, only national medium-haul flights were likely to generate additional rotations due to the overnight parking charge being waived. For Terminal mp2, each of the aircraft of its low-cost airline customers not operating single daily return flights from their overnight base was regarded as likely to generate an additional daily rotation. A weighting factor of 50 % was applied to these additional rotation assumptions.
- (361) The study used the assumption that the additional costs generated by the overnight parking were limited to labour, maintenance, repair and consumable costs, estimated at EUR [...] * per night and per aircraft.
- (362) The assumptions made in the original study seemed realistic at that time. However, it is apparent from a study conducted in 2008 that the costs were underestimated, but this study relied on the fact that the additional rotations generated by this measure would still result in a net profit from 2010. Consequently, when the business plans were updated and subsequent studies were carried out, the assumptions were updated to take account of the initial experience gained with this measure.
- (363) It appears from all this information that the CCIMP acted as a market economy operator in taking the decision to grant free overnight parking at Marseille Provence Airport.

7.2.2.3. *Financing of marketing activities*

- (364) An initial scheme for financing marketing activities was introduced at Marseille Provence Airport by a CCIMP decision of 21 November 2005. However, this scheme was withdrawn before it entered into force. According to France, it resulted in a single payment [of less than EUR 300 000] * to the airline bmibaby.
- (365) France has argued that this sum, in so far as it may constitute State aid, is covered by Regulation (EC) No 1998/2006. In 2012 bmibaby ceased trading.
- (366) The Commission concludes that this aid does indeed constitute *de minimis* aid.

[illegible]

[illegible][illegible]

Table 12

Profitability analysis (EUR '000 at current prices)

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	TOTAL 2005- 2021	Internal Rate of Return
TOTAL CASH FLOW with NBV end 2021 without LCT	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
TOTAL CASH FLOW with NBV end 2021 with LCT	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
DIFFERENTIAL CASH FLOW	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
Updated TOTAL CASH FLOW with NBV end 2021 with- out LCT	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
Updated TOTAL CASH FLOW with NBV end 2021 with LCT	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
TOTAL DIFFEREN- TIAL CASH FLOW	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*

Source: Updated Business Plan of 15 September 2005 (NBV — net book value; LCT — low-cost terminal).

(369) The prudent operator will take into account all the aeronautical and non-aeronautical revenue, as well as the elasticity of traffic demand in relation to the aeronautical charges in question, in order to determine the profitability of the simplified-service terminal and the corresponding charges. The difference between the passenger charge level and the cost of the passenger function, which is covered by the non-aeronautical revenue, does not therefore constitute an advantage granted to airlines, but is the result of the operator's underlying optimisation, which, on the contrary, is aimed at ensuring the profitability of the investment project.

(370) The passenger charges (excluding check-in desks) applicable at Terminal mp2 are shown in Table 13.

Table 13

Years	Charge per passenger for intra-EU flights (EUR)		Charge per passenger for extra-EU flights (EUR)	
	Original	Retroactive	Original	Retroactive
2006	1,23	2,85	x	2,99
2007	1,22	2,85	1,28	2,99
2008	1,31	2,54	6,75	2,68
2009	1,79		1,93	
2010	1,79		1,93	
2011	1,84		1,99	

(371) In 2009 the charges were adjusted following their annulment by the Council of State. The Cocoéco decision of 18 February 2009 explains in more detail the calculation methods used to set these charges, based on the costs and revenues allocated to each terminal as specified in the study conducted by the Mazars consultancy in 2008 and covering the next six years. According to this study and based on the projections that it uses, the costs taken into account are the costs of the buildings allocated to each terminal, servicing and maintenance costs, and operating costs in proportion to their allocation to the passenger function and their use for each terminal. The revenues taken into account are the income from airport charges (passenger and check-in desks) and the commercial revenues (shops and parking) generated at the airport and allocated to each of the terminals.

(372) It appears that the passenger charges were set such that the aeronautical revenue covered the same margin of the passenger function for both Terminal mp2 and Terminal mp1, i.e. [between 50 % and 80 % for the years 2007, 2008, 2009 and 2010]*.

(373) The figures in the decision of 18 February 2009 reveal that, if both the income from airport charges and the commercial revenues allocated to the passenger function are taken into account, they cover the costs of that function at Terminal mp2 [by between 100 % and 140 % for the years 2007, 2008, 2009 and 2010]*, based on the passenger charge set in the decision of 25 May 2009.

(374) The passenger charges at Terminal mp2 were set on the basis of a prior financial study that took account of all the applicable reductions. According to this financial study, the charges at each terminal would cover the respective costs. The study concluded that the NPV was positive.

(375) Although the new retroactive charges were calculated so that they covered all the airport's costs, after correction in order to distribute certain joint costs between the terminals, the original charges in fact already covered the incremental costs directly associated with the arrival of airlines and each additional passenger. As a result, it was always expected that the charges applied to the airlines would cover at least the incremental costs associated with each airline's use of the airport.

- (376) Furthermore, in the original business plan that led to the decision to construct Terminal mp2, the airport expected to achieve a positive NPV. Before any subsequent changes to the charges, the airport produced plausible estimates showing that the measures would positively contribute to the airport's profitability.
- (377) The Commission therefore considers that the decision setting the charges for Terminal mp2 satisfies the market economy operator test. The same is true for the decision of 25 May 2009 setting these charges for the years 2006 to 2008, and from 1 August 2009.

7.2.2.5. **Marketing agreement with AMS**

Joint assessment of an economic advantage granted to Ryanair and AMS

- (378) The Commission must firstly determine whether, for the purposes of identifying an economic advantage from which they may have benefited, Ryanair and its subsidiary AMS should be considered individually or jointly.
- (379) The Commission notes first of all that AMS is a wholly-owned subsidiary of Ryanair and that its managers are senior Ryanair executives ⁽⁷⁸⁾. The Commission further notes that AMS was in fact formed for the sole purpose of providing marketing services on the Ryanair website and that it does not carry out any other activities.
- (380) Moreover, the preparatory dossier for the CCIMP airport advisory committee meeting on 15 November 2005 states that the purchase of advertising services on the Ryanair website and the creation of a start-up aid scheme for new routes were both intended to establish cost conditions at Marseille Provence Airport that would allow Ryanair's profitability criteria to be met, particularly with a view to setting up an aircraft base.
- (381) It is also clear from France's arguments in its response that the financial terms of the agreement concluded with AMS were decided according to the financial margins generated for each flight operated by Ryanair. France has also stated that the agreement concluded with AMS contained various undertakings on the part of Ryanair with regard to the number of aircraft based at the airport, the number of daily frequencies operated and the number of passengers per year. Lastly, France claims in its response that the CCIMP's conduct must be assessed in the light of 'the profitability offered by combining the modulations for the creation of new routes with the AMS agreement for Ryanair flights alone' and stresses that 'this study of the various measures taken as a whole is particularly pertinent in this case' ⁽⁷⁹⁾.
- (382) Lastly, the Commission must point out that it also used this approach in its decision of 29 November 2007 opening the formal investigation procedure on Pau Airport, in its decision of 25 January 2012 extending the procedure on the same airport, and in its decisions of 8 February and 23 March 2012 opening procedures on La Rochelle and Angoulême Airports.
- (383) For all these reasons, the measures in favour of Ryanair and AMS should be assessed jointly in order to determine whether there was an economic advantage, as Ryanair and AMS in fact form a single beneficiary of the measures in question ⁽⁸⁰⁾.
- (384) The Commission also notes that the only advantage potentially gained by airport operators from the marketing services offered by AMS on the Ryanair website would be an increase in the number of passengers using Ryanair. Traffic and load factor estimates therefore constitute an essential component of the analysis of the profitability of entering into a relationship with Ryanair ⁽⁸¹⁾. The Commission therefore considers that, for the purposes of applying the market economy operator test, the assessment of the advisability of entering into a commercial relationship with Ryanair ⁽⁸²⁾ cannot ignore the consequences of the parallel conclusion of marketing agreements, and particularly their costs.

⁽⁷⁸⁾ See the report of the Aquitaine Regional Audit Chamber on the CCIPB, issued on 19 October 2006, which concludes in particular that 'AMS is simply an offshoot of Ryanair, managed by two senior Ryanair executives'.

⁽⁷⁹⁾ Letter from France of 12 March 2012, page 108.

⁽⁸⁰⁾ The Commission will therefore use 'Ryanair/AMS' in the rest of the assessment to denote the beneficiary of the measures in question.

⁽⁸¹⁾ Or of the start-up of a new route.

⁽⁸²⁾ Creation of a route, variation in the number of routes or their frequency, etc.

Market economy operator test

- (385) On 19 May 2006 the CCIMP concluded, for a term of five years renewable once for the same period, without prior publicity or competitive tendering, an agreement to purchase advertising space with the company AMS, a wholly-owned subsidiary of the airline Ryanair. It was indicated in the Cocoéco decision of 18 February 2009 on the charges that were set in the decision of 25 May 2009 that the cost of the AMS agreement over the agreed term, i.e. October 2006-October 2011, was EUR [...]*, i.e. EUR [...]* per year.
- (386) France's main argument is that the payments made under this agreement were in line with the market price for online marketing services, from which it concludes that the CCIMP acted as a market economy operator by signing the agreement with AMS.
- (387) However, as stated in Section 7.2.2.5, the Commission considers that any advantages received by AMS and Ryanair must be assessed jointly, given the indissociable nature of the services provided by the airline and its subsidiary. The Commission therefore considers that the potential value of the marketing services provided by AMS lies in an increase in Ryanair traffic.
- (388) France's response seems to suggest that it agrees with this analysis. In fact, France maintains that a prudent operator would have jointly analysed the charging framework applicable to Ryanair and the cost of the marketing services purchased from AMS in order to determine the profitability of a flight operated by Ryanair, which is the reasoning that the CCIMP would have followed in its decision to sign the agreement of 19 May 2006.
- (389) As the marketing services provided by AMS were indissociable from the relationship between Marseille Provence Airport and the airline Ryanair, the advantages granted to these two entities should therefore be studied jointly.
- (390) As a result, the CCIMP's conduct at the time when the agreement of 19 May 2006 was signed with AMS cannot be assessed in relation to the offers of other online advertisers, which do not provide a comparable service.
- (391) In the alternative, France maintains that the agreement concluded by the CCIMP with AMS represented a profitable purchase for Marseille Provence Airport, particularly with regard to the activity of Terminal mp2.
- (392) It should be recalled that the profitability study on investment in the construction of Terminal mp2 (September 2005 business plan updated in May 2006) did not take into account the costs of the agreement concluded with AMS, but rather the costs of the previous scheme for participating in marketing costs. In the end, this scheme was not applied, as explained in Section 7.2.2.3.
- (393) France has produced a profitability study on the financial margins generated by Ryanair flights over the 2007-2021 period, conducted in September 2005 and updated in May 2006 before the agreement was concluded with AMS, which the CCIMP apparently used to make the decision on the agreement of 19 May 2006.
- (394) This study is based on the following information (for 2007):
- the financial margin per flight, ignoring the cost of the AMS agreement, for a B737 aircraft at Terminal mp2 is EUR [...]*
 - the fact that Ryanair traffic accounts for 85 % of the low-cost traffic assumptions;
 - the fact that Ryanair traffic accounts for 2 694 flights (corresponding to an aircraft with 189 seats and a load factor of 75 %).
- (395) This study reveals that the presence of Ryanair at Marseille Provence Airport, under the charging conditions that it was offered, in particular the reductions for new routes and also for overnight parking, and given the purchase of marketing services from its subsidiary, leads to the airport making a loss in the first three years, with a profit being generated for the airport only from the fourth year of operation ⁽⁸³⁾.

⁽⁸³⁾ In addition, the *ex post* study based on the actual traffic figures for 2007 and 2008 and the costs audited by the Mazars consultancy reveals that each flight operated by Ryanair, given the modulated charges from which the airline benefited and the cost of the marketing services, generated a loss for the airport in the first two years.

[illegible]

- (398) As a result, the charges applied to the airlines, taking into account the various reductions and the costs of the agreement with AMS, always cover at least the additional costs associated with each airline's use of the airport.
- (399) Furthermore, in the original business plan that led to the decision to construct Terminal mp2, the airport expected to achieve a positive NPV. Before any subsequent changes to the charges and before the signature of the marketing agreement with AMS, the airport produced plausible estimates showing that the measures would positively contribute to the airport's profitability.
- (400) The assumptions made and other scenarios envisaged in the original business plan and its updates, just like the financial calculations associated with subsequent measures, seemed realistic at the time that they were produced. Subsequent developments have in fact shown that they were rather conservative. Moreover, they have been regularly updated and revised and the charges have been regularly adapted to guarantee the airport's profitability in the long term and changes to the charges in the short term.

7.2.3. Conclusion on the existence of aid

- (401) It is clear from Section 6.3 that Marseille Provence Airport has benefited from investment aid that is compatible with the internal market. The Commission considers that, where an airport operator has benefited from compatible aid, the advantage resulting from such aid cannot be passed on to a specific airline, particularly if the following conditions are met:
- (i) the infrastructure is open to all airlines (including infrastructure that is more likely to be used by certain categories, such as low-cost airlines or charter airlines) and is not reserved for a particular airline, and
 - (ii) the airlines pay charges covering at least the incremental costs.
- (402) In the present case, the Commission firstly notes that Terminal mp2 and its adjacent aircraft parking area are not reserved for a particular airline. Terminal mp2 is open to all airlines wishing to use it, on the understanding that it offers a limited level of service. To ensure that the terminal was open to all interested operators, the airport launched a call for expressions of interest in using the infrastructure. However, as it is not being operated to full capacity, the terminal is available to any interested airline.
- (403) Secondly, according to the assessment set out above (see Sections 7.2.2.1-7.2.2.5), the airlines also pay charges covering at least the incremental costs generated by each agreement.
- (404) The Commission notes that the agreements under investigation form part of the airport's overall strategy leading to profitability, at least in the long term. To assess the effect of agreements between the airport and an airline on the airport's profitability, the Commission takes account of the factual evidence available, as also the developments that could reasonably have been expected at the time when the agreements were concluded. It takes into account in particular:
- (i) the market conditions prevailing at the time, in particular changes occurring following liberalisation of the air transport market, the arrival on the market and development of low-cost airlines⁽⁸⁴⁾ and other 'point-to-point' carriers, changes to the organisational and economic structure of the airport sector⁽⁸⁵⁾, the degree of diversification and the complexity of the functions performed by airports, the reinforcement of competition between airlines and between airports, the uncertain economic context due to changes in market conditions, or any other uncertainty existing in the economic context;
 - (ii) the expected long-term effects on the airport's profitability.

⁽⁸⁴⁾ Increase in the market share of low-cost airlines from 1,5 % in 1992 to 45,94 % in 2013.

⁽⁸⁵⁾ It is only since the *Aéroports de Paris* judgment (12 December 2000) that the operation and construction of airport infrastructure must be considered as falling within the ambit of State aid control (see recital 228). Until that judgment, airports were not regarded as undertakings within the meaning of Article 107(1) of the Treaty.

- (405) The Commission points out that, according to the information provided by France, the airport expected, in the original business plan that led to the decision to construct Terminal mp2, to achieve a positive NPV in the long term. According to France, the financial results of Terminal mp2 have confirmed these optimistic expectations. Likewise, the reductions granted on the charges, which were applicable to the entire airport including Terminal mp1, were based on sound financial calculations according to which the airport could expect to achieve profitability by adopting these measures. The Commission takes the view that the forecasts of the profitability and use of Terminal mp2 were reasonable and sound. Most of the time they have proved to be conservative. Consequently, the Commission considers that the charges applied, the reductions granted and the marketing agreement concluded with AMS form part of the airport's overall strategy leading to profitability, at least in the long term.
- (406) It is therefore of the opinion that the agreements concluded between Marseille Provence Airport and the user airlines do not constitute State aid. Furthermore, it considers that, under these circumstances, even if State aid had been granted to the airlines, this would in any event have been compatible with the internal market for the same reasons proving the compatibility of the aid granted to the airport.
- (407) As one of the cumulative criteria pursuant to Article 107(1) TFEU is not fulfilled, the Commission considers that the measures under investigation are free of State aid within the meaning of Article 107(1) TFEU.

8. CONCLUSION

8.1. MEASURES IN FAVOUR OF THE AIRPORT

- (408) The Commission finds that France unlawfully granted investment aid to Marseille Provence Airport in breach of Article 108(3) TFEU. However, it must be stated that this aid is compatible with the internal market pursuant to Article 107(3)(c) TFEU.
- (409) The airport tax and the transfers between the airport and the CCIMP do not constitute State aid within the meaning of Article 107(1) TFEU.

8.2. MEASURES IN FAVOUR OF AIRLINES USING THE AIRPORT

- (410) The Commission finds that the airport acted as a market economy operator in its financial relations with the airlines using the airport. The various modulated charges and the marketing agreement with AMS do not constitute State aid within the meaning of Article 107(1) TFEU.

HAS ADOPTED THIS DECISION:

Article 1

The investment subsidies granted by France to Marseille Provence Airport in the amount of EUR 12,337 million are State aid compatible with the internal market pursuant to Article 107(3)(c) TFEU.

The airport tax payable to the airport, the transfers between the airport and the CCIMP, the reduced charges for airlines using the airport, and the marketing agreement with AMS granted by France do not constitute State aid within the meaning of Article 107(1) TFEU.

Article 2

This Decision is addressed to the French Republic.

Done at Brussels, 20 February 2014.

For the Commission
Joaquín ALMUNIA
Vice-President

COMMISSION DECISION (EU) 2016/1699**of 11 January 2016****on the excess profit exemption State aid scheme SA.37667 (2015/C) (ex 2015/NN) implemented by Belgium***(notified under document C(2015) 9837)***(Only the Dutch and French texts are authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provision(s) cited above ⁽¹⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) By letter of 19 December 2013, the Commission requested Belgium to provide information on the so-called 'excess profit tax ruling system' (hereinafter: the 'Excess Profit exemption' or the 'contested scheme') which is based on Article 185(2)(b) of the Belgian Income Tax Code 1992 ('Code des Impôts sur les revenus 1992' in French or 'Wetboek van Inkomstenbelastingen 1992' in Dutch, hereinafter: 'WIB 92'). The Commission also requested a list of rulings concerning the application of the Excess Profit exemption.
- (2) By letter of 21 January 2014, Belgium replied to the questions of the Commission's request for information, but did not provide the Commission with the requested list of rulings, indicating that providing such a list would require more time.
- (3) On 21 February 2014, the Commission sent follow-up questions and repeated its request for a list of rulings. For the rulings issued in 2004, 2007, 2010 and 2013 under the contested scheme, the Commission also requested the full text of the rulings as well as the applications requesting those rulings, plus their annexes, and — where applicable — subsequent correspondence related to those requests.
- (4) On 18 March 2014, Belgium responded to the Commission's follow-up questions and provided the individual rulings requested, including applications, annexes and further correspondence related to the granting of those rulings.
- (5) By letter of 28 July 2014, the Commission indicated that the Excess Profit exemption could represent incompatible State aid. The Commission also requested more information about a number of individual rulings. By letters of 1 September and 4 November 2014, Belgium replied to the request of 28 July 2014.
- (6) On 25 September 2014, a meeting was held between the Commission services and the Belgian authorities.

⁽¹⁾ OJ C 188, 5.6.2015, p. 24.

- (7) By letter of 3 February 2015, the Commission informed Belgium that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of the Excess Profit exemption (hereinafter: the 'Opening Decision').
- (8) On 29 May 2015, following a request for a deadline extension, Belgium submitted its comments to the Opening Decision.
- (9) On 5 June 2015, the Opening Decision was published in the *Official Journal of the European Union* ⁽²⁾. In that decision, the Commission invited interested parties to submit their comments on the measure.
- (10) On 1 and 2 July 2015, interested parties submitted comments on the Opening Decision, which were forwarded to the Belgian authorities. On 14 September 2015, Belgium informed the Commission that it had no intention to make any observations on those comments.
- (11) By letter of 16 September 2015, the Commission requested Belgium to further substantiate certain points made in their written comments of 29 May 2015 on the Opening Decision. Belgium replied to that request by letter of 16 October 2015.
- (12) On 20 October 2015 and 7 December 2015, meetings took place between the Commission services and the Belgian authorities.

2. DESCRIPTION OF THE CONTESTED SCHEME

2.1. The Excess Profit exemption scheme

- (13) The Excess Profit exemption scheme allows Belgian resident companies that are part of a multinational group and Belgian permanent establishments of foreign resident companies that are part of a multinational group (hereinafter: 'Belgian group entities') to reduce their tax base in Belgium by deducting from their actually recorded profit so-called 'excess profit'. That excess profit is determined by estimating the hypothetical average profit that a standalone ⁽³⁾ company carrying out comparable activities could be expected to make in comparable circumstances and subtracting that amount from the profit actually recorded by the Belgian group entity in question. An advance ruling, issued by a special ruling commission ('Service des Décisions Anticipées' in French or 'Dienst Voorafgaande Beslissingen' in Dutch, hereinafter: the 'Ruling Commission'), is necessary to benefit from the Excess Profit exemption.
- (14) According to the Belgian authorities ⁽⁴⁾, the rationale for the Excess Profit exemption is to ensure that a Belgian group entity is only taxed on its arm's length profit by exempting from taxation the profit recorded in excess of its arm's length profit, which corresponds to synergies, economies of scale or other benefits drawn from its participation in a multinational group and which would not exist for a comparable standalone company.
- (15) According to the Belgian authorities ⁽⁵⁾, the amount of excess profit exempted under the Excess Profit exemption is determined by using a two-step approach:
 - First, the arm's length prices charged in transactions between the Belgian group entity and its associated enterprises are fixed based on a transfer pricing report provided by the taxpayer. The Belgian group entity is identified as the 'central entrepreneur' in that relationship and is accordingly left with the residual profit from those transactions.

⁽²⁾ See footnote 1.

⁽³⁾ See Submission of Belgium of 29 May 2015 in response to the Opening Decision, point 30, where the term 'stand-alone basis' is explained as: 'without being a member of a multinational group of associated enterprises.'

⁽⁴⁾ See notably Submission of Belgium of 29 May 2015 in response to the Opening Decision, points 39 and 40.

⁽⁵⁾ See Submission of Belgium of 29 May 2015 in response to the Opening Decision, point 30.

- Second, according to Belgium the residual profit should not be seen as the Belgian group entity's arm's length profit, as it may exceed the profit that a comparable standalone company would have made in circumstances similar to those of the entity without being part of a multinational group. Therefore, that 'excess profit' is established on the basis of a second report submitted by the taxpayer as part of its ruling request under the contested scheme and exempted from taxation.
- (16) Belgium claims that the reports submitted under both steps apply the most appropriate OECD transfer pricing methods. In practice, the information provided indicates that the method used for the second step is the transactional net margin method ('TNMM'). The use of the TNMM in this context seeks to approximate the profitability of an entity within a multinational group by comparing it with the profits of comparable independent ⁽⁶⁾ (standalone) companies engaged in similar activities. The TNMM estimates the profit independent companies could be expected to make on an activity, such as the activity of selling goods, by taking an appropriate base such as costs, turnover or fixed assets — depending on functions performed, risks assumed and assets used — and applying a profit ratio ('a profit level indicator'), reflecting that observed for comparable independent companies to that base.
- (17) Applying that method, a hypothetical average profit is calculated for the Belgian group entity based on a benchmark study comparing it with comparable standalone companies ⁽⁷⁾. The hypothetical average profit is fixed as a point in the interquartile range of the chosen profit level indicator of a set of comparable standalone companies ⁽⁸⁾, averaged over a set period of time (usually five years). That hypothetical average profit is regarded by Belgium as the profit that the Belgian group entity would have made if it had been a standalone company instead of part of a multinational group. For the purpose of this Decision, that profit is referred to as the 'adjusted arm's length profit'.
- (18) The amount of excess profit to be exempted is then calculated as the difference between the arm's length profit estimated for the Belgian group entity following the first step (averaged over a projected time horizon) and the 'adjusted arm's length profit' obtained under the second step (also averaged over the same projected time horizon). That difference is translated into an exemption percentage of pre-tax profit (of either EBIT ⁽⁹⁾ or PBT ⁽¹⁰⁾) to achieve an average excess profit percentage over a projected period. That percentage represents the agreed tax base discount applied under the contested scheme to the Belgian group entity's profit actually recorded for the five years during which the ruling binds the Belgian tax administration.
- (19) The Belgian authorities claim that the projected commercial results of those entities benefitting from the contested scheme are evaluated against their profit actually recorded after three years. The agreed percentage can then be adjusted if required by that evaluation. However, there is no indication that such an evaluation has ever actually resulted in an adjustment of the agreed discount percentage in any of the cases reviewed by the Commission.
- (20) On the basis of Article 185(2) WIB 92, an advance ruling is a compulsory element for benefitting from the Excess Profit exemption. That provision also limits the grant of a ruling to entities forming part of a multinational group of associated companies with respect to their cross-border relations. Furthermore, according to the Belgian Law of 24 December 2002 ⁽¹¹⁾, rulings are only available for new situations ⁽¹²⁾.
- (21) Because a ruling is required to obtain the benefit of the Excess Profit exemption and because a ruling can only be delivered for profit derived from a new situation, the advantage that a multinational group obtains from the contested scheme is conditioned upon the relocation or increase of its activities in Belgium and is proportional to the importance of the new activities and profit created in Belgium. The rulings issued under the contested

⁽⁶⁾ See the glossary of the OECD TP Guidelines: 'Two enterprises are independent enterprises with respect to each other if they are not associated enterprises with respect to each other.'

⁽⁷⁾ In certain cases, the Commission observed that the comparable entities selected for the benchmark study are not deemed similar standalone companies but deemed similar holding/parent companies, i.e. consolidated group, taking into account consolidated data.

⁽⁸⁾ Return on sales is the most frequently used profit level indicator to determine the taxable base of the Belgian group entity.

⁽⁹⁾ Earnings Before Interest and Tax.

⁽¹⁰⁾ Profit Before Tax.

⁽¹¹⁾ *Loi du 24 décembre 2002 modifiant le régime des sociétés en matière d'impôts sur les revenus et instituant un système de décision anticipée en matière fiscale*, published in the Official Gazette (Moniteur Belge) No 410, second edition, 31 December 2002, p. 58817.

⁽¹²⁾ See recitals 44 and 45.

scheme that were examined by the Commission invariably concern changes in the organisational structure of the multinational group where the description of the key facts in the ruling request underlines the planning of a relocation of activities to Belgium, new investments to be made and the creation of new jobs in Belgium.

- (22) In sum, Belgian group entities that have obtained a ruling under the contested scheme may apply an annual proactive downward adjustment of their corporate income tax base through the exemption of alleged 'excess profit' from their profit actually recorded on the basis of Article 185(2)(b) WIB 92. In other words, Belgium considers that this excess profit should not be attributed to the Belgian group entity and should therefore be excluded from its Belgian tax base in accordance with Article 185(2)(b) WIB 92. Consequently, a Belgian group entity benefitting from the Excess Profit exemption is taxed on an amount resulting from the difference between its profit actually recorded and its 'excess profit'.

2.2. The relevant legal and regulatory framework

2.2.1. *The taxation of income pursuant to the Belgian corporate income tax system*

- (23) The WIB 92 establishes the rules for the taxation of income by Belgium. Article 1 defines four income taxes which cover taxation of income of natural persons (Title II: Articles 3 to 178), resident companies (Title III: Articles 179 to 219), other legal persons (Title IV: Articles 220 to 226) and non-resident taxpayers — natural persons, companies, other legal persons (Title V: Articles 227 to 248/3).
- (24) Article 183 WIB 92 states that the income subject to tax according to Title III (for resident companies) is of the same type as that subject to Title II (for natural persons) and that the taxable amount is established following the rules applicable to profit. Article 24 WIB 92 clarifies that the taxable income of industrial, commercial and agricultural undertakings includes all income from entrepreneurial activities such as 'profit from all the operations handled by those undertakings or through their intermediation' as well as 'profit from all increases in value of their assets or decrease in value of their liabilities when that profit has been realised and registered in the accounts'.
- (25) Article 185(1) WIB 92 provides that companies are taxed on the total amount of their profit before distribution. Read in conjunction with Article 1, Article 24 and Article 183 WIB 92, this means that the taxable profit under Belgian tax law should at least include — as a starting point and notwithstanding possible subsequent upward/downward adjustments — the total profit registered in the taxpayer's accounts.
- (26) Indeed, the establishment of the tax base under the Belgian income tax code relies on the profit actually recorded in the taxpayer's accounts as a starting point. A number of upward adjustments (such as non-deductible expenses) or downward adjustments (such as partial exemption of certain dividends received, deduction of losses carried forward, tax incentives) can be applied at subsequent steps in the establishment of the tax base. For each of those operations, taxpayers must provide information to the tax administration through their tax return (Form 275.1) and be able to give justifications for those adjustments.
- (27) When Belgian tax law provides for a permanent exemption of a part of the profit actually recorded in the taxpayer's accounts as a reserve, an adjustment can notably be reflected in the calculation of the tax base in the first operation of that calculation through a so-called 'increase of the initial situation of the reserves'.
- (28) Therefore, while the tax base may not always equal the net profit actually recorded in the taxpayer's annual accounts because of the adjustments applied to that base for tax purposes, the establishment of the tax base

should nevertheless rely on the figures actually recorded in those accounts as a starting point. The establishment of the tax base starts, for instance, with the calculation of the net increase/decrease of the taxable reserves (profit/loss of the year, profit/loss carried forward, other reserved profit, etc.) during the tax year and, whenever justified by the application of tax law provisions or following a tax audit, adjustments and corrections may be applied to the figures recorded in the taxpayer's accounts or mentioned in the taxpayer's tax return.

2.2.2. *The Law of 21 June 2004 modifying the WIB 92*

- (29) By Law of 21 June 2004 ⁽¹³⁾, Belgium introduced new fiscal rules regarding cross-border transactions of entities which are associated in a multinational group. In particular, a second paragraph was added to Article 185 WIB 92 with the objective of transposing into Belgian tax law the internationally accepted 'arm's length principle' for transfer pricing purposes ⁽¹⁴⁾. Article 185(2) WIB 92 reads as follows:

'(...), for two companies that are part of a multinational group of associated companies and in respect of their reciprocal cross-border relationships:

- (a) when two companies are in their commercial and financial relationships linked by conditions agreed upon or imposed on them which are different from those which would have been agreed upon between independent companies, the profit which — under those conditions — would have been made by one of the companies but is not because of those conditions, may be included in the profit of that company.
- (b) when profit is included in the profit of one company which is already included in the profit of another company and the profit so included is profit which should have been made by that other company if the conditions agreed between the two companies had been those which would have been agreed between independent companies, the profit of the first company is adjusted in an appropriate manner.

The first paragraph applies by way of advance ruling without prejudice to the application of the EU Arbitration Convention or of a Double Tax Treaty.'

- (30) Although the wording is different, Article 185(2) WIB 92 is similar to Article 9 of the OECD Model Tax Convention on Income and Capital, which forms the legal basis for transfer pricing adjustments in most treaties agreed between two jurisdictions to prevent the double taxation of income derived by a resident from one of the jurisdictions (hereinafter: 'Double Tax Treaty').
- (31) In accordance with the last sentence of Article 185(2) WIB 92, the upward adjustment under letter (a) or downward adjustment under letter (b) is subject to a compulsory prior authorisation procedure via an advance ruling. The only exception to that condition is where the adjustment results from the application of the Convention on the elimination of double taxation in connection with the adjustment of transfers of profit between associated undertakings (hereinafter: 'EU Arbitration Convention') ⁽¹⁵⁾ or a Double Tax Treaty.
- (32) The Law of 21 June 2004 also introduced an amendment to Article 235 2° WIB 92 to ensure that the transfer pricing rules established by Article 185(2) WIB 92 apply equally to Belgian permanent establishments of non-resident companies.

⁽¹³⁾ *Loi du 21 juin 2004 modifiant le Code des impôts sur les revenus 1992 et la loi du 24 décembre 2002 modifiant le régime des sociétés en matière d'impôts sur les revenus et instituant un système de décision anticipée en matière fiscale*, published in the Official Gazette (Moniteur Belge) of 9 July 2004: http://www.ejustice.just.fgov.be/cgi/article_body.pl?language=fr&caller=summary&pub_date=04-07-09&numac=2004003278. The law entered into force on 19 July 2004.

⁽¹⁴⁾ See Section 2.3.2.

⁽¹⁵⁾ OJ L 225, 20.8.1990, p. 10.

2.2.3. *The Memorandum to the Law of 21 June 2004 and associated guidance*

2.2.3.1. The Memorandum to the Law of 21 June 2004

- (33) The Memorandum to the Law of 21 June 2004 (hereinafter: 'the Memorandum') provides guidance on the objective and application of Article 185(2) WIB 92 ⁽¹⁶⁾. According to the Memorandum, Article 185(2) WIB 92 'is based on Article 9 of the OECD Model Tax Convention on Income and Capital' ⁽¹⁷⁾. The Memorandum further explains that '[t]he proposed provision aligns Belgian legislation to the internationally accepted norm.' ⁽¹⁸⁾. It points at the strong link between accountancy law and tax law, as a result of which a deviation from accountancy law for tax law purposes requires an explicit legal basis. The codification of the arm's length principle in the Belgian income tax code was therefore considered necessary to enable transfer pricing adjustments required under internationally agreed norms but deviating from accountancy law.
- (34) As regards the downward adjustment provided for by Article 185(2)(b) WIB 92, the Memorandum explains that that provision seeks to avoid or undo a (potential) problem of double taxation. It further explains that that adjustment shall only apply to the extent that the Ruling Commission considers both the principle and the amount of the primary adjustment justified.
- (35) The Memorandum also contains guidance on what is considered a multinational group of associated companies and on the task of the Ruling Commission. In particular, the Memorandum explains that the Ruling Commission shall agree on a methodology which is used, establish functions performed, assets used and risks assumed which are instrumental in determining the tax base.

2.2.3.2. The administrative Circular of 4 July 2006

- (36) On 4 July 2006, an administrative Circular was published containing guidance on the application of Article 185(2) WIB 92 (hereinafter: 'the Circular'), both as regards the upward and the downward transfer pricing adjustment ⁽¹⁹⁾. The Circular confirms the definitions laid down in the Memorandum of group entities that are part of a multinational group and of cross-border transactions covered by Article 185(2) WIB 92. The Circular further explains the role, responsibilities and competence of the Ruling Commission.
- (37) The Circular refers to the compulsory intervention of the Ruling Commission for downward adjustments and its autonomy to set conditions on a case-by-case basis, which should contribute to efficiency and certainty for taxpayers improving the Belgian investment climate.
- (38) The Circular confirms that, for the purpose of the calculation of the tax base, an appropriate downward adjustment of profit according to Article 185(2)(b) WIB 92 will take place by way of a so-called 'increase of the initial situation of the reserves' in the company's tax return (Form 275.1) ⁽²⁰⁾. Concerning the notion 'appropriate' used in Article 185(2)(b) WIB 92 in relation to the downward adjustment, the Circular notes that there will be no corresponding downward adjustment ⁽²¹⁾ in cases where the primary upward adjustment in another tax jurisdiction is exaggerated. The Circular also sets out how the transfer pricing adjustments are to be recorded in the tax accounts of the Belgian company concerned. Finally, the Circular recalls that Article 185(2) WIB 92 applies as of 19 July 2004.

⁽¹⁶⁾ DOC 51, 1079/001; Chambre des Représentants de Belgique, 30 April 2004: <http://www.lachambre.be/FLWB/pdf/51/1079/51K1079001.pdf>

⁽¹⁷⁾ Discussion article by article, in respect of Article 2: 'Door de toevoeging van een tweede paragraaf aan artikel 185, WIB 92, wordt het zogenoemde arm's length principe in de fiscale wetgeving geïntroduceerd. Het is gebaseerd op de tekst van artikel 9 van het OESO-modelverdrag inzake belastingen naar het inkomen en naar het vermogen.'/'La notion de principe de pleine concurrence est introduite dans la législation fiscale par l'addition d'un deuxième paragraphe à l'article 185, CIR 92. Il est basé sur le texte de l'article 9 de la convention-modèle de l'OCDE en matière d'impôt sur le revenu et sur la fortune'.

⁽¹⁸⁾ 'Met de voorgestelde bepaling sluit de Belgische wetgeving nauw aan bij de internationaal aanvaarde norm.'/'La disposition proposée permet à la législation belge de s'aligner sur la norme acceptée internationalement.'.

⁽¹⁹⁾ Circulaire No Ci.RH.421/569.019 (AOIF 25/2006) of 4 July 2007.

⁽²⁰⁾ See recital 27.

⁽²¹⁾ A corresponding adjustment is defined by the Glossary of the OECD TP Guidelines as: 'An adjustment to the tax liability of the associated enterprise in a second tax jurisdiction made by the tax administration of that jurisdiction, corresponding to a primary adjustment made by the tax administration in a first tax jurisdiction, so that the allocation of profits by the two jurisdictions is consistent.'

2.2.3.3. Replies given by the Minister of Finance to parliamentary questions on the Excess Profit exemption

- (39) In reply to a parliamentary question in 2005 ⁽²²⁾, the then Minister of Finance confirmed that the profit actually recorded by a Belgian group entity that exceeds an arm's length profit should remain untaxed in Belgium and that it is not the task of the Belgian tax authorities to determine which other foreign group entities should include that excess profit in their tax base instead.
- (40) A parliamentary question in 2007 concerning rulings and international tax avoidance ⁽²³⁾ points to the relationship between letters a) and b) of Article 185(2) WIB 92, on the one hand, and the corresponding paragraphs 1 and 2 of Article 9 of the OECD Model Tax Convention on Income and Capital, on the other. The Member of Parliament that had submitted the question noted that most Double Tax Treaties concluded by Belgium include only a provision on upward transfer pricing adjustments. In the treaties that do contain a provision on downward transfer pricing adjustments, the downward adjustment by Belgium is always a reaction to an upward adjustment by the other contracting State. The Member of Parliament further noted that few taxpayers will apply for an advance ruling concerning an upward transfer pricing adjustment, even though the requirement also legally applies to those adjustments. Finally, the Member of Parliament asked whether Belgium would make a unilateral downward adjustment conditional upon the foreign country concerned aligning its primary adjustment or being informed on the Belgian downward adjustment.
- (41) The then Minister of Finance replied that, indeed, only requests for a downward adjustment had thus far been received. Moreover, the Minister stated that it is not for Belgium to specify to which country excess profit ought to be attributed and that it is therefore not possible to determine with which country the information on a Belgian downward adjustment should be exchanged.
- (42) In January 2015, following press publications on the so-called 'LuxLeaks' affair, several parliamentary questions were again addressed to the Minister of Finance on the (lack of) information exchange between tax administrations, the promotion of the Excess Profit exemption under the slogan 'Only in Belgium' and the opportunities for multinationals offered by Belgium to reduce their corporate tax bill via tax rulings ⁽²⁴⁾. The Minister of Finance recalled that in the rulings concerning the Excess Profit exemption the Ruling Commission merely applies the arm's length principle and confirmed the reply given by the Minister of Finance in 2007 as regards exchanges of information.

2.2.4. The Law of 24 December 2002 introducing an advance tax ruling system

- (43) The Law of 24 December 2002 allows the Ministry of Finance to take a position by way of a tax ruling on all requests relevant to the implementation of tax law provisions ⁽²⁵⁾.
- (44) Article 20 of that law defines a tax ruling and establishes the principle that a ruling cannot have the effect of exempting from or reducing the tax due:

'Par décision anticipée, il y a lieu d'entendre l'acte juridique par lequel le Service public fédéral Finances détermine conformément aux dispositions en vigueur comment la loi s'appliquera à une situation ou à une opération particulière qui n'a pas encore produit d'effets sur le plan fiscal.

La décision anticipée ne peut emporter exemption ou modération d'impôt.'

- (45) Article 22 of the law defines the circumstances under which a tax ruling cannot be granted, for example when the request concerns situations or operations similar to those having already produced effects from a tax point of view. Article 23 of the law establishes the principle that rulings are binding on the tax administration for the future as well as circumstances in which a tax ruling is not binding on the tax administration. This is the case when it turns out that the ruling is not in conformity with the provisions of the treaties, of Union law or of domestic law.

⁽²²⁾ Minutes of the Commission on Finance and Budget of 13 April 2005, CRABV 51 COM 559 — 19.

⁽²³⁾ Minutes of the Commission on Finance and Budget of 11 April 2007, CRABV 51 COM 1271 — 06.

⁽²⁴⁾ Minutes of the Commission on Finance and Budget of 6 January 2015, CRABV 54 COM 043 — 02.

⁽²⁵⁾ See footnote 11.

- (46) The Law of 21 June 2004 contains an amendment to the Law of 24 December 2002 on the establishment of a system of advance tax rulings, regulating the formation of an autonomous body within the Belgian administration responsible for granting such rulings⁽²⁶⁾. On the basis of the law of 21 June 2004, the Ruling Commission was created by Royal Decree of 23 August 2004 within the central body of the Ministry of Finance competent for delivering rulings ('Service Public Fédéral Finances' in French or 'Federale Overheidsdienst Financiën' in Dutch). The Ruling Commission publishes an annual report on its activities.

2.3. Description of the OECD guidance on transfer pricing

2.3.1. *The OECD Model Tax Convention and Transfer Pricing Guidelines*

- (47) The Organisation for Economic Cooperation and Development (hereinafter: 'OECD') provides guidance on taxation for its member countries. The OECD's guidance on transfer pricing can be found in the OECD Model Tax Convention and the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (hereinafter: 'OECD TP Guidelines')⁽²⁷⁾, which are both non-binding legal instruments.
- (48) Given their non-binding nature, the tax administrations of the OECD member countries are simply encouraged to follow the Model Tax Convention and the TP Guidelines. However, in general, both instruments serve as a focal point and exert a clear influence on the tax practices of OECD member (and even non-member) countries. Moreover, in numerous OECD member countries those instruments have been given the force of law or serve as a reference for the purpose of interpreting Double Tax Treaties and domestic tax law⁽²⁸⁾. To the extent the Commission cites the Model Tax Convention and the OECD TP Guidelines in this Decision, it does so because those instruments are the result of expert discussions in the context of the OECD and elaborate on techniques aimed to address common challenges.
- (49) The OECD Model Tax Convention and its commentary provide guidance on the interpretation of Double Tax Treaties. The OECD TP Guidelines provide guidance to tax administrations and multinational enterprises on the application of the arm's length principle for the determination of transfer prices⁽²⁹⁾. Transfer prices refer to prices charged for commercial transactions between the separate entities of the same corporate group. The relationship among members of a multinational group may permit the group members to establish special conditions in their intra-group relations, which affect transfer prices (and consequently taxable income), that differ from those that would have been established had the group members been acting as independent enterprises⁽³⁰⁾. This can allow profit shifting from one tax jurisdiction to another and provides for an incentive to allocate as little profit as possible to jurisdictions where it is subject to higher taxation. To avoid these problems tax administrations should only accept transfer prices between intra-group companies that are remunerated as if they were agreed to by independent companies negotiating under comparable circumstances at arm's length⁽³¹⁾. This is known as the 'arm's length principle'.
- (50) The application of the arm's length principle is therefore based on a comparison of the conditions in a controlled (intra-group) transaction with the conditions in comparable transactions between independent companies under comparable circumstances so that none of the differences (if any) between the situations being compared could materially affect the conditions examined (e.g. price or margin), or that reasonably accurate adjustments can be made to eliminate the effect of any such differences.

⁽²⁶⁾ See footnote 13.

⁽²⁷⁾ Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, OECD, July 2010. The OECD TP Guidelines were adopted in their original version on 27 June 1995 by the OECD's Committee on Fiscal Affairs. The 1995 Guideline were substantially updated in July 2010. In the present Decision, when reference is made to the OECD TP Guidelines such reference refers to the 2010 OECD TP Guidelines.

⁽²⁸⁾ In Belgium, the arm's length principle was laid down in the corporate income tax law via the introduction of Article 185(2) WIB 92.

⁽²⁹⁾ Tax administrations of the OECD member countries are encouraged to follow the Model Tax Convention and the TP Guidelines. However, in general, both instruments serve as a focal point and exert a clear influence on the tax practices of OECD member (and even non-member) countries.

⁽³⁰⁾ See paragraph 6 of the preface to the OECD TP Guidelines.

⁽³¹⁾ Tax administrations and legislators are aware of this problem and tax legislation generally allows the tax administration to correct tax declarations of associated companies that incorrectly apply transfer prices to reduce their taxable income, by substituting prices which correspond to a reliable approximation of those agreed to by independent companies negotiating under comparable circumstances at arm's length.

- (51) Both the Model Tax Convention and the OECD TP Guidelines rely on the principle adhered to by OECD member countries and wider, that the various legal entities jointly constituting a multinational group are treated as separate entities for corporate tax purposes. A consequence of this separate entity approach is that each individual entity within a multinational group is taxed on its specific income ⁽³²⁾. The separate entity approach has been chosen as an international taxation principle by the OECD member countries with a view to securing the appropriate tax base in each jurisdiction and avoiding double taxation, thereby minimising conflicts between tax administrations and promoting international trade and investment.
- (52) Paragraph 1.10 of the OECD TP Guidelines makes an explicit reference to economies of scale and the benefits of integration (i.e. synergies) in relation to the separate entity approach that underlies the arm's length principle:

'The arm's length principle is viewed by some as inherently flawed because the separate entity approach may not always account for the economies of scale and interrelation of diverse activities created by integrated businesses. There are, however, no widely accepted objective criteria for allocating the economies of scale or benefits of integration between associated enterprises'

2.3.2. *The arm's length principle*

- (53) The authoritative statement of the arm's length principle is found in Article 9 of the OECD Model Tax Convention, which forms the basis of Double Tax Treaties involving OECD member countries including Belgium and an increasing number of non-member countries. Since the flexibility in the arrangement of transfer prices might lead to shifting the tax base from one jurisdiction to another, the authoritative presence of the arm's length principle in Double Tax Treaties serves the purpose of those treaties, i.e. the avoidance of double taxation and the prevention of fiscal evasion.
- (54) Article 9 of the OECD Model Tax Convention sets out how and when transfer pricing adjustments of the tax base should take place in practice.

— Article 9, first paragraph, determines that a Contracting State may increase the tax base of a taxpayer resident in its territory when it believes that the transfer prices applied by it have led to a too low taxable base and allow that State to tax it accordingly. This is referred to as the 'primary adjustment' and results in the tax administration increasing the taxable profit reported by a taxpayer ⁽³³⁾.

— Article 9, second paragraph, aims to prevent that the profit so taxed by the Contracting State making the primary adjustment in accordance with the first paragraph is not also taxed at the level of an associated company resident in the other Contracting State ⁽³⁴⁾. It does this by committing that other Contracting State to either decrease the tax base of that associated company with the amount of adjusted profit taxed by the first Contracting State following the primary adjustment or to provide a refund of taxes already collected. Such an adjustment by the other Contracting State is, however, not automatically made. If it considers that the primary adjustment is not justified, either in principle or as regards the amount, it may and usually will refrain from making such an adjustment ⁽³⁵⁾.

⁽³²⁾ See paragraph 1.5 of the OECD TP Guidelines.

⁽³³⁾ Article 9(1) provides: 'Where (...) conditions are made or imposed between the two [associated] enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.'

⁽³⁴⁾ Article 9(2) provides: 'Where a Contracting State includes in the profits of an enterprise of that State — and taxes accordingly — profits on which an enterprise of the other Contracting State has been charged to tax in that other State and the profits so included are profits which would have accrued to the enterprise of the first mentioned State if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other State shall make an appropriate adjustment to the amount of the tax charged therein on those profits. In determining such adjustment, due regard shall be had to the other provisions of this Convention and the competent authorities of the Contracting States shall if necessary consult each other.'

⁽³⁵⁾ If there is a dispute between the parties concerned over the amount and character of the appropriate adjustment the mutual agreement procedure provided for in Article 25 of the OECD Model Tax Convention should be implemented, even in the absence of a provision such as Article 9(2). The competent authorities involved are under a duty merely to use their best endeavours, but not to achieve a result, so double taxation could not be solved if an arbitration clause has not been agreed in the Tax Treaty in place between Contracting States.

The downward adjustment by the other Contracting State on the basis of Article 9, second paragraph, is referred to as the 'corresponding adjustment' and, when granted, effectively prevents that the same profit is taxed twice.

- (55) The OECD TP Guidelines provide five methods to approximate an arm's length pricing of transactions and profit allocation between companies of the same corporate group: (i) the comparable uncontrolled price method; (ii) the cost plus method; (iii) the resale minus method; (iv) the TNMM and (v) the transactional profit split method. The OECD TP Guidelines draw a distinction between traditional transaction methods (the first three methods) and transactional profit methods (the last two methods). Multinational corporations retain the freedom to apply transfer pricing methods not described in those guidelines provided those methods result in arm's length transfer prices ⁽³⁶⁾.
- (56) The TNMM is one of the 'indirect methods' to approximate an arm's length pricing of transactions and profit allocation between companies of the same corporate group. It approximates what would be an arm's length profit for a series of controlled transactions or an entire activity, rather than for an identified transaction.
- (57) When applying the TNMM, it is necessary to choose the party to the controlled transaction or series of controlled transactions for which a net profit indicator ⁽³⁷⁾ is selected and tested. That choice must be consistent with the functional analysis performed. As a general rule, the tested party within a TNMM-based study is the party to which the method can be applied in the most reliable manner and for which the most reliable comparables can be found. In practice, this will be the less complex of the two parties involved based on the functional analysis while the residual profit from the controlled transaction or series of controlled transactions will be allocated to the more complex party ⁽³⁸⁾.
- (58) The TNMM is therefore often applied in cases where one of the parties to a controlled transaction or series of controlled transactions makes all the complex and/or unique contributions involved in the transaction(s), while the other party performs the more standard and/or routine functions and does not make a unique contribution, for example a limited risk distributor. Conversely, the TNMM is unlikely to be reliable if each party to a transaction makes valuable, unique contributions. In such a case, the transactional profit split method is considered a more appropriate transfer pricing method ⁽³⁹⁾.

2.4. Beneficiaries of the contested scheme

- (59) The Excess Profit exemption scheme has been in place since 2004 and has gradually gained in importance. According to the information provided by Belgium, the number of companies that benefitted from the contested scheme since its introduction amounts to 66 rulings granted to 55 companies ⁽⁴⁰⁾. The Belgian authorities indicated that they have never refused any request for a ruling to benefit from the Excess Profit exemption since the contested scheme's introduction ⁽⁴¹⁾. The number of rulings granted per year, since the contested scheme's introduction in 2004, is provided in the table.

Number of excess profit rulings granted since 2004

Year	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
No of cases	0	2	3	5	4	7	6	7	15	9	8

Source: Belgian Ministry of Finance, per 31 May 2014

⁽³⁶⁾ According to paragraph 2.9 of the OECD TP Guidelines: 'Such other methods should however not be used in substitution for OECD-recognised methods where the latter are more appropriate to the facts and circumstances of the case.'

⁽³⁷⁾ A net profit indicator is defined by the Glossary of the OECD TP Guidelines as: 'The ratio of net profit to an appropriate base (e.g. costs, sales, assets).' Net profit indicators are also commonly named profit level indicators.

⁽³⁸⁾ See paragraph 3.18 of the OECD TP Guidelines.

⁽³⁹⁾ See paragraph 2.59 of the OECD TP Guidelines.

⁽⁴⁰⁾ Information updated per 31 May 2015.

⁽⁴¹⁾ See reply of 18 March 2014 to Question 1 of the Commission's second request for information: 'Nous précisons qu'aucune décision négative n'a été rendue'.

- (60) Belgium has provided key financial data for all 66 rulings granting an Excess Profit exemption (for details see the Annex).
- (61) Situations in which the Excess Profit exemption has been granted can be illustrated through the following examples.
- (62) As a first example, the ruling request of Company A indicates that the company has the intention to increase its capacity of producing a certain product in its Belgian-plant, while at the same time moving the coordination function (i.e. the so-called central entrepreneurial function) of a foreign subsidiary to Belgium. The request also indicates that Company A would transfer several posts (full time equivalent posts or 'FTE') to Belgium. It appears from the ruling that there is no double taxation issue. The ruling indicates that the fact that the accounting profit in Belgium is higher than that of a standalone company is due to e.g. knowhow, procurement advantages, client lists etc., which existed in the group before the central entrepreneurial function was transferred to Belgium. However, the ruling adds that those 'intangibles' have been made available to the Belgian group entity by the group for free, which implies that there is no taxable income anywhere else in the group and therefore no risk for double taxation. In fact, the ruling (point 48 thereof) reiterates that 'it is not up to the Belgian tax authorities to determine which foreign companies' profit accounts must include the excess profit'.
- (63) As a second example, the ruling request of Company B reads that the company intends to bring forward its expansion investments in Belgium. Company B claims that the new investment is more attractive for it as a group entity than for a standalone company. The synergies that the ruling refers to relate to advantages which arise in Belgium in the form of lower investment costs because it already has a plant in Belgium, lower operational costs because overhead costs of the site can be spread over a larger production base, and access to cheap energy.
- (64) As a third example, the ruling request of Company C describes the company's intention to establish its Belgian subsidiary as the central entrepreneur by way of a restructuring of its European operations. Company C would increase its FTE in Belgium. Belgium again accepts the use of the TNMM with profit before tax obtained by standalone companies in comparable uncontrolled transactions as a profit level indicator to calculate the taxable base of the central entrepreneur. On this basis, Company C obtains a downward adjustment of around 60 % of the net profit before tax.
- (65) Having reviewed a sample of 22 individual rulings, the Commission considers these three examples as representative for the entire contested scheme. Although the individual facts, amounts involved and transactions are different for each specific case, they all concern multinationals increasing their activities in Belgium and claiming and obtaining an exemption from their corporate tax base of profit actually recorded in Belgium but allegedly attributable to synergies, economies of scale or some other group-related factor. From the sample, the Commission observed that Excess Profit exemptions were not granted to small companies, nor have the Belgian authorities been able to substantiate their claim that the Excess Profit exemption could also be granted to entities that are part of a small group or for other reasons than the alleged existence of synergies or economies of scale.
- (66) When asked to substantiate the availability of the Excess Profit exemption for small or medium sized entities ('SMEs'), the Belgian authorities referred to three examples of the smallest beneficiaries:
- Company D with a balance sheet total of EUR [100-120] (*) million, a turnover of EUR [60-80] million and [200-250] FTE's;
 - Company E with a turnover of EUR [70-90] million and [250-300] FTE's, and
 - Company F with a balance sheet total of EUR [50-70] million, a turnover of EUR [70-90] million and [350-400] FTE's.

(*) Covered by the obligation of professional secrecy.

- (67) When asked to substantiate the availability of the Excess Profit exemption for other reasons than the alleged existence of synergies or economies of scale, the Belgian authorities provided three examples of transfer pricing rulings in which the Ruling Commission, upon the request of the Belgian group companies, agreed to a corresponding downward adjustment at the level of those companies, on the basis of Article 185(2)(b) WIB 92, as a consequence of a primary upward transfer pricing adjustment to the profits of their associated group companies in Germany, the United Kingdom and Denmark, respectively, made by the German, United Kingdom and Danish tax administrations, respectively.
- (68) The present decision does not concern such and other similar genuine corresponding transfer pricing adjustments. It only concerns rulings granting the Excess Profit exemption, which is a unilateral and pro-active reduction of the Belgian tax base without a primary upward transfer pricing adjustment made in another tax jurisdiction or any other indication of the reduced amounts being included in a foreign tax base. For the application of the Excess Profit exemption, the exempted profit does not need to have been taxed or even included in the tax base of another foreign group company. This feature distinguishes Excess Profit exemption rulings from other transfer pricing rulings granted by the Ruling Commission on the basis of Article 185(2)(b) WIB 92 that also allow for a reduction of the profit actually recorded for tax purposes, but where the reduction is the consequence of the actual taxation or a primary upward transfer pricing adjustment by a foreign tax administration.

3. GROUNDS FOR INITIATING THE PROCEDURE

- (69) The Commission decided to initiate the formal investigation procedure because it took the preliminary view that the Excess Profit exemption scheme constitutes a State aid scheme prohibited by Article 107(1) of the Treaty since it is incompatible with the internal market.
- (70) Firstly, the Commission expressed the preliminary view that the Excess Profit exemption scheme constitutes a State aid scheme within the meaning of Article 1(d) of Council Regulation (EU) 2015/1589 ⁽⁴²⁾, which allows, without further implementing measures being required, certain Belgian group companies of multinational groups to obtain a substantial reduction of their corporate tax liability in Belgium. This was considered to be the case notwithstanding the fact that the exemption was applied via the granting of tax rulings.
- (71) Secondly, the Commission took the preliminary view that the contested scheme allows for a selective advantage. The Commission considered that scheme to constitute a derogation from the reference framework since an exemption from corporate income tax liability was granted for a part of realised profit despite the fact that it was actually generated by and recorded in the accounts of the Belgian group entity. The Commission raised further doubts that the recognition of alleged excess profit exempted under the scheme was in line with the arm's length principle, since the recognition of such a separately identifiable profit component is highly questionable and the actual benefits of being part of a multinational group were in any case significantly overestimated.
- (72) The Commission also took the preliminary view that the advantage granted by the contested scheme was selective given that it only benefited Belgian entities that are part of a multinational group. Belgian entities that were only active in Belgium could not claim similar benefits. Moreover, the beneficiaries of the scheme usually relocated a substantial part of their activities to Belgium or made significant investments in Belgium.
- (73) The Commission further took the preliminary view that the Excess Profit exemption could not be justified by the objective to prevent double taxation, since it did not correspond to a claim from another country to tax the same profit.

⁽⁴²⁾ With effect from 14 October 2015, Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification) (OJ L 248, 24.9.2015, p. 9), repealed and replaced Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1). Any reference to Regulation (EC) No 659/1999 may be construed as a reference to Regulation (EU) 2015/1589 and should be read in accordance with the correlation table in Annex II to the latter regulation.

- (74) With all the other conditions of Article 107(1) of the Treaty being fulfilled and no apparent compatibility ground available, the Commission reached the preliminary conclusion that the Excess Profit exemption scheme constituted a State aid scheme which could not be found compatible with the internal market. On those grounds, the Commission decided to initiate the procedure laid down in Article 108(2) of the Treaty with respect to that scheme.

4. COMMENTS FROM BELGIUM

- (75) Belgium submitted comments on the assessment framework applied in the Opening Decision, the non-application of the equality principle and finally held that the Opening Decision contains several misconceptions.

4.1. Comments from Belgium on the assessment framework and the principle of equal treatment

- (76) Belgium contests that the combination of Article 185(2) WIB 92, the Circular of 4 July 2006, the annual reports of the Ruling Commission and the analysis of the rulings constitute a scheme meeting the criteria of Article 1(d) of Regulation (EU) 2015/1589. Belgium considers that the analysis as a scheme must be limited to the legal provision, in the absence of a thorough analysis of all rulings granting the Excess Profit exemption. Belgium considers the examples provided in the Opening Decision to be selectively chosen examples providing only superficial findings.
- (77) Belgium also holds that it is the only Member State against which the Commission has opened the formal investigation procedure on a ruling scheme instead of an individual case, while the majority of Member States provide for advance tax rulings. Belgium considers this conduct not to comply with the principle of equal treatment.

4.2. Comments from Belgium on misconceptions in the Opening Decision

4.2.1. *The role of accounting profit and the reference framework*

- (78) Belgium states that the Commission assigns too much relevance to the accounting profit of Belgian companies for the identification of the reference framework. Belgian corporate tax law allows or prescribes numerous adjustments, both upward and downward, to arrive from an accounting profit to a taxable profit. According to Belgium, those adjustments, including Article 185(2)(b) WIB 92 are an inherent part of the reference framework and apply to all taxpayers that meet the conditions for the respective adjustments.
- (79) Belgium also states that the purpose of Article 185(2)(b) WIB 92 is to prevent double taxation. Since nationally organised groups or standalone entities cannot be confronted with double economic taxation, they are in a different factual and legal situation from multinational companies in the light of the aim pursued by the measure in question. Hence, Article 185(2)(b) WIB 92 is not a derogation to the general tax system.

4.2.2. *The Belgian application of the arm's length principle based on Article 185(2)(b) WIB 92 does not confer an advantage*

- (80) Belgium states that only arm's length profit can be taxed under its corporate tax system. Moreover, since the Commission has previously accepted the arm's length principle as a principle to assess the presence of an advantage for State aid purposes, a tax ruling can only confer an advantage to a taxpayer if it is in conflict with the arm's length principle.
- (81) Belgium recalls that transfer pricing does not only concern appropriate pricing of goods and services between associated parties, but also concerns the intercompany allocation of excess profit. Belgium argues that even if all

intercompany transactions are accurately priced, that does not necessarily mean that the overall profit is at arm's length ⁽⁴³⁾. Belgium further states that the whole concept of transfer pricing adjustments proves that commercially booked prices cannot be relied upon for tax purposes. Consequently, the fact that commercial profit exceeds the agreed arm's length profit is of no relevance.

- (82) Belgium argues that excess profit cannot be attributed to the Belgian entities under the separate entity approach that is at the basis of the arm's length principle. Excluding such profit from the tax base of Belgian entities therefore does not confer an advantage. According to Belgium, there is no international consensus on how profit caused by group synergies and/or economies of scale should be attributed to various group entities. Even if an overall non-taxation of excess profit would occur because no other tax jurisdiction taxes the excess profit exempted by Belgium, ensuring the taxation of all profits is not Belgium's responsibility.
- (83) Belgium provided a description of the two-step method outlined in recital 15 as a way to determine the profit deducted under the Excess Profit exemption.
- (84) Belgium considers that the origin of the excess profit is in fact irrelevant for the question whether it grants an advantage so long as Belgium taxes the total arm's length profit of the relevant entities. Belgium states that excess profit will usually result from synergies or economies of scale and refers to paragraph 1.10 of the OECD TP Guidelines to substantiate that such profit should not be attributed to Belgium ⁽⁴⁴⁾. If the excess profit is not attributed to any other jurisdiction and remains therefore untaxed, Belgium considers that this outcome constitutes a shortcoming of the arm's length principle.
- (85) Belgium denies any inconsistencies in the selection of the appropriate transfer pricing method or in selecting the tested party. Moreover, according to Belgium any observed inconsistencies cannot be generalised for the assessment of the scheme without a thorough case-by-case analysis of all rulings.
- (86) Belgium states that (non-)taxation of excess profit abroad is not its responsibility. Some rulings granting an Excess Profit exemption have been published and some companies are transparent in their annual accounts. Exchanging information is not possible, since it is not for Belgium to decide where excess profit should be attributed to and taxed. If in effect that profit remains wholly untaxed, this is caused by a disparity between Belgian law and foreign law and/or a flaw in the arm's length principle.

4.2.3. *The application of Article 185(2)(b) WIB 92 is not selective*

- (87) Referring to the case-law of the General Court ⁽⁴⁵⁾, Belgium states that Article 185(2)(b) WIB 92 does not favour companies that display common properties that would allow them to be distinguished from other companies, other than the fact that they can meet the conditions for the application of the provision. According to Belgium, a limitation to multinationals does not suffice to prove selectivity as that group of undertakings, in contrast with for example offshore companies, does not have common characteristics in terms of economic sector, activity, size of balance sheet, number of employees or country of establishment.
- (88) Belgium also denies that the relocation of substantial activities to or the creation of investments or jobs in Belgium constitutes an implicit or explicit condition for the application of rulings granting the Excess Profit exemption. According to Belgium, there is no such condition in the law and the Ruling Commission does not have the discretion to set such conditions. It is merely a legal obligation to fully describe activities, factual background and the special situation or arrangement referred to in Article 21 of the Law of 24 December 2002, introducing advance rulings in Belgian tax law.

⁽⁴³⁾ Belgium refers in that context to examples concerning non-remunerated intercompany services in paragraph. 7.12 and 7.13 of the OECD TP Guidelines.

⁽⁴⁴⁾ See recital 52.

⁽⁴⁵⁾ Case T-399/11 *Banco Santander SA and Santusa Holding v Commission* ECLI:EU:T:2014:938.

4.2.4. Justification

- (89) Belgium considers the Excess Profit exemption justified since it is necessary and proportionate to prevent potential double taxation. Belgium underlines that it is not meant to reduce or remedy actual double taxation.

4.2.5. Recovery

- (90) Belgium argues that recovery would in any case be prevented by the principles of legal certainty and legitimate expectations ⁽⁴⁶⁾, since previous Commission decisions on transfer pricing and State aid have led it to believe that there can be no State aid involved if Member States adhere to the arm's length principle ⁽⁴⁷⁾, considering that there is no harmonised legislation in this area in the Union. Moreover, Belgium refers to conclusions by the Council of Ministers on the Code of Conduct for business taxation ⁽⁴⁸⁾ concerning another scheme purportedly based on the same principles as the Excess Profit exemption ⁽⁴⁹⁾ and the fact that the Commission did not raise any State aid issue against the Excess Profit exemption scheme until 10 years after the termination of the informal capital ruling scheme. Finally, recovery would lead to exceptional complexity and double taxation and unequal treatment between Belgium and other Member States that also have a ruling practice.

5. COMMENTS FROM INTERESTED PARTIES

- (91) Comments were submitted by AGC Glass Europe SA/NV on 1 July 2015 and by [...] on 3 July 2015. Both companies have received rulings pursuant to Article 185(2)(b) WIB 92.
- (92) AGC Glass Europe SA/NV notes in its submission that it has never applied or implemented the ruling that it obtained on the basis of Article 185(2)(b) WIB 92.
- (93) [...] states that it is incorrectly referred to in the Opening Decision as being one of the beneficiaries of the contested measure. [...] states that it has obtained an advance pricing agreement which can lead to either an upward transfer pricing adjustment on the basis of Article 185(2)(a) WIB 92 or to a downward adjustment on the basis of Article 185(2)(b) WIB 92 ⁽⁵⁰⁾. For that reason, it does not consider itself to be a beneficiary of the scheme and ask to be excluded from the final decision or any potential recovery actions following the final decision.

6. ASSESSMENT

6.1. Existence of a scheme

- (94) The Commission considers the contested measure to constitute an aid scheme within the meaning of Article 1(d) of Regulation (EU) 2015/1589. Pursuant to that provision, a scheme is defined as 'any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner (...)'.
- (95) The case-law of the Union Courts does not provide guidance on the interpretation of that definition. The Commission notes, however, that the Union Courts have in the past accepted the Commission's qualification of tax measures sharing many characteristics with the contested scheme as aid schemes within the meaning of that provision ⁽⁵¹⁾.

⁽⁴⁶⁾ See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v Commission* ECLI:EU:C:2006:416, paragraphs 69 and 147.

⁽⁴⁷⁾ Ibid.

⁽⁴⁸⁾ See ECOFIN Presidency's conclusions of 19 March 2003, referring to the Code of Conduct Group's report with reference 7018/1/03 FISC 31 REV 1, available here: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/75013.pdf

⁽⁴⁹⁾ The so-called *informal capital ruling* scheme, referred to as scheme E002 in the Code of Conduct documents.

⁽⁵⁰⁾ The ruling concerned the transfer pricing study on which the ruling is based were attached to [...] submission.

⁽⁵¹⁾ See, in particular, Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v Commission* ECLI:EU:C:2006:416 and Case C-519/07 P *Commission v Koninklijke FrieslandCampina* ECLI:EU:C:2009:556.

- (96) The definition includes three criteria: (i) any act on the basis of which aid can be awarded; (ii) which does not require any further implementing measures; and (iii) which defines the potential aid beneficiaries in a general and abstract manner.
- (97) As for the first criterion, the Excess Profit exemption is granted on the basis of Article 185(2)(b) WIB 92. That provision, which was introduced into the Belgian tax code by Law of 21 June 2004, allows downward transfer pricing adjustments to a taxpayers' tax base subject to certain conditions being met. That provision is cited in the individual rulings granting the Excess Profit exemption as the legal basis for that exemption and is mentioned by Belgium in several documents describing the exemption ⁽⁵²⁾.
- (98) The application of Article 185(2)(b) WIB 92 is explained by the guidance provided in the Memorandum, the Circular and the replies of the Minister of Finance to parliamentary questions on the application of that provision. As regards the latter, those replies affirm the extended application of the Excess Profit exemption beyond the terms of that provision to profit that has not also been included in the profit of an associated group company in another tax jurisdiction. The absence of any requirement to demonstrate the inclusion of the same profit in the tax base of both associated companies (one abroad, one in Belgium) is an important element distinguishing rulings granting the Excess Profit exemption from other rulings authorising a downward transfer pricing adjustment pursuant to Article 185(2)(b) WIB 92 ⁽⁵³⁾.
- (99) In sum, Article 185(2)(b) WIB 92, the Memorandum, the Circular and the replies by the Minister of Finance to parliamentary questions on the application of Article 185(2)(b) WIB 92 constitute the acts on which basis the Excess Profit exemption is awarded.
- (100) As for the second criterion, the Commission considers the term 'implementing measures' to be understood to entail a significant degree of discretion on the part of the aid granting authority to influence the amount, the characteristics or the conditions under which aid is granted through the adoption of subsequent acts ⁽⁵⁴⁾. By contrast, the mere technical application of the act providing for the grant of the aid in question does not constitute an implementing measure within the meaning of Article 1(d) of Regulation (EU) 2015/1589.
- (101) The Commission considers the Excess Profit exemption to be granted without further implementing measures being required within the meaning of that provision. The elements necessary to benefit from the Excess Profit exemption can be described in *abstracto*. The existence of those elements reveal the existence of a consistent approach to granting the aid observed in the sample of rulings reviewed by the Commission and described by Belgium in its comments to the Opening Decision.
- (102) Those elements are that a tax exemption will be provided:

— to entities of a multinational undertaking;

⁽⁵²⁾ The existence of a scheme is also supported by the reference made to rulings granting the Excess Profit exemption by the Ruling Commission in its annual reports as a specific category of rulings and by other Belgian authorities advertising the scheme; see, notably Brussels Capital Region, <http://www.investinbrussels.com>, 'Belgian R & D incentives unparalleled in Europe', 18/01/13: 'Companies established in Belgium acting as the principal in a centralised business model can also apply an 'excess accounting profit' ruling, resulting in an average tax rate of between 7-9 %'; Service Public Fédéral Finances, Cellule Fiscalité des Investissements Etrangers, slide shows 'Incitants fiscaux en Belgique', 2009, and 'Fiscalité belge: Nouvelles mesures innovatrices', Paris, 9 October 2007, available at http://finances.belgium.be/fr/sur_le_spf/structure_et_services/services_du_president/Fiscaliteit_van_de_buitenlandse_investeringen/publications/presentations

⁽⁵³⁾ Not all downward adjustments pursuant to Article 185(2)(b) WIB 92 are based on the alleged existence of excess profit. The provision is also the basis for corresponding transfer pricing adjustments where Belgium on request of the Belgian taxpayer agrees to reduce the Belgian tax base as a reaction to a primary upward transfer pricing adjustment by another tax jurisdiction. The fact that Article 185(2)(b) WIB 92 is also used as the legal basis for downward adjustments to the tax base other than the Excess Profit exemption does not prevent it from being the legal basis for the contested scheme.

⁽⁵⁴⁾ For example where a public body is empowered to use different instruments to promote the local economy and grants several aid measures in pursuit thereof, that implies the use of considerable discretion as to the amount, characteristics or conditions and purpose for which the aid is granted, and is therefore not to be regarded as an aid scheme; see Commission Decision 2012/252/EU of 13 July 2011 on State aid No C 6/08 (ex NN 69/07) implemented by Finland for Ålands Industrihus Ab (OJ L 125, 12.5.2012 p. 33), recital 110.

- which obtain a compulsory prior authorisation via a ruling from the Ruling Commission, as a consequence of which the aid can only be granted for profit related to a new situation which has not yet produced effects from a tax perspective, e.g. a reorganisation leading to the relocation of a central entrepreneur to Belgium, the increase of activities or new investments in Belgium ⁽⁵⁵⁾;
 - on the profit that they make that exceeds the profit that would be made by comparable standalone entities operating in similar circumstances;
 - without the need for an initial primary adjustment in another Member State.
- (103) Indeed, as indicated in recital 65, the Commission has assessed a sample of 22 individual rulings that can be considered as representative for the contested scheme. Even though the individual facts, amounts involved and transactions are different for each specific ruling, they all concern multinationals of a considerable size, increasing their activities in Belgium, and claiming and obtaining an exemption from their corporate tax base of profit actually recorded in Belgium but allegedly attributable to synergies, economies of scale or some other group related factor.
- (104) Contrary to what Belgium has claimed, the fact that the Commission refers to common elements found in a sample of the rulings does not imply that it considers the State aid elements to stem from individual rulings rather than from a scheme. The Commission considers that the rulings are an instrument through which the scheme is applied, as mandated by the law on which the scheme is based, and that the description of certain individual rulings in the Opening Decision only serves as an illustration of how the scheme has been implemented in practice. In any event, the Commission made clear in Section 4.1 of its Opening Decision why it considered, at that stage, that the measure constituted an aid scheme, so that Belgium could not harbour any illusions that the Commission considered the State aid elements to stem from the individual rulings instead of from a scheme.
- (105) The requirement to obtain an individual ruling to benefit from the Excess Profit exemption does not constitute an implementing measure, but a technical application of the scheme, confirming the fulfilment of the conditions set by the scheme and vetting the method chosen by the taxpayer to determine the amount of alleged excess profit to be exempted ⁽⁵⁶⁾.
- (106) The fact that the Ruling Commission enjoys a limited margin of discretion to agree the exact percentage of the downward adjustment to the tax base subject to the information provided by the taxpayer or to assess the fulfilment of some of the conditions under which that deduction can be awarded (e.g. the existence of a new situation that has not yet had tax consequences), does not affect that conclusion. Indeed, the existence of a special Ruling Commission with exclusive competence on rulings to assess the reliability of the approximation of the amount of excess profit claimed by the taxpayer under the second step, necessarily requires a limited margin of

⁽⁵⁵⁾ Whereas a transfer pricing study should be produced by the taxpayer, the Excess Profit exemption applies, as a matter of principle, without it being required to demonstrate the existence of double taxation. Moreover, the exemption always relies on the assumption that the excess profit corresponds to synergies, economies of scale or other benefits drawn from the participation in a multinational group.

⁽⁵⁶⁾ See, by way of analogy, Commission Decision 2003/601/EC of 17 February 2003 on aid scheme C54/2001 (ex NN55/2000) Ireland — Foreign Income (OJ L 204, 13.8.2003, p. 51) (in particular, recital 30 of that decision); Commission Decision 2003/755/EC of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium (OJ L 282, 30.10.2003, p. 25) (in particular recital 13 of that decision: a coordination centre needed to be individually approved by Royal Decree to benefit from special tax status under the scheme); Commission Decision 2003/515/EC of 17 February 2003 on the State aid implemented by the Netherlands for international financing activities (OJ L 180, 18.7.2003, p. 52) (in particular recital 16 of that decision: permission to establish a risk reserve under the scheme leading to a tax exemption had to be granted by the Dutch tax administration); Commission Decision 2003/501/EC of 16 October 2002 on the State aid scheme in Case C 49/2001 (ex NN 46/2000) — Coordination Centres — implemented by Luxembourg (OJ L 170, 9.7.2003, p. 20) (in particular recital 9 of that decision: prior administrative approval was necessary to benefit from special tax status under the coordination centre scheme); and Commission Decision 2003/81/EC of 22 August 2002 on the aid scheme implemented by Spain in favour of coordination centres in Vizcaya C 48/2001 (OJ L 31, 6.2.2003, p. 26) (in particular recital 14 of that decision: to qualify for the coordination centres scheme, an undertaking must obtain the prior approval of the tax authorities, which is granted for a period of up to five years).

discretion on the part of the Ruling Commission. However, this merely ensures a consistent application of that exemption.

- (107) The Ruling Commission has consistently issued rulings granting the Excess Profit exemption where the above conditions were met. Moreover, as confirmed by Belgium, no request for a ruling granting an Excess Profit exemption has ever been rejected by the Ruling Commission ⁽⁵⁷⁾.
- (108) The Commission therefore concludes that the Excess Profit exemption does not require any further implementing measures.
- (109) As for the third criterion, the act on the basis of which the Excess Profit exemption is granted defines the potential beneficiaries in a general and abstract manner. The application of Article 185(2)(b) WIB 92, which forms the legal basis for the rulings necessary to benefit from the exemption, is limited to entities that form part of 'a multinational group of associated companies'.
- (110) In conclusion, the Excess Profit exemption, as it is consistently applied by the Ruling Commission, meets the criteria laid down in Article 1(d) of Regulation (EU) 2015/1589 for classification as an aid scheme. According to the case-law of the Court of Justice, in the case of an aid scheme the Commission may confine itself to examining the general characteristics of the scheme in question without being required to examine each particular case in which it has been applied ⁽⁵⁸⁾.

6.2. Existence of aid

- (111) According to Article 107(1) of the Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the provision of certain goods shall be incompatible with the internal market, in so far as it affects trade between Member States.
- (112) According to settled case-law, for a measure to qualify as aid within the meaning of Article 107(1) of the Treaty, all the conditions set out in that provision must be fulfilled ⁽⁵⁹⁾. It is thus well-established that, for a measure to be qualified as State aid, first, there must be an intervention by the State or through State resources; second, that intervention must be liable to affect trade between Member States; third, it must confer a selective advantage on an undertaking and, fourth, it must distort or threaten to distort competition ⁽⁶⁰⁾.
- (113) As regards the first condition for a finding of State aid, the Excess Profit exemption finds its basis in the application of Article 185(2)(b) WIB 92 and all the guidance documents supporting the interpretation made by the Belgian authorities of that provision for granting that exemption. Moreover, the exemption is granted by means of compulsory advance tax rulings delivered by the Ruling Commission, an organ of the Belgian tax administration, and binding on the Belgian tax administration. Accordingly, the Excess Profit exemption is imputable to the Belgian State.
- (114) As regards the scheme's financing through State resources, the Court of Justice has consistently held that a measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a positive transfer of State resources, places those undertakings in a more favourable financial situation than other taxpayers constitutes State aid ⁽⁶¹⁾. The Commission will demonstrate in Section 6.3 that the Excess Profit exemption results in a lowering of the tax liability in Belgium of undertakings that have obtained a ruling under the contested scheme by deviating from the tax that those undertakings would otherwise have been obliged to pay according to the ordinary system of taxation of corporate profits absent the scheme.

⁽⁵⁷⁾ See recital 59.

⁽⁵⁸⁾ See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v Commission* ECLI:EU:C:2006:416, paragraph 82; Case 248/84 *Germany v Commission* ECLI:EU:C:1987:437, paragraph 18; and Case C-75/97 *Belgium v Commission* ECLI:EU:C:1999:311, paragraph 48.

⁽⁵⁹⁾ See Case C-399/08 P *Commission v Deutsche Post* ECLI:EU:C:2010:481, paragraph 38 and the case-law cited therein.

⁽⁶⁰⁾ See Case C-399/08 P *Commission v Deutsche Post* ECLI:EU:C:2010:481, paragraph 39 and the case-law cited therein.

⁽⁶¹⁾ See Joined Cases C-106/09 P and C-107/09 P *Commission v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, paragraph 72 and the case-law cited therein.

Consequently, the Excess Profit exemption gives rise to a loss of State resources, since any reduction of tax for the undertakings benefitting from the contested scheme results in a loss of tax revenue that would otherwise have been available to Belgium.

- (115) As regards the second condition for a finding of State aid, the undertakings benefitting from the contested scheme are multinational companies operating in several Member States, so that any aid in their favour is liable to affect intra-Union trade. Moreover, because a ruling to benefit from the exemption can only be granted for profit derived from a new situation, which entails the relocation or increase of the undertaking's activities in Belgium, and because the benefit of the exemption is proportional to the importance of the new activities and profit created by the undertaking in Belgium, the scheme is liable to influence the choices made by multinational groups as to the location of their investments within the Union and thus to affect intra-Union trade.
- (116) Similarly, a measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipients compared to other undertakings with which they compete ⁽⁶²⁾. To the extent that the contested scheme relieves the undertakings benefitting from it from a burden they would otherwise be obliged to bear by reducing their tax liability under the ordinary system of taxation of corporate profits, that scheme distorts or threatens to distort competition by strengthening the financial position of those undertakings, so that the fourth condition for a finding of State aid is also met.
- (117) As regards the third condition for a finding of State aid, the Commission will demonstrate in the following section how the contested scheme confers a selective advantage to the Belgian group entities admitted to that scheme, as well as to the multinational groups to which those entities belong. It does so by applying a unilateral downward adjustment to their tax base resulting in a reduction of their corporate tax liability in Belgium as compared to the taxes those undertakings would otherwise have had to pay under the ordinary system of taxation of corporate profits.

6.3. Existence of a selective advantage

- (118) According to settled case-law, 'Article 107(1) of the Treaty requires it to be determined whether, under a particular statutory scheme, a State measure is such as to favour 'certain undertakings or the production of certain goods' in comparison with others which, in the light of the objective pursued by the scheme in question, are in a comparable legal and factual situation. If it is, the measure concerned fulfils the condition of selectivity' ⁽⁶³⁾.
- (119) In fiscal cases, the Court of Justice has devised a three-step analysis to determine whether a particular tax measure is selective ⁽⁶⁴⁾. First, the common or normal tax regime applicable in the Member State is identified: 'the reference system'. Second, it is determined whether the tax measure in question constitutes a derogation from that system, in so far as it differentiates between economic operators who, in light of the objectives intrinsic to the system, are in a comparable legal and factual situation. If the measure constitutes a derogation from the reference system, it is then established, in the third step of the analysis, whether that measure is justified by the nature or the general scheme of the reference system. A tax measure which constitutes a derogation to the application of the reference system may be justified if the Member State concerned can show that that measure results directly from the basic or guiding principles of that tax system ⁽⁶⁵⁾. If that is the case, the tax measure is not selective. The burden of proof in that third step lies with the Member State.

6.3.1. Determination of the reference system

- (120) For the purpose of the selectivity analysis a reference system is composed of a consistent set of rules that apply on the basis of objective criteria to all undertakings falling within its scope as defined by its objective.

⁽⁶²⁾ See Case 730/79 Phillip Morris ECLI:EU:C:1980:209, paragraph 11 and Joined Cases T-298/97, T-312/97 etc. Alzetta ECLI:EU:T:2000:151, paragraph 80.

⁽⁶³⁾ Case C-172/03 Heiser ECLI:EU:C:2005:130, paragraph 40.

⁽⁶⁴⁾ See Joined Cases C-78/08 to C-80/08 Paint Graphos ECLI:EU:C:2011:550, paragraph 49 and 63.

⁽⁶⁵⁾ See Joined Cases C-78/08 to C-80/08 Paint Graphos ECLI:EU:C:2011:550, paragraph 65.

6.3.1.1. The reference system is the Belgian corporate income tax system

- (121) In the present case, the Commission considers the reference system to be the ordinary system of taxation of corporate profits under the general Belgian corporate income tax system ⁽⁶⁶⁾, which has as its objective the taxation of profit of all companies subject to tax in Belgium. The Belgian corporate income tax system applies to companies resident in Belgium as well as Belgian branches of non-resident companies. Companies resident in Belgium ⁽⁶⁷⁾ are liable to corporate income tax on their worldwide profit ⁽⁶⁸⁾, unless a tax treaty applies. Non-resident companies are only taxable on specific Belgium-sourced income ⁽⁶⁹⁾. In both cases, Belgian corporate income tax is payable on the total profit, either worldwide or Belgian sourced. In general, therefore, all undertakings generating income in Belgium are considered to be in a similar legal and factual situation from the perspective of corporate income taxation.
- (122) The total profit is established according to the rules for profit determination laid down in the provisions to calculate the profit for individual entrepreneurs as defined in Article 24 WIB 92. The total profit is calculated as income minus deductible expenses, which are typically recorded in the accounts, so that the profit actually recorded forms the starting point for calculating the total taxable profit under the Belgian corporate income tax system ⁽⁷⁰⁾.

6.3.1.2. The Excess Profit exemption is not an inherent part of the reference system

- (123) Under the Belgian corporate income tax system, the profit actually recorded is subject to a number of upward and downward adjustments laid down in Belgian tax law to obtain the total taxable profit ⁽⁷¹⁾. In this regard, Belgium argues that all adjustments to the profit actually recorded prescribed by the WIB 92, including the Excess Profit exemption, are an inherent part of the reference system.
- (124) The Commission does not agree that the Excess Profit exemption is an inherent part of the reference system for the following reasons.
- (125) First, the Excess Profit exemption is not prescribed by any provision of the WIB 92. Indeed, the Commission notes that Article 185(2)(b), the provision on the basis of which the Excess Profit exemption is actually granted, refers to specific transactions or arrangements between two related group entities. The non-arm's length character of the conditions agreed for those transactions or arrangements may lead to a transfer pricing adjustment on the basis of that provision, but it does not allow or prescribe an abstract unilateral exemption of a fixed part or percentage of the profit actually recorded by a Belgian entity forming part of a multinational group. Rather, that provision requires the identification of a transaction or arrangement (or series of transactions) with a specific associated foreign group counterparty. Indeed, only Article 185(2)(a) WIB 92, which concerns upward transfer pricing adjustments, allows the Belgian tax administration to make a unilateral primary transfer pricing adjustment if the conditions agreed for a transaction or arrangement differ from those that would have been agreed under arm's length conditions. By contrast, the application of Article 185(2)(b) WIB 92, which concerns downward transfer pricing adjustments, contains the additional condition that the profit from the transaction or arrangement to be exempted must also have been included in the profit of the foreign counterparty to that transaction or arrangement.
- (126) Second, the objective of the Belgian corporate income tax system is to tax all corporate taxpayers on their actual profits, whether they are a standalone or group company, whether they form part of a domestic or multinational group, whether they form part of a large or small multinational group, and whether they have recently

⁽⁶⁶⁾ See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v Commission* ECLI:EU:C:2006:416, paragraph 95.

⁽⁶⁷⁾ I.e. companies having their registered seat, main establishment or actual management in Belgium, Article 2(1) 5^o WIB 92.

⁽⁶⁸⁾ See Article 185(1) WIB 92.

⁽⁶⁹⁾ This includes income from real estate located in Belgium, income from certain Belgian based assets or capital and profit realised through a permanent establishment located in Belgium (Article 227 — 229 WIB 92)

⁽⁷⁰⁾ See recital 25.

⁽⁷¹⁾ See recitals 26 to 28.

established operations in Belgium or whether they have operated in Belgium for many years. In other words, all those taxpayers are in a comparable legal and factual situation in light of the objective pursued by the corporate tax system to tax all corporate taxpayers on their actual profits. Indeed, Belgian law lists the entities in Belgium that are subject to corporate income tax and it includes any company, association, establishment or institution that is duly founded, has legal personality and exploits an enterprise or otherwise engages in profitable activities ⁽⁷²⁾. Neither the legal form of the undertaking, nor its structure (group of undertakings or not) constitute a determinant criterion for the imposition of corporate income tax in Belgium. Consequently, while adjustments to the profit actually recorded that are available to all of those taxpayers are of a general nature and, for that reason, not selective for the purposes of Article 107(1) of the Treaty ⁽⁷³⁾, the Excess Profit exemption differentiates between those taxpayers, since only Belgian entities forming part of a multinational group of a sufficient size with recently established operations in Belgium can benefit from the contested scheme, as will be explained in Section 6.3.2.

- (127) Third, the difference in determining the taxable profit of standalone and group companies has no bearing on the objective of the Belgian corporate income tax system, which is to tax the profit of all companies resident or operating through a permanent establishment in Belgium, whether standalone or integrated. While the determination of taxable profit in the case of non-integrated/domestic standalone companies that transact on the market is rather straightforward, as it is based on the difference between income and costs determined in a competitive market, the determination of taxable profit in the case of integrated multinational group companies, requires the use of proxies. That is, integrated multinational group companies will have to set the prices they apply to those intra-group transactions for determining their taxable profit instead of those prices being dictated by the market. Even if certain strategic decisions could be expected to be taken in the best interest of a group as a whole, Belgian corporate income tax is levied on individual entities, not on groups. The contested scheme relates only to the taxable profit of Belgium group companies, so that any reduced tax revenue is based individually on those companies' results. While it may be true that Belgium tax law contains certain special provisions applicable to groups, these generally aim at putting on equal footing non-integrated companies and economic entities structured in the form of groups, but not at treating groups more favourably.
- (128) Finally, if the Commission were to accept Belgium's argument on this point, that would allow a Member State to easily evade the application of the Union State aid rules merely by introducing the exemption into its tax code.

6.3.1.3. Conclusion on the reference system

- (129) In conclusion, the reference system against which the Excess Profit exemption must be assessed to determine whether it is selective is the Belgian corporate income tax system, which has as its objective the taxation of profits of all companies resident or operating through a permanent establishment in Belgium in the same manner. Indeed, since the aim of the contested scheme is to adjust the company's taxable profit for the purpose of levying Belgian corporate income tax on that profit under the Belgian corporate income tax system, it is that system that constitutes the reference system against which the scheme should be examined to determine whether its beneficiaries have benefitted from a selective advantage.

6.3.2. *The Excess Profit exemption is a derogation from the reference system*

- (130) Having determined that the Belgian corporate income tax system constitutes the reference system against which the contested scheme should be assessed, it is necessary to establish whether the Excess Profit exemption constitutes a derogation from that reference system, leading to unequal treatment between companies that are legally and factually in a similar situation in light of the objective pursued by that system.

⁽⁷²⁾ Article 179 jo. Article 2(1) 5° WIB 92.

⁽⁷³⁾ See Case C-6/12 P *Oy ECLI:EU:2013:525*, paragraph 18; Joined Cases C-106/09 P and C-107/09 P *Commission v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, paragraph 73.

- (131) In relation to that second step of the selectivity analysis, whether a tax measure constitutes a derogation from the reference system will generally coincide with the identification of the advantage granted to its beneficiaries under that measure. Indeed, where a tax measure results in an unjustified reduction of the tax liability of beneficiaries who would otherwise be subject to a higher level of tax under the reference system, that reduction constitutes both the derogation from the system of reference and the advantage granted by the tax measure.
- (132) The Commission considers the Excess Profit exemption granted pursuant to Article 185(2)(b) WIB 92 to constitute a derogation from the Belgian corporate income tax system and not the mere application of it. As will be demonstrated in the following two subsections, the Commission considers that derogation to confer a selective advantage on the beneficiaries of the contested scheme.
- (133) First and foremost, the Excess Profit exemption departs from the ordinary system of taxation of corporate profits under the Belgian corporate income tax system, according to which corporate entities resident or operating through a permanent establishment in Belgium are taxed on their total profit, i.e. their profit actually recorded, not on a hypothetical level of profit arrived at by estimating an ‘adjusted arm’s length profit’ for the entity in question. The Excess Profit exemption grants Belgian group entities benefitting from the contested scheme a selective advantage for the purposes of Article 107(1) of the Treaty by exempting a part of their profit actually recorded from Belgian corporate income tax ⁽⁷⁴⁾.
- (134) In addition and without prejudice to the previous recital, regardless of whether the reference system could be said to include a general rule according to which multinational group companies resident or operating through a permanent establishment in Belgium should not be taxed on profit actually recorded that exceeds an arm’s length profit, which it does not ⁽⁷⁵⁾, the Commission considers the Excess Profit exemption to constitute a misapplication of and thus a deviation from the arm’s length principle, which forms a part of that system ⁽⁷⁶⁾.

6.3.2.1. The contested scheme grants a selective advantage to its beneficiaries by derogating from the general Belgian corporate income tax system,

- (135) An economic advantage may be granted through different types of reduction in an undertaking’s tax burden and, in particular, through a reduction in the tax base or in the amount of tax due ⁽⁷⁷⁾. As explained in Section 2.1, the Excess Profit exemption scheme allows entities resident or operating through a permanent establishment in Belgium that are part of a multinational group to reduce their corporate tax liability in Belgium by deducting from their profit actually recorded so-called ‘excess profit’. That excess profit is determined by estimating the hypothetical average profit that a standalone company carrying out comparable activities could be expected to make in comparable circumstances. The difference between that entity’s profit actually recorded and that hypothetical average profit is then translated into an exemption percentage of pre-tax profit to achieve an average excess profit percentage over a projected period. That percentage represents the agreed tax base discount for the beneficiary under the contested scheme for the five years during which the ruling binds the Belgian tax administration.
- (136) The Excess Profit exemption is not, however, available to all corporate entities that are in a similar legal and factual situation, which, in light of the objective of the Belgian corporate income tax system to tax corporate profits, consists of all companies subject to corporate tax in Belgium. Indeed, the Belgian corporate income tax

⁽⁷⁴⁾ See Section 6.3.2.1.

⁽⁷⁵⁾ See Section 6.3.1.2.

⁽⁷⁶⁾ See Section 6.3.2.2.

⁽⁷⁷⁾ See Case C-66/02 *Italy v Commission* EU:C:2005:768, paragraph 78; Case C-222/04 *Cassa di Risparmio di Firenze and Others* EU:C:2006:8, paragraph 132; Case C-522/13 *Ministerio de Defensa and Navantia* EU:C:2014:2262, paragraphs 21 to 31. See also point 9 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3). See also Decision 2003/601/EC, recitals 33 to 35.

system contains no principle or rule according to which profit actually recorded exceeding a hypothetical level of arm's length profit is exempt from taxation ⁽⁷⁸⁾. Article 185(2)(b) WIB 92, which is relied upon by Belgium to grant the Excess Profit exemption under the contested scheme, does not have that meaning or effect. Rather, the contested scheme constitutes a derogation from the general rule under Belgian tax law according to which profit actually recorded is taxed.

(137) Accordingly, the Commission confirms its view, expressed at recital 89 of the Opening Decision, that the contested scheme is selective on several levels and for several reasons.

(138) First, the Excess Profit exemption is only available to entities that are part of a multinational group, not to standalone entities or entities forming part of domestic corporate groups. Indeed, since the contested scheme is based on Article 185(2)(b) WIB 92, which restricts the application of the exemption and the grant of an advance ruling necessary to benefit from the exemption to entities engaged in cross-border transactions, only Belgian entities forming part of a multinational group may benefit from the Excess Profit exemption. In other words, the economic advantage provided to beneficiaries under the contested scheme is de jure selective because it is exclusively available to entities forming part of a multinational group, and not available to standalone entities or entities forming part of a domestic corporate group. In particular, entities forming part of a domestic corporate group could also operate as a central entrepreneur following a national reorganisation and could therefore also claim that their profit actually recorded after that reorganisation exceeds a hypothetical average profit that a standalone company carrying out comparable activities could be expected to achieve due to the (alleged) creation of national synergies or economies of scale. However, unlike the Belgium-based central entrepreneurs of their international competitors that deal with foreign associated group companies, those entities cannot obtain the tax base discount for excess profit under the contested scheme because those entities are not within the scope of Article 185(2)(b) WIB 92.

(139) Second, to benefit from the Excess Profit exemption under the contested scheme the prior authorisation of the Ruling Commission by way of an advance ruling is needed, which can only be obtained in respect of future situations or operations that have not yet had tax effects, not for existing situations. This results from the fact that the advance ruling system, introduced into the Belgian tax code by the Law of 24 December 2002, contains the rule that a ruling can only be granted with respect to 'a special situation or arrangement that has not yet had tax consequences' for the taxpayer concerned ⁽⁷⁹⁾. More precisely, a taxpayer is not eligible to apply for a ruling covering the tax implications of its current situation, only the tax implications of a 'new situation' can be covered by an advance ruling. Those conditions equally apply to rulings granting an Excess Profit exemption under the contested scheme. Indeed, in the sample of rulings granting an Excess Profit exemption that the Commission has analysed, each ruling contained references to substantial investments and/or the creation of employment and/or the relocation of activities to Belgium ⁽⁸⁰⁾. Those elements are not explicitly listed as conditions for the granting of the Excess Profit exemption under Article 185(2)(b) WIB 92, but do constitute key elements to be eligible for an advance ruling, which is compulsory for the application of the Excess Profit exemption. The 'new situation'-requirement caused by the requirement to apply for a ruling in advance to benefit from the Excess Profit

⁽⁷⁸⁾ See recital 125.

⁽⁷⁹⁾ See recital 44.

⁽⁸⁰⁾ See decision of 26 February 2013 in file 2011.569, § 42: 'Le programme d'investissement lié à ces projets est le suivant: (...) mise en place d'une troisième ligne de production: investissement de USD 2,2 millions (...) mise en place d'une quatrième et cinquième ligne de production: complément d'investissement d'au moins USD 5 millions (...)'; §43: 'En terme de création d'emplois, de tels investissements devraient résulter en une augmentation du nombre de travailleurs du groupe en Belgique d'au-moins 30 à 40 équivalents temps plein'; §83: '(...) (La demandeuse) s'engage à augmenter ses capacités de production en Belgique. (...)'; and §91: '(la demandeuse) réalisera un bénéfice supérieur en Belgique du fait des économies d'échelles et des synergies dont elle bénéficiera en raison de l'augmentation de sa capacité de production suite à la décision d'investissement additionnel par le groupe'; decision of 30 January 2007 in file 600.460, §15: '(...) the business intends to relocate the Central Entrepreneur company from (abroad) to Belgium in the course of 2007'; §18: 'The Entrepreneur activities that are currently carried out (abroad) require the employment of 15 positions. All these positions will be transferred to Belgium'; decision of 15 December 2005 in file 500.249 §6: 'De totale investerend bedroeg circa EUR 109,5 miljoen. De geraamde extra banentoeename als gevolg van deze nieuwe investering (...) wordt geraamd op 25 mensen'; decision of 10 December 2013 in file 2013.540, Section 2: Impact sur le niveau d'emploi en Belgique (...) §68: 'Grâce à la création de la centrale d'achat et du bureau de qualité en Belgique, 20 nouveaux emplois pourront être créés ou préservés en Belgique. Le recrutement de 4 personnes supplémentaires est également envisagé à moyen terme, après 2015.' §69: '(...) le nombre de points de vente en Belgique ainsi que la surface commerciale (...) devraient augmenter. On peut dès lors s'attendre à la création d'emplois supplémentaires dans le réseau belge de distribution.' §70: 'Il convient également de mettre en évidence (qu')en cas de faillite le nombre d'emplois perdus au sein de (l'entreprise reprise) se serait élevé à (...) 300 équivalents temps plein.' §71-72: 'Il est à noter que (la demandeuse) envisage également (...) de créer un nouvel entrepôt de stockage (...) ce qui conduirait à la création de nouveaux emplois'.

exemption⁽⁸¹⁾, therefore results in de jure selectivity between multinational groups that amend their business model by establishing new operations in Belgium and any other economic operator (including multinational groups) that continue to operate under existing business models in Belgium.

- (140) Third, the Excess Profit exemption scheme exempts profit which — allegedly — results from synergies, economies of scale or from other benefits related to being part of a multinational group. While all corporate groups can lay claim to such benefits, only entities belonging to a multinational group of a size that is sufficiently large to generate significant profit from synergies, economies of scale or other intragroup benefits have an incentive to obtain a ruling under the contested scheme. That is because the process for obtaining a ruling requires a detailed request presenting the new situation justifying the exemption, detailing the presence of the entity in terms of employment and providing a full excess profit study, which is clearly more cumbersome for small corporate groups than for large corporate groups. The synergies and cost savings invoked in the ruling requests effectively require a certain scope and size of operations that is sufficiently large to justify the request for a ruling. Indeed, in response to a request by the Commission, Belgium was unable to provide a single example where the Excess Profit exemption was requested by and granted to a Belgian group entity that is part of a small multinational group. In other words, the contested scheme is also de facto selective since only Belgian entities forming part of a large or at best medium-sized multinational group can effectively benefit from the Excess Profit exemption, not entities that are part of a small multinational group.
- (141) In conclusion, since the contested scheme allows only Belgian entities forming part of a sufficiently large multinational group establishing new operations in Belgium to reduce their tax base by deducting from their profit actually recorded so-called 'excess profit', that scheme should be considered to grant a selective advantage to those entities for the purposes of Article 107(1) of the Treaty. Indeed, by reducing the amount of tax normally due under the ordinary system of taxation of corporate profits, the Excess Profit exemption relieves those Belgian entities from a cost they should normally bear from their budget and thus confers a selective advantage upon them.
- (142) Belgium justifies the difference in treatment afforded by the contested scheme by referring to the General Court's judgment of 7 November 2014 in Case T-399/11 and arguing that limiting a tax measure to multinationals does not suffice for a showing of selectivity since that group of companies, in contrast with, for example, offshore companies, does not have common characteristics in terms of economic sector, activity, size of balance sheet, number of employees or country of establishment⁽⁸²⁾. However, not only is the judgment to which Belgium refers under appeal⁽⁸³⁾, that judgment is not applicable to the contested scheme since it concerned the question whether a tax benefit linked to particular financial transactions was selective, whereas the contested scheme concerns benefits granted to particular categories of undertakings. Indeed, in the judgment to which Belgium refers, the General Court held that a tax measure which favours the acquisition of foreign subsidiaries over the acquisition of domestic subsidiaries does not entail a selective advantage for the purposes of Article 107(1) of the Treaty since it did not a priori exclude any category of undertaking from taking advantage of it. By contrast, only certain categories of undertakings can benefit from the Excess Profit exemption scheme, namely entities that are part of a sufficiently large multinational group establishing new operations in Belgium.

⁽⁸¹⁾ For rulings other than those concerning the application of the Excess Profit exemption, this requirement would not raise selectivity concerns. Normal rulings merely provide legal certainty for a tax treatment under rules that are equally applicable to all companies, with or without a ruling. Consequently, outside the Excess Profit exemption, in principle the profit subject to tax will be the same whether agreed ex ante in a ruling or ex post in a tax return. The ruling granting the Excess Profit exemption, however, effectively works as a prior authorisation. By law, the discount for excess profit allegedly exceeding the arm's length profit must be established via a ruling and cannot be claimed ex post in a tax return. As a consequence, a company actually recording high (excess) profit in its normal course of business cannot benefit from the Excess Profit exemption. As a result two companies in the same legal and factual situation, where this situation in one case arises from a restructuring and in another case follows the normal course of business will be treated differently because only the first company is eligible to apply for a ruling granting an Excess Profit exemption.

⁽⁸²⁾ Case T-399/11 *Banco Santander SA and Santusa Holding v Commission* ECLI:EU:T:2014:938.

⁽⁸³⁾ Case C-21/15 P *Commission v Banco Santander and Santusa*.

- (143) The Commission also does not agree, as claimed by Belgium, that that selective advantage results from the absence of taxation abroad of the profit exempted in Belgium, as it is Belgium that unilaterally reduces the tax base of the Belgian group entity benefitting from the contested scheme irrespective of any actual or claimed taxation of the same profit by another Member State. In any event, Article 107(1) of the Treaty prohibits the grant of State aid by a Member State. Therefore, the assessment of whether a particular scheme gives rise to an advantage should be made having regard to the actions of the Member State in question, namely Belgium. That assessment need not take into account a possible neutral or negative impact of the scheme at the level of other group companies as a result of their treatment by other Member States.

6.3.2.2. The contested scheme grants a selective advantage by deviating from the arm's length principle

- (144) Regardless of whether the Belgian corporate income tax system could be said to contain a general rule according to which profit actually recorded by multinational group entities that exceeds an arm's length profit should not be taxed, which the Commission contests ⁽⁸⁴⁾, the Excess Profit exemption constitutes a derogation from the reference system since both the rationale for that exemption and the methodology used to establish excess profit under the contested scheme contravene the arm's length principle, which forms part of that system.

(a) The arm's length principle under Article 107(1) of the Treaty

- (145) The Court of Justice has already held that a reduction in the taxable base that results from a tax measure that enables a taxpayer to employ transfer prices in intra-group transactions that do not resemble prices which would be charged in conditions of free competition between independent undertakings negotiating under comparable circumstances at arm's length confers a selective advantage on that taxpayer, by virtue of the fact that its tax liability under the ordinary tax system is reduced as compared to independent companies which rely on their actually recorded profit to determine their taxable base ⁽⁸⁵⁾.
- (146) In its judgment on the Belgian tax regime for coordination centres ⁽⁸⁶⁾, the Court of Justice assessed a challenge to a Commission decision which concluded, inter alia, that the method for determining taxable income under that regime conferred a selective advantage on those centres ⁽⁸⁷⁾. Under that regime, taxable profit was established at a flat-rate amount which represented a percentage of the full amount of operating costs and expenses, from which staff costs and financial charges were excluded. According to the Court, 'in order to decide whether a method of assessment of taxable income such as that laid down under the regime for coordination centres confers an advantage on them, it is necessary, (...), to compare that regime with the ordinary tax system, based on the difference between profit and outgoings of an undertaking carrying on its activities in conditions of free competition.' The Court then held that 'the effect of the exclusion of [staff costs and the financial costs] from the expenditure which serves to determine the taxable income of the centres is that the transfer prices do not resemble those which would be charged in conditions of free competition', which the Court found to '[confer] an advantage on the coordination centres' ⁽⁸⁸⁾.
- (147) The Court has thus accepted that a tax measure which results in a group company charging transfer prices that do not reflect those which would be charged in conditions of free competition — that is, prices negotiated by independent undertakings negotiating under comparable circumstances at arm's length — confers a selective advantage on that group company, in so far as it results in a reduction of its taxable base and thus its tax liability under the ordinary corporate income tax system. This principle, that transactions between intra-group companies should be remunerated as if they were agreed to by independent companies negotiating under comparable circumstances at arm's length, is generally referred to as the 'arm's length principle'.

⁽⁸⁴⁾ See Section 6.3.1.2 and recital 136.

⁽⁸⁵⁾ See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v Commission* ECLI:EU:C:2006:416.

⁽⁸⁶⁾ Ibid.

⁽⁸⁷⁾ Commission Decision 2003/757/EC of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium (OJ L 282, 30.10.2003, p. 25).

⁽⁸⁸⁾ See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v Commission*, ECLI:EU:C:2006:416, paragraphs 96 and 97.

- (148) The purpose of the arm's length principle is to ensure that transactions between group companies are treated for tax purposes by reference to the amount of profit that would have arisen if the same transactions had been executed by independent companies. Otherwise, group companies would benefit from a favourable treatment under the ordinary corporate income tax system when it comes to the determination of their taxable profit that is not available to standalone companies, leading to unequal treatment between companies that are factually and legally in a similar situation in light of the objective of that system, which is to tax the profit of all companies falling under its tax jurisdiction.
- (149) The Commission's assessment of whether Belgium granted a selective advantage under the contested scheme must consist in verifying whether the methodology accepted by Belgium for determining the adjusted arm's length profit under the second step of that scheme departs from a methodology that leads to a reliable approximation of a market-based outcome and thus from the arm's length principle. In so far as that methodology results in a lowering of the Belgian entity's tax liability under the general Belgian corporate income tax system as compared to undertakings in a comparable legal and factual situation, that scheme will be deemed to confer a selective advantage for the purposes of Article 107(1) of the Treaty.
- (150) The arm's length principle therefore necessarily forms part of the Commission's assessment under Article 107(1) of the Treaty of tax measures granted to group companies, independently of whether a Member State has incorporated this principle into its national legal system and in what form. It is used to establish whether the taxable profit of a group company for corporate income tax purposes has been determined on the basis of a methodology that approximates market conditions, so that that company is not treated favourably under the ordinary corporate income tax system as compared to standalone companies whose taxable profit is determined by the market. Thus, for any avoidance of doubt, the arm's length principle that the Commission applies in its State aid assessment is not that derived from Article 9 of the OECD Model Tax Convention and the OECD TP Guidelines, which are non-binding instruments, but a general principle of equal treatment in taxation falling within the application of Article 107(1) of the Treaty, which binds the Member States and from whose scope the national tax rules are not excluded ⁽⁸⁹⁾.
- (151) In the present case, the Commission considers the methodology for determining the 'adjusted arm's length profit' under the second step of the contested scheme described at recital 15 to deviate from the arm's length principle, leading to the grant of a selective advantage in favour of entities benefitting from that scheme. According to the description of the contested scheme by the Belgian authorities and consistent with the information presented in the sample of individual rulings reviewed by the Commission ⁽⁹⁰⁾, Belgian group entities benefitting from the Excess Profit exemption are considered to manage and assume the most complex functions within their multinational group (either overall or limited to a business line or geographic territory). As explained in the following subsection, the Commission therefore considers that the total residual profit resulting from intra-group transactions concluded between those entities and their associated group companies should be attributable to the Belgian group entities as their arm's length profit (under the first step). There is no room in the application of the arm's length principle for a general separate recognition for and allocation of profit from synergies and economies of scale in a transfer pricing assessment (under the second step).

(b) The residual profit is the arm's length profit of the Belgian group entity operating as 'central entrepreneur'

- (152) The Belgian authorities describe the contested scheme as being based on the notion that the Belgian group entities operate as 'central entrepreneurs' ⁽⁹¹⁾. According to the Belgian authorities, the main responsibilities for

⁽⁸⁹⁾ See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v Commission* ECLI:EU:C:2006:416, paragraph 81. See also Case T-538/11 *Belgium v Commission* EU:T:2015:188, paragraphs 65 and 66 and the case-law cited.

⁽⁹⁰⁾ See recital 65.

⁽⁹¹⁾ The OECD TP Guidelines do not define the term 'central entrepreneur'. Paragraph 9.2 of those guidelines introduces the term 'principal' as the counterparty to a foreign associated enterprise acting as a limited risk distributor, agent, commissionaire or toll/contract manufacturer for the principal, but those guidelines do not further define the term 'principal'. Other examples where an entity is referred to as the principal within a controlled transaction are given in paragraph 9.26 and 9.27 of the OECD TP Guidelines. In a group structure, a separation of functions whereby, for example, one entity ensures strategic business decisions and another entity ensures production or execution functions may be economically rational. To this end, such a structure must be in line with market conditions in order to comply with the arm's length principle.

strategic and tactical decision-making and the group's most complex functions — either overall or limited to a business line or geographic territory — are consolidated within those Belgian group entities. The associated group entities transacting with those Belgian group entities should then be contract or toll manufacturers, contract researchers, limited risk distributors, commissionaires/agents⁽⁹²⁾ or other entities performing 'routine' functions and possessing limited responsibilities.

- (153) As explained at recital 15, the Excess Profit exemption is granted following a two-step process. Under the first step of that process, the Belgian group entity estimates its arm's length profit as a residual profit, which implies the use of a one-sided transfer pricing method. In practice, the TNMM is the most used one sided method⁽⁹³⁾. The TNMM is sometimes considered an appropriate transfer pricing method to establish the prices and conditions for controlled transaction between entities performing complex functions and entities performing less complex functions. The tested party in the application of the TNMM is, as a general rule, the party to the transaction to which a transfer pricing method can be applied in the most reliable manner and for which the most reliable comparables can be found, i.e. it will most often be the one that has the less complex functional analysis⁽⁹⁴⁾. In the application of the TNMM, the tested party's net profit is examined relative to an appropriate base such as costs, sales or assets⁽⁹⁵⁾. Conversely, the residual profit (or eventually the residual loss) resulting from the series of controlled transactions in the application of the TNMM will be for the non-tested party, e.g. as a general rule the entity with the more complex profile.
- (154) Without prejudice to the appropriateness of using a one-sided transfer pricing method to determine the arm's length profit of the Belgian group entity under the first step in each particular case in which a ruling has been granted under the contested scheme⁽⁹⁶⁾, the Commission considers that the Belgian group entity, as the central entrepreneur responsible for strategic and tactical decision-making within the group and managing and assuming the most complex functions within the multinational group, should be compensated by an increase in the expected return to ensure an outcome in line with market conditions⁽⁹⁷⁾. Conversely, its low-risk associated group counterparties would receive a limited remuneration in return for being protected against entrepreneurial risks and connected losses⁽⁹⁸⁾. In other words, as a result of the transfer pricing exercise conducted under the first step, the Belgian group entity, as 'central entrepreneur', is left with the residual profit from intra-group transactions. This residual profit therefore equals the arm's length profit of the Belgian group entity under the Belgian corporate income tax system and, in the case of the Excess Profit scheme, also equals its profit actually recorded.
- (155) However, under the second step of the process described at recital 15, the Belgian group entity estimates the profit that a comparable standalone company would have made in comparable circumstances to arrive at an 'adjusted arm's length profit' by applying the TNMM, this time with the Belgium group entity as the tested party. The difference between the profit arrived at following the first and second steps (residual profit from step one minus 'adjusted arm's length profit' from step two) constitutes the amount of 'excess profit', which is exempted

⁽⁹²⁾ A description of contract manufacturing is given in paragraph 7.40 of the OECD TP Guidelines. Limited risk distribution is described in paragraph 9.127 and a reference to the term 'agent' can be found in paragraph 6.37 of the OECD TP Guidelines.

⁽⁹³⁾ The other one sided methods are the cost plus and the resale minus.

⁽⁹⁴⁾ See recital 57.

⁽⁹⁵⁾ See footnote 37 and paragraph 2.58 et seq. of the OECD TP Guidelines.

⁽⁹⁶⁾ The 1995 OECD TP Guidelines, which were in force when the contested scheme was set up, declare an express preference for traditional transaction methods, such as the CUP, over transactional methods, such as the TNMM, as a means to establish whether transfer pricing is at arm's length (see paragraph 3.49 of the 1995 OECD TP Guidelines). Paragraph 2.3 of the 2010 OECD TP Guidelines provides in this regard: 'As a result, where, taking account of the criteria described at paragraph 2.2, a traditional transaction method and a transactional profit method can be applied in an equally reliable manner, the traditional transaction method is preferable to the transactional profit method.'

⁽⁹⁷⁾ See paragraph 1.45 of the OECD TP Guidelines. In addition, paragraph 9.39 of those guidelines states: 'In general, the consequence for one party of being allocated the risk associated with a controlled transaction (...) is that such party should: (...) c) Generally be compensated by an increase in the expected return.'

⁽⁹⁸⁾ Provided that the economic rationale for the central entrepreneur structure can be established. See also paragraph 1.47 of the OECD TP Guidelines.

from taxation under the contested scheme ⁽⁹⁹⁾. According to Belgium, the rationale for the second step of the process is that the Belgian entities of a multinational group should only be taxed on the 'adjusted arm's length profit' and, therefore, profit actually recorded that exceeds this 'adjusted arm's length profit' may be disregarded for taxation purposes as constituting 'excess profit'.

- (156) The Commission does not consider the second step to be in line with the arm's length principle. As explained at recital 154, the whole of the residual profit resulting from intra-group transactions should, as a rule, be considered the central entrepreneur's arm's length profit, in line with the entrepreneurial risks and connected costs borne by it (i.e. costs, if any, of managing or mitigating the risk, costs that may arise from the realisation of the risk), as central entrepreneur in the group structure. Consequently, the part of the profit that is considered by Belgium to be 'excess profit' is in fact just a component of the residual profit that is attributable to the Belgian group entity as central entrepreneur within its multinational group. Exempting any of that profit from the central entrepreneur's tax base therefore constitutes an unjustified derogation from a market-based outcome, which is contrary to the arm's length principle, and leads to the grant of a selective advantage in favour of entities benefitting from the contested scheme since it results in a lowering of their tax liability under the Belgian corporate income tax system.
- (157) Belgium argues that the Belgian group entities record a part of the residual profit not because of their individual functions, risks and assets, but because they belong to a multinational group. Belgium refers to that part of the profit as profit from synergies or economies of scale and claims that such profit should not be attributed to the Belgian central entrepreneur under the arm's length principle. The Commission does not agree with that line of reasoning.
- (158) First, the arm's length principle does not support a general downward adjustment for profit from synergies or economies of scale. On the contrary, the arm's length principle requires the whole residual profit resulting from transactions between associated group companies to be attributed to a group company operating as the central entrepreneur in light of its unique contribution to that group as demonstrated by the functions performed, risks assumed and asset used by it ⁽¹⁰⁰⁾. It is the allocation of functions, risks and assets between related parties in controlled transactions that determines which entity is entitled to a residual profit and to what extent under the arm's length principle, including those from synergies or economies of scale, if they arise.
- (159) The Commission considers, in this regard, that what Belgium refers to as 'excess profit', even if (partly) connected to synergies and economies of scale, should not be reattributed, but taxed where it arises ⁽¹⁰¹⁾. Profit from synergies or economies of scale is not separately identified, remunerated or attributed under the arm's length principle. Its attribution automatically follows from the transfer prices and conditions agreed between associated enterprises for all intercompany transactions and arrangements. If those conditions and prices are in line with the arm's length principle, the profit arising from synergies and economies of scale and the way in which it is shared among the group entities will automatically follow those conditions and prices. It should therefore be taxed where it arises.

⁽⁹⁹⁾ The residual profit therefore equals the sum of the hypothetical average profit of a deemed comparable standalone company described in recital 17, also referred to as the 'adjusted arm's length profit', and the 'excess profit'.

⁽¹⁰⁰⁾ See recital 154.

⁽¹⁰¹⁾ This is also confirmed in paragraph 1.158 of the OECD's report *Aligning Transfer Pricing Outcomes with Value Creation*, Actions 8-10-2015 Final Reports, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris (hereinafter: 'OECD Report on BEPS') which provides further guidance on synergies in relation to paragraph 7.13 of the OECD TP Guidelines: '(...) when synergistic benefits or burdens of group membership arise purely as a result of membership in an MNE group and without the deliberate concerted action of group members or the performance of any service or other function by group members, such synergistic benefits of group membership need not be separately compensated or specifically allocated among members of the MNE group.'

- (160) Thus, even when benefits arising from synergies and economies of scale in groups could be considered relevant, such benefits of group membership need not to be separately compensated or specifically (re)attributed among members of the multinational group. Those benefits are automatically shared among related parties as a consequence of the application of the arm's length principle in the transfer prices set for controlled intercompany transactions and services ⁽¹⁰²⁾.
- (161) Second, the manner in which the adjusted arm's length profit is arrived at under the second step of the process described at recital 15 is inherently inconsistent with whatever transfer pricing methodology is applied to arrive at the initial arm's length profit under the first step of that process. Indeed, since only entities operating as the central entrepreneur can benefit from the Excess Profit exemption, any transfer pricing methodology applied under the first step must consider them as the most complex and high risk party in a series of controlled transactions. Under the second step, that same entity is, however, invariably treated as the tested party and the less-complex part of the transaction in the application of the TNMM.
- (162) However, the TNMM is only considered a reliable method to approximate an arm's length remuneration for the party performing the simple, less complex functions and bearing limited risk in a transaction or series of transactions with an associated entity that performs the complex functions and bears the entrepreneurial risks ⁽¹⁰³⁾. If the Belgian group entity is the central entrepreneur, then the less complex parties within the multinational group are the foreign associated entities of that Belgian group entity. Since those associated entities should be compensated with a routine return for the routine functions they perform, the Belgian group entity should be entitled, in line with market conditions, to a residual, not a routine profit, for the complex functions it performs with the corporate group. By testing both parties to controlled transactions with a one-sided transfer pricing methodology such as the TNMM at different steps of the transfer pricing assessment, as the contested scheme ultimately does, the combined operating profit of the related transactions between the associated parties does not equal the sum of the profits obtained through the application of the TNNM on both parties, thus creating an untaxed tax base in contravention of the arm's length principle.
- (163) In other words, assuming the arm's length principle has been properly applied following the first step, the conditions and prices under which the Belgian group entities transact with associated group entities should be reflected in its profit actually recorded. The proper application of that principle leads to routine profit being attributable to and actually recorded by the associated entities abroad and residual profit being attributable to and actually recorded by the Belgian group entities.
- (164) Paragraph 1.10 of the OECD TP Guidelines ⁽¹⁰⁴⁾, upon which Belgium relies to justify the Excess Profit exemption, does not allow for profit from synergies or economies of scale to be disregarded or exempt from taxation, without reattributing that profit to one or more group members ⁽¹⁰⁵⁾. Although that paragraph mentions the difficulty and lack of consensus in attributing profit from synergies or economies of scale to the separate entities of a multinational group, it by no means recommends that those profits not be attributed or taxed, in the exceptional case that synergies can be ascertained.
- (165) Nor is the unilateral and abstract tax adjustment as provided by the contested scheme supported by the OECD Model Tax Convention, which forms the basis for many Double Tax Treaties between OECD and non-OECD members. Indeed, the unilateral adjustment by Belgium to the group entity's profit actually recorded inevitably means that the excess profit exempted under that scheme cannot and will not be taxed by another jurisdiction

⁽¹⁰²⁾ See also the examples given in paragraphs 1.168 and 1.169 of the OECD Report on BEPS.

⁽¹⁰³⁾ See paragraph 3.18 of the OECD TP Guidelines: 'As a general rule, the tested party is the one to which a transfer pricing method can be applied in the most reliable manner and for which the most reliable comparables can be found, i.e. it will most often be the one that has the less complex functional analysis.'

⁽¹⁰⁴⁾ See recital 52.

⁽¹⁰⁵⁾ Otherwise, the interpretation given by Belgium to the arm's length principle implies that a general application of that interpretation of the OECD principles by all the States hosting entities of multinational groups would necessarily lead to the conclusion that profit of group resulting from intragroup synergies or economies of scale should not be taxed in any of those States.

for the simple reason that those other jurisdictions do not recognise the right to tax any profit emerging specifically from synergies or economies of scale because those profits pertain only to Belgium, the tax jurisdiction in which they are actually recorded.

- (166) Third, to benefit from the Excess Profit exemption under the contested scheme, the existence of synergies or economies of scale does not need to be proven or quantified under the second step. Instead, the existence of synergies or economies of scale is assumed *in abstracto* and measured as the difference between the arm's length profit obtained by the Belgian entity following the first step of the process described at recital 15 (as reflected in its profit actually recorded) and an adjusted arm's length profit arrived at following the second step.
- (167) Belgium does not require Belgian group entities to substantiate the presence and/or origin of profit from synergies or economies of scale to benefit from the contested scheme. However, it is possible that synergies from a business restructuring, expected to lead to an increase in the profit of the multinational group, do not effectively materialise. There can be cases where the implementation of a global business model designed to derive more group synergies in fact leads to additional costs and less efficiency ⁽¹⁰⁶⁾. In those cases, the application of the contested scheme would nevertheless result in a deduction of 'excess profit' from the Belgian group entity's profit actually recorded.
- (168) In addition and contrary to OECD recommendations ⁽¹⁰⁷⁾, the Belgian authorities automatically accept that the excess profit, which is part of the whole residual profit emerging from combined transactions, is due to synergies, economies of scale or undefined group-related elements/factors. That profit is therefore completely disconnected from the analysis of functions, risks and assets of the parties involved in controlled transactions, which forms the basis of every transfer pricing exercise. That excess profit has therefore been entirely removed from the profit allocation exercise, which forms the rationale underpinning the arm's length principle.

(c) Conclusion on the existence of a selective advantage

- (169) In light of the above, the Commission concludes that the methodology for determining the taxable profits of Belgian group entities under that scheme departs from a methodology that leads to a reliable approximation of a market-based outcome and thus from the arm's length principle. Since the application of that methodology results in a discount being applied to those entities' profit actually recorded, which should form the starting point for calculating their total taxable profit under the Belgian corporate income tax system ⁽¹⁰⁸⁾, that scheme should be considered to grant a selective advantage to those entities for the purpose of Article 107(1) of the Treaty.
- (170) By deviating from the arm's length principle, the contested scheme reduces the tax liability of its beneficiaries under the Belgian corporate tax system as compared to standalone companies whose taxable profit is determined by the market. That deviation from the arm's length principle also confers a selective advantage on those beneficiaries as compared to entities forming part of a domestic corporate group and entities forming part of a multinational group that continue to operate under existing business models in Belgium ⁽¹⁰⁹⁾, neither of which can request the advance ruling necessary to benefit from that scheme, since those entities are taxed on the basis of their profit actually recorded. Finally, that deviation confers a selective advantage on its beneficiaries as compared to entities forming part of a small multinational group, since those entities will also be taxed on the basis of their actually recorded profit ⁽¹¹⁰⁾.

⁽¹⁰⁶⁾ See paragraph 9.58 of the OECD TP Guidelines.

⁽¹⁰⁷⁾ See recital 159.

⁽¹⁰⁸⁾ See footnote 70.

⁽¹⁰⁹⁾ See recitals 138 and 139.

⁽¹¹⁰⁾ See recital 123.

6.3.3. *Absence of a justification by the nature and general scheme of the tax system*

- (171) A measure which derogates from the reference system may still be found to be non-selective if it is justified by the nature or general scheme of that system. This is the case where a measure derives directly from the intrinsic basic or guiding principles of the reference system or where it is the result of inherent mechanisms necessary for the functioning and effectiveness of the system ⁽¹¹¹⁾.
- (172) Belgium considers the contested scheme justified to prevent potential double taxation. Double taxation refers to situations in which the same profit is taxed twice in respect of the same taxpayer (also referred to as legal double taxation) or in respect of two different taxpayers (i.e. economic double taxation). While the need to avoid double taxation may constitute a possible justification for derogating from the ordinary corporate income tax system ⁽¹¹²⁾, Belgium has not demonstrated that the contested scheme actually serves that purpose. Belgium has even acknowledged that the scheme is not meant to reduce or remedy actual double taxation, but only potential double taxation ⁽¹¹³⁾. Consequently, the Excess Profit exemption cannot be said to derive directly from the intrinsic basic or guiding principles of the reference system or to be the result of inherent mechanisms necessary for the functioning and effectiveness of that system.
- (173) While the terms of Article 185(2)(b) WIB 92 indicate that that provision applies to situations involving two (identified or identifiable) companies and that the tax administration may apply a (corresponding) downward adjustment on the taxable profit of a Belgian company if the same profit is also included in the taxable profit of a foreign associated company, the replies given by the Minister of Finance to the parliamentary questions on the application of that provision clearly affirm the extended application of the Excess Profit exemption beyond the terms of that provision to profit that has not been recorded by or included in the tax base of an associated foreign group entity in another tax jurisdiction. While the limitation of a corresponding downward adjustment to companies that are part of a multinational group in line with the exact terms of Article 185(2)(b) WIB 92 may be justified by the nature or general scheme of the system, this is not the case for the Excess Profit exemption.
- (174) The absence of any requirement to demonstrate the inclusion of the same profit in the tax base of both associated companies (one abroad, one in Belgium) is an important element distinguishing rulings granting the Excess Profit exemption from other transfer pricing rulings authorising a downward transfer pricing adjustment pursuant to Article 185(2)(b) WIB 92. For the latter type of rulings, the downward adjustment responds to a situation in which the profit recorded in Belgium and exempted has also been declared as taxable profit by an associated group entity in another tax jurisdiction or where a primary upward adjustment was carried out by a foreign tax administration on the taxable profit of that associated foreign entity ⁽¹¹⁴⁾. By contrast, the Excess Profit exemption provides a unilateral exemption granted in advance that does not require the exempted profit to have been or to be included in the tax base of an associated foreign group entity in another tax jurisdiction, nor that that profit is effectively taxed by that jurisdiction.

⁽¹¹¹⁾ See, for example, Joined Cases C-78/08 to C-80/08 *Paint Graphos* ECLI:EU:C:2011:550, paragraph 69.

⁽¹¹²⁾ See, by way of analogy, Joined Cases C-78/08 to C-80/08 *Paint Graphos* ECLI:EU:C:2011:550, paragraph 71, in which the Court referred to the possibility of relying on the nature or general scheme of the national tax system as a justification for the fact that cooperative societies which distribute all their profits to their members are not taxed themselves as cooperatives, provided that tax is levied on the individual members.

⁽¹¹³⁾ See recital 89.

⁽¹¹⁴⁾ The Commission observes that Belgium has provided three examples of rulings based on Article 185(2)(b) WIB 92 which indeed aim at solving actual situations of double taxation (see recital 67). Those rulings are, however, clearly different from the rulings granting the Excess Profit exemption. Indeed, for rulings authorising a downward transfer pricing adjustment, the downward adjustment will lead to a symmetric recording of profit in the accounts of companies involved in the controlled transaction. A downward adjustment of the tax base would therefore be justified by the nature and general scheme of the tax system and therefore not amount to State aid provided it is motivated by the desire to compensate for an upward adjustment in another tax jurisdiction. The Excess Profit exemption, by contrast, cannot be justified on similar grounds, because of the absence of another tax jurisdiction claiming the profit, so that double taxation concerns do not arise.

- (175) Consequently, the Excess Profit exemption also cannot be said to address situations of double taxation in a necessary and proportionate manner ⁽¹¹⁵⁾. The contested scheme clearly goes beyond what is necessary and proportionate to achieve the objective of preventing double taxation and therefore cannot be justified by the nature or general scheme of that system.
- (176) In addition, the Commission does not consider the arm's length principle, and in particular Article 9 of the OECD Model Tax Convention which translates that principle in relation to double taxation, to justify the unilateral downward adjustment to a taxpayer's tax base granted by the Excess Profit exemption scheme.
- (177) The Commission recalls that the application of the arm's length principle by tax administrations is primarily meant to prevent companies that are part of an international group from being able to influence transfer prices and thus profit allocation between them, a possibility that standalone companies do not have. The normal application of the arm's length principle therefore provides tax administrations with the right to increase the tax base of companies engaging in intra-group transactions to ensure equal treatment with taxpayers that only transact under market conditions.
- (178) While the arm's length principle allows tax administrations to make unilateral upward adjustments to the tax base of group companies that do not respect that principle in their transfer pricing, a downward transfer pricing adjustment leading to a tax reduction is only foreseen (not required) under the arm's length principle in the exceptional situation where it is a corresponding adjustment following a primary adjustment in another tax jurisdiction, i.e. on a symmetrical basis. As explained in section 6.3.2.2, a unilateral precautionary downward adjustment of the profit actually recorded does not follow from the proper application of the arm's length principle in general, nor does it in the specific case of the Excess Profit exemption.
- (179) Indeed, Article 9 of the OECD Model Tax Treaty only applies if it is established that the same profit has been included in the tax base of two different companies established in different tax jurisdictions, and has been — or is at risk of being — 'taxed accordingly' by both jurisdictions.
- (180) Finally, concerns about double non taxation due to transfer pricing adjustments were also expressed by the EU Joint Transfer Pricing Forum ⁽¹¹⁶⁾, which adopted a Report in 2014 to address the practical issues arising from the adjustment, at a later point of time, of transfer prices set at the time a transaction took place, so-called 'compensating adjustments' ⁽¹¹⁷⁾. That report stresses the importance of profit of related enterprises with respect to the commercial or financial relations between them needing to be calculated symmetrically. Companies participating in a transaction should use the same price for the respective transactions. As a result, the Member States were invited to accept compensating adjustments to the extent only that the adjustment is made symmetrically in the accounts of both entities involved and that the adjustment is made before filing the tax return to avoid double non taxation.
- (181) In conclusion, the Commission concludes that the Excess Profit exemption cannot be said to derive directly from the intrinsic basic or guiding principles of the reference system or to be the result of inherent mechanisms

⁽¹¹⁵⁾ See Joined Cases C-78/08 to C-80/08 *Paint Graphos* ECLI:EU:C:2011:550, paragraph 75.

⁽¹¹⁶⁾ The EU Joint Transfer Pricing Forum (JTPF) was formally established by Commission Decision 2007/75/EC of 22 December 2006 setting up an expert group on transfer pricing (OJ L 32, 6.2.2007, p. 189) to assist and advise the European Commission on transfer pricing tax matters. The JTPF has one representative from each Member State's tax administrations and 18 non-government organisation members. It is chaired by an independent chairperson.

⁽¹¹⁷⁾ Report on Compensating Adjustments which was welcomed by the Council of the European Union in its conclusions from 10 March 2015. In the Glossary of the OECD TP Guidelines the term 'compensating adjustment' is defined as 'an adjustment in which the taxpayer reports a transfer price for tax purposes that is, in the taxpayer's opinion, an arm's length price for a controlled transaction, even though this price differs from the amount actually charged between the associated enterprises. This adjustment would be made before the tax return is filed.' The Report, more generally, refers to taxpayer-initiated transfer pricing adjustments made at a later point of time (usually at the end of the year) of transfer prices set at the time of a transaction or series of transactions took place or before.

necessary for the functioning and effectiveness of that system. The Commission also concludes that the contested scheme goes beyond what is necessary and proportionate to achieve the objective of preventing double taxation and therefore cannot be justified by the nature or general scheme of that system.

6.3.4. *Conclusion on the existence of a selective advantage*

- (182) For all the foregoing reasons, the Commission concludes that the contested scheme confers a selective advantage on Belgian entities forming part of a multinational group by applying an unilateral downward adjustment to their tax base, since that adjustment leads to a lowering of their tax liability in Belgium as compared to the taxes those undertakings would otherwise have been obliged to pay according to the ordinary system of taxation of corporate profits under the general Belgian corporate income tax system.

6.3.5. *Beneficiaries of the contested scheme*

- (183) The beneficiaries of the contested scheme are Belgian entities forming part of a multinational group that have requested and obtained a tax ruling on the basis of Article 185(2)(b) WIB 92 and for which a unilateral downward adjustment has effectively been applied to the profit actually recorded in their accounts for the determination of their taxable profit under the general Belgian corporate income tax system. The Commission notes that those entities form part of a multinational group and that the exemption of excess profit generated as a result of being part of a multinational group constitutes the stated rationale for the contested scheme.
- (184) For the purpose of the application of State aid rules, separate legal entities may be considered to form one economic unit. That economic unit is then considered to be the relevant undertaking benefitting from the aid measure. As the Court of Justice has previously held, '[i]n competition law, the term 'undertaking' must be understood as designating an economic unit (...) even if in law that economic unit consists of several persons, natural or legal.' ⁽¹¹⁸⁾. To determine whether several entities form an economic unit, the Court of Justice looks at the existence of a controlling share or functional, economic or organic links ⁽¹¹⁹⁾. In the present case, the Belgian entities benefitting from the contested scheme are considered the central entrepreneurs which manage and control a (separate entrepreneurial activity within a) corporate group. Those entities therefore often control associated group entities and are, in turn, controlled by the entity managing the corporate group as a whole. Accordingly, the multinational group as a whole should be seen as the undertaking benefitting from the aid measure.
- (185) Moreover, it is the multinational group as a whole which will have taken the decision to relocate part of their activities to Belgium or to make significant investments in Belgium, which is a requirement to benefit from the contested scheme. In other words, where transfer pricing is required to set prices for products and services within various legal entities of one and the same group, the effects of setting a transfer price affects by its very nature more than one group company (a price increase in one company affects the profit of the other).
- (186) Thus, notwithstanding the fact that corporate groups are organised in different legal personalities, the companies forming part of such a group must be considered as a single group benefitting from the contested aid scheme ⁽¹²⁰⁾. Consequently, in addition to the Belgian entities admitted to the contested scheme, the Commission considers the multinational groups to which those entities belong as benefitting from State aid under that scheme within the meaning of Article 107(1) of the Treaty.

⁽¹¹⁸⁾ Case C-170/83 Hydrotherm ECLI:EU:C:1984:271, paragraph 11. See also Case T-137/02 Pollmeier Malchow v Commission ECLI:EU:T:2004:304, paragraph 50.

⁽¹¹⁹⁾ Case C-480/09 P Acea Electrabel Produzione SpA v Commission ECLI:EU:C:2010:787 paragraphs 47 to 55; Case C-222/04 Cassa di Risparmio di Firenze SpA and Others ECLI:EU:C:2006:8, paragraph 112.

⁽¹²⁰⁾ See, by analogy, Case 323/82 Intermills ECLI:EU:C:1984:345; paragraph 11 'It is clear from the information supplied by the applicants themselves that following the restructuring both SA Intermills and the three manufacturing companies are controlled by the Walloon regional executive and that, following the transfer of the plant to the three newly constituted companies, SA Intermills continues to have an interest in those companies. It must therefore be accepted that, in spite of the fact that the three manufacturing companies each has a legal personality separate from the former SA Intermills, all those undertakings together form a single group, at least as far as the aid granted by the Belgian authorities is concerned (...).'

6.4. Conclusion on the existence of aid

- (187) In light of the foregoing, the Commission concludes that the Excess Profit exemption scheme, based on Article 185(2)(b) WIB 92 and introduced by Law of 21 June 2004, grants a selective advantage to the beneficiaries of the scheme as well as to the multinational groups to which they belong, that is imputable to Belgium and financed through State resources, and distorts or threatens to distort competition and is liable to affect intra-Union trade. The contested scheme therefore constitutes State aid within the meaning of Article 107(1) of the Treaty.
- (188) Since the contested scheme gives rise to a reduction of charges that should normally be borne by the beneficiaries in the course of their annual business operations, the contested scheme should be considered as granting operating aid to the beneficiaries and the multinational groups to which they belong.

6.5. Compatibility of the aid

- (189) State aid shall be deemed compatible with the internal market if it falls within any of the categories listed in Article 107(2) of the Treaty ⁽¹²¹⁾ and it may be deemed compatible with the international market if it found by the Commission to fall within any of the categories listed in Article 107(3) of the Treaty. However, it is the Member State granting the aid which bears the burden of proving that State aid granted by it is compatible with the internal market pursuant to Articles 107(2) or 107(3) of the Treaty.
- (190) Belgium has not invoked any of the grounds for a finding of compatibility of the state aid scheme
- (191) Moreover, as explained in recital 188, the contested scheme should be considered as granting operating aid. As a general rule, such aid can normally not be considered compatible with the internal market under Article 107(3) of the Treaty in that it does not facilitate the development of certain activities or of certain economic areas, nor are the tax incentives in question limited in time, digressive or proportionate to what is necessary to remedy to a specific economic handicap of the areas concerned.
- (192) Consequently, the Excess Profit exemption scheme is incompatible with the internal market.

6.6. Unlawfulness of the aid

- (193) According to Article 108(3) of the Treaty, Member States are obliged to inform the Commission of any plan to grant aid (notification obligation) and they may not put into effect any proposed aid measures until the Commission has taken a final position decision on the aid in question (standstill obligation).
- (194) The Commission notes that Belgium did not notify the Commission of any plan to grant aid through the contested scheme, nor did it respect the standstill obligation laid down in Article 108(3) of the Treaty. Therefore, in accordance with Article 1(f) of Regulation (EU) 2015/1589, the Excess Profit exemption scheme constitutes an unlawful aid scheme, put into effect in contravention of Article 108(3) of the Treaty.

7. RECOVERY

- (195) Article 16(1) of Regulation (EU) 2015/1589 establishes an obligation on the Commission to order recovery of unlawful and incompatible aid. That provision also provides that the Member State concerned shall take all

⁽¹²¹⁾ The exceptions provided for in Article 107(2) of the Treaty concern aid of a social character granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences and aid granted to certain areas of the Federal Republic of Germany, none of which apply in the present case.

necessary measures to recover unlawful aid that is found to be incompatible with the internal market. Article 16(2) of Regulation (EU) 2015/1589 establishes that the aid is to be recovered, including interest from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its effective recovery. Commission Regulation (EC) No 794/2004 ⁽¹²²⁾ elaborates the methods to be used for the calculation of recovery interest. Finally, Article 16(3) of Regulation (EU) 2015/1589 states, that ‘recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow for the immediate and effective execution of the Commission decision’.

7.1. Legitimate expectations and legal certainty

- (196) Article 16(1) of Regulation (EU) 2015/1589 also provides that the Commission shall not require recovery of the aid if this would be contrary to a general principle of law.
- (197) Belgium argues, first, that recovery should be prevented by the principles of legitimate expectations and legal certainty, since previous Commission decisions on transfer pricing and State aid have led it to believe that there can be no State aid involved in a particular fiscal measure if the Member State adheres to the arm's length principle. It further argues that recovery should be prevented because the aid amount is difficult to quantify and because recovery might lead to double taxation.
- (198) As regards Belgium's reliance on the principle of legitimate expectations, the Commission recalls that, according to the case-law of the Union courts ⁽¹²³⁾, a Member State whose authorities have granted aid in breach of the procedural rules laid down in Article 108(3) of the Treaty may not plead the legitimate expectations of an aid beneficiary to justify a failure to comply with the obligation to take the steps necessary to implement a Commission decision instructing it to recover the aid. If it were allowed to do so, Articles 107 and 108 of the Treaty would be deprived of all practical force, since national authorities would thus be able to rely on their own unlawful conduct to render decisions taken by the Commission under those provisions of the Treaty ineffective. Thus, it is not for the Member State concerned, but for the recipient undertaking, to invoke the existence of exceptional circumstances on the basis of which it had entertained legitimate expectations, leading it to decline to repay the unlawful aid ⁽¹²⁴⁾. Since none of the beneficiaries of the contested scheme claimed a legitimate expectation as to the lawfulness of that scheme, the Commission considers Belgium's reliance on that principle ineffective for the purposes of recovery under the present Decision.
- (199) In any event, for a claim of legitimate expectations to succeed, the expectation must arise from prior Commission action in the form of precise assurances ⁽¹²⁵⁾. No such precise assurance have been given to Belgium with respect to the Excess Profit exemption scheme. In particular, beyond the fact that the Code of Conduct group's Report on which the Presidency based its conclusions of 19 March 2003 has not been published, the Court has confirmed that the conclusions of the Council of Ministers endorsing an agreement reached by the Member States in the context of the review of national tax measures by the Code of Conduct group do not constitute such precise assurances ⁽¹²⁶⁾. The Court notably confirmed that ‘the conclusions of the Council express an aspiration of a political nature and cannot, by reason of their contents, produce legal effects on which parties could rely before the Court. Furthermore, those conclusions could in no event bind the Commission in the exercise of its own powers, which are conferred on it by the Treaty in State aid matters’.
- (200) As regards Belgium's reliance on the principle of legal certainty and, in particular, the Commission's previous decision-making practice accepting the arm's length principle, the Commission recalls, as a preliminary matter,

⁽¹²²⁾ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

⁽¹²³⁾ See Case C-5/89 *Commission v Germany*, ECLI:EU:C:1990:320, paragraph 17, and Case C-310/99 *Italy v Commission* ECLI:EU:C:2002:143, paragraph 104.

⁽¹²⁴⁾ See Case T-67/94 *Ladbroke Racing v Commission* ECLI:EU:T:1998:7, paragraph 183; See also Joined Cases T-116/01 and T-118/01, *P&O European Ferries (Vizcaya) SA and Diputacion Floral de Vizcaya v Commission* ECLI:EU:T:2003:217, paragraph 203.

⁽¹²⁵⁾ See Case T-290/97 *Mehibas Dordtselaan v Commission* ECLI:EU:T:2000:8, paragraph 59 and Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v Commission* ECLI:EU:C:2006:416, paragraph 147.

⁽¹²⁶⁾ See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v Commission* ECLI:EU:C:2006:416, paragraph 150-152.

that it is not bound by its decision-making practice. Each potential aid measure must be assessed on the basis of its own merits under the objective criteria of Article 107(1) of the Treaty, so that even if a contrary decision-making practice were shown to exist, that could not affect the findings of the present decision ⁽¹²⁷⁾.

- (201) The Commission further observes that according to the decisions cited by Belgium, the Commission has previously concluded that a deviation from the arm's length principle for determining a group entity's taxable profit will constitute State aid where it leads to a reduction of that entity's tax liability under the ordinary system of taxation of corporate profits ⁽¹²⁸⁾. In addition, the Commission recalls that it clearly concluded in the context of its investigation into the new Coordination Centres scheme proposed by Belgium that profit accrued to a Belgian entity in excess of a profit determined according to a cost plus method should be subject to tax in Belgium even though the cost plus method led to a profit deemed to be at arm's length ⁽¹²⁹⁾. That conclusion has been confirmed by the Court of Justice ⁽¹³⁰⁾. Considering that the Excess Profit exemption scheme constitutes a deviation from the arm's length principle, as demonstrated in Section 6.3.2.2, Belgium cannot rely on those decisions to claim that recovery would be contrary to the general principle of legal certainty. On the contrary, Belgium should have been aware that a tax scheme that leads to a favourable treatment for the beneficiaries under that scheme in terms of artificially lowering their tax base, could lead to a violation of the State aid rules and should therefore, in case of doubt, have notified the contested scheme to the Commission before putting it into effect.
- (202) As regards the alleged difficulty to quantify the aid amount under the scheme, the Commission sees no difficulty in quantifying that amount. Since the Excess Profit exemption corresponds to a percentage of pre-tax profit applied to the Belgian group entity's profit actually recorded, all that is needed to eliminate the selective advantage granted by the measure is the repayment of the difference between the tax due on the profit actually recorded and the tax effectively paid as a result of the contested scheme plus the cumulated interest on that amount as from the moment that the aid was granted.
- (203) Finally, as regards Belgium's argument that recovery might lead to double taxation, the Commission refers to Section 6.3.3 and recalls that double taxation can only occur in situations where the same profit is included in the tax base of the Belgian group entity as well as in the tax base of an associated foreign entity. The Excess Profit exemption, however, concerns a unilateral adjustment that is not granted in response to the prior taxation of the same profit in another tax jurisdiction. In any event, even if double taxation were a legitimate concern, it could be solved through the normal resolution mechanisms put in place pursuant to Double Tax Treaties, the EU Arbitration Convention or the proper application of Article 185(2)(b) WIB 92 itself. Indeed, as explained in recital 172, downward adjustments applied by the Belgian tax administration in response to the taxation of the same profit in another tax jurisdiction (following their declaration by the taxpayer or a primary upward adjustment applied by the foreign jurisdiction) would then be justified by the nature and general scheme of the tax system and would not constitute State aid.
- (204) In conclusion, none of Belgium's arguments for preventing or limiting recovery of aid granted through the application of the contested scheme can be accepted.

7.2. Methodology for recovery

- (205) In accordance with the Treaty and the established case-law of the Court of Justice, the Commission is competent to decide that the Member State concerned must abolish or alter aid when it has found that it is incompatible with the internal market. The Court has also consistently held that the obligation on a State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the

⁽¹²⁷⁾ See C-138/09 *Todaro Nunziatina & C.* ECLI:EU:C:2010:291, paragraph 21.

⁽¹²⁸⁾ See Commission Decision of 11 July 2001 in Case C 47/2001 (ex NN 42/2000) — Germany: Control and coordination centres of foreign companies (OJ C 304, 30.10.2001, p. 2). Decision 2003/501/EC.

⁽¹²⁹⁾ See Commission Decision 2005/378/EC of 8 September 2004 concerning the aid scheme which Belgium is proposing to implement for coordination centres (OJ L 125, 18.5.2005, p. 10), a.o., recitals 22, 34 and 37 as well as Article 1, point (b).

⁽¹³⁰⁾ Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v Commission* ECLI:EU:C:2006:416.

previously existing situation. In this context, the Court has stated that that objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored.

(206) No provision of Union law requires the Commission, when ordering the recovery of aid declared incompatible with the internal market, to quantify the exact amount of the aid to be recovered. Rather, it is sufficient for the Commission's decision to include information enabling the addressee of the decision to work out that amount itself without overmuch difficulty ⁽¹³¹⁾.

(207) In relation to unlawful State aid in the form of tax measures, the Notice on business taxation provides in point (35) thereof that the amount to be recovered should be calculated on the basis of a comparison between the tax actually paid and the amount which should have been paid if the generally applicable rule had been applied. In order to arrive at an amount of tax which should have been paid if the generally applicable rules would have been complied with, that is, if the Excess profit exemption had not been granted, the Belgium tax administration must reassess the tax liability of the entities benefitting from the contested scheme for each year that they benefitted from that scheme. The amounts of aid to be recovered from each beneficiary ⁽¹³²⁾ shall take into account:

— the amount of tax saved as a consequence of all rulings delivered to that beneficiary, as well as

— the cumulated interest on that amount calculated as from the moment the aid is granted.

The aid is deemed granted on the day the tax saved would have been due in each tax year in the absence of the ruling.

(208) The amount of tax saved in a specific year in respect of a specific ruling shall be calculated as:

— the profit effectively deducted from a positive tax base,

— multiplied by the corporate tax rate applicable in the tax year concerned.

(209) In principle, the Excess Profit deduction claimed by the taxpayer in its annual tax return should be taken into account, possibly after correction by the Belgian tax administration in the context of a tax audit, for the purposes of determining the amount of tax saved.

(210) If the deduction to which the beneficiary was entitled in a specific year could not (fully) take place in that year because of an insufficient positive tax base, and if the amount not effectively deducted was carried forward to a subsequent tax year, then the aid shall be deemed attributed in the subsequent year(s) when the amounts of excess profit could effectively be deducted from a positive tax base.

(211) Bearing in mind that recovery should ensure that the tax ultimately due by the beneficiary of the scheme is the tax that would have been due in the absence of the Excess Profit exemption scheme, the methodology described above can be further refined in cooperation with the Belgian authorities during the recovery stage to establish the actual amount of the tax advantage enjoyed by the beneficiaries in the light of their individual situation. The tax that would have been due in the absence of the Excess Profit exemption scheme must be calculated on the basis of the general scheme applicable in Belgium at the time of the granting of the aid and in respect of the actual factual and legal situation of the beneficiary, not in respect of hypothetical alternative situations based on different operational and legal circumstances that the beneficiary could have chosen in the absence of the Excess Profit exemption.

⁽¹³¹⁾ See Case C-441/06 *Commission v France* ECLI:EU:C:2007:616, paragraph 29 and the case-law cited.

⁽¹³²⁾ The list of beneficiaries provided by Belgium and annexed to this decision is only regarded by the Commission as illustrative. It in no way restricts the obligation of Belgium to identify all the beneficiaries of aid under the contested scheme and recover from them the full amount of aid they were granted, including beneficiaries that have received tax advantages under the scheme that are not listed in the Annex and new tax advantages granted under the scheme to beneficiaries listed in the Annex.

8. CONCLUSION

- (212) In conclusion, the Commission finds that Belgium has unlawfully implemented the Excess Profit exemption scheme in breach of Article 108(3) of the Treaty. By virtue of Article 16 of Regulation (EU) 2015/1589 Belgium is required to recover all aid granted to the beneficiaries of the scheme,

HAS ADOPTED THIS DECISION:

Article 1

The Excess Profit exemption scheme, based on Article 185(2)(b) of the Belgian Income Tax Code 1992, pursuant to which Belgium granted tax rulings to Belgian entities of multinational corporate groups authorising those entities to exempt part of their profit from corporate income taxation constitutes aid within the meaning of Article 107(1) of the Treaty that is incompatible with the internal market and that was unlawfully put into effect by Belgium in breach of Article 108(3) of the Treaty.

Article 2

- (1) Belgium shall recover all incompatible and unlawful aid referred to in Article 1 from the recipients of that aid.
- (2) Any sums that remain unrecoverable from the recipients of the aid, following the recovery described in the paragraph 1, shall be recovered from the corporate group to which the recipient belongs.
- (3) The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.
- (4) The interest on the sums to be recovered shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.
- (5) Belgium shall stop granting the aid referred to in Article 1 and shall cancel all outstanding payments of such aid with effect from the date of adoption of this decision.
- (6) Belgium shall also reject all requests for an advance ruling concerning the aid referred to in Article 1 submitted to the Ruling Commission and pending on the date of the adoption of this decision.

Article 3

- (1) Recovery of the aid referred to in Article 1 shall be immediate and effective.
- (2) Belgium shall ensure that this Decision is fully implemented within four months following the date of notification of this Decision.

Article 4

- (1) Within two months following notification of this Decision, Belgium shall submit the following information:
 - (a) the list of beneficiaries that have received the aid referred to in Article 1 and the total amount of aid received by each of them;

- (b) the total amount (principal and recovery interests) to be recovered from each beneficiary;
- (c) a detailed description of the measures already taken and planned to comply with this Decision;
- (d) documents demonstrating that the beneficiaries have been ordered to repay the aid.

(2) Belgium shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.

Article 5

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 11 January 2016.

For the Commission
Margrethe VESTAGER
Member of the Commission

ANNEX

LIST OF RULINGS GRANTED UNDER THE CONTESTED SCHEME

No decision	Date	Company	start Ruling	end Ruling	EBIT exemption (%)	NPBT exemption (%)	Total excess profit in tax return 2005-2014
500.117	26.5.05	BASF Antwerpen	periode van 3 jaar				[...]
500.249	15.12.05	Eval Europe NV	1.4.2004	2009			[...]
500.343	4.5.06	BASF Antwerpen	periode van 4 jaar				[...]
600.144	17.10.06	Celio International NV	1.2.2007	2012			[...]
600.279	21.11.06	[...] (*)	1.1.2007	2012	[40-60]		
600.460	30.1.07	BP Aromatics Limited NV	1.1.2007		[40-60]		[...]
600.469	6.2.07	BASF Antwerpen	periode van 5 jaar en 3 jaar				[...]
700.064	8.5.07	[...] (*)	8.5.2007	2012			
700.075	10.7.07	The Heating Company	10.7.2007	2012	[60-80]		[...]
700.357	25.11.08	LMS International	1.1.2008	2013	[60-80]		[...]
700.412	27.11.07	[...] (*)	1.1.2007	2012			
800.044	12.8.08	[...] (*)	1.1.2008	2013	[60-80]		
800.122	1.7.08	Tekelec International sprl	1.6.2008	2013	[60-80]		[...]
800.225	15.7.08	VF Europe bvba	1.1.2010	2015	[60-80]		[...]
800.231	13.1.09	Noble International Europe bvba	1.9.2007	2012	[60-80]		[...]
800.346	9.6.09	[...] (*)	1.5.2010	2015			
800.407	8.9.09	[...] (*)	1.1.2011	2015			

No decision	Date	Company	start Ruling	end Ruling	EBIT exemption (%)	NPBT exemption (%)	Total excess profit in tax return 2005-2014
800.441	11.3.09	Eval Europe NV	11.3.2009	2013			[...]
800.445	13.1.09	Bridgestone Europe NV	1.1.2006	2011	> OM [1-4]		[...]
900.161	26.5.09	St Jude Medical CC bvba	1.1.2009	2014	> OM [1-4]		[...]
900.417	22.12.09	Trane bvba	1.1.2010	2015	[40-60]		[...]
900.479	29.6.10	[...] (*)	1.1.2010	2015			
2010.054	20.4.10	[...] (*)	1.3.2010	2015	> OM [1-4]		
2010.106	20.4.10	Luciad NV	1.1.2009	2014	[40-60](2009-2011) [40-60] (2012-2013)		[...]
2010.112	13.7.10	[...] (*)	1.1.2011	2016		[60-80]	
2010.239	6.9.11	Ontex bvba	1.1.2011	2016		[60-80]	[...]
2010.277	7.9.10	[...] (*)				[60-80]	
2010.284	13.7.10	[...] (*)	1.1.2010	2015		[60-80]	
2010.488	15.2.11	Dow Corning Europe SA	1.1.2010	2015	> OM [1-4]		[...]
2011.028	22.2.11	Soudal NV	1.1.2010	2015		[40-60]	[...]
2011.201	13.9.11	Belgacom Int. Carrier Services	1.1.2010	2015		[20-40]	[...]
2011.326	6.9.11	Atlas Copco Airpower NV	1.1.2010	2015		[40-60]	[...]
2011.337	8.11.11	Evonik Oxena Antwerpen NV	1.1.2012	2017		[20-40]	[...]
2011.469	13.12.11	BP Aromatics Limited NV	1.1.2012				[...]
2011.488	24.1.12	[...] (*)	1.1.2015	2020		[60-80]	
2011.542	28.2.12	Chep Equipment Pooling NV	1.7.2010	2015		[20-40]	[...]

No decision	Date	Company	start Ruling	end Ruling	EBIT exemption (%)	NPBT exemption (%)	Total excess profit in tax return 2005-2014
2011.569	26.2.13	Nomacorc	1.1.2012	2016		[60-80]	[...]
2011.572	18.12.12	[...] (*)					
2012.031	25.9.12	Pfizer Animal Health SA	1.12.2012	2017		[80-100]	[...]
2012.038	6.3.12	Kinopolis Group NV	1.1.2012	2016		[60-80]	[...]
2012.062	24.5.12	Celio International NV	1.2.2012	2017			[...]
2012.066	3.4.12	[...] (*)	1.1.2013	2018		[60-80]	
2012.101	17.4.12	[...] (*)	1.1.2014	2019		[60-80]	
2012.180	18.9.12	FLIR Systems Trading Belgium bvba	1.8.2012			[60-80]	[...]
2012.182	18.9.12	[...] (*)	31.7.2013	2015		[40-60]	
2012.229	28.8.12	ABI	1.1.2011	2016		[80-100]	[...]
2012.229	29.8.12	AMPAR				[80-100]	[...]
2012.355	6.11.12	Knauf Insulation SPRL	1.1.2013	2017		[60-80]	[...]
2012.375	20.11.12	Capsugel Belgium NV	1.1.2012	2017		[60-80]	[...]
2012.379	20.11.12	Wabco Europe BVBA	1.1.2012	2017		[40-60]	[...]
2012.446	18.12.12	[...] (*)	1.1.2015	2020		[60-80]	
2012.468	26.2.13	BASF Antwerpen	periode van 6 jaar				[...]
2013.052	16.4.13	[...] (*)	periode van 3 jaar				
2013.111	30.4.13	Delta Light NV	31.8.2012	2016		[60-80]	[...]
2013.138	17.9.13	[...] (*)	1.1.2012	2017		[60-80]	

No decision	Date	Company	start Ruling	end Ruling	EBIT exemption (%)	NPBT exemption (%)	Total excess profit in tax return 2005-2014
2013.156	25.6.13	Punch Powertrain NV	1.1.2013	2017		[60-80]	[...]
2013.331	8.10.13	Puratos NV	1.1.2013	2018		[40-60]	[...]
2013.443	10.12.13	Omega Pharma International	1.1.2013	2018		[40-60]	[...]
2013.540	10.12.13	[...] (*)	1.1.2014	2019		[60-80]	
2013.579	28.1.14	Esko Graphics BVBA	1.1.2012	2017		[60-80]	[...]
2013.612	25.2.14	Magnetrol International NV	1.1.2012	2016		[60-80]	[...]
2014.091	1.4.14	Mayckawa Europe NV	31.12.2013	2018		[60-80]	[...]
2014.098	10.6.14	[...] (*)	1.1.2014	2019		[60-80]	
2014.173	13.5.14	[...] (*)	1.1.2012	2016		[60-80]	
2014.185	24.6.14	[...] (*)				[60-80]	
2014.288	5.8.14	[...] (*)	1.7.2014	2019		[60-80]	
2014.609	23.12.14	[...] (*)	1.1.2014	2019		[60-80]	
TOTAL excess profit			[< 2 100 000 000 (**)]				

(*) According to information received from Belgium, these companies had not reported any excess profit amounts in their corporate tax returns until fiscal year 2013.

(**) This amount represents the total excess profit reported by the companies in their tax returns but does not provide any indication of the State aid granted.

Source: Submission by the Belgian authorities of 29 May 2015, following the Opening Decision.

COMMISSION DECISION (EU) 2016/1700**of 7 April 2016****on State aid SA. 15836 (2012/C) (ex NN 34/2000 and NN 34A/2000) implemented by Austria
(AMA marketing measures)***(notified under document C(2016) 1972)***(Only the German text is authentic)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having called on interested parties to submit their comments ⁽¹⁾,

Whereas:

- (1) By judgment of 27 October 2011 ⁽²⁾, the Court of Justice of the European Union (hereafter: the Court) upheld the Court of First Instance's ruling ⁽³⁾ (now the General Court) by which Commission Decision C(2004) 2037 of 30 June 2004 in State aid case NN 34A/2000 on quality programmes and the quality labels AMA Biosiegel (hereafter: the bio label) and AMA Gütesiegel (hereafter: the quality label) had been annulled.
- (2) Following the judgment of the Court, the Commission is required to take the necessary measures to comply with that judgment. It therefore must adopt a new decision.
- (3) The judgments cited above are the culmination of a procedure the principal stages of which are set out below.

1. PROCEDURE BEFORE THE COMMISSION**1.1. INITIATION OF THE PROCEEDINGS — COMPLAINTS**

- (4) Following two complaints of 21 September 1999 and of 5 November 1999, registered on 23 September 1999 and 20 January 2000 respectively, the Commission asked, by letter of 15 February 2000, the Austrian authorities to supply appropriate information concerning aid measures relating to the marketing activities of Agrarmarkt Austria Marketing GesmbH (AMA Marketing), a subsidiary of Agrarmarkt Austria (AMA).
- (5) The Austrian authorities supplied the requested information by letter of 20 March 2000, registered on 21 March 2000.
- (6) By letter of 4 April 2000 registered on 7 April 2000 the second complainant submitted additional information.
- (7) Additional information was also received from the second complainant on 18 May 2000 and on 30 May 2001, registered respectively on 26 May 2000 and on 6 June 2001. A third complaint on the same subject was received by the Commission on 22 January 2003.

1.2. CASE NN 34/2000 AND ADMINISTRATIVE SPLITTING

- (8) On the basis of the information received in the complaints the Commission informed the Austrian authorities by means of a letter of 19 June 2000 that the measures concerned had been registered as non-notified aid

⁽¹⁾ Invitation to submit comments pursuant to Article 108(2) of the TFEU, concerning State aid case SA.15836, of 12 June 2012, C(2012) 3760 final, OJ C 301, 5.10.2012, p. 22.

⁽²⁾ Case C-47/10 P *Republic of Austria v Scheucher-Fleisch GmbH and Others*, ECLI:EU:C:2011:698.

⁽³⁾ Case T-375/04 *Scheucher-Fleisch GmbH and Others v Commission of the European Communities*, ECLI:EU:T:2009:445.

(NN 34/2000) and asked the Austrian authorities to submit further information. The Austrian authorities replied with letter of 29 September 2000, registered on the same day and with letter of 16 October 2000 registered on 17 October 2000. Additional information was requested by letter of 15 October 2001, to which the Austrian authorities replied by letter of 7 November 2001. By letter of 19 December 2002 the Austrian authorities provided additional information and informed the Commission about the modified (internal) AMA directives (AMA Richtlinien) governing the advertising activities for products displaying the AMA quality label and the AMA bio label which entered into force on 26 September 2002.

- (9) By this letter, which included a completed notification form, the Austrian authorities claimed to notify the AMA quality and bio label measures implemented under the new internal rules ⁽⁴⁾. The Commission maintained however that this letter could not be regarded as a notification of new aid since the modified AMA directives had already entered into force on 26 September 2002 and were thus put into effect prior to any approval of the aid measures that were based on them ⁽⁵⁾.
- (10) Following a request from the Austrian authorities dated and received on 8 March 2004, the Commission decided to split case NN 34/2000. The registration number NN 34A/2000 was given to the examination concerning the provisions on the AMA bio label and the AMA quality label applicable after 26 September 2002, whereas under registration number NN 34/2000 the Commission dealt with the measures concerning the AMA bio label and the AMA quality label before 26 September 2002 as well as with the other marketing measures by AMA.
- (11) On 16 March 2004, for internal administrative reasons a new dossier NN 34B/2000 was opened regarding the measures implemented before 26 September 2002. The Commission notes that this case does not have any impact on the substance of the present procedure.
- (12) The new AMA internal rules introduced a new design for the labels and made new quality standards applicable to products displaying one of these labels. From the explanations provided by the Austrian authorities and the detailed examination of the new labels and quality standards it appeared that these had been adopted to conform to the new Community rules.
- (13) While the new version of the AMA internal rules did not stipulate conditions as to the origin of products, the basic legal act governing AMA, the AMA Act, still referred only to national products. In this regard, by a letter dated 19 December 2002, registered on 23 December 2002, the Austrian authorities confirmed that under the new rules the AMA labels are available to all products regardless of their origin and committed to the subsequent adaptation of the AMA Act. Based on the above grounds, the Commission services considered that the non-notified aid scheme registered as NN 34/2000 had been modified substantially as of 26 September 2002 to conform to the State aid rules and that for this reason a separate assessment of the scheme after that date was justified.

1.3. NON-NOTIFIED AID NN 34A/2000 AFTER SPLITTING

- (14) Regarding the case NN 34A/2000, additional information was provided by the Austrian authorities by letters of 2 April 2004 (registered on 5 April 2004), 19 April 2004, 29 April 2004, 4 May 2004, 7 May 2004, 13 May 2004, 9 June 2004, 16 June 2004 and 24 June 2004, all registered on the day of their receipt.
- (15) By decision C(2004) 2037 the Commission decided not to raise any objections to that measure and considered it as compatible with the common market within the meaning of Article 87(3)(c) EC (now Article 107(3)(c) TFEU), in that it complied with the conditions imposed by points 13 and 14 of the Community Guidelines for State aid in the agricultural sector ⁽⁶⁾ (hereafter: the 2000-2006 Guidelines) and by the Community Guidelines for State aid for advertising of products listed in Annex I to the EC Treaty and of certain non-Annex I products ⁽⁷⁾ (hereafter: the Advertising Guidelines). The aid scheme examined in case NN 34A/2000 was limited in time until 31 December 2008 for all quality label (AMA Gütesiegel) measures and the bio label (Biozeichen) quality support measures, whereas the bio label (Biozeichen) advertising measures were limited in time until 31 March 2006.

⁽⁴⁾ The same line of argument is used in a legal opinion attached to the submission of information from 26 February 2015.

⁽⁵⁾ The AMA measures on the quality and the bio label implemented since 26 September 2002 under the modified internal rules were approved on 30 June 2004 by the Commission's decision in case NN 34A/2000 (see recitals 10 to 16).

⁽⁶⁾ OJ C 28, 1.2.2000, p. 2.

⁽⁷⁾ OJ C 252, 12.9.2001, p. 5.

- (16) According to the decision, all the measures implemented by AMA and AMA Marketing before 26 September 2002, which remained subject to case NN 34/2000 were expressly excluded from the examination in case NN 34A/2000. In this respect it is however not clear when the new AMA internal rules have been put into effect, i.e. whether the aid measures were granted on the basis of the new rules already as from 26 September 2002, the date on which the rules entered into force or whether there was a transitional period after 26 September 2002 during which aid continued to be granted according to the old rules.
- (17) In the answer of 14 September 2012 the Austrian authorities maintained that no transitional period applied and that the new rules had been put into effect on 26 September 2002.

1.4. NOTIFICATION OF THE AMA MARKETING MEASURES (GENERIC MARKETING, MARKETING OUTSIDE AUSTRIA AND MARKET RESEARCH) — N 239/2004

- (18) On 28 May 2004 the Austrian authorities notified the AMA marketing measures that comprise generic marketing measures, marketing measures outside Austria and market research. The aid scheme registered under State aid number N 239/2004 was approved by Commission decision C(2004) 3945 of 20 October 2004. By decision C(2010) 377 of 21 January 2010 the Commission approved under State aid number N 496/2009 a continuation of the above aid scheme until 31 December 2013. These decisions are not affected by the Court rulings cited above and the approved measures are not subject to the present decision.

1.5. PROLONGATION OF NN 34A/2000

- (19) By letter of 15 March 2006, registered on the same day, the Austrian authorities notified a prolongation until 31 December 2010 for the measures regarding the bio label ⁽⁸⁾ (State aid scheme N 175/2006 approved by Commission decision C(2006) 2281 of 2 June 2006). By letter of 19 November 2008 Austria notified a prolongation until 31 December 2013 of the aid measure NN 34A/2000 regarding both the quality and the bio label which expired on 31 December 2010. The notified aid which was registered as N 589/2008 and approved by Commission decision C(2009) 1092 of 25 February 2009 at the same time replaced the aid measure N 175/2006.
- (20) The present decision does not concern the above described approved aid schemes N 175/2006, N 589/2008, N 239/2004 and N 496/2009.
- (21) Subject of the present decision are the non-notified AMA measures under aid scheme NN 34/2000 (covering the period before 26 September 2002) and the AMA measures that had been addressed by the annulled Commission decision NN 34A/2000 (covering the period after 26 September 2002).

2. PROCEEDINGS BEFORE THE UNION COURTS (GENERAL COURT AND COURT OF JUSTICE) AND OPENING DECISION

2.1. PROCEEDINGS BEFORE THE GENERAL COURT — CASE T-375/04

- (22) The Commission Decision in case NN 34A/2000 was challenged before the Court of First Instance (now General Court) by the complainants referred to in recital 4 on 17 September 2004. The case was registered as T-375/04.
- (23) In its judgment of 18 November 2009, the General Court concluded that the Commission should have initiated the formal investigation procedure because of the existence of a contradiction between (i) the wording of the AMA Act of 1992, which according to the General Court limits the scheme to national products, and (ii) the internal AMA directives and the assurances of the Austrian authorities, which had maintained that the scheme was open to products from other Member States. The General Court found that this contradiction sufficed to create serious doubts as to the compatibility of the scheme with the Internal Market.

⁽⁸⁾ As indicated at recital 15 above, under aid scheme NN 34A/2000 the bio label advertising measures were limited in time until 31 March 2006 and the bio label quality support measures until 31 December 2008.

- (24) The General Court therefore concluded (paragraph 86 of the judgment) that the Commission should have initiated the procedure provided by former Article 88(2) EC (now Article 108(2) TFEU). On this ground, the General Court annulled the Commission Decision in case NN 34A/2000.

2.2. PROCEEDINGS BEFORE THE COURT OF JUSTICE — CASE C-47/10

- (25) The Republic of Austria on 27 January 2010 appealed the above judgment of the General Court. The appeal was registered as Case C-47/10.
- (26) In its judgment of 27 October 2011, the Court of Justice dismissed the appeal brought by the Republic of Austria and fully upheld the ruling of the General Court.

2.3. OPENING DECISION AND SUBSEQUENT PROCEDURAL STEPS

- (27) Following the Court's judgment, the Commission opened the formal investigation procedure under Article 108(2) TFEU in case NN 34A/2000. Having regard to the grounds of the judgment, in the opening decision of 12 June 2012 ⁽⁹⁾, the Commission invited the Austrian authorities and the parties concerned to submit within a month their comments in order to clarify the doubts regarding the contradiction described in recital 23.
- (28) The Commission did not receive any comments from third parties.
- (29) Austria replied by letter of 29 June 2012 asking for a prolongation of the deadline for reply. The Commission granted an extension of the deadline for reply on 13 July 2012.
- (30) The Austrian authorities provided their comments on 14 September 2012.
- (31) Additional information was requested by the Commission by letter of 19 February 2014. The Austrian authorities answered on 14 March 2014 and asked for a prolongation of the deadline to reply. Austria submitted additional information on 7 May 2014.
- (32) The Commission sent a new request for information on 17 December 2014. On 23 December 2014 the Austrian authorities asked for a prolongation of the deadline to reply. The Commission granted this extension by letter dated 8 January 2015. The reply of the Austrian authorities was submitted on 26 February 2015 and 3 March 2015.

3. DESCRIPTION OF THE AID MEASURES

3.1. TITLE

- (33) AMA marketing measures

3.2. DURATION OF THE MEASURE

- (34) The AMA Act which establishes AMA entered into force in 1992. According to the information provided by the Austrian authorities in a letter of 4 July 1997, registered on 7 July 1997, the marketing measures have been in place since 1994, i.e. before 1 January 1995, the date when Austria joined the European Union. Nevertheless, the AMA measures were not communicated by the Austrian authorities to the Commission in accordance with Article 143 or 144 of the Act of Accession of Republic of Austria ⁽¹⁰⁾.

⁽⁹⁾ See footnote 1.

⁽¹⁰⁾ Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union, OJ C 241, 29.8.1994, p. 21 as adjusted by OJ L 1, 1.1.1995, p. 1.

- (35) In the submission of 14 September 2012 Austria stated that the Commission was 'informed' about the marketing measures by the Österreichische Weinmarketing. However, the information provided in that submission ⁽¹¹⁾ refers only to appropriate measures imposed by the Commission according to Article 93(1) EC Treaty (now Article 108(1) TFEU) for the wine sector. These measures are not within the scope of the present decision.
- (36) By letter of 7 February 1997, in the context of the OECD monitoring report, the Commission informed Austria that the AMA promotion measures could constitute State aid and consequently requested the Austrian authorities to provide all information necessary to assess those measures under the State aid rules in force and to fill in the relevant notification forms. By letter of 23 June 1997 the Austrian authorities provided the requested information and a completed notification form ⁽¹²⁾.
- (37) In their submission of 14 September 2012 the Austrian authorities maintained that the letter of 23 June 1997 constituted a valid notification and that at the expiry of the 2-month period the Member State was entitled to believe that a valid State aid clearance existed for those measures.
- (38) Regarding the end date of implementation, the different marketing activities of AMA have to be distinguished.
- (39) The Commission notes in this respect that by decision of 20 October 2004 the Commission approved under State aid number N 239/2004 the following AMA marketing measures: generic marketing measures (advertisement and PR-activities), marketing measures outside Austria and market research.
- (40) In summary, regarding the AMA bio and quality labels the end date of the measure was 31 December 2008, except for the bio label advertising measures which have expired on 31 December 2006 (see recitals 15 and 19 above). Concerning the other AMA marketing measures, they applied until 20 October 2004, the date on which the notified measure N 239/2004 was approved (see Chapter 1.4 and recital 39 above).
- (41) The Commission further notes that a beef promotion campaign measure by AMA was notified and approved under State aid number N 570/1998 by letter of 15 December 1998. The duration of the aid was limited to 2 years.
- (42) Except for the measures covered by the Commission's decisions in cases N 570/1998, NN 34A/2000 and N 239/2004, the Commission is not aware of any other approved aid measures related to the AMA marketing activities in the period at issue.

3.3. AID AMOUNT

- (43) According to the information provided in the detailed budget reports for the years 1995-1999 ⁽¹³⁾ and 2000-2008 ⁽¹⁴⁾, the following amounts were spent for AMA marketing activities:

1995: EUR 13 084 204,72

1996: EUR 16 241 658,38

1997: EUR 15 306 219,65

1998: EUR 18 217 604,15

1999: EUR 18 158 485,48

2000: EUR 15 867 096,22

2001: EUR 12 092 317,52

2002: EUR 13 538 228,32

⁽¹¹⁾ Namely, the reference to Commission decision N 88/98.

⁽¹²⁾ See recital 145 and the following.

⁽¹³⁾ These reports were submitted as Annex to the letter of the Austrian authorities dated 16 October 2000 by which they replied to the Commission request for additional information of 19 June 2000.

⁽¹⁴⁾ These reports were submitted with the letter of the Austrian authorities dated 14 September 2012.

2003: EUR 9 044 509,01

2004: EUR 10 559 442,86

2005: EUR 8 994 712,20

2006: EUR 12 193 320,12

2007: EUR 12 285 344,67

2008: EUR 15 087 084,71

- (44) By letter of 12 June 2012 the Austrian authorities were invited to confirm the above figures and to provide a breakdown of the budget per year for each aid category (advertising for quality labels, advertising for bio labels, generic advertising, advertising outside Austria, quality measures as well as technical support regarding both labels and generic products). The following figures were provided in the submission of 14 September 2012.

(EUR)

	Werbe- maßnahmen für Gütesiegel und Biozeichen	generische Werbung	Werbung außerhalb Öster- reichs	Qualitäts- maßnahmen	technische Hilfe für beide Siegel und generische Erzeugnisse	Sonstiges nicht zuordenbar	Summe
1995	1 299 346,00	6 362 489,86	3 571 312,11	371 139,09	582 771,80	897 145,82	13 084 204,68
1996	2 233 341,97	8 643 529,94	2 888 555,25	394 070,06	779 226,09	1 302 935,06	16 241 658,37
1997	1 711 790,25	8 550 846,55	2 679 179,98	362 098,72	752 833,66	1 249 471,22	15 306 220,38
1998	1 347 618,61	9 607 372,32	3 555 154,59	689 570,37	1 078 268,11	1 939 620,16	18 217 604,16
1999	1 950 511,57	9 740 191,85	3 444 902,31	802 776,30	874 229,94	1 345 873,52	18 158 485,49
2000	1 616 472,22	8 148 390,41	2 387 445,85	1 327 850,90	993 697,77	1 393 239,07	15 867 096,22
2001	1 537 390,80	5 448 146,98	2 234 769,81	728 167,14	899 896,37	1 243 946,42	12 092 317,52
2002	1 336 612,09	7 237 058,31	2 092 667,47	381 162,95	825 295,61	1 665 431,89	13 538 228,32
2003	1 628 162,19	3 561 930,45	1 487 154,69	74 665,78	491 988,97	1 800 606,93	9 044 509,01
2004	1 562 732,58	4 934 174,90	1 366 698,52	129 725,39	804 018,00	1 762 093,47	10 559 442,86

- (45) The Austrian authorities provided the following figures for the bio label and the quality label measures in the period 2002-2008.

Jahr	Gesamtkosten lt. Jahresbericht	davon AMA-Güte- siegel	in % von Gesamt	davon AMA-Bio- Zeichen	in % von Gesamt
2002	13 538 228,32	1 356 909,27	10,02	320 695,40	2,37
2003	9 044 509,01	2 139 261,31	23,65	829 573,19	9,17
2004	10 559 442,86	1 187 575,61	11,25	994 446,40	9,42

Jahr	Gesamtkosten lt. Jahresbericht	davon AMA-Gütesiegel	in % von Gesamt	davon AMA-Bio-Zeichen	in % von Gesamt
2005	8 994 712,20	1 709 859,07	19,01	714 448,63	7,94
2006	12 193 320,12	2 834 299,23	23,24	327 752,62	2,69
2007	12 285 344,67	3 466 665,92	28,22	641 760,86	5,22
2008	15 087 995,71	3 410 221,60	22,60	1 273 517,59	8,44
Summe	81 703 552,89	16 104 792,01		5 102 194,69	

3.4. BENEFICIARIES

- (46) From the information available it appears that the beneficiaries of the marketing measures are agricultural producers as well as undertakings active in the processing and marketing of agricultural products, including the food industry.

3.5. LEGAL BASIS

- (47) The basic legal act for all AMA marketing measures is the AMA Act — Bundesgesetz über die Errichtung der Marktordnungsstelle 'Agrarmarkt Austria' (Federal Law on the establishment of the market-regulating agency 'Agrarmarkt Austria') ⁽¹⁵⁾.
- (48) Following a request for information of 30 April 2014, the Austrian authorities submitted all implementing legal acts (Richtlinien, Verordnungen etc., including internal AMA directives and other internal rules) which govern the quality label and the bio label as well as the respective marketing measures.

3.6. THE AMA MARKETING AND THE PARAFISCAL FINANCING OF THE MEASURE

- (49) The AMA is a public law body established in 1992 by the AMA Act and controlled by the State. The scheme is administered by AMA Marketing, a wholly owned subsidiary of the AMA.
- (50) In case NN 34A/2000 the Austrian authorities have provided the following information about the status and the activities of AMA:
- (51) According to the Austrian authorities, AMA and AMA Marketing do not market goods or services. AMA Marketing supervises the use of the quality label and the bio label, plans and coordinates promotion measures (advertising, fairs, exhibitions, PR-events and similar), produces information materials on quality programmes and labels, and commissions research projects on various subjects connected with quality in agricultural production.
- (52) AMA Marketing does not conduct advertising campaigns or product controls. Instead AMA Marketing selects private firms in accordance with national legislation transposing Council Directive 92/50/EEC ⁽¹⁶⁾ and subsequently Directive 2004/18/EC of the European Parliament and of the Council ⁽¹⁷⁾ to conduct such campaigns or controls.
- (53) Austrian agricultural and food industry undertakings pay compulsory levies established by the AMA Act to finance to 100 % those measures. AMA and AMA Marketing themselves are also financed by those levies.

⁽¹⁵⁾ Bundesgesetzblatt für die Republik Österreich (BGBl.) 376/1992.

⁽¹⁶⁾ Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ L 209, 24.7.1992, p. 1).

⁽¹⁷⁾ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114).

(54) The AMA Act (§ 21c(1)) establishes that the levies have to be paid for the following operations or products:

- milk when delivered to be processed,
- cereals when milled,
- adult bovine animals, calves, pigs, lambs, sheep and fowl when slaughtered,
- keeping poultry for the production of eggs,
- production of vegetables and fruit,
- production of potatoes (except starch potatoes and potatoes used for the production of alcohol),
- production and cultivation of garden produce,
- cultivation of vineyards,
- first commercialisation of wine.

(55) The maximum amount of the contributions is also established in the AMA Act (§ 21d). The concrete level of the contributions is established through a regulation of the administrative board of AMA (Verordnung des Verwaltungsrates).

(56) By letter of 14 September 2012, the Austrian authorities communicated the following amounts of the levies collected in the period 1995-2008 ⁽¹⁸⁾:

1995 — EUR 13 833 026,19
 1996 — EUR 15 260 738,33
 1997 — EUR 14 340 815,84
 1998 — EUR 15 473 675,13
 1999 — EUR 15 260 405,37
 2000 — EUR 15 419 046,38
 2001 — EUR 15 228 252,40
 2002 — EUR 15 461 156,95
 2003 — EUR 13 529 199,62
 2004 — EUR 17 320 613,38
 2005 — EUR 16 003 552,29
 2006 — EUR 16 030 054,67
 2007 — EUR 15 909 792,32
 2008 — EUR 15 880 813,22

(57) By way of example, in the year 2003 a total of EUR 13 529 199,62 was collected in levies as follows:

Milk	7 754 833,88
Adult bovine animals	1 141 663,81

⁽¹⁸⁾ Annex to points (31) and (47) to the submission of 14 September 2012. The submission contains a main document and annexes thereto.

Pigs	1 976 514,84
Calves	31 926,33
Sheep and lambs	34 046,38
Poultry for slaughter	405 925,74
Laying hens	427 690,62
Fruit	769 823,87
Vegetables	408 448,99
Potatoes	243 896,60
Garden produce	334 428,56

- (58) According to § 21c (2) of the AMA Act, goods originating outside Austria are exempt from these charges.

4. THE AMA MARKETING MEASURES

- (59) By letter of 16 October 2000, in the context of the procedure NN 34/2000, the Austrian authorities provided annual reports for the years 1995, 1996, 1997, 1998 and 1999 in which all AMA marketing measures are listed.
- (60) Regarding the quality and bio labels, the Austrian authorities provided a detailed description in the framework of the assessment of the aid scheme NN 34A/2000.
- (61) On the basis of this information it appears that the marketing activities can be grouped under the following aid categories:
- advertising, which includes advertising regarding the quality label and the bio label, generic marketing measures and advertising measures outside Austria (section 4.1 below),
 - aid for quality assurance systems, quality controls and controls for organic products for products bearing the quality and bio labels (section 4.2 below), and
 - technical support measures (section 4.3 below).
- (62) A detailed description of the measures per aid category follows in Chapters 4.1 to 4.3 respectively.

4.1. ADVERTISING MEASURES

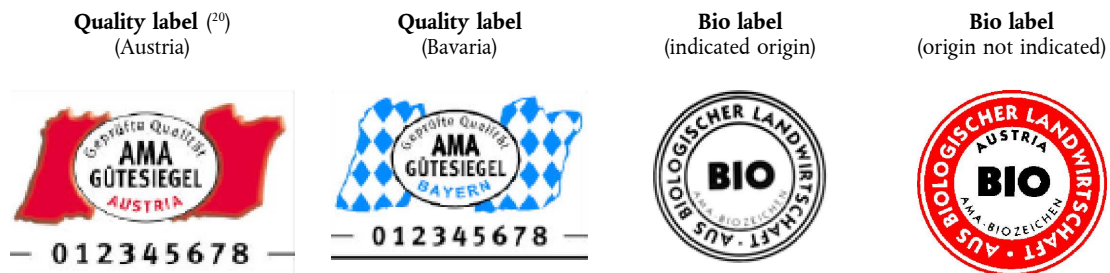
4.1.1. ADVERTISING MEASURES REGARDING THE QUALITY LABEL AND THE BIO LABEL

- (63) According to the information provided by the Austrian authorities regarding the aid scheme NN 34A/2000, the bio label may or may not have included an indication of origin. The quality label always included a specific indication of origin and a second field with colours and/or symbols (graphically) indicating the origin, depending on the Member State or the production region.

Logos used and eligibility under the scheme

- (64) According to the information provided by the Austrian authorities on the aid scheme NN 34A/2000, the labels had the following appearance after the year 2002:

Appearance of labels as of the year 2002 ⁽¹⁹⁾



- (65) From the examples submitted to the Commission for the period 1995-2002 it appears that the bio label had the same appearance as in the period after 2002, whereas until 31 December 1999 the quality label had a different design (as shown below): instead of the reference 'AMA Gütesiegel' the word 'Austria' (in the same size) was placed in the central field, i.e. the visually dominant part of the label.

Appearance of quality label in the period 1 January 1995 to 31 December 1999



- (66) As of January 2000, the original quality label was replaced with the label shown above in recital 65 ⁽²¹⁾. This is reflected in the annual reports from that period onwards.
- (67) According to the information provided relating to the aid scheme NN 34A/2000, the bio label and quality label were granted only with regard to products satisfying certain quality criteria regarding production methods, product characteristics and, in certain cases, requirements relating to the geographical origin of a product.
- (68) The Austrian authorities have given assurances that the provisions of Directive 2000/13/EC of the European Parliament and of the Council ⁽²²⁾ have been complied with in the subsidised advertising.
- (69) The bio label was only granted with regard to organic products satisfying the criteria laid down in Council Regulation (EEC) No 2092/91 ⁽²³⁾.

⁽¹⁹⁾ These labels were shown in recital 13 of Commission decision NN 34A/2000.

⁽²⁰⁾ This logo was used as well for the period 1999-2002.

⁽²¹⁾ The label is used in the product directives of the year 2000 (Richtlinien für Frischfleisch, Fleischerbetriebe, Fleischwaren, Frischeier, Putenfleisch, Milch und Milchprodukte, Obst, Gemüse und Speisekartoffeln, Speisefette, Speiseöle, Diverse Lebensmittel).

⁽²²⁾ Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs (OJ L 109, 6.5.2000, p. 29).

⁽²³⁾ Council Regulation (EEC) No 2092/91 of 24 June 1991 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs (OJ L 198, 22.7.1991, p. 1).

- (70) The quality label was awarded only to products that satisfied the quality requirements pursuant to Article 24a (b) of Council Regulation (EC) No 1257/1999 ⁽²⁴⁾. The products fulfilling the quality criteria required for the use of the quality label met the following higher standards within the meaning of point 47 of the 2000-2006 Guidelines ⁽²⁵⁾.

Product	Criterion
Beef, veal	pH 36 value < 5,8 within at least 36 hrs.
Pigmeat	PSE-pigmeat: pH1 value at least 30 min. after slaughter: 6,0 or greater.
	Only class S and E meat allowed
	DPE-pigmeat: pH12 value at least 12 hrs after slaughter: max. 5,8.
Turkey	Bacteriological requirements: maximum total bacteria L 50 000 KbE/cm ² and maximum enterobacteriaceae L 500 KbE/cm ² before cutting, corresponding values L 100 000 KbE/cm ² and L 1 000 KbE/cm ² after cutting.
Eggs	Only floor and free-range keeping.
	Participation in a salmonella prevention and control program.
Milk and milk products	Lipopolysaccharide content ≤ 400 EU/ml
	Only 1 quality class of 4 existing classes.
	In the microbiological tolerance range the lower limits according to the Austrian law <i>Milchhygieneverordnung</i> constitute the upper limits accepted for quality label products. If the tolerance range is e.g. 1-3 according to the law, the quality label allows only values up to 1.
	The content of yeast and moulds in fermented milk products ≤ 10/ml, butter ≤ 100/g, cottage cheese ≤ 1 000/g.
Honey	Water content max 19 %, HMF content ≤ 20 ppm.
Cereals, cereal products	Wheat: hl- weight 80 kg, gluten content 30 %, protein content 14 %, sedimentation value 50 Eh, fall rates 250 sec; rye hl- weight 72 kg, amylogramma 500AE; brewing rye: protein content max. 12 %, whole rye content 90 %.
Oil plants and cooking oils	Acid figure (SZ) 0,2 mg/kg.
	Peroxide figure(POZ) (fresh samples) 1,5.
Ice cream	Only raw milk of highest quality category (S) of three categories.
	Number of bacteria ≤ 50 000 (tolerance range + 30 000)

⁽²⁴⁾ Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations (OJ L 160, 26.6.1999, p. 80).

⁽²⁵⁾ These standards are described in recital 59 of Commission Decision NN 34A/2000.

Product	Criterion
	All microbiological highest allowed values lower than those in the Austrian law <i>Speiseisverordnung</i> .
Fruit, vegetables, table potatoes	Use of pesticides and herbicides only according to the Integrated Production positive list e.g. only ca. 160 of the ca. 300 plant protection chemicals listed in the Austrian law <i>Pflanzenschutzmittelgesetz</i> are allowed for the quality label products.
	In nitrogen fertilisation of potatoes only 100 kg pure N/hectare allowed (good agricultural practice in Austria: 175 kg)
	No sludge waste allowed.
	No fertilisation without soil analysis nor beyond nutrient level C (optimal nutrient supply).

- (71) The region of origin presented in the labels was considered to be the region where the processing of the product took place and from which the determining raw materials (wertbestimmende Rohstoffe) originated. One third of such raw materials may come from other regions if they could not be grown or obtained in the region of origin.
- (72) In the production of fresh eggs the laying hens had to be born and fattened in the region concerned. In beef, veal, pork, turkey and lamb production the animals had to be born in the region concerned.
- (73) Regarding the logo used for the quality label, in their submission of information of 14 September 2012 the Austrian authorities attached the applicable rules for the period until 1999. This information shows that both the regulatory acts (AMA-Gütesiegel Richtlinien ⁽²⁶⁾, Regulativ für die Verleihung des Rechts zur Führung der Ursprungs- und Gütezeichen für Lebensmittel ⁽²⁷⁾) and the application forms (Antrag auf Verleihung des Herkunfts- und Gütezeichens für Lebensmittel ⁽²⁸⁾) used the logo shown above at recital 65.
- (74) After the year 1999 the logo used for the quality label was identical with the logo shown in recital 64 above.

Eligible costs under the scheme

- (75) As regards the quality label, on the basis of the information provided in the annual reports for the years 1995 to 1999 and that relating to the aid scheme NN 34A/2000, it can be concluded that aid was granted for the costs of advertising campaigns to improve the quality consciousness of consumers and to promote the quality label. The aim was to create an image of the quality label as a guide for making purchases (Orientierungshilfe beim Einkauf).
- (76) As regards the bio label, aid was granted for the costs of advertising campaigns to inform the consumers about the products bearing the bio label as well as about the requirements for the use of the label and about organic farming in general.
- (77) The campaigns consisted of advertisements in printed and electronic media, at points of sale (POS) and public events, at information stands with brochures concerning the products bearing the quality label or the bio label, in information leaflets, as part of product tasting at fairs and other public occasions as well as other means to get

⁽²⁶⁾ AMA-Gütesiegel Richtlinie Frischfleisch of April 1999, Richtlinien Frischfleisch of April 1997, Richtlinien Frischfleisch of April 1997 (Anpassung entsprechend Beiratsbeschluss vom 22.1.1998), Richtlinien Frischfleisch vom Februar 1996, Richtlinien diverse Lebensmittel.

⁽²⁷⁾ Of February 1997.

⁽²⁸⁾ According to the Austrian authorities this form was used until 31 December 2000.

the consumers' attention, such as floor stickers (placed in supermarkets) with symbols and information relating to the quality label and the bio label. The campaigns concentrated on different product groups at a time depending on the local and market situation.

- (78) According to the information provided by the Austrian authorities in relation to the measure NN 34A/2000 the advertisements or activities at POS and public events for the period 2002-2008 did not make reference to any named producers or brands. Instead they only contained information on the product quality requirements and quality controls connected with the quality label so that the consumers could recognise the special quality of the products bearing the label. Support for POS activities was available to all interested undertakings that wished to organise such campaigns on their premises. These undertakings themselves did not receive any direct aid under the notified aid scheme.
- (79) Furthermore, according to the Austrian authorities, the origin of the product, where mentioned, had to be the secondary message in the subsidised advertising. The Austrian authorities have submitted representative examples of printed and audiovisual advertising to illustrate how the advertisements were designed in order to ensure that the message concerning origin always stayed secondary.
- (80) From the information relating to the measure NN 34A/2000 it appears that part of the bio label measures concern EU co-financed promotion activities.

4.1.2. GENERIC ADVERTISING MEASURES

- (81) The information provided in the annual reports 1995-1999 shows that the advertising campaigns concerned milk and milk products, meat and meat products, eggs, fruits, vegetables and potatoes as well as products processed from these raw materials and flowers.
- (82) The advertising campaigns consisted of advertisements in printed and electronic media and sales promotion at points of sale (POS), fairs and public events. Sales promotion made use of information stands with product samples and brochures concerning the advertised products and other means to get the consumers' attention, such as product testing, prize contests (Gewinnspiele) as well as posters, flags and pavement stickers with information relating to the advertised products. Furthermore, various printed and other materials were produced in order to promote different products or groups of products. Such materials include information leaflets, magazines, cookery books, printed clothes and promotional gifts.

Concrete campaigns carried out under the scheme

- (83) In the advertising examples from that period available to the Commission the origin of the product appears in word and symbol not only in the quality label but also elsewhere in the advertising material.
- (84) To provide a few examples contained in the 1995 annual report and the samples submitted by Austria to the Commission:

- a campaign of 1995 referred to 'Geflügel aus Österreich'. The main visual field of the logo shows the Austrian flag,
- an advertising campaign of 1995 was run under the title 'Appetite for Austria' ('Appetit auf Österreich'). The main visual field of the logo (with the word 'Österreich') used the Austrian flag as a background. In the descriptive part of the advertisement a clear reference to the origin of the products was made 'Foodstuff from Austria — why?' ('Lebensmittel aus Österreich — warum?'),
- a campaign promoting eggs from Austria was run in the year 1995 as 'Quality eggs fresh from Austria' ('Qualitätsei frisch aus Österreich'),
- promotional material on strawberries submitted to the Commission was run with the logo 'Fruit from Austria' ('Obst aus Österreich'),

- a campaign for veal was run under the motto ‘Austrian beef — every piece is a pleasure’ (‘Österreichisches Rindfleisch, jedes Stück ein Gustostück’),
 - a campaign for pig meat was run under the motto ‘Pigmeat from Austria — you know what you eat’ (‘Schweinefleisch aus Österreich, da weiß man was man isst’),
 - a campaign for cheese was run under the motto ‘Typisch Österreich, Käse mit Charakter’.
- (85) The annual report of **1996** summarises the mission of AMA as follows: ‘to convince domestic consumers, despite the growing diversity of the European foodstuff, of the benefits of Austrian products’ (‘die einheimischen Konsumenten, trotz der zunehmenden Vielfalt des europäisch werdender Lebensmittelangebots, von den Vorzügen österreichischer Produkte zu überzeugen’) ⁽²⁹⁾. It then goes on: ‘The cultivation of a “preference for Austria” is a major contribution to maintaining the market share for our farm products’. (‘Diese Kultivierung der “Präferenz für Österreich” ist ein wesentlicher Beitrag zur Marktanteilsicherung für unsere Agrarprodukte’). The same report states that the cooperation between AMA Marketing and the national producers was so successful that foreign milk and butter producers hardly entered the Austrian market ⁽³⁰⁾.
- (86) The final chapter of the report called ‘Patriotism valued by trade and the consumer’ (‘Patriotismus bei Handel und Konsument gefragt’) states that the high market share of national products as compared to the competition from other EU products had been safeguarded ⁽³¹⁾. The report names the companies (retailers) involved ⁽³²⁾ in the campaign and underlines that the use of the red-white-red logo was combined with highlighting the advantages of Austrian foodstuffs for consumers.
- (87) Regarding the campaigns and actions run in the year 1996 the following are provided as examples:
- (a) The report refers to the campaign ‘Our butter is irreplaceable’ (‘Unsere Butter kann durch nichts ersetzt werden’) ⁽³³⁾.
 - (b) Other examples cited in the yearly report refer to domestic meat: ‘Austria’s best recipe’ (‘Österreichs bestes Rezept’), ‘Beef and veal from Austria’ (‘Rindfleisch aus Österreich’) ⁽³⁴⁾. The coverage of the distributed materials seems to have been significant. The yearly report refers to 400 000 printed copies for the brochure ‘Veal from Austria’ (‘Kalbfleisch aus Österreich’) and 800 000 copies for the brochure ‘Everything about meat’ (‘Alles über Fleisch’) ⁽³⁵⁾.
- (88) The report also mentions campaigns with no reference to the origin of the products such as ‘Milch — white energy’ ⁽³⁶⁾ or the school campaign run under the slogan ‘The unbeatable apple’ (‘Der unbesiegbare Apfel’) ⁽³⁷⁾. The latter contains no reference to brand names or to the origin of the product, but only refers to generic characteristics of the fruit (nutrients, energy, vitamins and minerals etc.).
- (89) The annual report of the year **1997** mentions that the AMA measures managed to ‘build barriers to entry for other EU products’ and cites the case of yoghurt for which the national producers reconquered a 15 % market share back from foreign producers ⁽³⁸⁾.
- (90) For the year **1999**, in some advertising examples the advertising relates to particular firms (for instance a printed advertisement about Austrian cheese refers to the cheese producer [.....] ⁽³⁹⁾ and advertising for Austrian eggs to the food retail company [.....] ⁽⁴⁰⁾).
- (91) In the advertising for yoghurt bearing the AMA quality label the following text was displayed ‘Yoghurt from Austria’ ⁽⁴¹⁾.

⁽²⁹⁾ AMA activity report (Tätigkeitsbericht) 1996, page 3.

⁽³⁰⁾ AMA activity report (Tätigkeitsbericht) 1996, page 12.

⁽³¹⁾ AMA activity report (Tätigkeitsbericht) 1996, page 35.

⁽³²⁾ [.....] — covered by the obligation of professional secrecy.

⁽³³⁾ AMA activity report (Tätigkeitsbericht) 1996, page 15.

⁽³⁴⁾ Both examples are cited in AMA activity report (Tätigkeitsbericht) 1996, page 17.

⁽³⁵⁾ AMA activity report (Tätigkeitsbericht) 1996, page 19.

⁽³⁶⁾ AMA activity report (Tätigkeitsbericht) 1996, page 13.

⁽³⁷⁾ AMA activity report (Tätigkeitsbericht) 1996, page 26.

⁽³⁸⁾ AMA activity report (Tätigkeitsbericht) 1997, page 3. ‘Die österreichische Naturqualität hat sich mit der Unterstützung der AMA auch 1997 am Heimmarkt eine Position gesichert, mit der es gelungen ist, Eintrittsbarrieren gegenüber EU-Anbietern aufzubauen und gleichzeitig den heimischen Produkten Unverwechselbarkeit zu garantieren. Dass der “Geschmack der Natur” am Heimmarkt sogar Marktanteile zurückgewonnen hat, ist im Marktsegment Fruchtyoghurt klar abzulesen. So konnten 1997 von den heimischen Herstellern 15 % Marktanteil von ausländischen Anbietern zurückgewonnen werden’.

⁽³⁹⁾ Covered by the obligation of professional secrecy.

⁽⁴⁰⁾ Ibid.

⁽⁴¹⁾ This advertising example can be found on p. 10 of the AMA activity report (Tätigkeitsbericht) 1999.

- (92) The annual reports for the years 1997, 1998 and 1999 contain similar campaigns and slogans as described above.
- (93) The annual reports for the year **2000** and **2001** refer to campaigns such as:
- (a) Milk advertising ('Frische Milch hat's in sich') ⁽⁴²⁾
 - (b) A school milk campaign ⁽⁴³⁾
 - (c) The campaign Youth 2000 (Jugend 2000) ⁽⁴⁴⁾
 - (d) A brochure for the generation 50+ ⁽⁴⁵⁾

4.1.3. ADVERTISING MEASURES OUTSIDE AUSTRIA

- (94) The purpose of the advertising measures was to inform consumers and professionals about offers of products from Austria — their taste and culinary use — and to encourage them to (for the first time) try such products.
- (95) The advertising campaigns consisted of advertisements in the media, brochures and leaflets, promotional gifts, testing of products and direct e-mailing to consumers.
- (96) Advertising for Austrian products was done also in the context of Austrian food weeks and of international fairs in EU Member States outside Austria.
- (97) According to the Austrian authorities, the levies for the period 2002-2008 referred to above did not result in any discriminatory effect within the meaning of Article 90 of the EC Treaty (now Article 110 TFEU). In particular, they state that there are no indications that products of Austrian origin marketed outside Austria could not benefit from the measure to the same extent as products marketed in Austria.

4.2. STATE AID FOR QUALITY PRODUCTS

- (98) As regards the AMA quality and bio labels, aid was granted for the development of quality assurance systems (studies on improving the quality of production in general, drafting and distribution of quality assurance documents, development of related informatics systems within AMA Marketing), quality controls and controls for organic products (on-spot controls by external bodies and laboratory analyses). All routine quality controls were paid by the licence bearers themselves.
- (99) In addition, a measure consisting in the introduction of a quality assurance scheme ISO 9002 is listed in the annual reports 1995-1999.

4.3. TECHNICAL SUPPORT MEASURES

4.3.1. TECHNICAL SUPPORT FOR THE QUALITY AND BIO LABEL

- (100) Aid was granted for general information projects, PR-activities to disseminate general knowledge about the labels and for competitions organised to promote the quality labels (Gewinnspiele).

⁽⁴²⁾ AMA activity report (Tätigkeitsbericht) 2000, page 9.

⁽⁴³⁾ AMA activity report (Tätigkeitsbericht) 2000, page 10.

⁽⁴⁴⁾ AMA activity report (Tätigkeitsbericht) 2000, page 11.

⁽⁴⁵⁾ AMA activity report (Tätigkeitsbericht) 2000, page 12.

- (101) Eligible were costs incurred to organise information meetings and to produce leaflets, catalogues, newsletters and internet contributions.
- (102) The aim was to give consumers factual information about the AMA quality label and bio label programme in general, such as the quality orientation of the quality label programme, the content of the labels and the control systems.
- (103) According to information from the Austrian authorities, the above measures did not concern specific product groups nor did they induce customers to buy a given product.

4.3.2. TECHNICAL SUPPORT FOR GENERIC PRODUCT INFORMATION, INCLUDING MARKET RESEARCH

- (104) According to the annual reports, in the period 1995 until 1999 aid was granted for general information and PR activities, the organisation of and participation in fairs, and market research
- (105) The general information and PR activities for which aid was granted aimed to present generic characteristics of foodstuffs and dealt with concerns of general interest, such as providing advice and information in case of a food scandal. The PR activities also included the improvement of the communication basis in the media and used channels such as press releases, press conferences, press service, newsletters, open door days and lobbying.
- (106) Aid was also granted for the organisation of and participation in events such as competitions, conferences, seminars and workshops in Austria, as well as in 'Austrian weeks' and fairs in other EU Member States.
- (107) Aid for market research was granted for the preparation of studies concerning general food market data, the development of the markets, consumer behaviour, trends and analyses of the sales of the relevant agricultural products.

5. AID INTENSITIES

- (108) The aid covered 100 % of the eligible costs of the AMA marketing measures.
- (109) According to the information provided by the Austrian authorities, the aid for quality products and for technical support regarding the quality and the bio label never exceeded EUR 100 000 per beneficiary in a 3-year period.
- (110) Concerning control measures regarding the use of the quality label, the Austrian authorities confirmed that the aid was eliminated by 2009.

6. ASSESSMENT OF THE AID

6.1. PRESENCE OF AID

- (111) Article 107(1) TFEU prohibiting State aid applies if an aid is granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods in so far as it affects trade between Member States.

6.1.1. AID GRANTED BY THE STATE OR THROUGH STATE RESOURCES

- (112) As regards the classification of funds as State resources, no distinction needs to be drawn between cases where the aid is paid directly by the State or where it is paid by public or private bodies designated or established by the State for that purpose ⁽⁴⁶⁾.

⁽⁴⁶⁾ Judgments of 13 March 2001 in Case C-379/98, *Preussen Elektra*, ECLI:EU:C:2001:160, para. 58, and of 20 November 2003 in Case C-126/01, *GEMO*, ECLI:EU:C:2003:622, para. 23.

- (113) The Commission notes that in the present case the aid is granted not directly by the State but by AMA, an intermediate body established by law and controlled by the State (see recital 49). AMA administers and wholly owns AMA Marketing, on the basis of which it can be presumed that it exercises a decisive influence on the latter. For the purpose of this section, AMA and AMA Marketing will therefore be assessed together. Therefore, it has to be examined whether the levies collected by AMA can be regarded as State resources imputable to the State.
- (114) AMA and AMA Marketing have been established by law. The State establishes the objectives of these bodies (Article 2 of AMA law), their management structure (Articles 4-17 of AMA law), and the composition of the management board (see also recital 118). These bodies are therefore controlled by the State. Their marketing activities are funded by parafiscal levies (see recital 49 and 53) ⁽⁴⁷⁾. The AMA law (Article 21a(1)) establishes the use of the collected levies. AMA is subject to scrutiny by State institutions, such as the Austrian Court of Auditors ⁽⁴⁸⁾. Furthermore, Article 29 of the AMA law states that, when carrying out administrative procedures, AMA applies the General Administrative Procedure Act (allgemeines Verwaltungsverfahrensgesetz).
- (115) The decisions of the AMA can be challenged at the Bundesverwaltungsgericht (Federal Administrative Court) ⁽⁴⁹⁾. According to the 2004 version of the AMA law, the decisions of AMA can be challenged with the Ministry of Agriculture and Forestry.
- (116) The collection of the contribution under the AMA Law is a competence of the AMA. AMA has the competence to inspect premises or agricultural areas and to ask for reports or evidence from the undertakings liable for the levy ⁽⁵⁰⁾. Offences against the AMA law are punishable by the district administrative authority (Bezirksverwaltungsbehörde) with a fine of up to EUR 3 630 ⁽⁵¹⁾. An attempt to circumvent the AMA rules is punishable as well. In case the fine is not collectible a period of imprisonment of up to 6 weeks can be imposed ⁽⁵²⁾.
- (117) The Austrian authorities stated that the purpose of the levy, its scope and the maximal level of the levy are established by the AMA Law ⁽⁵³⁾. The concrete level of the levy is established by the management board of AMA (Verwaltungsrat der Agrarmarkt Austria). The management board establishes the concrete level of the levy based on the market situation of each product concerned, the development of sales, the income situation of domestic products in Austria and abroad and the need for and appropriateness of implementation of marketing measures ⁽⁵⁴⁾.
- (118) The management board of AMA is composed of 4 members representing the Chamber of Agriculture (Landwirtschaftskammer Österreich), the Federal Chamber of Labour (Bundesarbeitskammer), the Chamber of Economy (Wirtschaftskammer Österreich) and the Austrian Federation of Trade Unions (Österreichischer Gewerkschaftsbund) ⁽⁵⁵⁾.
- (119) In the opening decision, the Commission has checked the application of the *Pearle* jurisprudence to the case at hand. On 15 July 2004 the Court of Justice pointed out in its judgment in the *Pearle* case ⁽⁵⁶⁾ that compulsory contributions levied by an intermediary body on all undertakings in a commercial sector can be regarded as not constituting State resources when the following four cumulative conditions are met:
- the measure in question is adopted by the professional organisation representing the undertakings and employees in a commercial sector and is not used as an instrument for implementing a policy adopted by the State,
 - the objectives thus adopted are fully financed by contributions from the undertakings in the sector,
 - the financing method and the percentage/amount of the contributions are adopted in the commercial sector's professional organisation by representatives of the employers and employees without State intervention,
 - the contributions must be used to finance the measure without any possibility for the State to intervene.

⁽⁴⁷⁾ Submission of 14 September 2012.

⁽⁴⁸⁾ Ibid.

⁽⁴⁹⁾ Article 21i of AMA law.

⁽⁵⁰⁾ Article 21k of AMA law.

⁽⁵¹⁾ Article 21l of AMA law.

⁽⁵²⁾ Article 21l(2) of AMA law.

⁽⁵³⁾ Articles 21a(1), 21c and 21d respectively.

⁽⁵⁴⁾ See footnote 47.

⁽⁵⁵⁾ Article 11(1) of AMA Law.

⁽⁵⁶⁾ Judgment of the Court of 15 July 2004 in Case C-345/02, *Pearle*, ECLI:EU:C:2004:448, paras 35-38.

- (120) On the basis of the information available, the Commission considers that the scheme does not fulfil all these conditions.
- (121) As regards the first condition, it has to be noted that the financing of the marketing measures is administrated not by a professional organisation representing the sector but by AMA Marketing, a public body established and controlled by the State (see recital 49 and Article 3 of the AMA Act).
- (122) Concerning the third condition, the levy and the maximum amount of the contributions is imposed by means of law (i.e. by the AMA Act) and collected by a body controlled by the state and not by a commercial sector's professional organisation. Moreover, pursuant to the AMA Act the levy is compulsory (see recital 53). These elements demonstrate the State intervention regarding the aid financing method.
- (123) Hence, the Commission considers that the present case differs from the conditions under which the contributions analysed in the judgment of the Court of Justice in the *Pearle* case were considered not to constitute State resources.
- (124) On 30 May 2013, in the *Doux Élevage* case, the Court of Justice answered a question referred for a preliminary ruling on the interpretation of the concept of state resources ⁽⁵⁷⁾.
- (125) In its judgment, the Court concluded that a national authority's decision extending, to all those working in the agricultural sector, an agreement which, within the framework of an interbranch organisation recognised by the national authority, introduces a contribution with a view to enabling the implementation of measures on communication, promotion, external relations, quality assurance, research and defending the interests of the sector concerned, and thus makes the duty to pay the contribution generally applicable, does not constitute State aid.
- (126) In its judgment, the Court considered that the contributions in question came from private economic operators which carry out an activity on the markets concerned, which means that this mechanism did not involve any direct or indirect transfer of State resources. The funds created by the payments did not pass via the State budget or via another public entity and the State did not relinquish any resources in any form whatsoever (such as taxes, charges, contributions or other), which, under national legislation, should have been paid into the State budget.
- (127) Unlike this case, the present case does not involve (voluntary) contributions collectively established by an interbranch organisation. As shown in recital 53 above, the Austrian agricultural and food industry undertakings pay compulsory levies established by the AMA Act. The levies are therefore not of a private nature but are mandated by the state through a legislative act.
- (128) Furthermore, as opposed to the *Doux Élevage* case, AMA does not concern contributions introduced by private organisations. As shown above in recitals 49 to 54, the contributions are established by the state and administered by AMA, a public law body established by the AMA Act and controlled by the State. AMA Marketing, a wholly owned subsidiary of the AMA, administers the scheme.
- (129) In the *Doux Élevage* case, the Court considered that the contributions at issue retained their private character throughout and the national authorities were not in fact allowed to use those resources mainly to support certain businesses. Rather, it was the interbranch organisations concerned which decided on the use of those resources, and those resources were consequently entirely dedicated to the fulfilment of objectives determined by those organisations. Also, the resources were not constantly subject to public monitoring and were not available to the State authorities.
- (130) As opposed to the *Doux Élevage* case, in the present case the objectives pursued by AMA are not set by a private organisation deciding on the use of these resources, but in the legislative act governing the public body (i.e. the AMA Act, see recital 54).
- (131) Therefore, the conditions of the *Doux Élevage* case for assuming the existence of private resources are not met.

⁽⁵⁷⁾ Judgment of 30 May 2013 in Case C-677/11, *Doux Élevage SNC and Coopérative agricole GBP-ARREE v Ministère de l'Agriculture*, ECLI:EU:C:2013:348, paras 32, 35 and 38.

- (132) For the above reasons, the Commission considers that the funding of the measures in question carried out by AMA is attributable to the State and that the funds thus constitute State resources.

6.1.2. SELECTIVE ADVANTAGE

- (133) According to settled case-law of the Court of Justice, measures which, whatever their form, directly or indirectly favour certain undertakings or are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions are regarded as aid ⁽⁵⁸⁾. In addition, measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect, are considered to constitute aid ⁽⁵⁹⁾. The Court of Justice also pointed out that a measure adopted by the public authority and favouring certain undertakings or products does not lose the character of a gratuitous advantage by the fact that it is wholly or partially financed by contributions imposed by the public authority and levied on the undertakings concerned ⁽⁶⁰⁾.
- (134) The measure benefits companies active in the production, processing and marketing of agricultural products, including the food industry (see recital 46) by the means of advertising, support for quality products and technical support.
- (135) In this respect, the Austrian authorities were invited to provide more information about the scope of beneficiaries as well as about the number of beneficiaries for each marketing measure. In their submission of 14 September 2012, the Austrian authorities replied that it is not possible to identify the beneficiaries of each single measure, since not only the producers and the retailers using the logos benefitted from the scheme, but also the producers not directly participating in the scheme and thus the sector as such. Austria argued that the measures increased the awareness of consumers in general so that even producers not participating in the scheme had to increase the quality of their products.
- (136) Furthermore, in the opening decision, the Commission requested Austria to clarify to which extent the food industry benefits from the marketing measures. The Austrian authorities used the same argument as above (recital 135).
- (137) According to the jurisprudence ⁽⁶¹⁾, a measure maintains its selective character even if it applies to an entire sector (but not to other sectors). The arguments of the Austrian authorities claiming that the measure is general in nature have to be rejected.

6.1.3. DISTORTION OF COMPETITION AND EFFECT ON TRADE

- (138) According to the case-law of the Court of Justice, strengthening the competitive position of an undertaking through the granting of State aid generally distorts competition with other competing undertakings not having benefited from this aid ⁽⁶²⁾. Aid for an undertaking that operates in a market open to intra-Union trade is liable to affect trade between Member States ⁽⁶³⁾.
- (139) There was a substantial intra-Union trade in agricultural products in the period 1995-2008. By way of example, in the year 2004 agricultural products in the EU worth some EUR 183 billion (imports) to some EUR 187 billion (exports) were subject to intra-Union trade, accounting for some 57 % of the total agricultural production of EUR 324 billion ⁽⁶⁴⁾.
- (140) Therefore, with a view to the substantial intra-Union trade in agricultural products in the relevant period, it can be considered that the measures object of the present decision distort or threaten to distort competition and affect trade between Member States. This is moreover confirmed by some of AMA's own statements in its annual reports of the relevant period (see recitals 84-90 above), which demonstrate AMA's understanding that the marketing activities were apt to promote domestic production in competition with producers from other Member States.

⁽⁵⁸⁾ Judgment of the Court in Case C-280/00, *Altmark*, ECLI:EU:C:2003:415, para. 84.

⁽⁵⁹⁾ Judgment of the Court in Case C-355/00, *Freskot AE v Elliniko Dimosio*, ECLI:EU:C:2003:298, para. 83.

⁽⁶⁰⁾ Judgment of the Court of 22 March 1977 in Case 78/76, *Steinike & Weinlig*, ECLI:EU:C:1977:52, para. 22.

⁽⁶¹⁾ Judgment of the Court in Case C-75/97, *Belgium v Commission*, ECLI:EU:C:1999:311, para. 31.

⁽⁶²⁾ Judgment of the Court in Case 730/79, *Philip Morris Holland BV v Commission*, ECLI:EU:C:1980:209, paras 11 and 12.

⁽⁶³⁾ See, in particular, the judgment of the Court in Case 102/87, *French Republic v Commission*, ECLI:EU:C:1988:391.

⁽⁶⁴⁾ Source: Eurostat.

- (141) In the light of the foregoing, the conditions of Article 107(1) TFEU are fulfilled. It can therefore be concluded that the measures object of the present decision constitute State aid within the meaning of that Article.

6.2. TEMPORAL SCOPE OF THE DECISION AND EXISTING AID

- (142) The non-notified AMA marketing measures under aid scheme NN 34/2000 and the AMA measures of the annulled Commission decision NN 34A/2000 were the subject of the 2012 opening decision.
- (143) Taking into consideration that the AMA law and its implementing provisions have been modified several times, that many procedural steps have taken place and that the aid consists of numerous measures with different duration, the exact starting and final date for the implementation of the measures and thus the temporal scope of the decision have to be determined.
- (144) According to the information provided by the Austrian authorities, the marketing measures have been in place since 1994, i.e. before 1 January 1995, the date when Austria joined the European Union. Nevertheless, the AMA measures were not communicated by the Austrian authorities to the Commission in accordance with Article 143 or 144 of the Act of Accession of the Republic of Austria (see recital 34) and therefore cannot be regarded as existing aid. Therefore, these measures should be considered as new aid not notified as of the date of accession on 1 January 1995, which therefore should be considered as the starting date for the granting of the aid.
- (145) Further, as described in recital 36, the Austrian authorities claim that by letter of 23 June 1997 they provided a completed notification form regarding the AMA marketing measures to which the Commission did not react within the prescribed 2-month period ⁽⁶⁵⁾. In their view, this was a valid notification and, following the 2-month period, the aid should be considered as approved and thus be qualified as existing aid. The same line of argument is used in a legal opinion attached to the submission of information from 25 February 2015.
- (146) The Commission disagrees with this argument. Since the measures were implemented already before 1997, the above letter cannot be considered as a valid notification of the measures complying with Article 108(3) TFEU and thus the aid does not qualify as an existing aid. According to the *Lorenz* judgment, aid would only be considered existing aid if it had not yet been implemented when the measure was notified to the Commission; in case of prior non-implementation, aid could only be considered existing aid if the Member State, following a 2-month period, had given prior notice to the Commission. However, the Austrian authorities have implemented the measure before formal notification and have not given the Commission any prior notice. Therefore, the above letter of 23 June 1997 does not transform the present measure into an existing aid in the meaning of Article 108(1) TFEU.
- (147) In the light of the above information and considerations, the Commission concludes regarding the temporal scope of the decision that the start date of all AMA marketing measures is 1 January 1995 (see recital 34 and 144).
- (148) Regarding the end date of implementation, by letter of 14 September 2012 the Austrian authorities confirmed that the measures notified as aid scheme N 239/2004 relate to one part of the AMA measures investigated under case number NN 34/2000 (after a substantial modification of the measures in order to comply with the applicable rules (see recital 39).
- (149) In the same letter the Austrian authorities confirmed that, in the period after the year 2002, AMA Marketing did not implement aid measures other than those covered by NN 34A/2000 and N 239/2004 (and their subsequent prolongations ⁽⁶⁶⁾).

⁽⁶⁵⁾ According to point (b)(iii) of Article 1 in conjunction with Article 4(6) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1), when the Commission has not taken a decision within 2 months following the notification, the Member State concerned can implement the measure, after giving the Commission prior notice thereof, unless the Commission takes a decision within a period of 15 working days following this notice. Regulation (EC) No 659/1999 entered into force in 1999 and is therefore not applicable to the letter in question which dates back in 1997. Nevertheless, the above provisions of Regulation (EC) No 659/1999 were conceived as codification of the so called *Lorenz*-jurisprudence (judgment of the Court in Case 120/73, *Lorenz*, ECLI:EU:C:1973:152, paras 4 to 6), pursuant to which an aid is deemed approved and qualified as an existing aid after the passage of 2 months following notification and prior notice without reaction from the Commission.

⁽⁶⁶⁾ N 175/2006, N 589/2008 and N 496/2009.

- (150) From the information provided by the Austrian authorities, it results that the approved aid scheme N 570/1998 does not relate to the AMA marketing measures which are the object of this decision.
- (151) Concerning the AMA bio and quality labels the end date for the granting of aid was 31 December 2008, except for the bio label advertising measures which ended on 31 December 2006 (see recitals 15 and 19).
- (152) The other AMA marketing measures applied until 20 October 2004, the date on which decision N 239/2004 was approved (see Chapter 1.4 and recital 39 above). Therefore the scope of the present decision concerns the period 1 January 1995 to 31 December 2008 for all measures except for the bio label advertising measures where the relevant period is 1 January 1995 to 31 December 2006 and the other marketing measures where the relevant period is 1 January 1995 to 20 October 2004.

7. UNLAWFULNESS OF THE AID

- (153) According to Article 108(3) TFEU the Commission must be informed of any plans to grant or alter aid. According to Article 1(f) of Regulation (EC) No 659/1999, new aid put into effect in contravention of Article 108(3) TFEU is unlawful. The obligation to notify State aid is set out in Article 2 of that Regulation.
- (154) Austria did not inform the Commission, pursuant to Article 108(3) TFEU, of the provisions introducing the measures and the levy financing it before putting them into effect.
- (155) As shown above in Chapter 6, the measures implemented by Austria constitute State aid. As stated in recital 34 the marketing measures have been in place since 1994, i.e. before 1 January 1995, the date when Austria joined the European Union. Nevertheless, the AMA measures were never communicated by the Austrian authorities to the Commission in accordance with Article 143 or 144 of the Act of Accession of the Republic of Austria. Therefore the aid constituted new aid at the time of accession and the Austrian authorities should have notified it. In the absence of a proper notification the aid is unlawful under the respective provisions of the TFEU (see in this respect also recital 144).
- (156) Furthermore, as described in recitals 9, 36 and 148, neither the letter of 23 June 1997 nor the letter of 19 December 2002 can be considered as a valid notification of this new aid.

8. ASSESSMENT OF THE COMPATIBILITY OF THE AID

8.1. RULES REGARDING THE ORIGIN OF THE PRODUCTS

- (157) The General Court annulled the Commission decision NN 34A/2000 on the ground that a contradiction existed within the AMA Act of 1992. In its paragraph 21a relating to the purpose of the contribution a reference was made to national products. More precisely, point 1 referred to the objective of 'promoting and guaranteeing the sale of national agricultural and forestry products and their derivative products' ⁽⁶⁷⁾. Point 2 referred to 'promoting other marketing measures (in particular the supply of services and staff costs connected therewith)'.
- (158) The General Court stated that the restriction to national products in point 1 of paragraph 21a of the AMA Act of 1992 raised doubts as to the compatibility of the aid in question which should have led the Commission to initiate a formal investigation procedure ⁽⁶⁸⁾.
- (159) The issue of the national origin of the product is therefore an element which requires a detailed analysis.
- (160) The complainants maintained that the labels and the subsidised measures were available only for Austrian producers. They claimed in this respect that under paragraph 21a(1) of the AMA Act of 1992 only Austrian products would benefit from the subsidised advertising measures.

⁽⁶⁷⁾ *Förderung und Sicherung des Absatzes von inländischen land- und forstwirtschaftlichen Erzeugnissen.*

⁽⁶⁸⁾ Case T-375/04 *Scheucher-Fleisch GmbH and Others v Commission of the European Communities*, ECLI:EU:T:2009:445, paras 86 and 87.

- (161) In this regard, the Austrian authorities have clarified by letter of 19 December 2002 that the AMA quality and AMA bio labels were available for all products regardless of their origin. With letter of 5 March 2004 the Austrian authorities forwarded the new internal rules, issued by AMA Marketing and authorised by the Austrian Federal Ministry of Agriculture, Forestry, Environmental Protection and Hydrological resources (BMLFUW), that govern the granting of these labels. According to these rules the labels could be granted to all products, whether Austrian or from other Member States, that fulfil the quality requirements. Furthermore, the Austrian authorities undertook to adapt the AMA Act of 1992 which was amended by law with effect from July 2007. Since that date, paragraph 21a(1) of the AMA Act no longer contained a reference to 'national' products ⁽⁶⁹⁾.
- (162) Therefore, while the period after 30 June 2007 raises no particular problems regarding the origin of the products and the beneficiaries of these labels or measures, a more detailed analysis is necessary for the period before that date. Due to the specificities of the different measures comprised in this scheme and to the different importance of the reference to the national origin, a separate analysis for each measure is necessary.
- (163) As regards the quality label, as of January 2000, the norms implementing the AMA Act (Regulativ zur Verwendung des AMA-Gütesiegels für Lebensmittel) did not contain a reference to national products but covered all products regardless of their provenance. Article 23 on the declaration of origin explicitly refers to a region (e.g. Tirol or Bavaria) or a country (e.g. Austria, France) as the origin of the product, thereby indicating that any region/country could be named as the origin of the products. The claim that the quality label was available only to national (i.e. Austrian) products must be dismissed for the period after this date.
- (164) Furthermore, all provisions regarding the origin of the product contain the following definition of 'native/national' (heimisch): 'In these guidelines the term "native/national" refers to the region specified as the origin of the product' ('Wird in diesen Richtlinien der Begriff "heimisch" verwendet, ist darunter die im Herkunftsanteil des Zeichens angeführte Region zu verstehen.') ⁽⁷⁰⁾ Again, this indicates that the reference to 'national products' used in the implementing acts does not refer only to Austrian products but any region could be used as origin.
- (165) A bio label does *per se* refer primarily to the special quality requirements of a product. The respective labels under the scheme had the reference to BIO as their main message and were open to all products, irrespective of their origin. The latter could only be mentioned as a subsidiary message.
- (166) As regards the aid for quality products, this was awarded for the development of quality assurance schemes, quality controls and controls for organic products (recital 98). Such measures are also *per se* not limited to products of a particular national origin.
- (167) Aid for generic advertising does not raise issues regarding the origin of those products, as the campaigns advertised or referred to a product in a purely generic matter making no reference whatsoever to origin.

8.2. APPLICABLE RULES

- (168) Under Article 107(3)(c) of the TFEU, aid to facilitate the development of certain economic activities or of certain economic areas may be considered to be compatible with the common market, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.
- (169) According to the Commission notice on the determination of the rules applicable to the assessment of unlawful aid ⁽⁷¹⁾, any unlawful aid within the meaning of Article 1(f) of Regulation (EC) No 659/1999 is to be appraised in accordance with the rules applicable at the time the aid was granted.
- (170) Between 1 January 2000 and 31 December 2006 the 2000-2006 Guidelines applied. With effect from 1 January 2007, the Community guidelines for State aid in the agricultural and forestry sector 2007-2013 ⁽⁷²⁾ (hereafter: the 2007-2013 Guidelines) were applicable according to their point 194.

⁽⁶⁹⁾ BGBl. Teil I, Nr. 55/2007.

⁽⁷⁰⁾ This reference is contained in all articles on the origin of the products of the rules governing the fresh meat logo since 1995.

⁽⁷¹⁾ OJ C 119, 22.5.2002, p. 22.

⁽⁷²⁾ OJ C 319, 22.12.2006, p. 1.

- (171) In this respect it is to be noted that according to point 196 of the 2007-2013 Guidelines, Member States had a transitional period until 31 December 2007 to bring existing aid schemes in line with the provisions of the Guidelines. The definition of existing aid is stipulated in Article 1(b) of Regulation (EC) No 659/1999. According to Article 1(b)(ii), which applies to the case at hand, existing aid shall mean authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission or by the Council.
- (172) Aid scheme NN 34A/2000 was indeed approved by the Commission on 30 June 2004. However, in September 2004 the decision was challenged by the complainants before the Court of First Instance (now General Court) which annulled the Commission decision by judgment of 18 November 2009. This judgment was appealed by Austria and the Court of Justice dismissed the appeal and upheld the judgment of the Court of First Instance on 27 October 2011.
- (173) The Austrian authorities claim that the scheme at hand constituted existing aid and had to be assessed under the new 2007-2013 Guidelines only as of 1 January 2008. In its submission of 14 September 2012, Austria also refers to the principle of legitimate expectations and argues that the Commission decision was only annulled in 2011.
- (174) According to the jurisprudence ⁽⁷³⁾ regarding legitimate expectations, *'where an action for annulment has been brought, the recipient is not entitled to harbour such assurance so long as the Community court has not delivered a definitive ruling'*. Therefore, legitimate expectation cannot be invoked in the case at hand.
- (175) As a consequence, the aid scheme NN 34A/2000 could not be qualified as existing aid based on the Commission's decision of 30 June 2004 and therefore the transitional period of point 196 of the 2007-2013 Guidelines does not apply. The aid scheme should have been brought in line with the 2007-2013 Guidelines as of 1 January 2007.

8.3. AID FOR ADVERTISING MEASURES

- (176) As regards advertising measures, the compatibility of the aid granted in the period 1 January 1995 to 31 December 2001 must be assessed in the light of the Commission communication concerning State involvement in the promotion of agricultural and fisheries products ⁽⁷⁴⁾ (hereafter: the 1986 Communication) and the Framework for national aid for the advertising of agricultural products and certain products not listed in Annex II to the EEC Treaty, excluding fishery products ⁽⁷⁵⁾ (hereafter: the 1987 Advertising Framework).
- (177) Aid granted as from 1 January 2002 is to be assessed in the light of the Community guidelines for State aid for advertising of products listed in Annex I to the EC Treaty and of certain non-Annex I products (hereafter: the 2001 Advertising Guidelines) ⁽⁷⁶⁾.
- (178) When assessing State aid for the advertising of agricultural products granted after 1 January 2007 the Commission applies Section VI.D of the 2007-2013 Guidelines.

8.3.1. SCOPE OF ADVERTISING

- (179) The 1987 Advertising Framework applies to advertising, defined as any operation using the media (such as press, radio, TV or posters) which is designed to induce consumers to buy the relevant product. It excludes from its scope *promotion operations in the broader sense*, such as the dissemination to the general public of scientific knowledge, the organisation of trade fairs or exhibitions, participation in these and similar public relations exercises, including surveys and market research ⁽⁷⁷⁾.

⁽⁷³⁾ C-199/06 CELF/SIDE, ECLI:EU:C:2008:79, para. 68.

⁽⁷⁴⁾ OJ C 272, 28.10.1986, p. 3.

⁽⁷⁵⁾ OJ C 302, 12.11.1987, p. 6.

⁽⁷⁶⁾ OJ C 252, 12.9.2001, p. 5.

⁽⁷⁷⁾ Point 1.1 of the 1987 Advertising Framework.

- (180) The scope of the 2001 Advertising Guidelines is in principle the same as the one of the 1987 Advertising Framework described above, however with some differences. The first substantive change concerns the fact that economic operators were added as potential addressees of advertising ⁽⁷⁸⁾. The second change concerns the fact that the definition of advertising was enlarged to encompass advertising activities (such as the distribution of material for that purpose) aimed at consumers at the point of sale ⁽⁷⁹⁾.
- (181) The scope of Section IV.D of the 2007-2013 Guidelines is identical with the scope of the 2001 Advertising Guidelines ⁽⁸⁰⁾.
- (182) Both the 1987 Advertising Framework and the 2001 Advertising Guidelines apply to advertising activities but not to promotion activities. Aid for the latter category is classified as technical aid for which specific rules apply.
- (183) In the present case aid was granted towards advertising campaigns using different media and other means of publicity. The advertising campaigns concerned
- the bio and quality labels,
 - generic products, and
 - advertising outside Austria.
- (184) From the information submitted by the Austrian authorities, it can be concluded that the aim of the measures was to induce consumers to buy the relevant product (see recitals 75 and 94). Therefore, the above measures fall under the scope of advertising and have to be analysed in the light of the applicable rules.

8.3.2. ADVERTISING AID IN THE PERIOD 1 JANUARY 1995 TO 31 DECEMBER 2001

Conditions for compatibility

- (185) The compatibility of the aid granted prior to 1 January 2002 must be assessed in the light of the 1986 Communication and the 1987 Advertising Framework (recital 176).

General conditions

- (186) Point 2.2 of the 1987 Advertising Framework prohibits aid for advertising related to particular firms.
- (187) Point 3 stipulates the condition that the advertising should concern at least one of the following categories (**positive criteria**):
- surplus agricultural products,
 - new products or replacement products not yet in surplus,
 - the development of certain regions,
 - the development of small and medium-sized undertakings, or
 - the advertising of high-quality products and health foods.
- (188) Finally, according to point 4 of the 1987 Advertising Framework, aid granted under the abovementioned framework must not exceed the amount which the sector itself has committed to a given advertising campaign, which means that a maximum aid intensity of 100 % may be allowed but only if the trade has contributed at

⁽⁷⁸⁾ Point 5(b) of the 2001 Advertising Guidelines.

⁽⁷⁹⁾ Point 7 of the 2001 Advertising Guidelines.

⁽⁸⁰⁾ Point 152(a) of the 2007-2013 Guidelines.

least 50 % of the cost, either through voluntary contributions or through the collection of parafiscal levies or compulsory contributions. Therefore, a maximum aid intensity of 100 % is allowed.

Infringement of Article 30 of the EEC

- (189) Both point 2 of the 1986 Communication and point 2.1 of the 1987 Advertising Framework ⁽⁸¹⁾ stress the fact that aid for advertising cannot be considered compatible with the common market if the promotion material infringes Article 30 of the EEC Treaty (now Article 34 TFEU).
- (190) According to point 2.1 of the 1986 Communication, generic promotional campaigns making no reference to the origin of the product, export promotional campaigns organised in other Member States as well as campaigns on the home market promoting specific qualities or varieties of products which make no specific references to the national origin of the product other than which may be evident from the references made to the qualities or varieties concerned or to the normal designation of the product, do not infringe Article 34 TFEU.
- (191) By contrast, according to point 2.2 of the 1986 Communication the following campaigns clearly infringe Article 30 of the EEC Treaty (now Article 34 TFEU): promotional campaigns which advise consumers to buy national products solely because of their national origin or promotional campaigns intended to discourage the purchase of products from other Member States or disparage those products in the eyes of the consumer (negative promotion).
- (192) Further, point 2.3 of the 1986 Communication stipulates that promotional campaigns on a Member State's home market, because of the references made to the national origin of the products, and unless certain restraints are observed, may be open to objection under Article 30 of the EEC Treaty (now Article 34 TFEU).
- (193) Pursuant to point 2.3.1 of the 1986 Communication, promotional campaigns drawing attention to the varieties or qualities of products produced within a Member State are not in practice limited to national or regional specialties and frequently draw attention to the particular qualities of products produced within a Member State and the national origin of the products, even though those products and their qualities are similar to products produced elsewhere. If undue emphasis is placed on the national origin of the product in such promotional campaigns, there is a danger of breach of Article 30 of the EEC Treaty (now Article 34 TFEU).
- (194) The 1986 Communication therefore requested Member States to ensure particularly that the following guidelines were strictly respected:
- identification of the producing country by word or symbol might be made providing that a reasonable balance between references, on the one hand, to the qualities and varieties of the product and, on the other hand, its national origin is kept,
 - the references to national origin should be subsidiary to the main message conveyed to consumers by the campaign and not constitute the principal reason why consumers are being advised to buy the product,
 - qualities of the products which it was permissible to mention included taste, aroma, freshness, maturity, value for money, nutritional value, varieties available, usefulness (recipes, etc.). Conversely, to be avoided were superlatives such as 'the best', 'the tastiest', 'the finest' and expressions such as 'the real thing' or promotional campaigns which, because of the mentioning of the national origin, result in the product promoted being compared with the products of other Member States. References to quality control should only be made where the product was subjected to a genuine and objective system of control of its qualities.

Assessment

- (195) In a legal opinion attached to the submission of information from 25 February 2015 the Austrian authorities claim that the infringement of Article 30 of the EEC Treaty (now Article 34 TFEU) needs to be assessed in

⁽⁸¹⁾ It should be noted that point 2.1.1 (with footnote 1) of the Advertising Framework makes direct reference to the Commission's guidelines in the 1986 Communication.

a 'historical perspective' and that in the period 1995 to 2002 there was no Court case in which the text and the graphic message of a label was deemed to infringe Article 30 of the EEC Treaty. In the Commission's view this argument misses the point. As shown above, both the 1986 Communication ⁽⁸²⁾ and the 1987 Advertising Framework contained express and detailed guidelines for Member States on how to design their measures in order to avoid breaches of Article 30 of the EEC Treaty.

- (196) Based on the information available to the Commission for the period before 2002, it was not possible to assess the compatibility of the advertising measures with the above rules at the time of the opening decision. Therefore, the Austrian authorities were invited to provide the necessary information in respect of the above conditions.
- (197) The reply provided by the Austrian authorities on 14 September 2012 did not contain sufficient information to allow a compatibility assessment (the Austrian authorities just referred to the annual reports for the years 1995 to 2001). A further request for information on these points was therefore sent on 19 February 2014 and Austria provided a reply on 5 May 2014.
- (198) In the latter, the Austrian authorities stated that the advertising campaigns concerned surplus agricultural products and/or the advertising of high quality products. Therefore the **positive criteria** set out in point 3 of the 1987 Advertising Framework were complied with.
- (199) According to the information provided by the Austrian authorities, the advertising did not make any reference to particular firms.
- (200) As regards the **maximum aid intensity**, the levies from the sector constituted more than 50 % of the aid amount (see also recitals 43 and 56). Therefore, the criterion of point 4 of the 1987 Advertising Framework regarding the aid intensity is fulfilled.
- (201) In the opening decision the Commission expressed doubts as regards a potential **infringement of Article 30 of the EEC Treaty** (now Article 34 TFEU). In the preliminary view of the Commission the reference to the national origin in the quality label did not appear to be subsidiary (see recital 65). Moreover, the Commission noted that in many advertising materials, the reference to the origin of the product was not limited to the quality label but appeared also elsewhere in the advertisement (see recital 83).
- (202) Therefore, in the opening decision, the Austrian authorities were asked to describe the appearance of the quality and the bio labels in the period 1995-2001 and to provide representative examples of promotion material in which the labels were used.
- (203) On 14 September 2012, the Austrian authorities replied that the annual reports on State aid provided for the years 1995-2004 already contained this information. By letter of 19 February 2014, the Commission replied that this information was not sufficient for a compatibility analysis and asked for a detailed account (i.e. notification sheets) on the basis of the applicable rules at the time of the measure. This assessment was provided with the reply of 5 May 2014.
- (204) The specific compatibility criteria for the different types of advertising are analysed below.

Aid for generic advertising

- (205) As regards the reference to particular firms in some advertising campaigns (recital 90, the Commission notes that according to point 2.2 of the 1987 Advertising Framework, aid for advertising related to particular firms is prohibited.

⁽⁸²⁾ As can be seen from the text of the 1986 Communication, it sought to provide guidance that should ensure that promotion campaigns by Member States stay within the limits permitted by the case-law of the Court of Justice, in particular in Case 222/82 *Apple & Pear Development Council v K.J. Lewis Ltd and others*, EU:C:1983:370.

- (206) In their submission of 14 September 2012, the Austrian authorities argued that the firms mentioned had contributed to some of the costs of the campaign (*Druck und Werbeeinschaltung*). Nevertheless, such campaigns referring to particular firms cannot be cleared under the State aid rules (point 2.2 of the 1987 Advertising Framework). The fact that the firms contributed partially to the costs related to the campaign does not change this assessment.
- (207) From the available information it appears that **some of the generic advertising campaigns** explicitly referred to the origin of the product (i.e. Austria) (see the examples provided in recitals 84 and 90).
- (208) Therefore, the measures did not comply with points 2.1 ⁽⁸³⁾, 2.2 of the 1987 Advertising Framework and infringed Article 30 of the EEC Treaty (now Article 34 TFEU). Therefore, the Commission considers the aid for advertising measures in the period 1 January 1995 to 31 December 1999 referring to the origin of the products or to particular companies to be incompatible with the common market ⁽⁸⁴⁾.
- (209) As regards the period 1 January 2000 to 31 December 2001 the advertising campaigns referred only to the specific qualities or varieties of products with no specific references to their national origin.
- (210) Therefore, for this latter period the campaigns did not infringe Article 30 of the EEC Treaty and thus complied with the 1987 Advertising Framework. Therefore, the Commission considers them to be compatible with the common market.

Aid for the quality label

- (211) In their reply of 14 September 2012, the Austrian authorities stated that for the **quality** label, the same labels as the ones approved in the Commission's decision in case N 589/2008 were used. Therefore, the Austrian authorities concluded that the reference to the national origin had a subordinated role.
- (212) The Commission does not agree with the comments by the Austrian authorities. As shown above (recital 65), another logo was used for the quality label in the period **1995 to 1999**. In this logo the reference to the origin is not subsidiary to the quality message of the logo. Both the visual message (Austrian flag) and the text used indicate Austria as the main message.
- (213) Therefore, point 2.3.1 of the 1986 Communication which required that references to national origin should be subsidiary to the main message conveyed to consumers by the campaign and not constitute the principal reason why consumers are being advised to buy the product was not complied with. Therefore, the Commission considers the aid for the quality label for the period 1 January 1995 to 31 December 1999 to be incompatible with the common market.
- (214) As regards the period 1 January 2000 to 31 December 2001, the Commission considers that the new logos, which were the same as those assessed in the Commission's decision in case N 589/2008, comply with the conditions of the 1987 Advertising Framework and thus considers the related aid compatible with the common market.

Aid for the bio label

- (215) In the advertising measures for the bio logo, as shown above at recital 65, the same logos were used as in the period after 2002.
- (216) As this type of advertising draws the attention to the varieties or qualities of products produced within a Member State, they fall under point 2.3.1 of the 1986 Communication which required that no undue emphasis had to be placed on the national origin of the product.

⁽⁸³⁾ With reference to the 1986 Communication.

⁽⁸⁴⁾ See also recital 65 above.

- (217) One of two versions of the logo did not make any reference to the origin of the products. The other one indicated the origin of the product as a secondary message. The former did not raise any problems as regards a potential breach of Article 30 of the EEC Treaty (now Article 34 TFEU). As for the latter, the conditions of point 2.3.1 of the 1986 Communication were met because:
- the logo kept a reasonable balance between a reference, on the one hand, to the qualities of the product (i.e. bio) and, on the other hand, to the identification of the producing country by word or symbol,
 - the reference to the national origin was subsidiary to the main message conveyed to consumers and did not constitute the principal reason why consumers were being advised to buy the product,
 - the qualities of the products referred to objective qualities of the product and no superlatives resulting in the product promoted being compared with the products of other Member States were used,
 - references to quality control were made where the product was subjected to a genuine and objective system of control of its qualities through AMA.
- (218) Therefore, the advertising aid for the bio logo for the period 1 January 1995 to 31 December 2001 complied with the conditions of the 1986 Communication. Therefore, the Commission considers that aid to be compatible with the common market.

Advertising outside Austria

- (219) The advertising campaigns organised outside Austria made no specific references to the national origin of the product other than the one which may be evident from the references made to the qualities or varieties concerned or to the normal designation of the product. These campaigns were thus in line with point 2.1 of the 1986 Communication and did not infringe Article 30 of the EEC Treaty (now Article 34 TFEU).
- (220) Therefore, the aid for advertising outside Austria for the period 1 January 1995 to 31 December 2001 complied with the conditions of the 1986 Communication. Therefore, the Commission considers that aid to be compatible with the common market.

8.3.3. ADVERTISING AID IN THE PERIOD 1 JANUARY 2002 TO 31 DECEMBER 2006: QUALITY AND BIO LABELS

- (221) For the period 1 January 2002 to 31 December 2006 aid for advertising activities had to comply with the conditions set out in the 2000-2006 Guidelines. According to point 18 of the 2000-2006 Guidelines, measures for the promotion and advertising of agricultural products had to be assessed in accordance with the 1987 Advertising Framework.
- (222) From 1 January 2002 onwards the 2001 Advertising Guidelines were applicable and replaced the 1986 Communication and the 1987 Advertising Framework (points 69, 75 of the 2001 Advertising Guidelines). The Commission will therefore base its assessment for the period 1 January 2002 to 31 December 2006 on the 2001 Advertising Guidelines.
- (223) According to point 12 of the 2001 Advertising Guidelines, aid granted for the advertising of agricultural and other products, in order to be compatible with the common market, should not interfere with trade to an extent contrary to the common interest (negative criteria), and should facilitate the development of certain economic activities or of certain economic areas (positive criteria).

Negative criteria

- (224) Point 18 of the 2001 Advertising Guidelines laid down that no aid could be granted for advertising campaigns that infringed Article 28 EC (now Article 34 TFEU) prohibiting quantitative restrictions on imports and all measures having equivalent effect between Member States.

- (225) The aid could not be granted for advertising relating directly to the products of one or more particular firm or firms. If the conduct of publicly financed advertising activities was entrusted to private firms such firms had to be chosen on market principles (points 29 and 30 of the 2001 Advertising Guidelines).
- (226) Furthermore, campaigns could not contravene secondary Community legislation and in particular had to comply with the provisions of Directive 2000/13/EC (points 25 to 28 of the 2001 Advertising Guidelines).

Positive criteria

- (227) Points 31 and 32 of the 2001 Advertising Guidelines stated that, in order to qualify for a derogation under Article 87(3)(c) EC (now Article 107(3)(c) TFEU), advertising had to concern surplus products or underexploited species, new products or replacement products not yet in surplus, high quality products, the development of certain regions or the development of SMEs.
- (228) Chapter 4 of the 2001 Advertising Guidelines detailed the application of the above mentioned positive criteria to particular types of advertising, namely to aid for advertising where origin is part of the message (section 4.1) and advertising aid for quality products (section 4.2).

Advertising where origin is a part of the message

- (229) According to point 23 of the 2001 Advertising Guidelines, identification of the producing country by word or by symbol could be made providing that a reasonable balance was struck between references to, on the one hand, qualities and varieties of the product and, on the other hand, its national origin. The references to national origin had to be subsidiary to the main message conveyed to consumers and could not constitute the principal reason why consumers were being advised to buy the product. Advertising which mentioned the (regional) origin of the product as a subsidiary message was deemed not to infringe Article 28 EC (now Article 34 TFEU). In order to assess whether the origin was indeed a subsidiary message, the Commission would take into account the overall importance of text and/or symbol, including pictures and general presentation, referring to origin and the importance of text and/or symbol referring to the unique selling point of the advertisement, i.e. the part of the advertising message which does not focus on origin (points 40 and 41 of the 2001 Advertising Guidelines).

Advertising for quality products

- (230) When aid was granted towards products meeting special quality requirements it had to be open to all products produced in the Community irrespective of their origin. Member States were also required to recognise the results of comparable controls carried out in other Member States (point 49 of the 2001 Advertising Guidelines).

Advertising for products of organic farming, in particular

- (231) According to point 55 of the 2001 Advertising Guidelines, aid could only be authorised when the products bearing indications referring to organic farming methods satisfied the requirements of Regulation (EEC) No 2092/91. All the producers and processors of products of organic farming had to be subject to the system of controls laid down in the Regulation.

Assessment

- (232) In applying the above provisions to the advertising measures for the quality and bio label in the period 1 January 2002 to 31 December 2006 the Commission comes to the following conclusions:
- (233) The quality label and one of the two versions of the bio label (see recital 64) contained a reference to the origin of the product, but this message may be considered secondary to the main message concerning the (organic) quality of the product. The reference to the origin of the product had a subordinate position both in the graphic message (background) and in the text of the logo.

- (234) Regarding the design of the labels the Commission notices that the central space of the labels was occupied by the field in which the text 'AMA Gütesiegel' or 'BIO' dominated and the origin of the product was indicated in considerably smaller letters. The side fields were presented in national colours (e.g. red and white for Austria) without any additional symbols identifying the production country. The central field not only occupied the visually dominant space in the labels but constituted ca. 65 % of the total width of the label (see recital 64). The Austrian authorities have further specified that in all advertising relating to both labels the product quality was the main message and the origin of the product, where mentioned, was only a secondary message (see recital 79).
- (235) According to the Austrian authorities, the bio label was only granted to organic products satisfying the criteria laid down in Regulation (EEC) No 2092/91 (see recital 69).
- (236) The Austrian authorities have given assurances that the provisions of Directive 2000/13/EC were complied with in the subsidised advertising (see recital 68).
- (237) The advertising did not relate to the products of one or more particular firm or firms. The Austrian authorities have specified that in advertising at a point of sale no named firms or products were advertised and that the owner of the point of sale did not benefit from the aid (see recital 78).
- (238) The Austrian authorities have specified that all advertising activities funded by AMA Marketing were carried out by private firms selected by means of a public tender (see recital 52).
- (239) Further, according to the Austrian authorities, the use of the quality label was open to all products produced in the Union if they met the special requirements for the use of the label. These special requirements either concerned product quality or were limited to ensuring the indicated geographical origin of the product. In any case the special requirements could be fulfilled irrespective of the geographical origin of the product (see recital 161).
- (240) In the opening decision the Commission pointed out that it did not have information regarding the question whether equivalent controls carried out in other Member States were recognised. In their submission of 14 September 2012, the Austrian authorities confirmed that such controls were recognised and provided supporting evidence for this.
- (241) Although the Austrian authorities confirmed that as from 2002 the quality and the bio label were open to all products regardless of their origin, in the opening decision the Commission expressed doubts since the reference to national products in the main legal basis for the measures, the AMA Act, was abolished only in 2007 (see recital 161).
- (242) In their submissions, the Austrian authorities provided the new internal rules according to which the labels were open to all products as well as data showing that a number of non-Austrian products had indeed obtained the labels after 2001. They also confirmed again that since 2002 the rules were applied to all products irrespective of their origin.
- (243) In the opening decision, the Commission noted that it was not clear whether the new AMA internal rules had been put into effect already as from 26 September 2002 or whether there was a transitional period after 26 September 2002 during which aid continued to be granted according to the old rules. In their submission of 14 September 2012, the Austrian authorities declared that there was no such transitional period.
- (244) In recital 175 of the opening decision, the Commission stated that it did not have enough information to assess whether the State aid rules are applicable to the co-financed bio-label promotion measures mentioned in recital 80 above. To that end the Austrian authorities were invited to provide more information on the State aid clearance of the measures as well as about the duration of the programming period. In their submission of 14 September 2012, the Austrian authorities indicated that the bio-label promotion measures were part of the Austrian co-financed information and promotion programme for bio products.

- (245) In their reply of 14 September 2012 the Austrian authorities also stated the following: In the period 2002-2008 (20 September 2002-15 September 2005) a co-financed information and promotion programme for organic products was run. This programme had been approved by Commission Decision C (2002) 3116 of 22 August 2002 ⁽⁸⁵⁾. Furthermore, Commission Decision C (2007) 3299 of 10 July 2007 approved another 3-year programme for the bio label (1 October 2007-30 September 2010) ⁽⁸⁶⁾.
- (246) For the reasons stated above the aid for advertising measures carried out in the period 1 January 2002 to 31 December 2006 complied with the 2001 Advertising Guidelines and thus the 2000-2006 Guidelines. Therefore, the Commission considers that this aid was compatible with the common market.

8.3.4. ADVERTISING CAMPAIGNS OUTSIDE AUSTRIA AND GENERIC ADVERTISING IN AUSTRIA, 2002-2004 ⁽⁸⁷⁾

- (247) Advertising campaigns could be authorised if they were organised directly or indirectly by one Member State on the market of another Member State or on the home market of the supporting Member State and advertise the product in a purely generic manner making no reference whatsoever to its national origin (point 19(a)-(b) of the 2001 Advertising Guidelines).
- (248) According to the 2001 Advertising Guidelines the Commission took a favourable view of advertising campaigns that were undertaken in order to introduce consumers to the agricultural and other products of a particular Member State or region. The primary focus of such campaigns could be the origin of the product provided the campaign was undertaken outside the Member State or region in which the agricultural and other products were produced. The campaigns had to be limited to presenting the objective characteristics of the products concerned and should in principle not include subjective claims about the quality of the products (points 35-39 of the 2001 Advertising Guidelines).
- (249) On the basis of the information available at the time of the opening decision for the period 2002-2004 regarding generic advertising and advertising outside Austria (see sections 2.7.1.2 and 2.7.1.3 of the opening decision) it was not possible to assess the compatibility of the measures with the conditions set out in points 19(b), 29, 30 and 39 of the 2001 Advertising Guidelines.
- (250) Therefore, in the opening decision, the Austrian authorities were invited to provide the necessary information in respect of the above provisions.

Positive criteria

- (251) Advertising campaigns outside the Member State and generic advertising within the Member State had to comply with the positive criteria of the 2001 Advertising Guidelines (see recitals 227 and 228).
- (252) In addition, point 47 of the 2001 Advertising Guidelines provided that for advertising of products meeting particular quality requirements such products should meet standards or specifications which were clearly higher or more specific than those which were laid down in the relevant Community or national legislation.
- (253) Point 60 of the 2001 Advertising Guidelines provided that in the case of aid for advertising, the rate of direct aid should, as a general rule, not exceed 50 % and undertakings from the sector had to contribute at least 50 % of the cost, where the direct aid came from a general purpose government budget. The sector contribution could also come from parafiscal levies or compulsory contributions.

⁽⁸⁵⁾ The total budget of the measure was EUR 4 165 399 and was co-financed from EU funds at a share of EUR 2 082 699 and from national means amounting to EUR 709 721,78. The rest was financed from the AMA levy.

⁽⁸⁶⁾ The total budget was EUR 2 659 974. In the years 2007 and 2008 the EU part amounted to EUR 550 047 and the national part amounted to EUR 142 967.

⁽⁸⁷⁾ The period after 2004 is covered by decision N 239/2004. See recital 39 above.

- (254) Regarding generic advertising and advertising outside Austria, on the basis of the information available to the Commission at the time of the opening decision for the period 2002-2004 it was not possible to assess the compatibility of the measures with the above rules. Therefore, the Austrian authorities were invited to provide the necessary information in respect of the condition stipulated in point 32 of the 2001 Advertising Guidelines (recital 174 of the opening decision).
- (255) In the reply of 14 September 2012 Austria referred to its submission of 13 December 2002. This submission, however, only contains concrete examples and the national legal basis for the measures. Therefore, in its request for information of 19 February 2014 the Commission asked the Austrian authorities to complete the relevant notification forms and to submit them to the Commission. In their reply of 30 April 2014, the Austrian authorities submitted the requested notification forms. However, the information filled in the forms only referred to general descriptions of the conditions of the scheme and was not sufficient for the proper assessment of the measures.
- (256) In its request for information of 17 December 2014, the Commission asked for additional information on this measure. In its reply of 25 February 2015, Austria confirmed that:
- (a) the advertising campaigns advertised the products in a purely generic manner making no reference whatsoever to their national origin (point 19(a)-(b) of the 2001 Advertising guidelines);
 - (b) the aid was not granted for advertising relating directly to the products of one or more particular firm or firms (point 29 of the 2001 Advertising Guidelines);
 - (c) the private firms entrusted with the public financing of advertising activities were chosen on market principles (point 30 of the 2001 Advertising Guidelines);
 - (d) the campaigns were limited to present the objective characteristics of the products concerned and did not include subjective claims about the quality of the products (points 35-39 of the 2001 Advertising Guidelines);
 - (e) the advertising in question concerned the promotion of high-quality products (points 31 and 32 of the 2001 Advertising Guidelines). These standards or specifications were clearly higher or more specific than those which are laid down in the relevant Community or national legislation.
- (257) For the reasons stated above the aid for advertising campaigns outside Austria and generic advertising in Austria carried out in the period 2002 to 2004 complied with the 2001 Advertising Guidelines and thus the 2000-2006 Guidelines. Therefore, the Commission considers this aid to be compatible with the common market.

8.3.5. ADVERTISING AID IN THE PERIOD 2007-2008

- (258) When assessing State aid for advertising of agricultural products granted after 1 January 2007 the Commission applies Section VI.D of the 2007-2013 Guidelines.

Quality advertising

- (259) At the stage of the opening decision, the Commission did not have sufficient information to assess whether these measures were in line with the 2007-2013 Guidelines. In this respect the Commission expressed certain doubts regarding the fulfilment of the conditions which differed from the requirements of the 2000-2006 Guidelines.
- (260) In particular, the Commission drew the attention of the Austrian authorities to the modifications set out in point 153(c), second half of sentence, point 155, second sentence, and point 158 of the 2007-2013 Guidelines. Therefore, the Austrian authorities were invited to provide the necessary information to show that the quality advertising measures complied with the above mentioned conditions of the Guidelines.

- (261) Under point 153 of the 2007-2013 Guidelines, State aid for advertising campaigns within the Community could be declared compatible with the Treaty if the following conditions were fulfilled:
- the advertising campaign was earmarked for quality products, defined as products fulfilling the criteria to be established pursuant to Article 32 of Council Regulation (EC) No 1698/2005 ⁽⁸⁸⁾, for Community-recognised denominations (protected designations of origin (PDOs), protected geographical indications (PGIs) or other designations of origin which are protected under Community legislation) or for national or regional quality labels,
 - the advertising campaign was not earmarked for products of a particular company or companies,
 - the advertising campaign complied with Article 2 of Directive 2000/13/EC, as well as with the specific labelling rules laid down for various products, such as wine, dairy products, eggs and poultry (see point 152(j) of the 2007-2013 Guidelines).
- (262) According to the information provided by the Austrian authorities on 30 April 2014, the conditions of point 153 of the 2007-2013 Guidelines were complied with.
- (263) Point 155 of the 2007-2013 Guidelines provided that, in the case of national or regional quality labels, the origin of the products could (only) be mentioned as a subsidiary message. In assessing whether or not the origin was a subsidiary message, the Commission had to take into account the overall importance of the text and/or symbol, including pictures and general presentation, referring to origin and the importance of the text and/or symbol referring to the unique selling point of the advertisement, i.e. the part of the advertising message which did not focus on origin.
- (264) In their submission of 30 April 2014, the Austrian authorities confirmed that the labels used in 2007 were identical with those approved in the 2004 Commission decision (see also recital 233). The Commission refers to this assessment and considers therefore that the conditions of point 155 of the 2007-2013 Guidelines are fulfilled.
- (265) Point 156 of the 2007-2013 Guidelines stated that the rate of direct aid intensity could not exceed 50 %. If the sector contributed at least 50 % of the costs, whatever the form of the contribution, the rate of aid could go up to 100 % of the eligible costs. As shown above (recital 200), this condition is fulfilled.
- (266) Point 158 the 2007-2013 Guidelines provided that advertising activities with an annual budget in excess of EUR 5 million had to be notified separately. From the information provided by the Austrian authorities (recital 45) it can be concluded that this condition is complied with, as the annual budget allocated for the quality label in the years 2007 and 2008 was below EUR 5 million.
- (267) For the reasons stated above the advertising measures carried out in the period 2007 to 2008 comply with the 2007-2013 Guidelines and are thus compatible with the internal market.
- (268) The Commission notes in this regard that the **bio label advertising measures expired at the end of 2006** and thus are not subject to the assessment under the 2007-2013 Guidelines (see recital 15).

Generic advertising

- (269) The provisions about generic advertising and advertising in third countries are not relevant for the period 2007-2008 since the aid measures that concerned those activities expired in 2004 with the adoption of aid scheme N 239/2004, as described in recital 39.

⁽⁸⁸⁾ Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ L 277, 21.10.2005, p. 1).

8.4. TECHNICAL SUPPORT MEASURES AND AID FOR QUALITY PRODUCTS IN THE PERIOD 1995-1999

- (270) Specific State aid guidelines have applied for the agriculture sector only since 1 January 2000. The compatibility of the aid granted prior to this date must thus be assessed based on the Treaty and in the light of the established Commission practice at that time (see recital 169 above).

8.4.1. PROMOTION IN A BROADER SENSE AND TECHNICAL SUPPORT MEASURES IN THE PERIOD 1995-1999

- (271) Promotion operations in a broader sense such as the dissemination to the general public of scientific knowledge, the organisation of fairs or exhibitions, participation in these and similar public relations operations, including surveys and market research were excluded from the scope of the 1987 Advertising Framework by virtue of its point 1.1. As far as expenditure for these activities is concerned, it was established Commission practice to consider aid of up to 100 % to be compatible with the common market pursuant to Article 92(3)(c) of the Treaty (now Article 107(3)(c) TFEU) ⁽⁸⁹⁾.
- (272) In addition, according to its practice and policy the Commission took a favourable view of soft aid measures which were intended to provide technical support in the agricultural sector. For instance, aid of up to 100 % of the eligible costs of measures to spread new techniques was authorised.
- (273) The AMA marketing measures described in Chapter 4.3 above fall into these categories.
- (274) The objective of the measures at stake was the dissemination of general knowledge through the organisation of general information projects. They were targeted at presenting to customers factual information and did not induce customers to buy a specific product.
- (275) The measures were therefore in line with the Commission practice at that time which considered that the objective pursued was legitimate. The aid intensity of 100 % also complied with the maximum aid intensity considered at that time to be proportionate in light of this objective and the limited negative impact on competition and trade.
- (276) The aid for promotion in a broader sense in the period 1995-1999 was in line with the established practice of the Commission at that time and the Commission considers that these measures were therefore compatible with the common market pursuant to Article 92(3)(c) EC (now Article 107(3)(c) TFEU).

8.4.2. TECHNICAL ASSISTANCE, ADVISORY SERVICES AND CONTROL MEASURES RELATING TO QUALITY PRODUCTS IN THE PERIOD 1995-1999

- (277) Concerning aid for technical assistance and advisory services in connection with drawing up quality assurance schemes, the Commission considered such services to constitute a form of 'soft aid' which pursued an objective of common interest and was proportionate (in particular given that it did not affect conditions of competition to any significant extent), and thus to be compatible with the common market.
- (278) The measures described in Chapter 4.3 can be considered as such soft aid which, according to the established Commission practice of that time, was deemed to be compatible with the common market.

⁽⁸⁹⁾ See in this respect for example Commission decisions in cases N 570/1998 (quoted already in recital 41 above), N 662/1998 (Commission decision of 30 April 1999, SG(99) D/3095), and C(1999) 4227 (Commission Decision 2000/132/EC of 25 November 1999 on the measure which Germany is planning to implement for the promotion of agricultural products of Mecklenburg-Vorpommern (OJ L 37, 12.2.2000, p. 31). For the purpose of the assessment in this section, the Commission makes reference to the assessment carried out in these decisions.

- (279) As regards control measures to ensure compliance with industry-managed quality or traceability standards, the Commission, following the approach communicated to the Member States in the letter on stock-farming ⁽⁹⁰⁾, consistently allowed for aid of up to 100 % of the costs for obligatory controls. This was again based on the idea that such aid pursued an objective of common interest and was proportionate, in particular given the limited negative impact on competition and trade of such indirect support.
- (280) Regarding those measures, the Austrian authorities were asked to explain whether the AMA controls were obligatory or not and if the latter is the case, to indicate whether the aid intensity limit was respected.
- (281) In their submission of 30 April 2014, the Austrian authorities replied that the controls in question were obligatory according to the AMA implementing legal acts and that the aid intensity limit was respected.
- (282) The conditions for the compatibility of the aid are therefore fulfilled.

8.5. STATE AID FOR QUALITY PRODUCTS IN THE PERIOD 2000-2006

- (283) Activities related to the development of quality systems and quality controls were eligible for aid in relation to both the bio label and the quality label. This constitutes aid for the production and marketing of quality products, which is to be assessed under point 13 of the 2000-2006 Guidelines.

Applicable rules

- (284) Point 13 of the 2000-2006 Guidelines sets out the conditions under which aid to encourage the production and marketing of quality agricultural products could be granted.
- (285) According to point 13.2 of the 2000-2006 Guidelines support could be granted, among other things, towards the costs of consultancy, technical studies, feasibility and design studies and market research and the introduction of quality assurance schemes. In the case of SMEs, the costs could not exceed EUR 100 000 per beneficiary in a 3-year period or 50 % of the eligible expenses, whichever was greater. For large undertakings the first limit alone applied.
- (286) As specified in point 13.3 of the 2000-2006 Guidelines, the Commission considered that no aid should be granted in respect of routine quality controls carried out by the manufacturer. Aid could only be granted in respect of controls undertaken by or on behalf of third parties, such as the regulatory authorities or organisms in charge of supervising labels. Point 13.4 of the 2000-2006 Guidelines provided that aid for controls of organic production methods conducted within the framework of Regulation (EEC) No 2092/91 was allowed at the rate of up to 100 % of the costs incurred.
- (287) Point 13.5 of the 2000-2006 Guidelines established that aid could be granted at an initial rate of up to 100 % of the costs of controls carried out by bodies responsible for supervising the use of quality marks and labels under recognised quality assurance schemes. Such aids had to be reduced progressively, so that by the seventh year following their establishment they were eliminated.

Assessment

- (288) The aid for the costs of the drafting and distribution of quality assurance documents and development of informatics systems within AMA Marketing was destined to finance the administrative costs of AMA Marketing (a public body, not an economic operator) and therefore does not constitute State aid for the production, distribution or marketing of products listed in Annex I to the Treaty.

⁽⁹⁰⁾ Proposals for appropriate measures relating to aids granted by Member States in the livestock and livestock products sector. No S/75/29416, 29 September 1975.

- (289) As described in recital 98, aid for quality controls was available for external controls conducted by bodies selected for that purpose on condition of the use of the bio or quality label. The controls concerning the use of the bio and quality label were subsidised at a rate of 100 %, whereas the costs of routine controls were borne by the licence bearers and thus not subsidised.
- (290) In their submission of 14 September 2012, the Austrian authorities confirmed that aid for quality controls never exceeded the EUR 100 000 threshold per beneficiary in a 3-year period. The conditions of point 13.2 of the 2000-2006 Guidelines were therefore met.
- (291) In their submissions of 14 September 2012 and of 30 April 2014 the Austrian authorities did not provide sufficient information for an assessment of the conditions of points 13.3, 13.4 and 13.5 of the 2000-2006 Guidelines.
- (292) Therefore, in its request for information of 17 December 2014, the Commission asked again for additional information on this measure. In its reply of February 2015 Austria confirmed that:
- (a) the aid was not granted in respect of routine quality controls carried out by the manufacturer (point 13.3 of the 2000-2006 Guidelines);
 - (b) the aid was only granted in respect of controls undertaken by or on behalf of third parties, such as the regulatory authorities or organisms in charge of supervising labels (point 13.3 of the 2000-2006 Guidelines);
 - (c) the aid was granted for controls of organic production methods conducted within the framework of Regulation (EEC) No 2092/91 up to 100 % of the costs incurred (point 13.4 of the 2000-2006 Guidelines).
- (293) In their earlier submissions of 14 September 2012 and 30 April 2014, the Austrian authorities had already confirmed that the aids were progressively reduced and completely eliminated in the year 2009. As the 2000-2006 Guidelines foresee a progressive reduction of the aid, the conditions of point 13.5 of the 2000-2006 Guidelines were therefore met for all measures granted until 31 December 2006.
- (294) However, as these aids were also granted after 1 January 2007 (i.e. in the years 2007 and 2008), the 2007-2013 Guidelines apply to this period.
- (295) As regards the latter legal instrument, the conditions, as compared to the 2000-2006 Guidelines have changed in two aspects: the list of the types of aid has been refined ⁽⁹¹⁾ and this type of aid has been available only to primary producers ⁽⁹²⁾.
- (296) Therefore, those measures benefitting primary producers which have been continued after 2007 comply with the 2007-2013 Guidelines and are compatible with the internal market.
- (297) However, aids given to processing and marketing undertakings have to be assessed in accordance with point 99 of the 2007-2013 Guidelines. Reference is therefore made to the assessment in the section 8.6.2 below.
- (298) Finally, concerning the introduction of the quality assurance scheme ISO 9002 (see recital 99), in recital 203 of the opening decision, the Austrian authorities were invited to indicate whether this measure was applicable also after 1999. If the question were to be answered in the affirmative, the Austrian authorities were invited to show whether the measure fulfilled the conditions of point 13 of the 2000-2006 Guidelines.
- (299) In its reply of February 2015, Austria stated that neither the ISO 9001:1994 standard nor any other certification has ever been compulsory according to the AMA Guidelines (quality label or bio label). Furthermore, the Austrian authorities maintain that the quality assurance scheme ISO 9002 was also neither required nor applicable.

⁽⁹¹⁾ See recital 304 below.

⁽⁹²⁾ See a detailed analysis of the Chapter IV.J of the 2007-2013 Guidelines in section 8.6 below.

- (300) For the reasons stated above the aid for quality products granted in the period 2000-2006 complies with the 2001 Advertising Guidelines. Therefore, the Commission considers that the aid was compatible with the common market.

8.6. STATE AID FOR QUALITY PRODUCTS IN THE PERIOD 1 JANUARY 2007 TO 31 DECEMBER 2008

- (301) Such aid is to be assessed under Chapter IV.J of the 2007-2013 Guidelines.

8.6.1. AID FOR PRIMARY PRODUCERS

- (302) Pursuant to point 98 of the 2007-2013 Guidelines, the Commission could declare State aid to encourage the production of quality products granted to primary producers compatible with the common market pursuant to Article 87(3)(c) EC (now: Article 107(3)(c) TFEU) if it fulfilled all the conditions of Article 14 of Commission Regulation (EC) No 1857/2006 ⁽⁹³⁾.
- (303) Article 14 of Regulation (EC) No 1857/2006 stated that aid was compatible with the common market within the meaning of Article 87(3)(c) EC (now: Article 107(3)(c) TFEU) if it was granted towards the eligible costs listed in Article 14(2) and fulfilled the conditions set out in paragraphs 3 to 6 of Article 14 of Regulation (EC) No 1857/2006.
- (304) According to Article 14(2) of Regulation (EC) No 1857/2006, aid to encourage the production of quality agricultural products could cover up to 100 % of eligible costs for, among others:
- (a) market research activities, product conception and design (including the preparation of applications for the recognition of geographical indications and designations of origin or certificates of specific character); the charges levied by recognised certifying bodies for the initial certification of quality assurance and similar schemes;
 - (b) the introduction of quality assurance schemes such as ISO 9000 or 14000 series, systems based on hazard analysis and critical control points (HACCP), traceability systems, systems to assure respect of authenticity and marketing norms or environmental audit systems;
 - (c) compulsory control measures undertaken pursuant to Community or national legislation by or on behalf of the competent authorities, unless Community legislation required enterprises to bear such costs;
 - (d) up to the amounts laid down in the Annex to Regulation (EC) No 1698/2005 for support concerning measures referred to in Article 32 of that Regulation.
- (305) According to Article 14(3) of Regulation (EC) No 1857/2006, the aid could be granted only in respect of the costs of services provided by third parties and/or controls undertaken by or on behalf of third parties, such as the competent regulatory authorities, or bodies acting on their behalf, or independent organisms responsible for the control and supervision of the use of geographical indications and designations of origin, organic labels, or quality labels, provided these denominations and labels were in conformity with Community legislation. The aid could not be granted towards expenditure for investment.
- (306) Pursuant to Article 14(4) of Regulation (EC) No 1857/2006, the aid could not be granted towards the cost of controls undertaken by the farmer or manufacturer himself, or where Community legislation provided that the cost of control was to be met by producers, without specifying the actual level of charges.
- (307) Article 14(5) of Regulation (EC) No 1857/2006 laid down that with the exception of the aid referred to in paragraph 2(f) of that Regulation, the aid had to be granted in kind by means of subsidised services and could not involve direct payments of money to producers.

⁽⁹³⁾ Commission Regulation (EC) No 1857/2006 of 15 December 2006 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) No 70/2001 (OJ L 358, 16.12.2006, p. 3).

- (308) The aid had to be accessible to all those eligible in the area concerned, based on objectively defined conditions. If the services were provided by producer groups or agricultural mutual support organisations, membership of such organisations could not be a condition for access to the service and any contribution towards the administrative costs had to be limited to the proportional costs of providing the service (Article 14(6) of Regulation (EC) No 1857/2006).
- (309) Pursuant to point 100 of the 2007-2013 Guidelines, the Commission did not authorise State aid towards the costs covered in favour of large undertakings.
- (310) Most substantive conditions of the 2007-2013 Guidelines for the compatibility of aid for primary producers have not changed in comparison with the 2000-2006 Guidelines described above. Reference is made to the assessment in section 8.5.
- (311) The substantive changes compared to the previous period were related to the fact that the aid had to be in kind (by means of subsidised services) and that the aid had to be accessible to all those eligible in the area concerned, based on objectively defined conditions. The Austrian authorities have confirmed that these conditions were fulfilled.
- (312) The aid for quality products for primary producers is therefore in line with the 2007-2013 Guidelines. Therefore, the Commission considers this aid to be compatible with the common market pursuant to Article 87(3)(c) EC (now: Article 107(3)(c) TFEU).

8.6.2. AID FOR UNDERTAKINGS ACTIVE IN PROCESSING AND MARKETING

Applicable rules

- (313) Pursuant to point 99 of the 2007-2013 Guidelines, the Commission could declare State aid to encourage the production and marketing of quality agricultural products granted to undertakings active in the processing and marketing of agricultural products compatible with the common market pursuant to Article 87(3)(c) EC (now: Article 107(3)(c) TFEU) if it fulfilled all the conditions set out in Article 5 of Commission Regulation (EC) No 70/2001 ⁽⁹⁴⁾.
- (314) Regulation (EC) No 70/2001 was replaced by Commission Regulation (EC) No 800/2008 ⁽⁹⁵⁾ (2008-2013 GBER) which in its Article 43 states that any references to Regulation (EC) No 70/2001 should be construed as references to Regulation (EC) No 800/2008. According to its Article 45, Regulation (EC) No 800/2008 entered into force on the 20th day following its publication in the *Official Journal of the European Union*, i.e. on 29 August 2008. Consequently, between 1 January 2007 and 28 August 2008, Article 5(a) of Regulation (EC) No 70/2001 was applicable to the aid at issue and after that date, Article 26 of Regulation (EC) No 800/2008 became applicable.
- (315) Insofar as aid for consultancy services is concerned, those articles stipulate the same conditions: aid could be granted in favour of SMEs, the consultancy costs of services provided by outside consultants were eligible, the aid intensity could not exceed 50 % of the eligible costs of the services and the services concerned could not be a continuous or periodic activity nor relate to the undertaking's usual operating costs, such as routine tax consultancy services, regular legal services or advertising.
- (316) Further, regarding both primary production and processing and marketing, pursuant to point 101 of the Guidelines, aid for investments necessary to upgrade production facilities, including investments necessary to manage the documentation system and perform process and product controls, could be granted only in accordance with the rules set out for investment aid in the 2007-2013 Guidelines.
- (317) In this respect, in the opening decision the Commission expressed certain doubts regarding the fulfilment of those conditions which differed from the requirements stipulated in the 2000-2006 Guidelines.

⁽⁹⁴⁾ Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ L 10, 13.1.2001, p. 33).

⁽⁹⁵⁾ Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (OJ L 214, 9.8.2008, p. 3).

- (318) In particular, the Commission drew the attention of the Austrian authorities to the following substantive modifications:
- (a) in the 2007-2013 Guidelines, aid for the control of organic production methods conducted within the framework of Regulation (EEC) No 2092/91 and aid for controls carried out by other bodies responsible for supervising the use of quality marks and labels under recognised quality assurance schemes was no longer considered to be compatible with the common market;
 - (b) special attention was further drawn to the requirements stipulated in Article 14(5) and (6) of Regulation (EC) No 1857/2006. According to these articles, the services had to be provided in kind and based on objectively identified conditions to all undertakings eligible in the area concerned;
 - (c) another major modification as compared to the 2000-2006 Guidelines concerns the differentiation between primary production and the processing and marketing of agricultural products. As regards processing and marketing, only aid for SMEs could be granted as of 2007, the scope of the eligible costs was reduced to consultancy and other services and the aid intensity was reduced to 50 %. Furthermore, regarding primary production aid to large companies could not be declared compatible.

Assessment

- (319) From the information available at the stage of the preliminary examination procedure it was unclear whether in 2007 the Austrian authorities brought the measures under examination in line with the above conditions of the 2007-2013 Guidelines. The Austrian authorities were therefore invited to submit additional information in order to prove that in the period 1 January 2007 to 31 December 2007 the quality support measures complied with the new rules applicable as of 1 January 2007.
- (320) In their submission of 14 September 2012 the Austrian authorities argued that the obligation to adapt to the new State aid rules applied as from 1 January 2008 and not from 1 January 2007, as noted by the Commission (see also recitals 172-173). Therefore, the Austrian authorities provided no further information for the compatibility assessment. In the request for information of 19 February 2014, the Commission again invited the Austrian authorities to provide the necessary information on this point. In their reply of 30 April 2014, the Austrian authorities maintained the view expressed in their previous submission and provided no further information for the compatibility assessment.
- (321) In the request for information of 17 December 2014, the Commission again asked the Austrian authorities to provide the information for a compatibility assessment of the quality measures. The Austrian authorities reiterated that the obligation to adapt to the new State aid rules applied as from 1 January 2008 and not from 1 January 2007.
- (322) The Commission would like to point out that, contrary to what the Austrian authorities maintain, the obligation to adapt the scheme to the new rules applied as of 1 January 2007 and not as of 1 January 2008.
- (323) At the time of the entrance into force of the new rules (i.e. 1 January 2007), the Court Case T-375/04 (see recital 22) which led to the annulment of Commission Decision NN 34A/2000 of 30 June 2004 was pending. The subsequent annulment of the Commission decision on 18 November 2009 had a retroactive effect.
- (324) Therefore, Austria could not rely on this decision to consider the aid as an existing aid scheme within the meaning of point 196 of the 2007-2013 Guidelines.
- (325) Furthermore, according to settled jurisprudence

‘in essence, (...) a positive decision of the Commission cannot give rise to a legitimate expectation on the part of the aid recipient, first, where that decision has been challenged in due time before the Community judicature, which annulled it, or, secondly, so long as the period for bringing an action has not expired or, where an action has been brought, so long as the Community judicature has not delivered a definitive ruling’ ⁽⁹⁶⁾.

⁽⁹⁶⁾ Judgment of the Court in Case C-1/09, *Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE)*, ECLI:EU:C:2010:123, para. 45.

- (326) Although the measures covered under this section had been declared compatible by Commission Decision NN 34A/2000 of 30 June 2004, no legitimate expectations were created based on this decision, be it at the level of the beneficiaries or at the level of the Member State. Already on 17 September 2004 an action for annulment was launched and this was pending at the date of the entry into force of the new State aid rules. Therefore, due to the pending action for annulment the Austrian authorities should have applied the 2007-2013 Guidelines starting with 1 January 2007.
- (327) As shown above, the rules concerning undertakings active in the processing and marketing of agricultural products have changed in substance in the 2007-2013 Guidelines. Since the Austrian authorities made no adaptation, the measures on organic products, large undertakings and the measure other than services in kind (as described in recital 318) were not in line with the 2007-2013 Guidelines. Therefore, the Commission considers these aid measures to be incompatible with the common market. The other measures (i.e. in so far as they do not concern organic products, large undertakings and the measure other than services in kind ⁽⁹⁷⁾) complied with the 2007-2013 Guidelines and therefore compatible with the common market.

8.7. TECHNICAL SUPPORT IN THE PERIOD 1 JANUARY 2000 TO 31 DECEMBER 2006

- (328) Aid for technical support for the period 1 January 2000 to 31 December 2006 has to be assessed pursuant to point 14 of the 2000-2006 Guidelines. According to point 14.1 of those Guidelines such aids were considered by the Commission as 'soft aids' which contributed to the long term viability of agriculture in the Community while producing only very limited effects on competition. Aid could be granted for up to 100 % of the costs to cover among others the following activities: the organisation of competitions, exhibitions and fairs, including support for the costs incurred by participating in such events; and other activities for the dissemination of knowledge relating to new techniques, such as reasonable small scale pilot projects or demonstration projects.
- (329) The total amount of support granted could not exceed EUR 100 000 over any 3-year period per beneficiary or, in the case of SMEs, 50 % of the eligible costs, whichever was greater (point 14.3 of the 2000-2006 Guidelines). Such aid had to be available to all those eligible in the area concerned based on objectively defined conditions (point 14.2 of the 2000-2006 Guidelines).

8.7.1. TECHNICAL AID FOR THE QUALITY AND THE BIO LABEL IN THE PERIOD 1 JANUARY 2000 TO 31 DECEMBER 2006

- (330) Regarding the bio and the quality labels, aid was granted for general information projects, PR-activities to disseminate general knowledge about the labels and for quality competitions (see recitals 100-103). These measures do not induce customers to buy a given product. Therefore, rather than being advertising measures they are general promotion measures and soft aids that fall under point 14 of the 2000-2006 Guidelines.
- (331) The information measures fall under the dissemination of knowledge relating to new techniques. By definition, such general measures benefit all producers using the labels.
- (332) Aid to cover the costs for technical support measures falls under point 14.1 of the 2000-2006 Guidelines. In the information provided relating to the aid scheme NN 34A/2000 the Austrian authorities specified that such aid would never exceed EUR 100 000 per beneficiary in a 3-year period (see recital 109). In the opening decision the Austrian authorities were invited to provide information to prove that the above assurances were indeed complied with. Furthermore, they were asked to indicate whether the requirements laid down in points 14.2 and 14.3 of the 2000-2006 Guidelines were fulfilled also in respect of the period 2000-2001 ⁽⁹⁸⁾.
- (333) In their submission of 14 September 2012, the Austrian authorities confirmed that aid for these measures never exceeded the EUR 100 000 threshold per beneficiary in a 3-year period. The condition of point 14.3 of the 2000-2006 Guidelines was therefore met.

⁽⁹⁷⁾ As opposed to the previous legal framework, these categories were no longer eligible under the 2007-2013 Guidelines. See recital 318.

⁽⁹⁸⁾ Regarding the reference period for which information should be provided, the Austrian authorities were invited to take into account the comments made in recital 243 above regarding the existence (or not) of a transitional period..

- (334) As regards the conditions of point 14.2 of the 2000-2006 Guidelines, the Commission asked the Austrian authorities, in a new request for information of 17 December 2014, to provide the information necessary for carrying out a compatibility assessment.
- (335) In their reply of 25 February 2015 the Austrian authorities confirmed that the scheme was open to all those eligible in the area concerned based on objectively defined conditions. The condition of point 14.2 of the 2000-2006 Guidelines was therefore met.
- (336) Therefore, the aid for technical support complied with the conditions stipulated in the 2000-2006 Guidelines and the Commission considers that the aid was compatible with the common market pursuant to Article 87(3)(c) EC (now: Article 107(3)(c) TFEU).

8.7.2. TECHNICAL SUPPORT FOR GENERIC PRODUCTS IN THE PERIOD 1 JANUARY 2000 TO 31 DECEMBER 2004 ⁽⁹⁹⁾

- (337) Aid to cover the costs for technical support measures regarding generic products as described in recitals 104-107 fall under point 14.1 (fourth indent) of the 2000-2006 Guidelines. As regards the conditions of points 14.2 and 14.3, at the time of the opening decision the Commission did have no information for this period on the basis of which it could assess whether those conditions were fulfilled. The Austrian authorities were thus invited to submit the necessary information.
- (338) In their submission of 14 September 2012, the Austrian authorities confirmed that aid for these measures never exceeded the EUR 100 000 threshold per beneficiary in a 3-year period. The condition of point 14.3 of the 2000-2006 Guidelines was therefore met.
- (339) As regards the condition of point 14.2 of the 2000-2006 Guidelines on aid available to all eligible in the area concerned, the Commission notes that this condition is fulfilled since the technical support measures concerned generic information on products. The condition of point 14.2 of the 2000-2006 Guidelines was therefore met.
- (340) Therefore, the conditions of the 2000-2006 Guidelines on aid to provide technical support were met. Therefore, the Commission considers that this aid was compatible with the common market pursuant to Article 87(3)(c) EC (now: Article 107(3)(c) TFEU).

8.8. TECHNICAL SUPPORT IN THE PERIOD 1 JANUARY 2007 TO 31 DECEMBER 2008

8.8.1. APPLICABLE RULES

Aid for primary agricultural producers

- (341) Pursuant to point 103 of the 2007-2013 Guidelines, the Commission could declare State aid for the provision of technical support granted to primary producers compatible with the common market pursuant to Article 87(3)(c) EC (now: Article 107(3)(c) TFEU) if it fulfilled all the conditions of Article 15 of Regulation (EC) No 1857/2006.
- (342) Under Article 15 of Regulation (EC) No 1857/2006, aid was deemed compatible with the common market within the meaning of Article 87(3)(c) EC (now: Article 107(3)(c) TFEU) if it was granted towards the eligible costs of the technical support activities listed in Article 15(2) of Regulation (EC) No 1857/2006 and fulfilled the conditions set out in Article 15(3) and (4) of Regulation (EC) No 1857/2006.
- (343) According to Article 15(2)(d) of Regulation (EC) No 1857/2006 concerning the organisation of and participation in forums to share knowledge between businesses, competitions, exhibitions and fairs, aid could be granted for the following eligible costs: participation fees, travel costs, costs of publications, the rent of exhibition premises, or symbolic prizes awarded in the framework of competitions, up to a value of EUR 250 per prize and winner.

⁽⁹⁹⁾ Generic measures after the year 2004 were covered by Commission decision N 239/2004 (see also recital 20 above). This decision has not been affected by the Court judgments mentioned at recital 22 and following.

- (344) Article 15(2)(e) of Regulation (EC) No 1857/2006 allowed aid for the costs connected to the vulgarisation of scientific knowledge and factual information on quality systems open to products from other countries (without any reference to individual companies, brands or origin).
- (345) Article 15(2)(f) of Regulation (EC) No 1857/2006 allowed aid for the costs of publications such as catalogues or websites presenting factual information about producers from a given region or producers of a given product, provided the information and presentation remained neutral and that all producers concerned had equal opportunities to be represented in the publication.
- (346) Article 15(3) and (4) of Regulation (EC) No 1857/2006 allowed technical support aid to be granted at a rate of up to 100 % of costs where the following conditions were met: the aid had to be granted in kind by means of subsidised services and could not involve direct payments of money to producers; the aid had to be accessible to all those eligible in the area concerned, based on objectively defined conditions; where technical support was provided by producer groups or other organisations, membership of such groups or organisations could not be a condition for access to the service. Any contribution by non-members towards the administrative costs of the group or organisation concerned had to be limited to the costs of providing the service.

Undertakings active in processing and marketing

- (347) Pursuant to point 105 of the 2007-2013 Guidelines, the Commission could declare State aid for the provision of technical support to companies active in the processing and marketing of agricultural products compatible with the common market pursuant to Article 87(3)(c) EC (now: Article 107(3)(c) TFEU) if it fulfilled all the conditions of Article 5 of Regulation (EC) No 70/2001. Article 43 of Commission Regulation (EC) No 800/2008 which replaced Regulation (EC) No 70/2001 stated that any references to Regulation (EC) No 70/2001 should be construed as references to Regulation (EC) No 800/2008 ⁽¹⁰⁰⁾.
- (348) Regarding the conditions of Article 26 of Regulation (EC) No 800/2008 and Article 5(a) of Regulation (EC) No 70/2001 a reference is made to recital 315 above.
- (349) Article 27 of Regulation (EC) No 800/2008 and Article 5(b) of Regulation (EC) No 70/2001 stated that, as regards aid for the participation in fairs and exhibitions, the aid intensity could not exceed 50 % of the eligible costs and that 'eligible costs' meant the costs incurred for renting, setting up and running the stand for the first participation by an enterprise in any particular fair or exhibition.

8.8.2. ASSESSMENT OF THE TECHNICAL SUPPORT (PRIMARY PRODUCERS AND PROCESSING AND MARKETING)

Aid for primary agricultural producers

- (350) The Commission is of the view that on substance the rules applicable as of 1 January 2007 on technical support for primary agricultural producers were almost identical with the conditions set in the 2000-2006 Guidelines. The eligible costs listed in Article 15(2) of Regulation (EC) No 1857/2006 are in substance identical with the costs enumerated in point 14 of the 2000-2006 Guidelines ⁽¹⁰¹⁾. The conditions set out in Article 15(4) of Regulation (EC) No 1857/2006 are identical with the provision of point 14.2 of the 2000-2006 Guidelines. However, as opposed to the 2000-2006 Guidelines, the 2007-2013 Guidelines stated that the aid had to be provided in kind by means of subsidised services. On this point the Austrian authorities pointed out that, even in the period before 2007 the technical support was in the form of subsidised services.

⁽¹⁰⁰⁾ As explained in recital 314 above, between 1 January 2007 and 28 August 2008, Article 5 (a) and (b) of Regulation (EC) No 70/2001 was applicable to the aid at issue and after that date Articles 26 and 27 of Regulation (EC) No 800/2008. However, since those articles set the same conditions, a differentiation in the assessment between the above time periods is not necessary.

⁽¹⁰¹⁾ The 2000-2006 Guidelines provide a non-exhaustive list of activities covered under technical aid.

- (351) Reference is made to the compatibility assessment of section 8.7 above. Therefore, the Commission considers that this aid was compatible with the common market.

Undertakings active in processing and marketing

- (352) As regards the technical support for undertakings active in processing and marketing, the 2007-2013 Guidelines have introduced substantive changes as compared to the previous rules; therefore, a separate assessment is necessary for this category. From the information available at the stage of the opening decision, it was unclear whether in 2007 the Austrian authorities brought the technical support measures under examination in line with the above conditions of the Guidelines. The Austrian authorities were therefore invited to submit additional information in order to prove that in the period 1 January 2007 to 31 December 2008 the measures complied with the new rules. In this respect, the Commission expressed doubts regarding the fulfilment of those conditions which differed from the requirements stipulated in the 2000-2006 Guidelines. In particular, the Commission drew the attention of the Austrian authorities to the following substantive modifications:

- the differentiation between primary production and processing and marketing of agricultural products,
- as for the latter, solely aid for SMEs could be declared compatible under the 2007-2013 Guidelines, the scope of the eligible costs was reduced to consultancy services and the participation in fairs and exhibitions and the aid intensity was reduced to 50 %.

- (353) In their submission of 14 September 2012 the Austrian authorities argued that the obligation to adapt to the new State aid rules applied as from 1 January 2008 and not from 1 January 2007, as noted by the Commission (see also recitals 172-175). Therefore, the Austrian authorities provided no further information for the compatibility assessment. In the request for information of 19 February 2014, the Commission again invited Austria to provide the necessary information on this point. In their reply of 30 April 2014, the Austrian authorities maintained the view expressed in their submission of 2012 and provided no further information for the compatibility assessment.

- (354) Reference is made to the reasoning in recitals 322-326 above, which equally applies to the type of aid referred to in this section.

- (355) For the reasons stated above, insofar as the technical support aid granted to undertakings active in the processing and marketing of agricultural products in the period 1 January 2007 to 31 December 2008 did not comply with the new conditions stipulated for this category of aid in the 2007-2013 Guidelines (i.e. aid for large undertakings, aid for first participation in fairs, an aid rate over 50 % for any service but consultancy services and participation in fairs over 50 % or compensation in kind) (recital 350), the Commission considers that such aid was incompatible with the common market pursuant to Article 87(3)(c) EC (now: Article 107(3)(c) TFEU).

- (356) For measures other than those referred to in the recital above the compatibility criteria have not changed as compared to the 2000-2006 Guidelines. Reference is made to the compatibility assessment in recital 328 and following. These measures are therefore compatible.

8.9. PARAFISCAL LEVIES AND HYPOTHECATION OF THE AID

- (357) Since the measures object of the present decision are financed by a parafiscal charge, the Commission must examine both the measures financed, i.e. the aid actually awarded, and the way it is financed.
- (358) According to a settled jurisprudence of the Court of Justice, where the method of financing the aid, in particular through compulsory contributions, forms an integral part of the aid measure, the Commission must take that method of financing into account when examining the aid ⁽¹⁰²⁾.

⁽¹⁰²⁾ Judgment of the Court of 21 October 2003 in Joined Cases C-261/01 and C-262/01, Van Calster, ECLI:EU:C:2003:571, para. 49.

- (359) For a tax or part of a tax to be considered as forming an integral part of an aid measure, it must be hypothecated to the aid measure under the relevant national rules, in the sense that the revenue from the tax must be necessarily allocated for the financing of the aid measure ⁽¹⁰³⁾ and the amount of the tax should have a direct impact on the amount of State aid ⁽¹⁰⁴⁾.

8.9.1. PERIOD 1995-2001

- (360) According to recital 235 of the opening decision, the application of these criteria to the measures under examination led the Commission to the following, preliminary conclusions: the first criterion appeared to be fulfilled since according to the Austrian authorities the collected levies exclusively benefited the aid measures covered by the decision (see recital 53).
- (361) As regards the question whether the amount of the levy had a direct impact on the amount of State aid, at the stage of the opening decision the Commission did not possess all the necessary information to assess whether this criterion was fulfilled. To this end the Austrian authorities were invited to explain whether the aid amount at stake was directly linked to the revenue from the levy, i.e. whether it was established up-front or whether it depended on the concrete AMA marketing needs.
- (362) The Commission also indicated that, should it conclude after the submission of the necessary information that the levies form an integral part of the aid measure, it would have to examine whether the financing of the scheme discriminates between imported products and products produced in Austria ⁽¹⁰⁵⁾, or between exported national products and national products marketed on the domestic market ⁽¹⁰⁶⁾ (recital 236 of the opening decision).
- (363) The Austrian authorities were invited to provide information on these points. In particular, they were invited to indicate whether § 21c(2) of the AMA Act, according to which goods originating outside Austria are exempted from the levy (see recital 58, was in force already in 1995 or whether it was inserted by a later amendment of the law. Further, the Member State was invited to explain whether products of Austrian origin marketed outside Austria could benefit from the measure to the same extent as products marketed in Austria.
- (364) In recital 237 of the opening decision the Commission underlined that it also had to verify whether charging the levy did not run counter to the objectives of the common market organisation in the agricultural sector. In this respect it had to be assessed whether the levies did not interfere with the price of the end products and thus whether domestic products were not discriminated against compared to imported products.
- (365) In this regard, in the opening decision the Austrian authorities were invited to provide data showing the percentage of the respective sales prices to which the levy amounted and to explain to which extent a possible negative impact caused by the levy was compensated by the positive effects of the measures financed by the same levy. In addition, the Austrian authorities were invited to explain whether the prices of the relevant products are largely market driven.
- (366) In their submission of 14 September 2012, the Austrian authorities informed the Commission that foreign products were exempted from paying the levy according to Article 2c paragraph 2 of the AMA Act. This exemption applied since 1 January 1994 and therefore for the entire period of assessment.
- (367) As regards the relationship with the objectives of the common market organisation in the agricultural sector, in their submission of 14 September 2012, the Austrian authorities stated that due to the fact that the prices were formed by supply and demand on the relevant markets and that there was no intervention from the side of the authorities, it was not possible to calculate the percentage of sales prices to which the levy amounted.

⁽¹⁰³⁾ Judgment of the Court of 13 January 2005 in Case C-174/02, *Streekgewest Westelijk Noord-Brabant*, ECLI:EU:C:2005:10, para. 26, Judgment of the Court of 27 October 2005 in Joined Cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04, *Nazairdis SAS e.a./Caisse nationale de l'organisation autonome d'assurance vieillesse des travailleurs non salariés des professions industrielles et commerciales (Organic)*, ECLI:EU:C:2005:657, paras 46 to 49.

⁽¹⁰⁴⁾ *Streekgewest Westelijk Noord-Brabant*, cited above in footnote 102, para. 28 and Judgment of the Court of 15 June 2006, C-41/05, *Air Liquide*, ECLI:EU:C:2006:403, para. 46.

⁽¹⁰⁵⁾ With regard to discrimination between domestic and exported products, see, inter alia, the Judgment of the Court of 23 April 2002 in Case C-234/99, *Nygard*, ECLI:EU:C:2002:244, paras 21-22.

⁽¹⁰⁶⁾ With regard to discrimination between domestic and imported products, see, inter alia, the Judgment of the Court of 11 March 1992 in Joined Cases C-78/90, C-79/90, C-80/90, C-81/90, C-82/90 and C-83/90, *Compagnie Commerciale de l'Ouest*, ECLI:EU:C:1992:118, para. 26.

- (368) In the same reply the Austrian authorities argued that the amount of the levy did not have a direct impact on the amount of State aid. In addition to the revenue from the AMA levy, additional sources of financing existed. Namely, aside from the 'net revenue' deriving from the levy, and EU funds (for co-financed actions), other revenues were collected from economic operators by way of licence fees and from the proceeds from the royalties paid in the AMA-shop (cookery books, etc.) to finance the measures.
- (369) In fact, the Austrian authorities demonstrated that a part of the financing for the AMA measures was not covered by the levy ⁽¹⁰⁷⁾ and thus the amount of the aid spent (which in turn influenced the scope of the measures actually carried out) did not exclusively depend on the levy revenue; in addition, the revenue from the levy was not exclusively allocated for the financing of the aid ⁽¹⁰⁸⁾.
- (370) Hence, the Commission considers that the criteria for hypothecation within the meaning of the case-law were not fulfilled for the period 1995 to 2001.

8.9.2. PERIOD 2002-2008

- (371) The Austrian authorities were also invited to provide the necessary information to allow the Commission to assess whether the parafiscal financing of the measure (levy) formed an integral part of the aid measures for the period 2002 to 2008 (recital 238 of the opening decision).
- (372) For the reasons stated above, and given that the sources of funding remained the same, the Commission considers that no hypothecation between the levy and the State aid measures existed also for the period 2002 to 2008.

9. CONCLUSION ON THE EXISTENCE OF AID AND COMPATIBILITY

- (373) For the reasons stated above, and notwithstanding recital 378 below, the AMA marketing measures constitute State aid.
- (374) For the reasons stated above, and notwithstanding recital 378 below, the aid measures referred to in recitals 208, 213, 327, third sentence and 355 are incompatible with the internal market. The other measures assessed above are compatible with the internal market.
- (375) Any compensation which at the time of the granting fulfilled the conditions stipulated in the *de minimis* Regulation ⁽¹⁰⁹⁾ is deemed not to constitute aid. Any aid which, at the time of the granting fulfilled the conditions of a block exemption or an approved aid scheme is compatible with the internal market, up to the maximum aid intensities applicable to that type of aid.

⁽¹⁰⁷⁾ According to the submission of 25 February 2015, the sums collected from licenses ranged between 2,01 % and 2,84 % of the annual revenue. The proceeds from the AMA shop ranged between 0,08 % and 0,48 % of the annual revenue.

⁽¹⁰⁸⁾ See for instance the situation for the year 2001: As can be seen from the tables reproduced above in recitals 43 and 56, the amount of the levy collected was EUR 15 million, whereas only EUR 12 million were paid as aid. While the sums and proportions differ for each year (in some years the aid amount exceeded the amount of the levies collected), it is clear that the amount of the levy did not directly translate into a particular aid level.

⁽¹⁰⁹⁾ Commission Regulation (EC) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (OJ L 352, 24.12.2013, p. 1), Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ L 379, 28.12.2006, p. 5), Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid (OJ L 10, 13.1.2001, p. 30), Commission notice on the *de minimis* rule for State aid (OJ C 68, 6.3.1996, p. 9), Commission Regulation (EU) No 1408/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid in the agriculture sector (OJ L 352, 24.12.2013, p. 9), Commission Regulation (EC) No 1535/2007 of 20 December 2007 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid in the sector of agricultural production (OJ L 337, 21.12.2007, p. 35), Commission Regulation (EC) No 1860/2004 of 6 October 2004 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid in the agriculture and fisheries sectors (OJ L 325, 28.10.2004, p. 4).

10. RECOVERY

- (376) In accordance with the Treaty and the Court of Justice's established case-law, the Commission is competent to decide that the Member State concerned must abolish or alter aid ⁽¹¹⁰⁾ when it has found that it is incompatible with the internal market. The Court has also consistently held that the obligation on a State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation ⁽¹¹¹⁾. In this context, the Court has stated that that objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored ⁽¹¹²⁾.
- (377) Following that case-law, Article 16 of Council Regulation (EU) 2015/1589 ⁽¹¹³⁾ (hereinafter Procedural Regulation) lays down that 'where negative decisions are taken in respect of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary.'
- (378) According to Article 17 of the Procedural Regulation, the powers of the Commission to recover incompatible aid are subject to a limitation period of 10 years. The limitation period begins on the day on which the unlawful aid was awarded to the beneficiary. Any action taken by the Commission with regard to the unlawful aid interrupts the limitation period. The limitation period is suspended for as long as the decision of the Commission is the subject of proceedings before the ECJ.
- (379) The complaint which triggered the present procedure was received on 21 September 1999 (see recital 4) and the Commission registered the scheme as a non-notified aid in the year 2000 (see recital 8). Furthermore, the 2004 decision acknowledges the fact that the Commission has decided, for administrative reasons, to split the procedure (see recital 10) and assess the measures before and after the year 2003 separately. This splitting of the procedure had been a request of the Austrian authorities dated from 8 March 2004.
- (380) The above cited actions (splitting of procedure acknowledged by 2004 decision) and letters (Austrian request of 8 March 2004) are interrupting events in the meaning of Article 17 Council Regulation (EU) 2015/1589.
- (381) This means that the Commission has the power to order recovery as of 1 January 1995, the date of Austria's accession to the European Union.
- (382) The Commission decision NN 34A/2000 was challenged before the General Court on 30 June 2004 and its ruling was appealed before the Court of Justice on 27 January 2010. The judgment of the Court was pronounced on 27 October 2011 (see above recital 22). According to Article 15 paragraph 2, third sentence of Regulation (EC) No 659/1999, the limitation period was therefore suspended between 30 June 2004 and 27 October 2011.
- (383) For the reasons stated above the 10 years limitation period for recovery with regard to the measures assessed in this decision has not expired. The incompatible State aid specified at recital 374 above must therefore be recovered by the Austrian authorities.
- (384) Article 16(1) of the Procedural Regulation specifies that 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary'.
- (385) Article 16(3) of the Procedural Regulation specifies that 'recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision.'
- (386) The means according to national law established by the Member States, by which they implement recovery decisions, should give full effect to the recovery decision. It is therefore necessary that the national measures taken by Member States lead to an effective and immediate execution of the Commission decision.

⁽¹¹⁰⁾ Case C-70/72, *Commission v Germany*, ECLI:EU:C:1973:87, para. 13.

⁽¹¹¹⁾ Joined Cases C-278/92, C-279/92 and C-280/92, *Spain v Commission*, ECLI:EU:C:1994:325, para. 75.

⁽¹¹²⁾ Case C-75/97, *Belgium v Commission*, ECLI:EU:C:1999:311, paras 64-65.

⁽¹¹³⁾ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

- (387) According to a settled jurisprudence, in the case of negative decisions for non-notified aid, particularly where a significant period of time has elapsed, the Commission may resort to approximate evaluations of the sums to be recovered ⁽¹¹⁴⁾.
- (388) The Commission would like to point out that, according to the jurisprudence ‘no provision of Community law requires the Commission, when ordering the recovery of aid declared incompatible with the common market, to fix the exact amount of the aid to be recovered. It is sufficient for the Commission’s decision to include information enabling the recipient to work out himself, without overmuch difficulty, that amount.’ ⁽¹¹⁵⁾
- (389) Given the nature of some of the measures concerned (i.e. measures concerning indirect aid to a large number of beneficiaries) the Commission is not in a position to determine in the present decision the exact aid amount per beneficiary for each measure for which recovery has been ordered.
- (390) The Commission would therefore point out that the sums communicated by the Austrian authorities during the investigation period (see recitals 43-45) constitute the starting point for the calculation of the aids to be recovered from the respective beneficiaries. The categories of incompatible aid, as well as the relevant periods have been identified in the decision.
- (391) Therefore, the Commission considers that, in the framework of the recovery procedure, a reasonable method of calculating the aid per beneficiary needs to be provided by the Austrian authorities, and communicated to the Commission, in a spirit of loyal cooperation with the Commission,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Austria has implemented for the following measures and periods is **compatible** with the internal market within the meaning of Article 107(3)(c) of the Treaty on the Functioning of the European Union:

- aid for generic advertising in the period 1 January 2000 to 31 December 2001,
- advertising aid in the period 1 January 2002 to 31 December 2006,
- aid for/by way of advertising campaigns outside Austria and generic advertising in Austria, in the period 1 January 2002 to 1 January 2004,
- quality advertising aid in the period 1 January 2007 to 31 December 2008,
- aid for/by way of promotion measures in a broader sense and technical support measures in the period 1 January 1995 to 31 December 1999,
- aid in the form of technical assistance, advisory services and control measures relating to quality products in the period 1 January 1995 to 31 December 1999,
- aid for quality products in the period 1 January 2000 to 31 December 2006,
- aid in the form of technical support in the period 1 January 2000 to 31 December 2006,
- aid in the form of technical support for generic products in the period 1 January 2000 to 31 December 2004,
- aid in the form of technical support in the period 1 January 2007 to 31 December 2008 for primary producers.

⁽¹¹⁴⁾ Case T-366/00, *Scott SA v Commission*, ECLI:EU:T:2007:99, para. 96.

⁽¹¹⁵⁾ Case C-480/98, *Spain v Commission*, ECLI:EU:C:2000:559, para. 25.

Article 2

The following State aid schemes, unlawfully put into effect by Austria in breach of Article 108(3) of the Treaty on the Functioning of the European Union are **incompatible** with the internal market, for the respective periods indicated:

- aid for generic advertising in the period 1 January 1995 to 31 December 1999,
- aid for the quality label in the period 1 January 1995 to 31 December 1999,
- aid for quality products in the period 1 January 2007 to 31 December 2008,
- technical support for undertakings active in processing and marketing in the period 1 January 2007 to 31 December 2008.

Article 3

Individual aid granted under the scheme referred to in Article 2 does not constitute aid if, at the time it was granted, it fulfilled the conditions laid down by a regulation adopted pursuant to Article 2 of Council Regulation (EC) No 994/98 ⁽¹¹⁶⁾ which was applicable at the time the aid was granted.

Article 4

Individual aid granted under the scheme referred to in Article 2 which, at the time it was granted, fulfilled the conditions laid down by a regulation adopted pursuant to Article 1 of Regulation (EC) No 994/98 or by any other approved aid scheme is compatible with the internal market, up to the maximum aid intensities applicable to that type of aid.

Article 5

Austria shall recover the incompatible aid referred to in Article 2 from its beneficiaries.

The sums to be recovered shall bear interest from the date of their disbursement until their actual recovery.

The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ⁽¹¹⁷⁾.

Article 6

Recovery of the aid referred to in Article 2 shall be immediate and effective.

Austria shall ensure that this Decision is implemented within 4 months following the date of notification of this Decision.

Article 7

Within 2 months following notification of this Decision, Austria shall submit the following information to the Commission:

- (a) the list of beneficiaries that have received aid under the schemes referred to in Article 2 and the total amount of aid received by each of them under the scheme;
- (b) the total amount (principal and recovery interests) to be recovered from the beneficiaries;

⁽¹¹⁶⁾ Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid (OJ L 142, 14.5.1998, p. 1).

⁽¹¹⁷⁾ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

- (c) a detailed description of the measures already taken and planned to comply with this Decision;
- (d) documents demonstrating that the beneficiary has been ordered to repay the aid.

Austria shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid granted under the scheme referred to in Article 2 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.

Article 8

This Decision is addressed to the Republic of Austria.

Done at Brussels, 7 April 2016.

For the Commission
Phil HOGAN
Member of the Commission

COMMISSION IMPLEMENTING DECISION (EU) 2016/1701**of 19 August 2016****laying down rules on the format for the submission of work plans for data collection in the fisheries and aquaculture sectors***(notified under document C(2016) 5304)*

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 508/2014 of the European Parliament and of the Council of 15 May 2014 on the European Maritime and Fisheries Fund and repealing Council Regulations (EC) No 2328/2003, (EC) No 861/2006, (EC) No 1198/2006 and (EC) No 791/2007 and Regulation (EU) No 1255/2011 of the European Parliament and of the Council ⁽¹⁾, and in particular Article 22(1)(d) thereof,

Whereas:

- (1) Article 25 of Regulation (EU) No 1380/2013 of the European Parliament and of the Council ⁽²⁾ requires the Member States to collect biological, environmental, technical and socioeconomic data necessary for fisheries management.
- (2) According to Article 21(1) of Regulation (EU) No 508/2014, Member States shall submit to the Commission by electronic means work plans for data collection in accordance with Article 4(4) of Council Regulation (EC) No 199/2008 ⁽³⁾ by 31 October of the year preceding the year from which the work plan is to apply.
- (3) According to Article 21(2) of Regulation (EU) No 508/2014, these work plans have to be approved by the Commission by means of implementing acts by 31 December of the year preceding the year from which the work plan is to apply.
- (4) According to Article 22(1)(d) of Regulation (EU) No 508/2014, the Commission may adopt implementing acts laying down rules on procedures, format and timetables for the submission of these work plans.
- (5) It is appropriate to take into account the most recent data requirements needed for the implementation of the Common Fisheries Policy as set in the multiannual Union programme for the collection, management and use of data in the fisheries and aquaculture sector for the period 2017-2019 ⁽⁴⁾ and to indicate what information Member States have to provide when submitting their work plans in order to ensure consistency with the multiannual Union programme and to ensure its homogenous implementation across the Union.
- (6) The Commission has taken account of the recommendations made by the Scientific, Technical and Economic Committee for Fisheries (STECF). Representatives of Member States gathered in dedicated expert groups have also been consulted.
- (7) The measures provided for in this Decision are in accordance with the opinion of the Committee for the European Maritime and Fisheries Fund,

⁽¹⁾ OJ L 149, 20.5.2014, p. 1.

⁽²⁾ Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC (OJ L 354, 28.12.2013, p. 22).

⁽³⁾ Council Regulation (EC) No 199/2008 of 25 February 2008 concerning the establishment of a Community framework for the collection, management and use of data in the fisheries sector and support for scientific advice regarding the Common Fisheries Policy (OJ L 60, 5.3.2008, p. 1).

⁽⁴⁾ Commission Implementing Decision (EU) 2016/1251 of 12 July 2016 adopting a multiannual Union programme for the collection, management and use of data in the fisheries and aquaculture sectors for the period 2017-2019 (OJ L 207, 1.8.2016, p. 113).

HAS ADOPTED THIS DECISION:

Article 1

Content of work plans

1. The content of work plans for data collection for the period 2017-2019, as referred to in Article 21 of Regulation (EU) No 508/2014, shall be presented in accordance with the model set out in the Annex to this Decision.
2. For the purpose of this Annex, definitions set out in Council Regulation (EC) No 1224/2009 ⁽¹⁾, Commission Implementing Regulation (EU) No 404/2011 ⁽²⁾, Regulation (EU) No 1380/2013 and the multiannual Union programme shall apply.
3. The work plans drawn up by Member States shall contain a description of:
 - (a) data to be collected in accordance with the multiannual Union programme;
 - (b) the temporal and spatial distribution and the frequency by which the data will be collected;
 - (c) the source of the data, the procedures and methods to collect and process the data into the data sets that will be provided to end-users;
 - (d) the quality assurance and quality control framework to ensure adequate quality of the data;
 - (e) how and when the data will be available, taking into account the needs defined by the end-users of scientific advice;
 - (f) the international and regional cooperation and coordination arrangements, including bilateral and multilateral agreements; and
 - (g) how the international obligations of the Union and its Member States have been taken into account.
- (4) The contents and format of the above descriptions shall follow the requirements set out in Articles 2 to 8 as further specified in the Annex to this Decision.

Article 2

Data to be collected in accordance with the multiannual Union programme

1. Member States shall collect the data specified in Annex I in accordance with the multiannual Union programme.
2. The correlation between the tables of the multiannual Union programme and the tables and text for the work plan are set out in Annex II.

⁽¹⁾ Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, amending Regulations (EC) No 847/96, (EC) No 2371/2002, (EC) No 811/2004, (EC) No 768/2005, (EC) No 2115/2005, (EC) No 2166/2005, (EC) No 388/2006, (EC) No 509/2007, (EC) No 676/2007, (EC) No 1098/2007, (EC) No 1300/2008, (EC) No 1342/2008 and repealing Regulations (EEC) No 2847/93, (EC) No 1627/94 and (EC) No 1966/2006 (OJ L 343, 22.12.2009, p. 1).

⁽²⁾ Commission Implementing Regulation (EU) No 404/2011 of 8 April 2011 laying down detailed rules for the implementation of Council Regulation (EC) No 1224/2009 establishing a Community control system for ensuring compliance with the rules of the Common Fisheries Policy (OJ L 112, 30.4.2011, p. 1).

*Article 3***Temporal and spatial distribution and the frequency by which data will be collected**

1. Specifications on temporal and spatial distribution and frequency shall follow the requirements as set in Chapter III of the multiannual Union programme. When no such requirements are set, Member States shall establish and describe specifications on temporal and spatial distribution or frequency taking into account historic time series, cost-effectiveness, any relevant marine region coordination and end-user needs.
2. Specifications on temporal and spatial distribution or frequency by which data are to be collected shall be reported in:
 - (a) Table 4A and Table 4B for data obtained during sampling of commercial fisheries;
 - (b) Table 1A and Table 1B for biological data obtained from research surveys and commercial fisheries;
 - (c) Table 1D for data obtained during sampling of recreational fisheries;
 - (d) Table 1E for data obtained during sampling of the relevant anadromous and catadromous species;
 - (e) Table 1G for data obtained from research surveys;
 - (f) Table 3A for economic and social data on fisheries;
 - (g) Table 3B for economic and social data on aquaculture; and
 - (h) Table 3C for economic and social data on the processing industry.

*Article 4***Source of data, procedures and methods to collect and process data**

1. When data are primarily collected through the application of Regulation (EC) No 199/2008, as defined in Article 1(1)(a) of that Regulation, the source of data shall be described in:
 - (a) Table 1C;
 - (b) Table 1D;
 - (c) Table 1E;
 - (d) Table 3A;
 - (e) Text Box 3A;
 - (f) Table 3B;
 - (g) Text Box 3B;
 - (h) Table 3C; and
 - (i) Text Box 3C.
2. When data are collected under other legal acts than Regulation (EC) No 199/2008, as defined in Article 15(1)(a) of that Regulation, the source of data shall be described in:
 - (a) Table 2A;
 - (b) Text Box 2A;

(c) Table 3A, where relevant; and

(d) Text Box 3A, where relevant.

3. Where the multiannual Union programme refers to a pilot study or simplified methodology, Member States shall describe such a study, including the aim, duration, methodology and expected outcomes in:

(a) Pilot Study 1 of Section 1;

(b) Pilot Study 2 of Section 1;

(c) Pilot Study 3 of Section 3; and

(d) Pilot Study 4 of Section 3.

4. The planned sampling designs shall be described in Table 4A, Text Box 4A and Table 4B. The reference population, that will be used for the selection of the sampling population, shall be described in Table 4C and in Table 4D. Where sampling is carried out by observers on board or at shore, the fraction of the catch that is sampled shall be indicated, so as to specify whether all species, only commercial species or only certain taxa of the catch are covered.

5. Methodologies, definition and calculation of social and economic variables shall follow commonly accepted guidelines by expert bodies to the European Commission, where relevant. When this is not the case, Member States shall clearly describe and justify the adopted approach in:

(a) Text Box 3A;

(b) Text Box 3B; and

(c) Text Box 3C.

6. Member States shall coordinate with a view to design and implement methods on an EU-wide or regional basis, in order to correct and impute data for those parts of the sampling plans which are not sampled or are inadequately sampled. Imputation methods shall take into account guidelines and methods adopted by international statistical organisations. Imputed data should be clearly flagged when reporting to end-users.

Article 5

Quality assurance and quality control

1. A quality assurance and quality control framework shall be described in publicly available documents referred to in the work plans, where appropriate. It shall establish the general principles, methods and tools that can provide guidance and evidence for an effective and common approach at European and national level.

2. Methods related to quality shall be described in:

(a) Table 5A for catch-sampling schemes, sampling schemes for recreational fisheries, sampling schemes for anadromous and catadromous species and research surveys at sea;

(b) Table 5B for fishing activity variables, economic and social data for fisheries, economic and social data for aquaculture and economic and social data for the processing industry;

(c) Text Box 2A;

(d) Text Box 3A;

(e) Text Box 3B; and

(f) Text Box 3C.

3. Where data are to be collected by sampling, Member States shall use statistically sound designs that follow guidelines for good practice provided by the Commission, the International Council for the Exploration of the Sea (ICES), STECF or other expert bodies to the European Commission. The description of sampling schemes shall include, but not be limited to, the specification of the purposes, design, expected execution difficulties (including non-response and refusals), data archiving, quality assurance procedures and analysis methods. This description shall also cover the definition of the sampling units, sampling frames and their coverage of the target population (including criteria used for coverage), stratification schemes and sample selection methods for primary, secondary and lower level sampling units. Where quantitative targets can be defined, they may be specified either directly by sample sizes or sampling rates, or by the definition of the levels of precision and of confidence to be achieved. For census data, Member States shall indicate if all segments are covered, which parts of the total population are missed and how these parts are estimated. The quality of sampling data shall be demonstrated using quality indicators related to precision and potential for bias, where appropriate.

Article 6

Availability of data to end-users

For the purpose of describing when data will be made available to end-users, Table 6A shall be used.

Article 7

Regional and International cooperation and coordination arrangements

1. Member States shall set out in Table 7A in which relevant regional and international meetings they participate and in Table 7B on how agreed recommendations at marine region level or at EU-wide level, where appropriate, are followed up. If these recommendations are not followed up, Member States shall explain the reasons in the 'Comments' section of Table 7B. The effect these recommendations will have on their data collection shall be indicated.

2. Member States shall report in Table 7C all relevant information on agreements with other Member States. This information shall identify which Member State collects which part of the data and ensures that all data collection is covered, specify the duration of the agreement and identify which Member State will be responsible for data transmission to end-users.

3. Notwithstanding the research surveys at sea listed in Table 10 of the multiannual Union programme, Member States may take into consideration the needs of end-users when planning the survey effort or sampling design, provided that this does not negatively affect the quality of the results and provided that this is coordinated at marine region level. Member States may agree to redistribute certain tasks and contributions with other Member States in the same region. If agreement is reached on distribution of tasks with other Member States, the participation (physical and/or financial) in each individual survey as well as the reporting and transmission obligations of each Member State shall be stated in Text Box 1G.

Article 8

International obligations

Member States shall include all the relevant data collection requirements stemming from their international obligations in the following tables:

- (a) Table 1A;
- (b) Table 1B;
- (c) Table 1C;

- (d) Table 4A;
- (e) Table 4B;
- (f) Table 7B; and
- (g) Table 7C.

This applies to the regional fisheries management organisations (RFMOs)/regional fisheries bodies (RFBs) to which these Member States or the Union are Contracting Parties, as well as to the Sustainable Fisheries Partnership Agreements (SFPAs) under which their fleets operate.

Article 9

This Decision is addressed to the Member States.

Done at Brussels, 19 August 2016.

For the Commission
Karmenu VELLA
Member of the Commission

ANNEX I

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SECTION 1
BIOLOGICAL DATA

Table 1A
List of required stocks

									WP		
									WP date of submission		31.10.2016
MS	Reference years	Species	Region	RFMO/RFO/IO	Area/Stock	Selected for sampling (Y/N)	Average landings in the reference years (tons)	EU TAC (if any) (%)	Share (%) in EU landings	Threshold (Y/N)	Comments
GBR	2013-2015	<i>Gadus morhua</i>	North Sea and Eastern Arctic	ICES	IIIa, IV, VIIId	Y	180	8			
GBR	2013-2015	<i>Solea solea</i>	North Atlantic	ICES	VIIa	Y	515	16			
GBR	2013-2015	<i>Solea solea</i>	North Atlantic	ICES	VIIe	N	75	3			
GBR	2013-2015	<i>Nephrops norvegicus</i>	North Sea and Eastern Arctic	ICES	IV, FU 33	Y	150	6			
ITA	2013-2015	<i>Boops boops</i>	Mediterranean and Black Sea	GFCM	GSA17	N	240		7		
ESP	2013-2015	<i>Merluccius merluccius</i>	Mediterranean and Black Sea	GFCM	GSA06	Y	3 500		60		
ESP	2013-2015	<i>Merluccius merluccius</i>	Mediterranean and Black Sea	GFCM	GSA07	Y	3 500		60		

General comment: This table fulfils paragraph 2 point (a)(i)(ii)(iii) of Chapter III of the multiannual Union programme and Article 2, Article 3 and Article 8 of this Decision. This table is intended to specify data to be collected under Tables 1(A), 1(B) and 1(C) of the multiannual Union programme. Use this table to give an overview of the collection of data at the level of area/stock. All individuals sampled shall be identified to species level and have length measurements taken, where possible.

Name of the variable	Guidance
MS	Member State's name shall be given as ISO 3166-1 alpha-3 code, e.g. 'DEU'.
Reference years	Member State shall report the year(s) to which the data actually refer. Member State shall select the three most recent years with data available. Give the reference year/years as '2013-2015'.
Species	Member State shall report (in Latin) the name of the species/stocks for which biological variables sampling is required according to the Tables 1(A), 1(B) and 1(C) of the multiannual Union programme, for all areas where the Member State's fishing fleet is operating.
Region	Member State shall refer to the naming convention used in Table 5(C) of the multiannual Union programme (level II). If information refers to all regions, insert 'all regions'.
RFMO/RFO/IO	Member State shall enter the acronym of the competent regional fisheries management organisation (RFMO), regional fisheries organisation (RFO) or international organisation (IO) for providing management/advice on the species/stock. e.g. RFMO: ICCAT, GFCM, NAFO e.g. RFO: CECAF e.g. IO: ICES If no RFMO, RFO or IO is applicable, 'NA' (not applicable) is used.
Area/Stock	Member State shall indicate the area of the mentioned species/stock, in accordance with Tables 1(A), 1(B) and 1(C) of the multiannual Union programme (e.g. GSA 16; ICES areas I, II; ICES areas IIIa, IV, VIIId, etc.).
Selected for sampling (Y/N)	Member State shall indicate by 'Y' (yes) or 'N' (no) whether the species/stock has been selected for sampling. Indicate 'Y' (yes) if the species/stock is selected for sampling for at least one variable of Table 1B of this Annex.
Average landings in the reference years (tons)	Average landings for each species and stock over the most recent 3-year reference period. While entering the landings data, Member State shall take into account the following conventions: If the species is not landed at all, then enter 'None'. If the average landings are less than 200 t, then do not enter the average landings figure, but enter '< 200' instead. If the average landings exceed 200 t, then enter the average landings figure for the most recent 3-year reference period. Average landings figures may be rounded to the nearest 5 or 10 t.

Name of the variable	Guidance
EU TAC (if any) (%)	Only applies to stocks that are subject to TAC and quota Regulations. In this column Member State shall: — enter 'None', if the Member State has no share in the EU TAC of the stock concerned, — enter the exact share if the Member State has a share in the EU TAC of the stock concerned.
Share (%) in EU landings	Applies to (i) all stocks in the Mediterranean; and (ii) all stocks outside the Mediterranean for which no TACs have been defined yet. In this column Member State shall: — enter 'None', if the Member State has no landings of the stock concerned, — enter the exact share, if the Member State has landings of the stock concerned, in the case that the Member State wants to invoke a threshold.
Threshold (Y/N)	Member State shall indicate by 'Y' (yes) or 'N' (no) whether, for the reported species/stock, a threshold applies, according to Chapter V of the multiannual Union programme.
Comments	Any further comment.

Table 1B

Planning of sampling for biological variables

																	WP							
																	WP date of submission						31.10.2016	
MS	Species	Region	RFMO/ RFO/IO	Area/ Stock	Fre- quency	Length			Age			Weight			Sex ratio			Sexual maturity			Fecundity			Comments
						2017	2018	2019	2017	2018	2019	2017	2018	2019	2017	2018	2019	2017	2018	2019	2017	2018	2019	
PRT	<i>Pleuronectes platessa</i>	North Sea and Eastern Arctic	ICES	IV								X			X			X			Not applicable			
PRT	<i>Nephrops norvegicus</i>	North Atlantic	ICES	FU 7								X	X	X	X	X	X	X	X	X	X	X	X	
ESP	<i>Merluccius merluccius</i>	Mediterranean and Black Sea	GFCM	GSA06																				
ESP	<i>Merluccius merluccius</i>	Mediterranean and Black Sea	GFCM	GSA07																				

General comment: This table fulfils paragraph 2 point (a)(i)(ii)(iii) of Chapter III of the multiannual Union programme and Article 2, Article 3 and Article 8 of this Decision. This table is intended to specify data to be collected under Tables 1(A), 1(B) and 1(C) of the multiannual Union programme. For species listed in this table, biological parameters (length, age, weight, sex ratio, maturity and fecundity) shall be collected. For each parameter and year, enter 'X' if data collection has taken place or is planned. This table shall allow to identify in which year(s) data is/will be collected by the Member State.

Name of the variable	Guidance
MS	Member State's name shall be given as ISO 3166-1 alpha-3 code, e.g. 'DEU'.
Species	Member State shall report (in Latin) the name of the species/stocks for which biological variables sampling is required according to Tables 1(A), 1(B) and 1(C) of the multiannual Union programme, for all areas where the Member State's fishing fleet is operating.
Region	Member State shall refer to the naming convention used in Table 5(C) of the multiannual Union programme (level II). If information refers to all regions, insert 'all regions'.
RFMO/RFO/IO	Member State shall enter the acronym of the competent regional fisheries management organisation (RFMO), regional fisheries organisation (RFO) or international organisation (IO) for providing management/advice on the species/stock. e.g. RFMO: ICCAT, GFCM, NAFO e.g. RFO: CECAF e.g. IO: ICES If no RFMO, RFO or IO is applicable, 'NA' (not applicable) is used.
Area/Stock	Member State shall indicate the fishing ground of the mentioned species/stock (e.g. GSA 16; ICES areas I, II; ICES areas IIIa, IV, VIIId, etc.).
Frequency	Member State shall indicate the frequency at which sampling will take place ('M' (monthly), 'Q' (quarterly), 'A' (annually), 'O' (other) — please specify).
Length	Member State shall indicate the year(s) in which length will be sampled.
Age	Member State shall indicate the year(s) in which age will be sampled.
Weight	Member State shall indicate the year(s) in which weight will be sampled.
Sex ratio	Member State shall indicate the year(s) in which sex ratio will be sampled.
Sexual maturity	Member State shall indicate the year(s) in which sexual maturity will be sampled.
Fecundity	Member State shall indicate the year(s) in which fecundity will be sampled.
Comments	Any further comment.

Table 1C
Sampling intensity for biological variables

									WP		
									WP date of submission		31.10.2016
MS	MS participating in sampling	Sampling year	Species	Region	RFMO/RFO/IO	Area/Stock	Variables	Data sources	Planned minimum no of individuals to be measured at the national level	Planned minimum no of individuals to be measured at the regional level	Comments
FRA	FRA-GBR-BEL	2017	<i>Solea solea</i>	North Sea and Eastern Arctic	ICES	IIIa, IV, VIIId	age	Commercial			
FRA	FRA-GBR-BEL	2017	<i>Solea solea</i>	North Sea and Eastern Arctic	ICES	IIIa, IV, VIIId	sex	Surveys			
FRA	FRA-GBR-BEL	2017	<i>Solea solea</i>	North Sea and Eastern Arctic	ICES	IIIa, IV, VIIId	maturity	Commercial			
FRA	FRA-GBR-BEL	2017	<i>Solea solea</i>	North Sea and Eastern Arctic	ICES	IIIa, IV, VIIId	length	commercial			
FRA	FRA	2017	<i>Merluccius merluccius</i>	North Atlantic	ICES	IIIa, IV, VI, VII, VIIIab		Commercial			
FRA	FRA	2017	<i>Merluccius merluccius</i>	North Atlantic	ICES	IIIa, IV, VI, VII, VIIIab		Surveys			
FRA	FRA	2017	<i>Merluccius merluccius</i>	North Atlantic	ICES	IIIa, IV, VI, VII, VIIIab		Surveys			
FRA	FRA	2017	<i>Parapenaeus longirostris</i>	Mediterranean Sea and Black Sea	GFCM	GSA09		Commercial			

General comment: This table fulfils paragraph 2 point (a)(i)(ii)(iii) of Chapter III, Chapter IV of the multiannual Union programme and Article 2, Article 4 paragraph 1 and Article 8 of this Decision. This table is intended to specify data to be collected under Tables 1(A), 1(B) and 1(C) of the multiannual Union programme. Explain the sampling strategy planned with regards to the biological variables.

Name of the variable	Guidance
MS	Member State's name shall be given as ISO 3166-1 alpha-3 code, e.g. 'DEU'.
MS participating in sampling	If the sampled activity has been carried out according to a regionally coordinated programme, all participating Member States shall be listed. Otherwise, the Member State responsible for the sampling shall be listed. Links to planned regional and international coordination or bi- and multilateral agreements, where available, shall be listed in the 'Comments'.
Sampling year	Member State shall detail the year or years for planned objectives. Different years shall be stated in different rows of the table. All years concerned shall be included.
Species	Member State shall report (in Latin) the name of the species/stocks for which biological variables sampling is required according to Tables 1(A), 1(B) and 1(C), for all areas where the Member State's fishing fleet is operating.
Region	Member State shall refer to the naming convention used in Table 5(C) of the multiannual Union programme (level II). If information refers to all regions, insert 'all regions'.
RFMO/RFO/IO	Member State shall enter the acronym of the competent regional fisheries management organisation (RFMO), regional fisheries organisation (RFO) or international organisation (IO) for providing management/advice on the species/stock. e.g. RFMO: ICCAT, GFCM, NAFO e.g. RFO: CECAF e.g. IO: ICES If no RFMO, RFO or IO is applicable, 'NA' (not applicable) is used.
Area/Stock	Member State shall indicate the fishing ground of the mentioned species/stock (e.g. GSA 16; ICES areas I, II; ICES areas IIIa, IV, VIIId, etc.).
Variables	Member State shall report the variables length, age, weight, sex ratio, sexual maturity and fecundity, as given in Table 1B of this Annex. Combination of species and variables as indicated in Table 1B of this Annex shall match with this information.
Data sources	Member State shall give a keyword description of the main data sources (e.g. surveys, commercial samples, market samples, discard samples, etc.). Member State shall report separately the planned sampling for 'commercial fisheries' and 'surveys'.

Name of the variable	Guidance
Planned minimum No of individuals to be measured at the national level	Member State shall state the total planned minimum number of fish to be measured at the national level. Use 'Comments' to briefly define the methodology used to obtain these values (e.g. previous sampling, simulation, etc.).
Planned minimum No of individuals to be measured at the regional level	Member State shall state the planned minimum number of fish to sample as part of a regionally coordinated scheme if one exists or, otherwise, 'NA' (not applicable) is used. Use 'Comments' to briefly define the methodology used to obtain these values (e.g. previous sampling, simulation, etc.).
Comments	Any further comment.

Table 1D

Recreational fisheries

											WP	
											WP date of submission	31.10.2016
MS	Sampling year	Area/EMU	RFMO/RFO/IO	Species	Applicable (Species present in the MS?)	Reasons for not sampling	Threshold (Y/N)	Annual estimate of catch? (Y/N)	Annual percentage of released catch? (Y/N)	Collection of catch composition data? (Y/N)	Type of Survey	Comments
GBR	2017	North Sea and Eastern Arctic	ICES	<i>Gadus morhua</i>	Y			Y	Y	Y	National estimates of numbers of trips & on-site surveys of catch per unit effort	
NLD	2017	North Sea and Eastern Arctic	ICES	<i>Anguilla anguilla</i>	Y			Y	Y	Y	National estimates of numbers of angler & angler diaries	
GBR	2017	North Sea and Eastern Arctic	ICES	Sharks	N			Y	Y	Y	National estimates of numbers of trips & on-site surveys of catch per unit effort	
DEU	2017	Baltic Sea	ICES	Elasmobranchs	Y	No catches		N	N			
		Baltic Sea	ICES									
		Baltic Sea	ICES									
		North Atlantic	ICES									
		North Atlantic	ICES									
		North Atlantic	ICES									

											WP	
											WP date of submission	31.10.2016
MS	Sampling year	Area/EMU	RFMO/RFO/IO	Species	Applicable (Species present in the MS?)	Reasons for not sampling	Threshold (Y/N)	Annual estimate of catch? (Y/N)	Annual percentage of released catch? (Y/N)	Collection of catch composition data? (Y/N)	Type of Survey	Comments
		Mediterranean Sea and Black Sea	GFCM									
		Mediterranean Sea and Black Sea	GFCM									
		Mediterranean Sea and Black Sea	GFCM									

General comment: This table fulfils paragraph 2 point (a)(iv) of Chapter III of the multiannual Union programme and Article 2, Article 3 and Article 4 paragraph 1 of this Decision. This table is intended to specify data to be collected under Table 3 of the multiannual Union programme, which also includes marine and freshwater recreational catches for anadromous and catadromous species.

Name of the variable	Guidance
MS	Member State shall be given as ISO 3166-1 alpha-3 code, e.g. 'DEU'.
Sampling year	Member State shall state the year for planned sampling.
Area/EMU	Member State shall refer to the naming convention used in Table 3 of the multiannual Union programme In the case of eel, Eel Management Unit (EMU) shall be reported.
RFMO/RFO/IO	Member State shall enter the acronym of the competent regional fisheries management organisation (RFMO), regional fisheries organisation (RFO) or international organisation (IO) for providing management/advice on the species/stock. e.g. RFMO: ICCAT, GFCM, NAFO e.g. RFO: CECAF e.g. IO: ICES If no RFMO, RFO or IO is applicable, 'NA' (not applicable) is used.
Species	Member State shall report (in Latin, where possible) the name of the species for which recreational fisheries sampling is required according to Table 3 of the multiannual Union programme or identified by pilot studies and/or management needs for the recreational fishery (by region). All species shall be included even if the species is/are not present in the Member State.
Applicable (Species present in the MS?)	Member State shall indicate with 'Y' (yes) or 'N' (no) if the species is present in the Member State.
Reasons for not sampling	If the species is present in the Member State, but not collected, Member State shall indicate the reason(s) (free text) for not sampling this species, with specific references where appropriate (e.g. species not present in the area, regulations/laws in the country, fit the requested threshold, etc.).
Threshold (Y/N)	Member State shall indicate by 'Y' (yes) or 'N' (no) whether, for the mentioned species, a threshold applies, according to Chapter V of the multiannual Union programme.
Annual estimate of catch? (Y/N)	Member State shall indicate by 'Y' (yes) or 'N' (no) whether, for the mentioned species, the annual estimate of catch (weight and/or numbers) is planned.
Annual percentage of released catch? (Y/N)	Member State shall indicate by 'Y' (yes) or 'N' (no) whether, for the mentioned species, the annual percentage of released catch (rate of released fish) is planned.

Name of the variable	Guidance
Collection of catch composition data? (Y/N)	Member State shall indicate by 'Y' (yes) or 'N' (no) whether, for the mentioned species, the catch composition (e.g. length structure) is planned.
Type of survey	Member State shall indicate the types of survey that will be done to collect data on recreational fisheries (e.g. on-site surveys, telephone surveys, anglers' diaries, etc. or any combination of these).
Comments	Any further comment.

Pilot Study 1

Relative share of catches of recreational fisheries compared to commercial fisheries

General comment: This box fulfils paragraph 4 of Chapter V of the multiannual Union programme and Article 2 and Article 4 paragraph (3) point (a) of this Decision.

1. Aim of pilot study
2. Duration of pilot study
3. Methodology and expected outcomes of pilot study

(max. 900 words)

Table 1E

Anadromous and catadromous species data collection in fresh water

													WP	
													WP date of submission	31.10.2016
MS	Sampling period	Area	RFMO/RFO/IO	Species	Applicable (Y/N)	Reasons for not sampling	Water Body	Life stage	Fishery/Independent data collection	Method	Unit	Planned nos	Frequency	Comments
FIN	2017-2020	Baltic	NASCO	<i>Salmo salar</i>			RIVER AAA	parr	I	electrofishing	n. sites	40		
FIN	2017-2020	Baltic	NASCO	<i>Salmo salar</i>			RIVER AAA	smolt	I	trap	n. smolts	4 000		
FIN	2017-2020	Baltic	NASCO	<i>Salmo salar</i>			RIVER AAA	adult	I	counter	n. counter	1		
FIN	2017-2020	Baltic	NASCO	<i>Salmo salar</i>			RIVER AAA	adult	F	sampling	n. samples	100		
FIN	2017-2020	Baltic	ICES	<i>Anguilla anguilla</i>			RIVER EEE	glass	I	electrofishing	n. sites	40		
FIN	2017-2020	Baltic	ICES	<i>Anguilla anguilla</i>			RIVER EEE	yellow	I	trap	n. smolts	4 000		
FIN	2017-2020	Baltic	ICES	<i>Anguilla anguilla</i>			RIVER EEE	silver	I	counter	n. counter	1		
GBR	2017-2020	UK Northern	ICES	<i>Anguilla anguilla</i>			N/A	glass	F	sampling	n. samples	100		
GBR	2017-2020	UK Northern	ICES	<i>Anguilla anguilla</i>			N/A	yellow	I	trap	n. traps	1		
GBR	2017-2020	UK Northern	ICES	<i>Anguilla anguilla</i>			N/A	silver	I	electrofishing	n. sites	20		

General comment: This table fulfils paragraph 2 points (b) (c) of Chapter III of the multiannual Union programme and Article 2, Article 3 and Article 4 paragraph (1) of this Decision. This table is intended to specify data to be collected under Table 1(E) of the multiannual Union programme. Use this table to give an overview of the data to be collected on freshwater commercial fisheries for anadromous and catadromous species.

Name of the variable	Guidance
MS	Member State's name shall be given as ISO 3166-1 alpha-3 code, e.g. 'DEU'.
Sampling period	Member State shall state the period for planned sampling.
Area	In the case of eel, 'EMU' (Eel Management Unit) shall be reported. For all other cases, catchment basin shall be reported.
RFMO/RFO/IO	Member State shall enter the acronym of the competent regional fisheries management organisation (RFMO), regional fisheries organisation (RFO) or international organisation (IO) for providing management/advice on the species/stock. e.g. RFMO: ICCAT, GFCM, NAFO e.g. RFO: CECAF e.g. IO: ICES If no RFMO, RFO or IO is applicable, 'NA' (not applicable) is used.
Species	Member State shall report (in Latin) the name of the species. All species shall be reported even if the species is/are not present in the Member State.
Applicable (Y/N)	Member State shall indicate by 'Y' (yes) or 'N' (no) if the species is present in the Member State or if fisheries of this species is banned.
Reasons for not sampling	If the species is present in the Member State, but not collected, Member State shall indicate the reason(s) (free text) for not sampling this species (e.g. species not present in the area, regulations/laws in the Member State, fit the requested threshold, etc.).
Water body	Member State shall fill with the name of the river/system chosen (e.g. index river).
Life stage	Member State shall indicate the life stage of the species (e.g. adult, glass, silver, etc.).
Fishery/Independent data collection	Member State shall indicate whether data shall be derived from commercial catches (fishery) or from sources other than commercial catches (independent).
Method	Member State shall indicate the source(s) of data (e.g. trap, counter, logbooks, etc. or any combination of these methods) from which data will be derived.
Unit	For each method, the planned unit of data reporting shall be indicated (e.g. number of traps, number of counters, number of electrofishing, etc.).

Name of the variable	Guidance
Planned Nos	Member State shall indicate the quantitative objective planned (in numbers) for the unit chosen.
Frequency	Member State shall indicate the frequency at which sampling will take place ('M' (monthly), 'Q' (quarterly), 'A' (annually), 'O' (other) — please specify).
Comments	Any further comment.

Text Box 1E

Anadromous and catadromous species data collection in fresh water

General comment: This box fulfils paragraph 2 points (b) and (c) of Chapter III of the multiannual Union programme and Article 2 of this Decision.

Method selected for collecting data.

(max. 250 words per area)

Table 1F

Incidental by-catch of birds, mammals, reptiles and fish

							WP		
							WP date of submission		31.10.2016
MS	Sampling period/ year(s)	Region	RFMO/RFO/IO	Sub-area/Fishing ground	Scheme	Stratum ID code	Group of vulner- able species	Expected occurrence of recordings	Comments
FRA	2017-2018	North Sea and Eastern Arctic	ICES		demersal at sea	SCT SD1-5	birds		
FRA	2017-2018	Mediterranean Sea and Black Sea	GFCM						
FRA	2017-2018	North Sea and Eastern Arctic	ICES						

General comment: This table fulfils paragraph 3 point (a) of Chapter III of the multiannual Union programme and Article 2 of this Decision. This table is intended to specify data to be collected under Table 1(D) of the multiannual Union programme. Explain the sampling strategy planned.

Name of the variable	Guidance
MS	Member State's name shall be given as ISO 3166-1 alpha-3 code, e.g. 'DEU'.
Sampling period/year(s)	Member State shall state the period for planned sampling. Give the sampling year/years as '2017-2018'.
Region	Member State shall refer to the naming convention used in Table 5(C) of the multiannual Union programme (level II). If information refers to all regions, insert 'all regions'.
RFMO/RFO/IO	Member State shall enter the acronym of the competent regional fisheries management organisation (RFMO), regional fisheries organisation (RFO) or international organisation (IO) for providing management/advice on the species/stock. e.g. RFMO: ICCAT, GFCM, NAFO e.g. RFO: CECAF e.g. IO: ICES If no RFMO, RFO or IO is applicable, 'NA' (not applicable) is used.
Sub-area/Fishing ground	Member State shall indicate the fishing ground of the mentioned species/stock (e.g. GSA 16; ICES areas I, II; ICES areas IIIa, IV, VIIId, etc.).
Scheme	Member State shall state the sampling scheme: 'at markets', 'at sea', a combination of both methods or 'other'. Values shall match those reported in Table 4A and Table 4B of this Annex, unless directed schemes are in place.
Stratum ID code	Member State shall indicate a unique code to identify each stratum within the scheme. Values shall match those reported in Table 4A and Table 4B of this Annex, unless directed schemes are in place.
Group of vulnerable species	Member State shall indicate the group of species, based on provision 3(a) of Chapter III of the multiannual Union programme.
Expected occurrence of recordings	Member State shall indicate the expected occurrence of recordings for individuals caught as incidental by-catch, including releases, in accordance with Table 1(D) of the multiannual Union programme. Fill in with (+/-) number or 'X'.
Comments	Any further comment.

*Pilot Study 2***Level of fishing and impact of fisheries on biological resources and marine ecosystem**

General comment: This box fulfils paragraph 3 point (c) of Chapter III of the multiannual Union programme and Article 2 and Article 4 paragraph (3) point (b) of this Decision.

1. Aim of pilot study
2. Duration of pilot study
3. Methodology and expected outcomes of pilot study

(max. 900 words)

Table 1G

List of research surveys at sea

														WP		
														WP date of submission		31.10.2016
MS	Name of survey	Ac- ronym	Manda- tory (Y/N)	Thresh- old (Y/N)	Agreed at RCG level	MS par- ticipa- tion	Area(s) covered	Period (Month)	Fre- quency	Days at sea planned	Type of sampl- ing activities	Planned target	Map	Relevant inter- national plan- ning group - RFMO/RFO/IO	Internat- ional database	Comments
NLD	Demersal Young Fish Survey						IVc	Sept- Oct	Annual	10	Fish Hauls	33	Fig 7.1	ICES PGIPS		
NLD	NS Herring Acous- tic Survey						IIIa, IV	July	Annual	15	Echo Nm	50	Fig 7.2	ICES PGIPS		
NLD	NS Herring Acous- tic Survey						IIIa, IV	July	X	15	Plank- ton hauls	15	Fig 7.2	ICES PGIPS		

General comment: This table fulfils Chapter IV and Chapter V of the multiannual Union programme and Article 2 and Article 3 of this Decision. This table is intended to specify which research surveys at sea set out in Table 10 of the multiannual Union programme and which additional surveys will be carried out by the Member State.

Name of the variable	Guidance
MS	Member State's name shall be given as ISO 3166-1 alpha-3 code, e.g. 'DEU'.
Name of survey	Member State shall state the name of the survey. For mandatory surveys the name shall be the same as the one used in Table 10 of the multiannual Union programme.
Acronym	Member State shall state the acronym of the survey. For mandatory surveys the acronym shall be the same as the one used in Table 10 of multiannual Union programme.
Mandatory (Y/N)	Member State shall enter 'Y' (yes) or 'N' (no) if the survey is included in Table 10 of the multiannual Union programme.
Threshold (Y/N)	Member State shall enter 'Y' (yes) or 'N' (no) if a threshold applies, according to provision 7 of Chapter V of the multiannual Union programme. If 'Y' (yes), describe in more detail in Text Box 1G of this Annex.
Agreed at RCG level	Member State shall enter 'Y' (yes) or 'N' (no) if the survey is agreed at marine region level.
MS participation	Indicate whether other Member State(s) are participating in the survey and the form of participation ('F' (financial), 'T' (technical), 'E' (effort) or 'C' (combination)). Describe in more detail in Text Box 1G of this Annex. If no other Member State is participating in the survey, this field shall be filled with 'NA' (not applicable).
Area(s) covered	Member State shall indicate the areas planned to be covered. For mandatory surveys the area shall be the same as the one used in Table 10 of the multiannual Union programme.
Period (Month)	Member State shall indicate the time period (in months) planned to be covered. For mandatory surveys the time period shall be as the one used in Table 10 of multiannual Union programme.
Frequency	Member State shall indicate the frequency of the survey: 'Annual', 'Biennial', 'Triennial', etc.
Days at sea planned	Member State shall indicate the days at sea planned at national level.
Type of sampling activities	Member State shall state the type of core sampling activities. Core sampling activities are those agreed in the relevant group in charge of planning the survey, as opposed to additional sampling activities. Use a separate line for each type of sampling activity. Member State is prompted to use the following categories: fish hauls, conductivity temperature density (CTD), plankton hauls, etc.
Planned target	Member State shall indicate the number of planned sampling activities.

Name of the variable	Guidance
Map	Member State shall add reference to the map, as included in Text Box 1G of this Annex.
Relevant international planning group — RFMO/RFO/IO	Member State shall enter the relevant international group in charge of planning the survey and its corresponding RFMO/RFO/IO. Member State shall enter the acronym of the competent regional fisheries management organisation (RFMO), regional fisheries organisation (RFO) or international organisation (IO) for providing management/advice on the species/stock. e.g. RFMO: ICCAT, GFCM, NAFO e.g. RFO: CECAF e.g. IO: ICES If no RFMO, RFO or IO is applicable, 'NA' (not applicable) is used.
International database	Member State shall state the name of the international database, in relation to the data collected under the research survey, or enter 'no existing database'. This applies to the existence of an international database, not to the fact that data are, or are not, uploaded.
Comments	Any further comment.

Text Box 1G

List of research surveys at sea

General comment: This box fulfils Chapter IV of the multiannual Union programme and Article 2 and Article 7 paragraph (3) of this Decision. It is intended to specify which research surveys at sea set out in Table 10 of the multiannual Union programme will be carried out. Member States shall specify whether the research survey is included in Table 10 of the multiannual Union programme or whether it is an additional survey.

1. Objectives of the survey
2. Description of the methods used in the survey. For mandatory surveys, link to the manuals. Include a graphical representation (map)
3. For internationally coordinated surveys, describe the participating Member States/vessels and the relevant international group in charge of planning the survey
4. Where applicable, describe the international task-sharing (physical and/or financial) and the cost-sharing agreement used
5. Explain where thresholds apply

(max. 450 words per survey)

Table 1H

Research survey data collection and dissemination

			WP			
			WP date of submission			31.10.2016
MS	Name of survey	Acronym	Type of data collected	Core/Additional variable	Used as basis for advice (Y/N)	Comments
NLD	North Sea IBTS	IBTS_NS_Q1	Biological data for Cod IVa	C	Y	
NLD	North Sea IBTS	IBTS_NS_Q1	Biological data for Sprat IVa	C	Y	
NLD	North Sea IBTS	IBTS_NS_Q1	Herring Larvae	C	Y	
NLD	North Sea IBTS	IBTS_NS_Q1	CTD by Haul	A	N	
NLD	North Sea IBTS	IBTS_NS_Q1	Litter items in the trawl	A	N	
NLD	North Sea IBTS	IBTS_NS_Q1	Benthos in the trawl	A	N	
NLD	Internation Blue whiting Acoustic survey	BWAS	Blue whiting acoustic/biological data	C	Y	
NLD	Internation Blue whiting survey	BWAS	Marine Mammal observations	A	N	
NLD	International Mackerel and Horse Mackerel Egg Survey	MEGS	Mackerel Egg production	C	Y	
NLD	International Mackerel and Horse Mackerel Egg Survey	MEGS	CTD by Haul	C	Y	
ITA	Mediterranean international bottom trawl survey	MEDITS	biological data for Horse Mackerel	C	Y	
ITA	Mediterranean international bottom trawl survey	MEDITS	biological data for striped red Mullet	C	Y	

General Comment: This table fulfils Chapter IV of the multiannual Union programme. This table is intended to specify data to be collected in relation to the research surveys at sea that are described in Table 1G of this Annex.

Name of the variable	Guidance
MS	Member State's name shall be given as ISO 3166-1 alpha-3 code, e.g. 'DEU'.
Name of survey	Member State shall state the name of the survey. For mandatory surveys the name shall be the same as the one used in Table 10 of the multiannual Union programme.
Acronym	Member State shall state the acronym of the survey. For mandatory surveys the acronym shall be the same as the one used in Table 10 of multiannual Union programme.
Type of data collected	Member State shall state the type of data collected. Use a separate line for each type of data collected. Member State is prompted to use the following categories: biological data for a given stock, larvae data for a given stock, egg production for a given stock, CTD by haul, litter by haul, marine mammal, turtles, sea bird observations, benthos in the trawl, etc. In the case of multispecies surveys, different stocks may be grouped.
Core/Additional variable	Core variables are those resulting from core sampling activities driving the survey design. Additional variables are all the rest. Reporting of additional variables is not mandatory.
Used as basis of advice (Y/N)	Member State shall enter 'Y' (yes) or 'N' (no) if the data collected is expected to be used as basis for advice. Member State can specify in the 'Comments' the type of advice (stock assessment, integrated ecosystem assessment, national advice, etc.).
Comments	Any further comment.

SECTION 2
FISHING ACTIVITY DATA

Table 2A

Fishing activity variables data collection strategy

												WP	
												WP date of submission	31.10.2016
MS	Supra region	Region	Variable Group	Fishing technique	Length class	Metiers (level 6)	Data collected under control regulation appropriate for scientific use (Y/N/I)	Type of data collected under control regulation used to calculate the estimates	Expected coverage of data collected under control regulation (% of fishing trips)	Additional data collection (Y/N)	Data collection scheme	Planned coverage of data collected under complementary data collection (% of fishing trips)	Comments
FRA	North Atlantic	North Sea and Eastern Arctic	Effort	Beam trawlers	18-< 24 m	All metiers	I	Sales notes	50 %	Y	Probability sampling survey	5 %	
FRA	North Atlantic	North Sea and Eastern Arctic	Effort	Beam trawlers	40 m or larger	OTB-DEF8090	Y	Logbooks, VMS data, Sales notes	100 %	N	None	NA	
FRA	North Atlantic	North Sea and Eastern Arctic	Landings	Drift and/or fixed netters	12-< 18 m	All metiers	I	Fishing forms, Sales notes	75 %	Y	Indirect survey	10 %	
FRA	North Atlantic	North Sea and Eastern Arctic	Landings			All metiers	N	NA	NA	Y	Non probability sampling survey	5 %	
FRA	North Atlantic	North Sea and Eastern Arctic	Capacity			All metiers	I	Logbooks, Sales notes	90 %	Y	Census survey	100 %	
FRA	North Atlantic	North Sea and Eastern Arctic											

												WP	
												WP date of submission	31.10.2016
MS	Supra region	Region	Variable Group	Fishing technique	Length class	Metiers (level 6)	Data collected under control regulation appropriate for scientific use (Y/N/I)	Type of data collected under control regulation used to calculate the estimates	Expected coverage of data collected under control regulation (% of fishing trips)	Additional data collection (Y/N)	Data collection scheme	Planned coverage of data collected under complementary data collection (% of fishing trips)	Comments
FRA	North Atlantic	North Sea and Eastern Arctic											
FRA	North Atlantic	North Sea and Eastern Arctic											
FRA	North Atlantic	North Sea and Eastern Arctic											
FRA	North Atlantic	North Sea and Eastern Arctic											
FRA	North Atlantic	North Sea and Eastern Arctic											
FRA	North Atlantic	North Sea and Eastern Arctic											
FRA	North Atlantic	North Sea and Eastern Arctic											
FRA	North Atlantic	North Sea and Eastern Arctic											
FRA	North Atlantic	North Sea and Eastern Arctic											
FRA	Mediterranean Sea and Black Sea	Mediterranean Sea and Black Sea											

												WP	
												WP date of submission	31.10.2016
MS	Supra region	Region	Variable Group	Fishing technique	Length class	Metiers (level 6)	Data collected under control regulation appropriate for scientific use (Y/N/I)	Type of data collected under control regulation used to calculate the estimates	Expected coverage of data collected under control regulation (% of fishing trips)	Additional data collection (Y/N)	Data collection scheme	Planned coverage of data collected under complementary data collection (% of fishing trips)	Comments
FRA	Mediterranean Sea and Black Sea	Mediterranean Sea and Black Sea											
FRA	Mediterranean Sea and Black Sea	Mediterranean Sea and Black Sea											
FRA	Mediterranean Sea and Black Sea	Mediterranean Sea and Black Sea											
FRA	Mediterranean Sea and Black Sea	Mediterranean Sea and Black Sea											
FRA	Mediterranean Sea and Black Sea	Mediterranean Sea and Black Sea											
FRA	Mediterranean Sea and Black Sea	Mediterranean Sea and Black Sea											

General comment: This table fulfils provision 4 of Chapter III of the multiannual Union programme and Article 2 and Article 4 paragraph (2) point (a) of this Decision. This table is intended to state and describe the method used to derive estimates on representative samples where data are not to be recorded under Regulation (EU) No 1224/2009 or where data collected under Regulation (EU) No 1224/2009 are not at the right aggregation level for the intended scientific use.

Name of the variable	Guidance
MS	Member State's name shall be given as ISO 3166-1 alpha-3 code, e.g. 'DEU'.
Supra region	Member State shall refer to the naming convention used in Table 5(C) of the multiannual Union programme (level III). If information refers to all regions, insert 'all regions'.
Region	Member State shall refer to the naming convention used in Table 5(C) of the multiannual Union programme (level II). If information refers to all regions, insert 'all regions'.
Variable group	Member State shall refer to the naming convention used in Table 4 of the multiannual Union programme. It can be specified by variable, and not by variables group, if different sources are used for different variables within the same variables group.
Fishing technique	Member State shall refer to the naming convention used in Table 5(B) of the multiannual Union programme. Put an asterisk in the case the segment has been clustered with other segment(s) for data collection purposes. Inactive vessels shall be included as a separate segment.
Length class	
Metiers (level 6)	Member State shall refer to the naming convention used in Table 2 of the multiannual Union programme. Only to be identified if Member State has a specific sampling frame defined by 'metier by segment'. Otherwise Member State can provide 'all metiers' but the information has to be reported by 'fleet segment by metiers'.
Data collected under control regulation appropriate for scientific use (Y/N/I)	Member State shall enter 'Y' (yes), 'N' (no) or 'I' (insufficient).
Type of data collected under control regulation used to calculate the estimates	Member State shall enter the type of data collected: logbooks, sales notes, VMS data, fishing forms, etc.
Expected coverage of data collected under control regulation (% of fishing trips)	For each of the data sources, the planned coverage percentage, estimated on the basis of fishing trips, shall be provided as quality assurance and quality control framework indicators.

Name of the variable	Guidance
Additional data collection (Y/N)	Member State shall enter 'Y' (yes) or 'N' (no), if additional data collection is planned.
Data collection scheme	Member State shall enter the data collection scheme: probability sampling survey, non-probability sampling survey, indirect survey, census survey, none, etc.
Planned coverage of data collected under complementary data collection (% of fishing trips)	For each of the data sources, the planned coverage percentage, estimated on the basis of fishing trips, shall be provided as quality assurance and quality control framework indicators.
Comments	Any further comment.

Text Box 2A

Fishing activity variables data collection strategy

General comment: This box fulfils paragraph 4 of Chapter III of the multiannual Union programme and Article 2, Article 4 paragraph (2) point (b) and Article 5 paragraph (2) of this Decision. It is intended to describe the method used to derive estimates on representative samples where data are not to be recorded under Regulation (EU) No 1224/2009 or where data collected under Regulation (EU) No 1224/2009 are not at the right aggregation level for the intended scientific use.

1. Description of methodologies used to cross-validate the different sources of data
2. Description of methodologies used to estimate the value of landings
3. Description of methodologies used to estimate the average price (it is recommended to use weighted averages, trip by trip)
4. Description of methodologies used to plan collection of the complementary data (sample plan methodology, type of data collected, frequency of collection, etc.)

(max. 900 words per region)

SECTION 3
ECONOMIC AND SOCIAL DATA

Table 3A

Population segments for collection of economic and social data for fisheries

									WP	
									WP date of submission	31.10.2016
MS	Supra region	Fishing technique	Length class	Type of variables (E/S)	Variable	Data Source	Type of data collection scheme	Frequency	Planned sample rate %	Comments
ESP	Baltic Sea, North Sea and Eastern Arctic, and North Atlantic	Beam trawlers	18-< 24 m	E	Gross value of landings	questionnaires	A - Census			
ESP	Baltic Sea, North Sea and Eastern Arctic, and North Atlantic	Beam trawlers	40 m or larger	E	Other income	questionnaires	B - Probability Sample Survey			
ESP	Mediterranean Sea and Black Sea	Drift and/or fixed netters	12-< 18 m	E	Wages and salaries of crew	questionnaires	C - Non-Probability Sample Survey			
				S	Employment by gender					

General comment: This table fulfils paragraph 5 points (a) and (b) of Chapter III of the multiannual Union programme and Article 2, Article 3 and Article 4 paragraphs (1) and (2) of this Decision. This table is intended to specify data to be collected under Tables 5(A) and 6 of the multiannual Union programme. Use this table to give an overview of the population for economic and social data in the fisheries sector.

Name of the variable	Guidance
MS	Member State's name shall be given as ISO 3166-1 alpha-3 code, e.g. 'DEU'.
Supra region	Member State shall refer to the naming convention used in Table 5(C) of the multiannual Union programme (level III). If information refers to all regions, insert 'all regions'.
Fishing technique	Member State shall refer to the naming convention used in Table 5(B) of the multiannual Union programme. Put an asterisk in the case the segment has been clustered with other segment(s) for data collection purposes. Inactive vessels shall be included as a separate segment.
Length class	
Type of variables (E/S)	Member State shall enter the category that the variables belong to: 'E' (economic) or 'S' (social), based on Table 5(A) of the multiannual Union programme for the economic variables and Table 6 of the multiannual Union programme for the social variables.
Variable	Member State shall refer to the naming convention used in Table 5(A) of the multiannual Union programme, 2nd column for the economic variables and Table 6 of the multiannual Union programme for the social variables.
Data Source	Member State shall enter the data sources used (logbook, sales notes, accounts, questionnaires, etc.). Data sources shall be clearly stated for each variable.
Type of data collection scheme	Member State shall enter the code of the data collection scheme, as follows: A — Census; B — Probability sample survey; C — Non-probability sample survey; D — Indirect survey. In case the variable is not directly collected but estimated, indirect survey is applied. In that case, further explanation on the data collection scheme and estimation method is provided in Text Box 3A of this Annex.
Frequency	Member State shall enter the frequency that economic and social data are to be collected according to provision 5(a)(b) of Chapter III of the multiannual Union programme.
Planned sample rate %	The planned sample rate (%) shall be based on the fleet population, which is defined as vessels included in the Fleet Register on the 31 December and any active vessel fishing at least one day during the year. When data collection for some variables will not be implemented, the column 'Planned sample rate (%)' shall be filled in with 'N' (no). Planned sample rate can be modified based on updated information on the total population (fleet register).
Comments	Any further comment.

*Text Box 3A***Population segments for collection of economic and social data for fisheries**

General comment: This box fulfils paragraph 5 points (a) and (b) of Chapter III of the multiannual Union programme and Article 2, Article 4 paragraphs (1), (2) and (5) and Article 5 paragraph (2) of this Decision. It is intended to specify data to be collected under Tables 5(A) and 6 of the multiannual Union programme.

1. Description of methodologies used to choose the different sources of data
2. Description of methodologies used to choose the different types of data collection
3. Description of methodologies used to choose sampling frame and allocation scheme
4. Description of methodologies used for estimation procedures
5. Description of methodologies used on data quality

(max. 900 words per region)

*Pilot Study 3***Data on employment by education level and nationality**

General comment: This box fulfils paragraph 5 point (b) and paragraph 6 point (b) of Chapter III of the multiannual Union programme and Article 2 and Article 3 paragraph (3) point (c) of this Decision. It is intended to specify data to be collected under Table 6 of the multiannual Union programme.

1. Aim of pilot study
2. Duration of pilot study
3. Methodology and expected outcomes of pilot study

(max. 900 words)

Table 3B

Population segments for collection of economic and social data for aquaculture

									WP	
									WP date of submission	31.10.2016
MS	Techniques	Species group	Type of variables (E/S)	Variable	Data source	Type of data collection scheme	Threshold (Y/N)	Frequency	Planned sample rate %	Comments
DEU	Hatcheries and Nurseries	other marine fish	E	Turnover	Financial accounts	A - Census				
DEU	Cages	sea bass & sea bream	E	Energy costs	questionnaires	B - Probability Sample Survey				
DEU	Cages	salmon	E	Energy costs	questionnaires	C - Non-Probability Sample Survey				
			S	Unpaid labour by gender						

General comment: This table fulfils paragraph 6 points (a) and (b) of Chapter III and Chapter V of the multiannual Union programme and Article 2, Article 3 and Article 4 paragraph (1) of this Decision. This table is intended to specify data to be collected under Tables 6 and 7 of the multiannual Union programme. Use this table to give an overview of the collection of economic and social data of the aquaculture sector.

Name of the variable	Guidance
MS	Member State's name shall be given as ISO 3166-1 alpha-3 code, e.g. 'DEU'.
Techniques	Member State shall follow Table 9 of the multiannual Union programme for the segmentation to be applied for the collection of aquaculture data.
Species group	
Type of variables (E/S)	Member State shall enter the category that the variables belong to: 'E' (economic) or 'S' (social), based on Table 7 of the multiannual Union programme for the economic variables and Table 6 of the multiannual Union programme for the social variables.
Variable	Member State shall refer to the naming convention used in Table 7 of the multiannual Union programme, second column for the economic variables and Table 6 of the multiannual Union programme for the social variables.
Data source	Member State shall enter the data sources used (accounts, questionnaires, etc.). Data sources shall be clearly stated for each variable.
Type of data collection scheme	Member State shall enter the code of the data collection scheme, as follows: A — Census; B — Probability sample survey; C — Non-probability sample survey; D — Indirect survey. In case the variable is not directly collected but estimated, indirect survey is applied. In that case, further explanation on the data collection scheme and estimation method is provided in Text Box 3B of this Annex.
Threshold (Y/N)	Member State shall enter 'Y' (yes) or 'N' (no) if a threshold applies, according to Chapter V of the multiannual Union programme.
Frequency	Member State shall enter the frequency that economic and social data are to be collected, according to provision 6(a)(b) of Chapter III of the multiannual Union programme.
Planned sample rate %	The planned sample rate (%) shall be based on the population, as defined in provision 6(a) of Chapter III of the multiannual Union programme. When data collection for some variables will not be implemented, the column 'Planned sample rate (%)' shall be filled in with 'N' (no). Planned sample rate can be modified based on updated information on the total population.
Comments	Any further comment.

*Text Box 3B***Population segments for collection of economic and social data for aquaculture**

General comment: This box fulfils paragraph 6 points (a) and (b) of Chapter III of the multiannual Union programme and Article 2, Article 4 paragraphs (1) and (5) and Article 5 paragraph (2) of this Decision. It is intended to specify data to be collected under Tables 6 and 7 of the multiannual Union programme.

1. Description of methodologies used to choose the different sources of data
2. Description of methodologies used to choose the different types of data collection
3. Description of methodologies used to choose sampling frame and allocation scheme
4. Description of methodologies used for estimation procedures
5. Description of methodologies used on data quality

(max. 1 000 words)

*Pilot Study 4***Environmental data on aquaculture**

General comment: This box fulfils paragraph 6 point (c) of Chapter III of the multiannual Union programme and Article 2 and Article 4 paragraph (3) point (d) of this Decision. It is intended to specify data to be collected under Table 8 of the multiannual Union programme.

1. Aim of pilot study
2. Duration of pilot study
3. Methodology and expected outcomes of pilot study

(max. 900 words)

Table 3C

Population segments for collection of economic and social data for the processing industry

							WP	
							WP date of submission	31.10.2016
MS	Segment	Type of variables (E/S)	Variables	Data sources	Type of data collection scheme	Frequency	Planned sample rate %	Comments
ESP	Companies <= 10	E	Turnover	financial accounts	B - Probability Sample Survey			
ESP	Companies 11-49	E	Other operational costs	questionnaires	B - Probability Sample Survey			
ESP	Companies 50-250	E	Other operational costs	questionnaires	A - Census			
ESP	Companies > 250	E	Other income	questionnaires	B - Probability Sample Survey			
ESP		S	Unpaid labour by gender					

General comment: This table fulfils footnote 6 of paragraph 1.1(d) of Chapter III of the multiannual Union programme and Article 2, Article 3 and Article 4 paragraph (1) of this Decision. This table is intended to specify data to be collected under Table 11 of the multiannual Union programme. Use this table to give an overview of the collection of economic and social data of the processing industry. Specify data collection for variables not covered by the ESTAT or for which additional sampling is required. Economic data shall be collected on fish processing companies below 10 employees as well as for companies which have fish processing as a secondary activity, as well as for unpaid labour and raw material. Employment data, by gender, shall be collected for all companies' sizes.

Name of the variable	Guidelines
MS	Member State's name shall be given as ISO 3166-1 alpha-3 code, e.g. 'DEU'.
Segment	The criteria for the segmentation shall be the number of persons employed. The following segmentation is recommended: companies ≤ 10; companies 11-49; companies 50-250; companies > 250.
Type of variables (E/S)	Member State shall enter the category that the variables belong to: 'E' (economic) or 'S' (social), based on Table 11 of the multiannual Union programme.
Variables	Member State shall refer to the naming convention used in Table 11 of the multiannual Union programme.
Data Sources	Member State shall enter the data sources used (accounts, questionnaires, etc.). Data sources shall be clearly stated for each variable.
Type of data collection scheme	Member State shall enter the code of the data collection scheme, as follows: A — Census; B — Probability sample survey; C — Non-probability sample survey; D — Indirect survey. In case the variable is not directly collected but estimated, indirect survey is applied. In that case, further explanation on the data collection scheme and estimation method is provided in Text Box 3C of this Annex.
Frequency	Member State shall enter the frequency that economic and social data shall be collected.
Planned sample rate %	The planned sample rate (%) shall be based on the population. When data collection for some variables will not be implemented, the column 'Planned sample rate (%)' shall be filled in with 'N' (no). Planned sample rate can be modified based on updated information on the total population.
Comments	Any further comment.

Text Box 3C

Population segments for collection of economic and social data for the processing industry

General comment: This box fulfils footnote 6 of paragraph 1.1(d) of Chapter III of the multiannual Union programme, Article 2, Article 4 paragraphs (1) and (5) and Article 5 paragraph (2) of this Decision. It is intended to specify data to be collected under Table 11 of the multiannual Union programme.

1. Description of methodologies used to choose the different sources of data
2. Description of methodologies used to choose the different types of data collection
3. Description of methodologies used to choose sampling frame and allocation scheme
4. Description of methodologies used for estimation procedures
5. Description of methodologies used on data quality

(max. 1 000 words)

SAMPLING STRATEGY FOR BIOLOGICAL DATA FROM COMMERCIAL FISHERIES

Table 4A

Sampling plan description for biological data

											WP			
											WP date of submission			31.10.2016
MS	MS partici- pating in sampling	Region	RFMO/ RFO/IO	Sub-area/ Fishing ground	Scheme	Stratum ID code	PSU type	Catch fractions covered	Species/Stocks covered for esti- mation of volume and length of catch fractions	Season- ality (Temporal strata)	Reference years	Average Number of PSU during the refer- ence years	Planned number of PSUs	Comments
GBR		NSEA NA			Demersal at-sea	SCT SD1-5	vessel x trip			annual		~ 4 000	40	
GBR		NSEA NA			Demersal at-sea	SCT SD2-5	vessel x trip			annual		~ 500	10	
GBR		NSEA NA			Demersal at-sea	SCT SD3-5	vessel x trip			annual		~ 2 000	6	
GBR		NSEA NA			Demersal at-sea	SCT SD4-5	vessel x trip			annual		~ 750	20	
GBR		NSEA NA			Demersal at-sea	SCT SD5-5	vessel x trip			annual		~ 15 000	6	
GBR		NSEA NA			Demersal on- shore	SCT LD1-4	port X day			annual		~ 345	60	
GBR		NSEA NA			Demersal on- shore	SCT LD2-4	port X day			annual		~ 7 000	20	
GBR		NSEA NA			Demersal on- shore	SCT LD3-4	port X day			annual		~ 3 000	25	

											WP			
											WP date of submission			31.10.2016
MS	MS participating in sampling	Region	RFMO/ RFO/IO	Sub-area/ Fishing ground	Scheme	Stratum ID code	PSU type	Catch fractions covered	Species/Stocks covered for esti- mation of volume and length of catch fractions	Season- ality (Temporal strata)	Reference years	Average Number of PSU during the refer- ence years	Planned number of PSUs	Comments
GBR		NSEA NA			Demersal on- shore	SCT LD4-4	port X day			annual		~ 1 000	30	
		North Atlantic	NAFO	NAFO	sampling at sea	L3	vessel trip			annual	2015-2017	71	9	
		Other Regions	IOTC	FAO 51 + 57	sampling on shore	T18	vessel trip			annual	2015-2017	157	120	

General comment: This table fulfils Article 3, Article 4 paragraph (4) and Article 8 of this Decision and forms the basis for the fulfilment of paragraph 2 point (a)(i) of Chapter III of the multiannual Union programme. This table refers to data to be collected under Tables 1(A), 1(B) and 1(C) of the multiannual Union programme. Use this table to identify all fishery-dependent sampling schemes in the Member State. The Member State shall list the strata within the scheme, the primary sampling unit (PSU) type and the envisaged number of PSUs that will be available in the year of submission. For each stratum, Member State shall record the number of PSUs it is planning to undertake.

Name of the variable	Guidance
MS	Member State's name shall be given as ISO 3166-1 alpha-3 code, e.g. 'DEU'.
MS participating in sampling	If the sampled activity has been carried out according to a regionally coordinated programme, all participating Member States shall be listed. Otherwise, the Member State responsible for the sampling shall be listed. Links to planned regional and international coordination or bi- and multilateral agreements, where available, shall be listed in the 'Comments'.
Region	Member State shall refer to the naming convention used in Table 5(C) of the multiannual Union programme (level II). If information refers to all regions, insert 'all regions'.
RFMO/RFO/IO	Member State shall enter the acronym of the competent regional fisheries management organisation (RFMO), regional fisheries organisation (RFO) or international organisation (IO) for providing management/advice on the species/stock. e.g. RFMO: ICCAT, GFCM, NAFO e.g. RFO: CECAF e.g. IO: ICES If no RFMO, RFO or IO is applicable, 'NA' (not applicable) is used.
Sub-area/Fishing ground	Member State shall indicate the fishing ground (e.g. the ICES area, the GFCM GSA, the NAFO area, etc.).
Scheme	Member State shall state the sampling scheme: 'at markets', 'at sea', a combination of both methods or 'other'. If 'other' is used (e.g. 'other (Market stock-specific sampling)'), it shall be described in Text Box 4A of this Annex.
Stratum ID code	Member State shall indicate a unique code to identify each stratum within the scheme. Free text or coding can be used, but it shall always coincide with the 'stratum ID code', as in Table 4B of this Annex. Strata with no coverage (i.e. no planned number of PSUs) shall also be detailed, in order to provide measurement on coverage of the sampling plan.
PSU type	Member State shall indicate the primary sampling unit (PSU) inside each stratum. PSU could be fishing trip, fishing vessel, port, fishing day, etc.
Catch fractions covered	Member State shall indicate which fraction of the catch is to be sampled. Insert 'Catch', if the bulk catch is sampled, 'Landings', 'Discards', 'Landings+Discards', etc.

Name of the variable	Guidance
Species/Stocks covered for estimation of volume and length of catch fractions	Member State shall indicate if the sampling plan covers all or only a part of the species. Insert 'all species and stocks', 'only stocks in Table 1A, 1B and 1C', 'selected species/stocks' and specify further in 'Comments'.
Seasonality (Temporal strata)	Member State shall provide a keyword description of the sampling scheme in terms of temporal stratification: 'monthly', 'quarterly', 'annual', etc.
Reference years	Member State shall indicate the year(s) used as a reference for the expected primary sampling units in the year of implementation of the sampling scheme. Member State shall use the three most recent years (e.g. '2014-2016'). Reasons may be given to justify the use of a different period.
Average number of PSUs during the reference years	Member State shall indicate the total number of PSUs calculated as the average values of the years used as reference.
Planned number of PSUs	Member State shall state the planned number of PSU to be sampled.
Comments	Any further comment.

Text Box 4A

Sampling plan description for biological data

General comment: This box fulfils Article 3, Article 4 paragraph (4) and Article 8 of this Decision and forms the basis for the fulfilment of paragraph 2 point (a)(i) of Chapter III of the multiannual Union programme. This Table refers to data to be collected under Tables 1(A), 1(B) and 1(C) of the multiannual Union programme.

Description of the sampling plan according to Article 5 paragraph (3) of this Decision

(max. 900 words per region)

Table 4B

Sampling frame description for biological data

				WP	
				WP date of submission	31.10.2016
MS	Stratum ID number	Stratum	Sampling frame description	Method of PSU selection	Comments
GBR	SCT SD1-5	North Sea offshore fish trawlers	Vessel list of 120 DTS >18 m	random draw from randomised list	
GBR	SCT SD2-5	North sea offshore prawn trawlers	Vessel list of 60 DTS targeting shell-fish	random draw from randomised list	
GBR	SCT SD3-5	North sea inshore trawlers	Vessel list of 250 DTS <18 m based in NS ports	random draw from randomised list	
GBR	SCT SD4-5	West coast offshore trawlers	Vessel list of 15 DTS >18 m based in WC ports	random draw from randomised list	
GBR	SCT SD5-5	Westcoast inshore trawlers	Vessel list of 2 500 DTS < 18 m based in WC ports	random draw from randomised list	
GBR	SCT LD1-4	NE main port	1 port active for ~ 345 days	random weekday from systematic (weekly) coverage	
GBR	SCT LD2-4	NE minor ports	25 ports active over 280 days	random weekday from systematic (weekly) coverage	
GBR	SCT LD3-4	W ports	10 ports active over ~ 300 days	random weekday from systematic (weekly) coverage	
GBR	SCT LD4-4	Island ports	4 ports active over ~ 250 days	random weekday from systematic (weekly) coverage	

				WP	
				WP date of submission	31.10.2016
MS	Stratum ID number	Stratum	Sampling frame description	Method of PSU selection	Comments
ESP	L3	trawlers operating in NAFO	vessels with licence to fish in NAFO	random draw from the list of vessels (without replacement)	
ESP	T18	purse seiners fishing tropical tunas in IOTC	purse seiners fishing in Indian Ocean and landing in the port of Victoria (Seychelles)	random draw from purse seiner vessels landing in the port of Victoria (Seychelles)	purse seiner fleet, fishing tropical tunas in Indian Ocean lands their catches in the ports of Victoria, Mahé, Mombasa, Antisarana, but due to the long distance, sampling can be performed only in the port of Victoria (where most of the fleet landings take place)

General comment: This table fulfils Article 3, Article 4 paragraph (4) and Article 8 of this Decision and forms the basis for the fulfilment of paragraph 2 point (a)(i) of Chapter III of the multiannual Union programme. This table refers to data to be collected under Tables 1(A), 1(B) and 1(C) of the multiannual Union programme. Use this table to provide more detail on the strata and sampling frames of each scheme.

Name of the variable	Guidance
MS	Member State shall be given as ISO 3166-1 alpha-3 code, e.g. 'DEU'.
Stratum ID code	Member State shall indicate a unique code to identify each stratum within the scheme. Free text or coding can be used, but it shall always coincide with the 'stratum ID code', as in Table 4A of this Annex. Strata with no coverage (i.e. no planned number of PSUs) shall also be detailed, in order to provide measurement on coverage of the sampling plan.
Stratum	Member State shall insert a short description (free text) of the sampling strata (e.g. trawlers in the GSA 22; west coast purse-seiners; ports of the NW area, etc.).
Sampling frame description	Member State shall shortly describe (free text) the sampling frame for each stratum (e.g. list of vessels in the GSA 22; list of purse-seiners in the west coast; list of ports in the NW area).
Method of PSU selection	Member State shall indicate the method(s) (free text) for the selection of the primary sampling unit (PSU).
Comments	Any further comment.

Table 4C

Data on the fisheries by member state

										WP			
										WP date of submission			31.10.2016
MS	Region	RFMO/ RFO/IO	Sub-area/Fishing ground	Reference years	Fleet segment/ Metier	Targeted species/species assemblage	Average number of vessels	Average number of fishing trips	Average number of fishing days	Average landings (tons)	Average landings (tons) in national ports	Average landings (tons) in foreign ports	Comments
DEU	Baltic Sea		ICES areas III b-d		demersal trawlers	bottom trawl mixed fishery	102	24 563		57 388	54 234	3 154	
DEU	Baltic Sea		ICES areas III b-d		demersal seine net	mixed whitefish	6	758		2 264	2 130	134	
DEU	Baltic Sea		ICES areas III b-d		pelagic	mackerel	25	89		119 745	98 403	21 342	
GBR	North Sea and Eastern Arctic		ICES Sub- areas I, II, IIIa, IV and VIId		OTB_CRU_16-22	shrimps	15	3 625		6 345	6 345	0	
GBR	North Atlantic	NAFO	NAFO	2015-2017	OTB_MD D_130-219_0_0	Mixed demersal and deep water species (Greenland Hali- but)	23	47	795	9 125	9 125	0	
GBR	North Atlantic	NAFO	NAFO	2015-2017	OTB_MD D_>=220_0_0	Mixed demersal and deep water species (skates)	19	20	342	4 648	4 648	0	
GBR	North Atlantic	NAFO	NAFO	2015-2017	OTB_CRU_40- 59_0_0	Crustaceans (northern shrimp)	2	2	12	25	25	0	

										WP			
										WP date of submission			31.10.2016
MS	Region	RFMO/ RFO/IO	Sub-area/Fishing ground	Reference years	Fleet segment/ Metier	Targeted species/species assemblage	Average number of vessels	Average number of fishing trips	Average number of fishing days	Average landings (tons)	Average landings (tons) in national ports	Average landings (tons) in foreign ports	Comments
GBR	North Atlantic	NAFO	NAFO	2015-2017	OTM_DEF_130- 135_0_0	Demersal species (alfonsino)	1	2	NA *	NA *	NA *	0	* Confidential data (only one vessel)
ESP	Other Regions	IOTC	FAO 51 + 57	2015-2017	PS_LPF_0_0_0 (TROP)	Tropical tunas (bigeye, skip- jack, yellowfin)	15	157	4 108	127 795	0	127 795	a different reference period (2015-2016) have been ta- ken because during the year 2017 most vessels moved to other regions due to the piracy

General comment: This table fulfils Article 4 paragraph (4) of this Decision and forms the basis for the fulfilment of paragraph 2 point (a)(i)(ii)(iii) of Chapter III of the multiannual Union programme. This table refers to data to be collected under Tables 1(A), 1(B) and 1(C) of the multiannual Union programme. Use this table to summarise the size and activity of the national fleet.

Name of the variable	Guidance
MS	Member State's name shall be given as ISO 3166-1 alpha-3 code, e.g. 'DEU'.
Region	Member State shall refer to the naming convention used in Table 5(C) of the multiannual Union programme (level II). If information refers to all regions, insert 'all regions'.
RFMO/RFO/IO	Member State shall enter the acronym of the competent regional fisheries management organisation (RFMO), regional fisheries organisation (RFO) or international organisation (IO) for providing management/advice on the species/stock. e.g. RFMO: ICCAT, GFCM, NAFO e.g. RFO: CECAF e.g. IO: ICES If no RFMO, RFO or IO is applicable, 'NA' (not applicable) is used.
Sub-area/Fishing ground	Member State shall indicate the fishing ground (e.g. the ICES area, the GFCM GSA, the NAFO area, etc.).
Reference years	Member State shall state the year(s) to which the description of the fisheries actually refers (e.g. 2014-2016). Member State shall select the three most recent years with data available.
Fleet Segment/metier	Data shall be reported by metier (at level 6) as defined in Table 2 of the multiannual Union programme, or fleet segment, as defined in Table 5(B) of the multiannual Union programme.
Targeted species/species assemblage	Member State shall indicate the target species assemblage ('Demersal species', 'Small pelagic fish', etc.) as indicated in Table 2 of the multiannual Union programme.
Average number of vessels	Member State shall indicate the average number of vessels by fleet segment/metier in the given reference years.
Average number of fishing trips	Member State shall indicate the average number of fishing trips by fleet segment/metier in the given reference years.
Average number of fishing days	Member State shall indicate the average number of fishing days by fleet segment/metier in the given reference years.
Average landings (tons)	Member State shall report the average volume in live weight (tons) of the total landings by fleet segment/metier in the given reference years. This column shall be obtained from the sum of the other two columns of this table: 'Average landings (tons) in national ports' and 'Average landings (tons) in foreign ports'.

Name of the variable	Guidance
Average landings (tons) in national ports	Member State shall report the average volume in live weight (tons) of the landings by fleet segment/metier in the given reference years.
Average landings (tons) in foreign ports	Member State shall report the average volume in live weight (tons) of the landings abroad by fleet segment/metier in the given reference years. If none, indicate '0'.
Comments	Any further comment.

Table 4D
Landing Locations

							WP			
							WP date of submission			31.10.2016
MS	Region	Sub-area/Fishing ground	Reference years	Landing locations(s)	Average number of locations	Average number of registered landings	Average landed tonnage	Average landed tonnage of national fleet	Average landed tonnage of foreign fleet	Comments
GBR	North Sea and Eastern Arctic	ICES Sub-areas I, II, IIIa, IV and VIIId	2015-2017	grouping 1	2	2 894	113 247	102 478	10 769	
GBR	North Sea and Eastern Arctic	ICES Sub-areas I, II, IIIa, IV and VIIId	2015-2017	grouping n	37	950	1 564	1 564	0	
GBR	North Sea and Eastern Arctic	ICES Sub-areas I, II, IIIa, IV and VIIId	2015-2017							
GBR	North Sea and Eastern Arctic	ICES Sub-areas I, II, IIIa, IV and VIIId								

General comment: This table fulfils Article 4 paragraph (4) of this Decision and forms the basis for the fulfilment of paragraph 2 point (a) (i)(ii)(iii) of Chapter III of the multiannual Union programme. This table refers to data to be collected under Tables 1(A), 1(B) and 1(C) of the multiannual Union programme. Use this table to summarise the characteristics of the landings into the Member State.

Name of the variable	Guidance
MS	Member State's name shall be given as ISO 3166-1 alpha-3 code, e.g. 'DEU'.
Region	Member State shall refer to the naming convention used in Table 5(C) of the multiannual Union programme (level II). If information refers to all regions, insert 'all regions'.
Sub-area/Fishing ground	Member State shall indicate the fishing ground (e.g. the ICES area, the GFCM GSA, the NAFO area, etc.).
Reference years	Member State shall state the year(s) to which the description of the landing locations actually refers (e.g. '2014-2016'). Member State shall select the three most recent years with data available.
Landing locations(s)	Member State shall fill in with free text describing the grouping/assemblage of landing locations (e.g. major ports, minor ports, ports, local ports, etc.), if available.
Average number of locations	Member State shall indicate the average number of landing locations by grouping/assemblage in the given reference years, if available.
Average number of registered landings	Member State shall indicate the average number of registered landing operations that took place by grouping/assemblage (if applicable) in the given reference years. As the previous fields are optional, this field could refer the average number of total landings operations in the Member State.
Average landed tonnage	Member State shall indicate the average volume in live weight (tons) of the total landing during the reference years. Data shall be reported by grouping/assemblage of landing places (if applicable). This column shall be given by the sum of the other two columns of this Table: 'Average landed tonnage of national fleet' and 'Average landed tonnage of foreign fleet'.
Average landed tonnage of national fleet	Member State shall indicate the average volume in live weight (tons) of the total landing made by Member State vessels during the reference years by grouping/assemblage of landing places (if applicable).
Average landed tonnage of foreign fleet	Member State shall indicate the average volume in live weight (tons) of the total landing made by foreign vessels during the reference years by grouping/assemblage of landing places (if applicable). If none, indicate '0'.
Comments	Any further comment.

SECTION 5
DATA QUALITY

Table 5A

Quality assurance framework for biological data

															WP			
															WP date of submission		31.10.2016	
							Sampling design		Sampling implementation	Data capture		Data Storage		Data processing				
MS	MS participating in sampling	Sampling year/period	Region	RFMO/RFO/IO	Name of sampling scheme	Sampling frame	Is the sampling design documented?	Where can documentation on sampling design be found?	Are non-responses and refusals recorded?	Are quality checks to validate detailed data documented?	Where can documentation on quality checks for data capture be found?	In which national database are data stored?	In which international database (s) are data stored?	Are processes to evaluate data accuracy (bias and precision) documented?	Where can documentation on processes to evaluate accuracy be found?	Are the editing and imputation methods documented?	Where can documentation on editing and imputation be found?	Comments
SWE	SWE	2017	NS&EA	ICES	sea-sampling	demersal trawlers	Y	xxxx	Y	Y	xxx	Fisk-Data2	RDB-Fish-Frame	N	xxxx			
SWE	SWE	2017	Baltic	ICES	shore sampling	cod landings	Y	xxxx	Y	Y	xxx	Fisk-Data2	RDB-Fish-Frame					
SWE	SWE	2017	NS&EA/Baltic	ICES	recreational survey				Y									

General comment: This table fulfils Article 5 paragraph (2) point (a) of this Decision. This table is intended to specify data to be collected under Tables 1(A), 1(B) and 1(C) of the multiannual Union programme. Use this table to state whether documentation in the data collection process (design, sampling implementation, data capture, data storage and data processing) exists and identify where this documentation can be found. Names on sampling schemes and strata shall be identical to those in Tables 4A and 4B of this Annex.

Name of the variable	Guidance
MS	Member State's name shall be given as ISO 3166-1 alpha-3 code, e.g. 'DEU'.
MS participating in sampling	If the sampling scheme is carried out within a regional/bilateral/multilateral coordinated programme, all participating Member States shall be given. If the sampling scheme is carried out unilaterally, the single Member State shall be given.
Sampling year/period	Member State shall state the year or period for planned sampling.
Region	Member State shall refer to the naming convention used in Table 5(C) of the multiannual Union programme (level II). If information refers to all regions, insert 'all regions'.
RFMO/RFO/IO	Member State shall enter the acronym of the competent regional fisheries management organisation (RFMO), regional fisheries organisation (RFO) or international organisation (IO) for providing management/advice on the species/stock. e.g. RFMO: ICCAT, GFCM, NAFO e.g. RFO: CECAF e.g. IO: ICES If no RFMO, RFO or IO is applicable, 'NA' (not applicable) is used.
Name of sampling scheme	Member State shall state the name of the sampling scheme. Names of sampling schemes shall be identical to the names used in Tables 4A and 4B of this Annex, in Table 1D of this Annex ('type of survey') and in Table 1E of this Annex ('species' *'method').
Sampling frame	Member State shall state the sampling frame. Names of sampling frames shall be identical to the names in Tables 4A and 4B of this Annex.
Is the sampling design documented?	Member State shall indicate with 'Y' (yes) or 'N' (no). If 'N' (no), indicate in the 'Comments' when (year) documentation will be available.
Where can documentation on sampling design be found?	Member State shall provide link to web page where the documentation can be found, if Member State responded 'Y' (yes) in previous field. Otherwise, insert 'NA' (not applicable).
Are non-responses and refusals recorded?	Member State shall indicate with 'Y' (yes) or 'N' (no). If 'N' (no), indicate in the 'Comments' when (year) documentation will be available.

Name of the variable	Guidance
Are quality checks to validate detailed data documented?	Member State shall indicate with 'Y' (yes) or 'N' (no). If 'N' (no), indicate in the 'Comments' when (year) documentation will be available.
Where can documentation on quality checks for data capture be found?	Member State shall provide link to web page where the documentation can be found, if Member State responded 'Y' (yes) in previous field. Otherwise, insert 'NA' (not applicable).
In which national database are data stored?	Member State shall provide the name of national database, if applicable. Otherwise, insert 'NA' (not applicable).
In which international database(s) are data stored?	Member State shall provide the name of international database(s), if applicable. Otherwise, insert 'NA' (not applicable).
Are processes to evaluate data accuracy (bias and precision) documented?	Member State shall indicate with 'Y' (yes) or 'N' (no). If 'N' (no), indicate in the 'Comments' when (year) documentation will be available.
Where can documentation on processes to evaluate accuracy be found?	Member State shall provide link to web page where the documentation can be found, if Member State responded 'Y' (yes) in previous field. Otherwise, insert 'NA' (not applicable).
Are the editing and imputation methods documented?	Member State shall indicate with 'Y' (yes) or 'N' (no). If 'N' (no), indicate in the 'Comments' when (year) documentation will be available.
Where can documentation on editing and imputation be found?	Member State shall provide link to web page where the documentation can be found, if Member State responded 'Y' (yes) in previous field. Otherwise, insert 'NA' (not applicable).
Comments	Any further comment. Use this field to indicate when documentation will be made available (if that presently is not the case).

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									WP	
Statistical Outputs									WP date of submission	31.10.2016
P9 Relevance	P10 Accuracy and reliability		P11 Timeliness and punctuality	P12 coherence and comparability		P13 Accessibility and Clarity			Comments	
Are end-users listed and updated?	Are sources, intermediate results and outputs regularly assessed and validated?	Are errors measured and documented?	Are procedures in place to ensure timely execution?	Are procedures in place to monitor internal coherence?	Are statistics comparable over time?	Are methodological documents publicly available?	Are data stored in databases?	Where can documentation be found?		

General comment: This table fulfils Article 5 paragraph (2) point (b) of this Decision. This table is intended to specify data to be collected under Tables 5(A), 6 and 7 of the multiannual Union programme. Use this table to state whether documentation in the data collection process exists and identify where this documentation can be found.

Name of the variable	Guidance
MS	Member State's name shall be given as ISO 3166-1 alpha-3 code, e.g. 'DEU'.
Sampling year/period	Member State shall state the year or period for planned sampling.
Region	Member State shall refer to the naming convention used in Table 5(C) of the multiannual Union programme (level II). If information refers to all regions, insert 'all regions'.
RFMO/RFO/IO/NSB	Member State shall enter the acronym of the competent regional fisheries management organisation (RFMO), regional fisheries organisation (RFO), international organisation (IO) or national statistical body (NSB) for providing management/advice on the species/stock. e.g. RFMO: ICCAT, GFCM, NAFO e.g. RFO: CECAF e.g. IO: ICES e.g. agencies, institutions dealing with socioeconomic statistics If no RFMO, RFO, IO or NSB is applicable, 'NA' (not applicable) is used.
Name of data collection scheme	Member State shall indicate the name of sampling schemes. They shall be identical to the names used in Table 3A, Table 3B and Table 3C of this Annex.
Name of data sources	Member State shall indicate the name of data sources. They shall be identical to the names used in Table 3A, Table 3B and Table 3C of this Annex.
Statistically sound sources and methods	Member State shall indicate with 'Y' (yes) or 'N' (no) whether statistically sound sources and methods are in place. If 'N' (no), indicate in the 'Comments' main constraints.
Error checking	Member State shall indicate with 'Y' (yes) or 'N' (no) whether errors discovered in published data are corrected at the earliest possible date and publicised. If 'N' (no), indicate in the 'Comments' main constraints.
Are procedures for confidential data handling in place and documented?	Member State shall indicate with 'Y' (yes) or 'N' (no) whether procedures for the enforcement, treatment and reduction of confidential data are in place and documented. If 'N' (no), indicate in the 'Comments' main constraints.
Are protocols to enforce confidentiality between DCF partners in place and documented?	Member State shall indicate with 'Y' (yes) or 'N' (no) whether protocols to enforce confidentiality between DCF partners are in place and documented. If 'N' (no), indicate in the 'Comments' main constraints.

Name of the variable	Guidance
Are protocols to enforce confidentiality with external users in place and documented?	Member State shall indicate with 'Y' (yes) or 'N' (no) whether protocols to enforce confidentiality with external users are in place and documented. If 'N' (no), indicate in the 'Comments' main constraints.
Is sound methodology documented?	Member State shall indicate with 'Y' (yes) or 'N' (no) whether sound methodology is documented. If yes, please provide reference. If 'N' (no), indicate in the 'Comments' main constraints.
Does it follow international standards, guidelines and best practices?	Member State shall indicate with 'Y' (yes) or 'N' (no) whether sound methodology follows international standards, guidelines and best practices. If 'Y' (yes), please provide reference. If 'N' (no), indicate in the 'Comments' main constraints.
Are methodologies consistent at MS, regional and EU level?	Member State shall indicate with 'Y' (yes) or 'N' (no) whether procedures are in place to ensure that standards, concepts, definitions and classifications are consistent between partners at Member State, regional and EU level. If 'N' (no), indicate in the 'Comments' main constraints.
Is there consistency between administrative and other statistical data?	Member State shall indicate with 'Y' (yes) or 'N' (no) whether procedures are in place to ensure the consistency of definitions and concepts between administrative and other statistical data. If 'N' (no), indicate in the 'Comments' main constraints.
Are there agreements for access and quality of administrative data between partners?	Member State shall indicate with 'Y' (yes) or 'N' (no) whether there are agreements in place to ensure access to relevant administrative data and quality of relevant administrative data between partners. If 'N' (no), indicate in the 'Comments' main constraints.
Are data collection, entry and coding checked?	Member State shall indicate with 'Y' (yes) or 'N' (no) whether data collection, data entry and coding are routinely monitored and revised, as required. If 'N' (no), indicate in the 'Comments' main constraints.
Are editing and imputation methods used and checked?	Member State shall indicate with 'Y' (yes) or 'N' (no) whether editing and imputation methods are used and regularly reviewed, revised or updated as required. If no, indicate in the 'Comments' main constraints.
Are revisions documented and available?	Member State shall indicate with 'Y' (yes) or 'N' (no) whether revisions are documented and available. If 'N' (no), indicate in the 'Comments' main constraints.
Is duplication of data collection avoided?	Member State shall indicate with Y (yes) or N (no) whether administrative sources are used whenever possible to avoid duplication of data collection and reduce burden on respondents. If 'N' (no), indicate in the 'Comments' main constraints.

Name of the variable	Guidance
Do automatic techniques for data capture, data coding and validation exist?	Member State shall indicate with 'Y' (yes) or 'N' (no) whether procedures and tools exist to implement automatic techniques for data capture, data coding and validation. If 'N' (no), indicate in the 'Comments' main constraints.
Are end-users listed and updated?	Member State shall indicate with 'Y' (yes) or 'N' (no) whether a list of key end-users and their data uses, including a list of unmet user needs, are available and regularly updated. If 'N' (no), indicate in the 'Comments' main constraints.
Are sources, intermediate results and outputs regularly assessed and validated?	Member State shall indicate with 'Y' (yes) or 'N' (no) whether data sources, intermediate results and statistical outputs are regularly assessed and validated. If 'N' (no), indicate in the 'Comments' main constraints.
Are errors measured and documented?	Member State shall indicate with 'Y' (yes) or 'N' (no) whether sampling errors and non-sampling errors are measured and systematically documented, according to the European standards. If 'N' (no), indicate in the 'Comments' main constraints.
Are procedures in place to ensure timely execution?	Member State shall indicate with 'Y' (yes) or 'N' (no) whether procedures exist to monitor the progress of the tasks and ensure their timely execution. If 'N' (no), indicate in the 'Comments' main constraints.
Are procedures in place to monitor internal coherence?	Member State shall indicate with 'Y' (yes) or 'N' (no) whether procedures to monitor internal coherence are developed and carried out in a systematic way and divergences explained. If 'N' (no), indicate in the 'Comments' main constraints.
Are statistics comparable over time?	Member State shall indicate with 'Y' (yes) or 'N' (no) whether statistics are comparable over a reasonable period of time, whether breaks in the time series are explained and whether methods to ensure reconciliation over a period of time are made available. If 'N' (no), indicate in the 'Comments' main constraints.
Are methodological documents publicly available?	Member State shall indicate with 'Y' (yes) or 'N' (no) whether methodological documents are readily available. If 'N' (no), indicate in the 'Comments' main constraints.
Are data stored in databases?	Member State shall indicate with 'Y' (yes) or 'N' (no) whether primary, detailed and aggregated data and associated metadata are stored in databases. If 'N' (no), indicate in the 'Comments' main constraints.
Where can documentation be found?	Give link to webpage where the documentation can be found, if Member State responded 'Y' (yes) in previous field. Otherwise, insert 'NA' (not applicable).
Comments	Any further comment. Use this field to indicate when documentation will be made available (if that presently is not the case).

SECTION 6
DATA AVAILABILITY

Table 6A
Data availability

						WP	
						WP date of submission	31.10.2016
MS	Data set	Section	Variable group	Year(s) of WP implementation	Reference year	Final data available after	Comments
SWE	Fleet economic	3A	Revenue/costs	N	N – 1	N + 1, March 1	
SWE	Aquaculture economic		all	N	N – 1	N + 1, March 1	
SWE	Fishing Activity Variable		capacity	N	N	N + 1, January 31	
SWE	Fishing Activity Variable		landings	N	N	N + 1, March 31	
SWE	Fish processing economic		all	N	N – 2	N + 1, November 1	

General comment: This table fulfils Article 6 of this Decision. Use this table to provide information on data availability to end-users per data set.

Name of the variable	Guidance
MS	Member State shall be given as ISO 3166-1 alpha-3 code, e.g. 'DEU'.
Data set	Member State shall refer to the data set for which information on availability will be given. The name of the data set can be derived by the title of the respective tables of this Annex.
Section	Member State shall refer to the specific section of the work plan.
Variable group	Member State shall refer to the specific variables in Tables 1B, 1E, 1I, 2A, 3A, 3B of this Annex. When reference is made to another table, this field can be left empty.
Year(s) of WP implementation	Member State shall refer to the year or years that the work plan will apply.
Reference year	Member State shall refer to the year of the foreseen collection of data.
Final data available after	Member State shall state after how many years from collection, the data will be available to end-users. Use year and month if applicable.
Comments	Any further comment.

SECTION 7
COORDINATION

Table 7A

Planned regional and international coordination

				WP	
				WP date of submission	31.10.2016
MS	Acronym	Name of meeting	RFMO/RFO/IO	Planned MS participation	Comments
SWE	RCM Med			X	
SWE	WGNSSK		ICES	X	
SWE	MEDITS			X	

General comment: This table fulfils Article 7 paragraph (1) of this Decision. Use this table to provide information on the planned participation of the Member State to meetings relevant for data collection under the DCF.

Name of the variable	Guidance
MS	Member State shall be given as ISO 3166-1 alpha-3 code, e.g. 'DEU'.
Acronym	Member State shall provide the official acronym of the meeting attended.
Name of the meeting	Member State shall provide the full official name of the meeting attended.
RFMO/RFO/IO	Member State shall enter the acronym of the competent regional fisheries management organisation (RFMO), regional fisheries organisation (RFO) or international organisation (IO) for providing management/advice on the species/stock. e.g. RFMO: ICCAT, GFCM, NAFO e.g. RFO: CECAF e.g. IO: ICES If no RFMO, RFO or IO is applicable, 'NA' (not applicable) is used.
Planned MS participation	Member State shall mark if it is planned to attend the meeting.
Comments	Any further comment.

Table 7B

Follow-up of recommendations and agreements

								WP	
								WP date of submission	31.10.2016
MS	Region	RFMO/RFO/IO	Source	Section	Topic	Recommendation number	Recommendation/ Agreement	Follow-up action	Comments
SWE	North Atlantic		LM 2014		Metier related variables				
LVA	Baltic		STECF 14-13	VII					
				III.C, III.E					
				III.F					
				all					

General comment: This table fulfils Article 7 paragraph (1) and Article 8 of this Decision. Use this table to provide information on how the Member State plans to fulfil the recommendations and agreements relating to data collection under the DCF at the European and international level.

Name of the variable	Guidance
MS	Member State shall be given as ISO 3166-1 alpha-3 code, e.g. 'DEU'.
Region	Member State shall refer to the naming convention used in Table 5(C) of the multi-annual Union programme (level II). If recommendation refers to all regions, insert 'all regions'.
RFMO/RFO/IO	Member State shall enter the acronym of the competent regional fisheries management organisation (RFMO), regional fisheries organisation (RFO) or international organisation (IO) for providing management/advice on the species/stock. e.g. RFMO: ICCAT, GFCM, NAFO e.g. RFO: CECAF e.g. IO: ICES If no RFMO, RFO or IO is applicable, 'NA' (not applicable) is used.
Source	Member State shall provide the source of recommendation in the form of the acronym of the relevant Regional Coordination Meeting (RCM)/Regional Coordination Group (RCG), Liaison Meeting (LM), STECF Expert Working Group (EWG), e.g. 'LM 2014', 'STECF EWG 14-07'.
Section	Member State shall refer to the work plan section, e.g. '1A', '1B', etc. If recommendation applies to several sections, insert the relevant sections. If recommendation applies to all sections, insert 'all'.
Topic	Member State shall refer to the topic to which recommendation applies, e.g. 'Data quality', 'Surveys', etc.
Recommendation number	Member State shall refer to the number assigned to an individual recommendation, where numbers exist.
Recommendation/Agreement	Member State shall refer to the relevant recommendations to the work plan reference period and to the Member State. There is no need to list recommendations and agreements that do not apply to the Member State (e.g. on the terms of reference of ICES expert groups, on actions to be taken by the Commission, etc.).
Follow-up action	Member State shall give a brief description on the responsive actions taken or to be taken.
Comments	Any further comment.

Table 7C

Bi- and multilateral agreements

							WP	
							WP date of submission	31.10.2016
MSs	Contact persons	Content	Coordination	Description of sampling/sampling protocol/sampling intensity	Data transmission	Access to vessels	Validity	Comments
DEU - DNK	name and email address by MS participating	a) DEU vessels landing for first sale in DNK to be covered under DEU WP. b) DNK vessels landing for first sale in DE to be covered under DNK WP.	NA	Length and age of discards and landings, in accordance with the respective WP. Levels and coverage of sampling to be as agreed at the annual RCMs Baltic and NS&EA.	DEu/DNK responsible for submitting data from each own vessels to the respective end-users and to each other.	country responsible for sampling ensures access to vessels	according to WP	
LTU - DEU - LVA - NLD - POL		DEU, LVA, LTU, NLD, POL to cooperate in the biological data collection on pelagic fisheries in CECAF waters in 2014-2015 and 2016-2017 (new extension).	NL to coordinate the execution of this multi-lateral agreement. NL will contract independent contractor 'Corten Marine Research' (CMR) as agent between NL and IMROP, the Mauritanian Fisheries Research Institute. CMR will hire Mauritanian observers from IMROP to carry out the actual sampling. CMR and IMROP will have an agreement in which the mutual obligations will be formalized; among others that only the additional costs for this specific task will be priced.	Biological sampling carried on board fishing vessels in CECAF area by Mauritanian observers. Observers introduced by CMR and follow the sampling protocol as described in 'Biological Data Collection of pelagic fisheries in CECAF waters in compliance with the DCF', version 31-05-2011.	CMR is responsible for data collection, quality control and delivery to the CECAF pelagic working group of all data collected under this agreement. CMR also reports all data to CVO and CVO will distribute the data to the partners.	Each Partner ensures access to its fleet for Mauritanian observers under this agreement. Denied access to vessels does not exempt a Partner from legal or financial obligations.	This agreement commences on January 1, 2012. With exception of financial obligations, it ends on December 31, 2013. It is subject to dissolve prior to this date in case the pelagic fishery in the CECAF area by EU vessels closes. Eventual remaining contributions will be pro rata reimbursed to Partners. The agreement was extended to a new end date: 31 December 2015	

General comment: This table fulfils Article 7 paragraph (2) and Article 8 of this Decision. Use this table to provide information on the agreements with other Member States and how European and international obligations are met.

Name of the variable	Guidance
MSs	Member States involved in the agreement shall be given as ISO 3166-1 alpha-3 code, e.g. 'DEU'.
Contact persons	Member State shall provide the name and email address of the responsible person from each Member State, involved in the agreement.
Content	Member State shall provide a brief description of the aim of the agreement. Member State shall provide an unambiguous full reference or a valid link to the documentation of the agreement, where relevant, in the 'Comments'.
Coordination	Member State shall describe briefly how the coordination is done/will be done and by whom.
Description of sampling/sampling protocol/sampling intensity	Member State shall describe briefly the sampling to be carried out under the agreement.
Data transmission	Member State shall state which Member State is/will be responsible for submitting which data set.
Access to vessels	Member State shall state if the agreement implies access to other partners' vessels.
Validity	Member State shall mention the year when the agreement expires or the year when the agreement was/will be signed, if it rolls over annually.
Comments	Any further comment.

ANNEX II

Provisions of the multiannual Union programme		Corresponding part of the work plan	
Provision	Table	Table	Text
Chapter III			
Footnote 6 of 1.1(d)		3(C)	Text Box 3(C)
2(a)(i)	1(A), 1(B), 1(C)	1(A), 1(B), 1(C)	
2(a)(ii)	1(A), 1(B), 1(C)	1(A), 1(B), 1(C)	
2(a)(iii)	1(A), 1(B), 1(C)	1(A), 1(B), 1(C)	
2(a)(iv)	3	1(D)	
2(b)	1(E)	1(E)	Text Box 1(E)
2(c)	1(E)	1(E)	Text Box 1(E)
3(a)	1(D)	1(F)	
3(c)	—	—	Pilot Study 2
4	4	2(A)	Text Box 2(A)
5(a)	5(A)	3(A)	Text Box 3(A)
5(b)	6	3(A)	Text Box 3(A), Pilot study 3
6(a)	7	3(B)	Text Box 3(B)
6(b)	6	3(B)	Text Box 3(B)
6(c)	8	—	Pilot Study 4
Chapter IV			
1	10	1(G), 1(H)	Text Box 1(G)
Chapter V			
4	—	—	Pilot Study 1

