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I

(Acts whose publication is obligatory)

COUNCIL REGULATION (EC) No 1182/2005**of 18 July 2005****adopting autonomous and transitional measures to open a Community tariff quota for the import of live bovine animals originating in Switzerland**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 133 thereof,

Having regard to the proposal from the Commission,

Whereas:

(1) Following the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia to the European Union, the European Community and the Swiss Confederation agreed at the bilateral Summit on 19 May 2004 on the principle that the trade flows in accordance with the preferences granted previously under the bilateral arrangements between the new Member States and Switzerland should be maintained after the enlargement of the European Union. Parties therefore agreed to proceed with the adaptation of tariff concessions within the framework of the Agreement between the European Community and the Swiss Confederation on trade in agricultural products ⁽¹⁾ (hereinafter called the Agreement), which entered into force on 1 June 2002. The adaptation of these concessions, which are listed in Annexes 1 and 2 of the Agreement, includes notably the opening of a Community tariff quota for the import of live bovine animals of a weight exceeding 160 kg.

(2) Parties have put in place autonomous measures, opened in the Swiss Confederation and until 30 June 2005 in the European Community, as regards imports of live bovine animals. However, the procedures for adopting bilaterally a decision to amend the Annexes 1 and 2 of the Agreement are not yet completed in the Swiss Confederation. In order to ensure that quota benefit is available until the entry into force of the said decision by the end of 2005, it is appropriate to open, on an autonomous and transitional basis, another tariff-quota concession until 31 December 2005 under the

same conditions as those foreseen by Council Regulation (EC) No 1922/2004 of 25 October 2004 adopting autonomous and transitional measures to open a Community tariff quota for the import of live bovine animals originating in Switzerland ⁽²⁾.

(3) Detailed rules for the implementation of this Regulation and, in particular, the provisions required for quota management should be adopted in accordance with the provisions laid down in Article 32 of Council Regulation (EC) No 1254/1999 of 17 May 1999 on the common organisation of the market in beef and veal ⁽³⁾.

(4) To be eligible for the benefit of these tariff quotas, products should originate in Switzerland in conformity with the rules referred to in Article 4 of the Agreement.

(5) Given the urgency of the matter, it is imperative to grant an exception to the six-week period referred to in paragraph I(3) of the Protocol on the role of national parliaments in the European Union, annexed to the Treaty on European Union and to the Treaties establishing the European Communities,

HAS ADOPTED THIS REGULATION:

Article 1

1. A duty-free Community tariff quota is hereby opened on an autonomous and transitional basis for the period from the date of the entry into force of this regulation until 31 December 2005 for the import of 2 300 heads of any live bovine animal originating in Switzerland weighting more than 160 kg, falling within CN code 0102 90 41, 0102 90 49, 0102 90 51, 0102 90 59, 0102 90 61, 0102 90 69, 0102 90 71 or 0102 90 79.

2. The rules of origin applicable to the products referred to in paragraph 1 shall be those provided for in Article 4 of the Agreement.

⁽²⁾ OJ L 331, 5.11.2004, p. 7.

⁽³⁾ OJ L 160, 26.6.1999, p. 21. Regulation as last amended by Commission Regulation (EC) No 1899/2004 (OJ L 328, 30.10.2004, p. 67).

⁽¹⁾ OJ L 114, 30.4.2002, p. 132.

Article 2

The detailed rules for the implementation of this Regulation shall be adopted in accordance with the provisions laid down in Article 32 of Regulation (EC) No 1254/1999.

Article 3

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

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

Done at Brussels, 18 July 2005.

For the Council

The President

M. BECKETT

II

(Acts whose publication is not obligatory)

COUNCIL

**DECISION No 1/2005 OF THE EU-TUNISIA ASSOCIATION COUNCIL
of 14 July 2005**

derogating from the provisions concerning the definition of the concept of 'originating products' and methods of administrative cooperation laid down in the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States and the Republic of Tunisia

(2005/563/EC)

THE EU-TUNISIA ASSOCIATION COUNCIL,

Having regard to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part⁽¹⁾, hereinafter referred to as the 'Agreement', and in particular to Article 39 of Protocol No 4 to the Agreement, concerning the definition of the concept of originating products and methods of administrative cooperation,

Whereas:

- (1) The Joint Declaration on Article 39 of the said Protocol states that the Community is prepared to examine any request from Tunisia for derogations from the rules of origin after signature of the Agreement.
- (2) On 16 February 2005 Tunisia submitted a request for a derogation from the rules of origin for a quantity of 8 040 tonnes of trousers and for a quantity of 1 855 tonnes of other garments falling within chapters 61 and 62 of the Harmonized Commodity Description and Coding System.
- (3) Pending the entry into force of the Tunisia-Turkey Free Trade Agreement signed on 25 November 2004 and pending the amendment of the abovementioned Protocol for the purpose of Pan-Euro-Mediterranean cumulation, the derogation would allow the manufacture

in Tunisia of originating garments from fabrics originating in Turkey for export to the European Union.

- (4) The derogation should be applicable also to fabrics originating in Turkey and exported to Tunisia from the Community.
- (5) For the purpose of this derogation, Tunisia and Turkey need to implement identical rules of origin and identical provisions on administrative cooperation.
- (6) The said derogation can be granted until the entry into force of the Pan-Euro-Mediterranean protocol on rules of origin among the three Parties concerned, namely Tunisia, Turkey and the EU but, in any event, for no longer than a period of one year,

HAS DECIDED AS FOLLOWS:

Article 1

By way of derogation from the special provisions in the list in Annex II to Protocol No 4 to the Agreement, the garments listed in the Annex to this Decision and manufactured in Tunisia from fabrics originating in Turkey shall be considered as originating in Tunisia in accordance with the terms of this Decision.

Article 2

The derogation provided for in Article 1 may be applied only provided that preferential rules of origin identical to the rules of origin defined in the said Protocol are in force between Turkey and Tunisia in order to determine the originating status of the fabrics originating in Turkey.

⁽¹⁾ OJ L 97, 30.3.1998, p. 2. Agreement as amended by the Agreement in the form of an Exchange of Letters between the European Community and the Republic of Tunisia concerning reciprocal liberalisation measures and amendment of the Agricultural Protocols to the EC/Tunisia Association Agreement (OJ L 336, 30.12.2000, p. 93).

Article 3

For the purpose of this Decision and by way of derogation from the provisions in Article 18(4) and (5) of the said Protocol, the customs authorities of a Member State of the Community may issue EUR.1 movement certificates for fabric originating in Turkey to be exported to Tunisia.

Article 4

The quantity given in the Annex shall be managed by the Commission, which shall take all administrative actions it deems advisable for their efficient management. Articles 308a, 308b and 308c of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code ⁽¹⁾ which relate to the management of tariff quotas shall apply *mutatis mutandis* to the management of the quantities referred to in the Annex.

Article 5

The customs authorities of Tunisia shall take the necessary steps to carry out quantitative checks on the exported products referred to in Article 1. To that end, all the certificates they issue pursuant to this Decision shall bear a reference to it. The Tunisian competent authorities shall forward to the Commission every three months a statement of the quantities in respect of which movement certificates EUR.1 have been issued pursuant to this Decision and the serial numbers of those certificates.

Article 6

Box 7 of movement certificates EUR.1 issued pursuant to this Decision shall contain the following indication, in one of the languages of the Agreement:

'Derogation — Decision No 1/2005'.

Article 7

Tunisia and the Member States of the Community shall take the measures necessary on their part to implement this Decision.

Article 8

This Decision shall enter into force on the day of its adoption and be applicable as soon as the conditions of Article 2 are fulfilled.

This Decision shall apply until the entry into force of the Pan-Euro-Mediterranean cumulation of origin among Tunisia, Turkey and the European Union but, in any case, for no longer than a period of one year.

Done at Brussels, 14 July 2005.

For the Association Council

The President

J. STRAW

⁽¹⁾ OJ L 253, 11.10.1993, p. 1. Regulation as last amended by Regulation (EC) No 883/2005 (OJ L 148, 11.6.2005, p. 5).

ANNEX

LIST AS REFERRED TO IN ARTICLE 1
(product benefiting from the derogation)

HS heading No	Description	Quantities (tonnes)
ex 620342 and ex 620462	Men's or boys' trousers of cotton Women's or girls' trousers of cotton	6 505
ex 620343	Men's or boys' trousers of synthetic fibres	674
ex 620341, ex 620349, ex 620461, ex 620463 and ex 620469	Men's or boys' trousers of wool or fine animal hair Men's or boys' trousers of other textile materials Women's or girls' trousers of wool or fine animal hair Women's or girls' trousers of synthetic fibres Women's or girls' trousers of other textile materials	861
6208 and 6212	Women's or girls' singlets and other vests, slips, petticoats, briefs, panties, night-dresses, pyjamas, négligés, bathrobes, dressing gowns and similar articles of man-made fibres Brassières, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof, whether or not knitted or crocheted	646
.6205 and .6206	Men's or boys' shirts Women's or girls' blouses, shirts and shirt-blouses	663
611231 to 611239 and 611241 to 611249	Men's or boys' swimwear of synthetic fibres Men's or boys' swimwear of other textile materials Women's or girls' swimwear of synthetic fibres Women's or girls' swimwear of other textile materials	105
620451 to 620459	Women's or girls' skirts and divided skirts	441
	Total	9 895

COMMISSION

COMMISSION DECISION

of 10 December 2003

on State aid in the form of loans from the Wagnisbeteiligungsgesellschaft and the Landesförderinstitut implemented by Germany for Neue Harzer Werke GmbH

(notified under document number C(2003) 4496)

(Only the German text is authentic)

(Text with EEA relevance)

(2005/564/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

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

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

Whereas:

I. PROCEDURE

- (1) By letter of 23 February 1999, Germany informed the Commission that it had granted aid to Neue Harzer Werke GmbH (NHW).
- (2) By letter of 13 July 2000, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of that aid.
- (3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ⁽²⁾. The Commission invited interested parties to submit their comments on the aid.
- (4) On 17 October 2001 the Commission adopted a negative decision (Decision 2002/377/EC) on the part of the State aid granted by Germany to NHW for the restructuring of the company from 1996 to 1999 ⁽³⁾.
- (5) By letter of 17 October 2001, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the remaining measures.

⁽¹⁾ OJ C 301, 21.10.2000, p. 16 and OJ C 32, 5.2.2002, p. 9.

⁽²⁾ See footnote 1.

⁽³⁾ OJ L 134, 22.5.2002, p. 51.

- (6) The Commission decision to extend the procedure was published in the *Official Journal of the European Communities* ⁽⁴⁾. The Commission invited interested parties to submit their comments on the aid.

II. DESCRIPTION OF THE AID

- (7) The aid recipient, NHW, is located in Saxony-Anhalt, Germany, which is an assisted region within the meaning of Article 87(3)(a) of the EC Treaty. It was set up in March 1996, when its owners acquired the assets of Harzer Werke GmbH, in liquidation, from the receiver through an asset deal. NHW produced iron castings. It originally had two lines consisting of sand casting and centrifugal casting.
- (8) On 24 July 2000 NHW had to file for insolvency. On 4 January 2001 the receiver, with the consent of the committee of creditors, sold the shares in the company for DEM 1 to a new investor, ASSET GmbH.
- (9) Germany further informed the Commission that the efforts of the new investor, ASSET GmbH, to continue the company's business had failed in July 2001 and the insolvency proceedings subsequently had had to be resumed.
- (10) In order to satisfy NHW's creditors, the assets had to be disposed of as part of the regular insolvency proceedings. The sand casting business ceased on 21 December 2001 and the assets used in it were disposed of. Centrifugal-casting production has been continued in the context of the insolvency proceedings and it is intended that the receiver, with the consent of the committee of creditors, will sell it to a new investor through an asset deal.
- (11) The present investigation procedure covers the restructuring of NHW between 1996 and 1999.
- (12) In 1996 a restructuring plan was drawn up envisaging a return to profitability within three years. The costs of restructuring amounted to EUR 8 415 864 (DEM 16 460 000). Under the plan, NHW was granted aid amounting to EUR 4 963 110 (DEM 9 707 000) for restructuring between 1996 and 1999.
- (13) The restructuring was financed as follows:

Table 1

Public contributions to restructuring

		(in DEM)
1.	Grant [Gemeinschaftsaufgabe (GA Mittel)] ⁽¹⁾	4 402 000
2.	Investment allowance [Investitionszulage] ⁽²⁾	531 000
3.	WBG ⁽³⁾ loan [Konsolidierungsprogramm] ⁽⁴⁾	2 000 000
4.	LFI ⁽⁵⁾ loan [Konsolidierungsprogramm] ⁽⁶⁾	744 000
5.	BvS ⁽⁷⁾ grant	2 000 000
Subtotal DEM		9 677 000
EUR		4 947 771

⁽¹⁾ *Gemeinschaftsaufgabe, Förderung der regionalen Wirtschaftsaufgabe*, 26. Rahmenplan [26th Outline Plan for the Joint Federal Government/Länder scheme for improving regional economic structures].

⁽²⁾ *Investitionszulagengesetz* [Investment Assistance Act].

⁽³⁾ *Wagnisbeteiligungsgesellschaft* [Venture Capital Corporation].

⁽⁴⁾ *Richtlinie zur Förderung von Konsolidierungsbeteiligungen im Mittelstand (Sachsen-Anhalt)* [Guidelines on promoting consolidation holdings in small and medium sized enterprises (Saxony-Anhalt)].

⁽⁵⁾ *Landesförderinstitut* [Land Promotion Institute].

⁽⁶⁾ *Konsolidierungsfonds des Landes Sachsen-Anhalt* [Consolidation Fund for the Land of Saxony-Anhalt].

⁽⁷⁾ *Bundesanstalt für vereinigungsbedingte Sonderaufgaben* [Federal Office for Special Unification related Tasks].

⁽⁴⁾ See footnote 1.

Table 2

Private contributions for restructuring

(in DEM)

6.	Capital injection	500 000
7.	Loan KfW	2 750 000
8.	Credit NordLB	2 000 000
9.	Leasing agreement	1 179 000
10.	Cash flow	354 000
Subtotal DEM		6 783 000
EUR		3 468 093
Total (Tables 1 and 2)		16 460 000
EUR		8 415 864

- (14) Since Germany had indicated that Measures 1 to 4 in Table 1 were implemented under approved aid schemes, these measures were originally considered to constitute existing aid and were not assessed as part of the formal investigation procedure initiated on 13 July 2000. Initially, therefore, only Measure 5 was considered ad hoc aid for restructuring which had to be assessed as to its compatibility with the common market.
- (15) Subsequently, on 17 October 2001, the Commission adopted Decision 2002/377/EC on this ad hoc aid measure totalling EUR 1 022 584 (DEM 2 million), which was assessed in accordance with the 1994 Community guidelines on State aid for rescuing and restructuring firms in difficulty (the 1994 guidelines) ⁽⁵⁾. In that decision the Commission found that the ad hoc aid granted for the restructuring of NHW was incompatible with the common market.
- (16) Measures 7, 8 and 9 in Table 2 were not taken into account in the assessment as private contributions since Germany, despite the issue of an information injunction pursuant to Article 10 of Council Regulation (EC) 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽⁶⁾, failed to supply the information necessary for the Commission to assess whether these measures had been implemented on market terms.
- (17) On the same day that Decision 2002/377/EC as regards Measure 5 was adopted, the Commission adopted a decision extending the formal investigation procedure under Article 88(2) of the EC Treaty to Measures 3 and 4, which together totalled EUR 1 402 985 (DEM 2 744 000). These measures formed part of the same restructuring package as the measure assessed in Decision 2002/377/EC but, for formal reasons, they could not be included in the initial assessment as they were purportedly granted under aid schemes approved by the Commission and so had to be considered as existing aid. In so far as a measure constitutes existing aid, it cannot be assessed directly under Article 88(2) as such measures must, in principle, be considered as having already been approved.
- (18) In the decision to extend the formal investigation, the Commission concluded that aid amounting to EUR 1 402 985 (DEM 2 744 000) did not comply with the terms of the previously approved schemes and therefore had to be considered as ad hoc aid towards the overall restructuring plan and, like the ad hoc aid assessed previously, had to comply with the derogations allowed for the authorisation of restructuring aid.

⁽⁵⁾ OJ C 368, 23.12.1994, p. 12.

⁽⁶⁾ OJ L 83, 27.3.1999, p. 1. Regulation as last amended by the 2003 Act of Accession.

III. COMMENTS FROM GERMANY

- (19) By letter of 14 October 2003, Germany supplied additional information concerning the purportedly private contributions to the restructuring (Measures 7, 8 and 9 in Table 2). According to this information:
- (a) Measure 7 contained an interest subsidy of EUR 2 812 (DEM 5 500);
 - (b) Measure 8 contained an interest subsidy of EUR 8 684 (DEM 16 985);
 - (c) Measure 9 was never put into effect.

IV. ASSESSMENT OF THE AID

- (20) Article 87(1) of the EC Treaty declares any aid granted through state resources to certain undertakings incompatible with the common market where such aid distorts or threatens to distort competition in so far as it affects trade between Member States. Measures falling within the scope of Article 87(1) that do not constitute existing aid are generally incompatible with the common market unless they qualify for the derogation in Article 87(2) or (3).

1. State aid

- (21) The Commission notes that the interest subsidies contained in Measures 7 and 8 together amount to EUR 11 496 and are therefore below the threshold for *de minimis* aid laid down in Commission Regulation (EC) 69/2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid ⁽⁷⁾. Consequently, these measures need not be further assessed in this decision.
- (22) Contrary to Germany's assertion, Measures 3 and 4, involving two loans together amounting to EUR 1 402 985, are not covered by existing aid schemes. For the reasons already stated in the decision to initiate the formal investigation procedure, they must therefore be considered as ad hoc measures for the restructuring of NHW.
- (23) These loans were granted by Germany to finance the restructuring of NHW, a firm in difficulty. They therefore conferred economic benefits on a specific undertaking which it would not have received on normal market terms. Such measures may, therefore, distort competition. Given the nature of the aid and since there is trade between Member States in the sector where the recipient operates, the financial measures fall within the scope of Article 87(1) of the EC Treaty. They therefore constitute State aid.

2. Derogations under Article 87 of the EC Treaty

- (24) Article 87(2) and (3) sets out the conditions on which an aid is compatible or may be considered compatible with the common market.
- (25) The two loans, like the other restructuring measures already assessed in Decision 2002/377/EC, were granted between 1996 and 1999 to finance the restructuring of NHW. Therefore, like the measures previously assessed, they must be assessed under the 1994 guidelines, which lay down the detailed conditions for a favourable exercise of the Commission's discretion under Article 87(3)(c) of the EC Treaty. Although the firm is located in an assisted region, ad hoc aid to firms in difficulty must be assessed in accordance with these guidelines even when the needs of regional development are considered. In particular, the result of the restructuring operation must be an economically viable business that will contribute to the real development of the region without requiring continual aid ⁽⁸⁾.

⁽⁷⁾ OJ L 10, 13.1.2001, p. 30.

⁽⁸⁾ See point 3.2.3 of the 1994 guidelines.

- (26) As already established in Decision 2002/377/EC, the information submitted by Germany indicates that all of the aid was granted to the recipient before the entry into force of the new guidelines in 1999 (the 1999 guidelines). Accordingly, under point 7.5 if the 1999 guidelines, the 1994 guidelines are to be applied to the measures in question ⁽⁹⁾.
- (27) It should also be noted that the measures form part of a restructuring plan that had already been assessed by the Commission in Decision 2002/377/EC.
- (a) *Restoration of viability*
- (28) According to the 1994 guidelines, the restructuring plan should lead to the restoration of viability within a reasonable time, after which the company should be able to compete on the market on its own merits.
- (29) The Commission had already assessed the restructuring aid in the light of this criterion in Decision 2002/377/EC, and concluded that the viability criterion of the 1994 guidelines was not fulfilled as the restructuring plan could not be considered suitable to restoring the firm's long term viability. That conclusion was based on the finding that:
- (a) the turnover levels envisaged in the restructuring plan were overstated;
- (b) the overhead costs, one of the reasons for the initial failure, were not adequately tackled by the plan;
- (c) the staff reduction from 203 to 177 was insufficient to reduce staff costs;
- (d) the operating costs envisaged by the plan, in particular the high maintenance costs, were excessive.
- (30) Since the two loans were granted for the same restructuring project and on the basis of the same restructuring plan, the Commission can only restate its view that viability was not secured by the plan.
- (b) *Avoidance of undue distortions of competition*
- (31) A further condition laid down in the 1994 Guidelines is that measures are taken to offset as far as possible adverse effects on competitors. In so far as a company is operating on markets with excess capacity, capacities should be reduced.
- (32) It should be noted here that NHW, as already established in Decision 2002/377/EC, was to be considered an SME when the aid was granted. Under the 1994 guidelines, the Commission adopts a less restrictive approach in relation to capacity reductions where restructuring aid is granted to SMEs ⁽¹⁰⁾.
- (33) Since the aid was granted to an SME with a very low market share, the Commission concludes that the aid to NHW could not unduly distort competition within the meaning of the 1994 guidelines.

⁽⁹⁾ OJ C 288, 9.10.1999, p. 2.

⁽¹⁰⁾ Point 3.2.4 of the guidelines.

- (c) *Aid in proportion to the restructuring costs and benefits*
- (34) The 1994 guidelines require that aid be limited to the strict minimum needed for the restructuring.
- (35) In Decision 2002/377/EC the Commission came to the conclusion that the proportionality criterion was not fulfilled in two respects.
- (36) On the one hand, according to the proportionality criterion, the recipient is required to make a significant contribution to the restructuring plan from its own resources or external commercial financing on market terms. It transpires from the information available that the investor has contributed DEM 0,5 million. Since no further information on the terms of the lease (Measure 9 in Table 2) was provided during the investigation procedure, the Commission was unable to assess whether the contribution was made on market terms. However, the assessment of the lease was considered to be immaterial to determining the significance of the recipient's contributions.
- (37) Moreover, the other contributions could not be considered contributions by the aid recipient. Since, notwithstanding the information injunction, no further information was provided on the KfW loans (Measure 7 in Table 2), the Commission was unable to assess whether the amounts were granted on market terms. The same reasoning applies to the NordLB loan (Measure 8 in Table 2). The cash flow (Measure 10 in Table 2) could not be considered as a contribution by the recipient. It was, to a large extent, generated on the basis of previous State aid. In addition, at the time the restructuring plan was drawn up in 1996, this cash flow had still to be generated and was therefore uncertain.
- (38) These contributions therefore could not be considered contributions by the recipient and so could not be taken into account in assessing the proportionality of the aid. Accordingly, the total costs of the restructuring amounted to DEM 16,46 million, of which State bodies contributed DEM 9,707 million or 58,9 % and the investor DEM 1,679 million or 10,2 % (or possibly only DEM 0,5 million or 3 %). Given these circumstances, the Commission concluded that the recipient's contribution could not be regarded as significant within the meaning of the 1994 guidelines.
- (39) According to the latest information supplied by Germany, Measure 9 in Table 2 was never put into effect. It follows that, contrary to what was previously argued and determined in Decision 2002/377/EC, no contribution of this amount was made to the restructuring.
- (40) According to the latest information, Measures 7 and 8 in Table 2, which amount to EUR 2 428 636 (DEM 4 750 000), were publicly refinanced and include interest grants of EUR 11 496. It follows that such measures, being linked to public grants, cannot be regarded as private contributions.
- (41) Essentially, having regard to the latest information, there is all the more reason to consider that the recipient's contributions cannot be regarded as significant within the meaning of the 1994 guidelines.
- (42) On the other hand, pursuant to the 1994 guidelines, the proportionality criterion also implies that investments can be granted aid only if they are essential for restructuring; otherwise, the aid is not limited to the strict minimum. In the decision initiating the procedure, the Commission expressed doubts as to whether the aid was limited to the strict minimum, given that the firm took a 20 % holding in Eisenguss Torgelow GmbH during the restructuring. Since no information on the background to this holding was provided, notwithstanding the information injunction, the Commission is unable to assess whether the acquisition of the holding was essential for the 1996 restructuring. It therefore held in Decision 2002/377/EC that the aid was not limited to the strict minimum. This assessment has to be confirmed in the present decision.

V. CONCLUSION

- (43) In view of the foregoing observations, it can be stated that the aid granted to NHW, on the one hand, did not comply with the proportionality criterion and, on the other, was not linked to a viable restructuring plan enabling the firm to compete on its own merits after the restructuring. The Commission therefore concludes that the aid does not comply with the conditions set out in the 1994 guidelines and is not compatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The State aid amounting to EUR 1 402 985 which Germany has provided in the form of loans granted by the Wagnisbeteiligungsgesellschaft and the Landesförderinstitut to Neue Harzer Werke GmbH is incompatible with the common market.

Article 2

1. Germany shall take all necessary measures to recover from the recipient the aid referred to in Article 1 and unlawfully made available to the recipient.
2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the Decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the recipient until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

Article 3

Germany shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 10 December 2003.

For the Commission
Mario MONTI
Member of the Commission

COMMISSION DECISION

of 9 March 2004

on an aid scheme implemented by Austria for a refund from the energy taxes on natural gas and electricity in 2002 and 2003

(notified under document number C(2004) 325)

(Only the German version is authentic)

(Text with EEA relevance)

(2005/565/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

- (5) By letter dated 4 July 2003, registered as received by the Commission on the same day (A/34759), Austria commented on the initiation of the procedure.

Having regard to the Treaty establishing the European Community, and in particular Article 88(2) thereof,

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

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

- (6) The Commission received comments from the Austrian Industry Association (Vereinigung der österreichischen Industrie) on 12 August 2003, from Stahl- und Walzwerk Marienhütte GmbH on 18 August 2003 and from Jungbunzlauer GmbH on 14 August 2003. Comments from the Austrian Chamber of Labour (Bundesarbeitskammer) were withdrawn by letter dated 21 November 2003.

Whereas:

- (7) All comments were received in time ⁽³⁾. The Commission forwarded them to Austria, which made no comments on these submissions.

I. PROCEDURE

- (1) On 8 October 2002, Law No 158/2002 was published in the Austrian Official Journal. Its Article 6 modifies the Energy Tax Rebate Act 1996.
- (2) By letter dated 30 April 2003, the Commission informed Austria that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid involved in the abovementioned legislation.

- (8) By letter dated 5 December 2003, registered as received by the Commission on 8 December 2003 (A/38575), Austria submitted further information on the implementation of the energy tax rebate for the years 2002 and 2003.

II. DETAILED DESCRIPTION OF THE AID

- (3) On 20 August 2003, Law No 71/2003 was published in the Austrian Official Journal. Its Article 54 point 6 extends the duration of the Energy Tax Rebate Act 1996 in the form of Law 158/2002 until 31 December 2003.
- (4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽²⁾. The Commission invited interested parties to submit their comments on the aid.

- (9) Pursuant to the Electricity Tax Act (Elektrizitätsabgabengesetz) and the Natural Gas Tax Act (Erdgasabgabengesetz), both introduced on 1 June 1996, the tax on electricity and natural gas is payable on the supply of electric power and natural gas, except where supplied to electricity or natural gas undertakings or to other dealers for onward supply, on the consumption of electric power and natural gas by electricity or natural gas undertakings, and on the consumption of electric power or natural gas self-generated in or imported into the tax district.

⁽¹⁾ OJ C 164, 15.7.2003, p. 2.

⁽²⁾ See footnote 1.

⁽³⁾ In accordance with Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits (OJ L 124, 8.6.1971, p. 1), and in particular Article 3 thereof, the period for submission of comments ended on 18 August 2003.

(10) The person liable to tax will usually be the supplier of the electric power or natural gas. The supplier passes on the tax to the customer, who has to reimburse the tax to the person liable. At least in the customer's annual bill the supplier must clearly show the customer the amount that that customer has to pay in energy taxes.

(11) The rate of tax on electric power for the period under examination is EUR 0,015/kWh. The rate of tax on natural gas is EUR 0,0436 per m³.

(12) Following the preliminary ruling of the Court of Justice of the European Communities in Case C-143/99 (hereinafter called the *Adria-Wien* ruling) ⁽⁴⁾, Austria modified the Energy Tax Rebate Act 1996 (*Energieabgabenvergütungsgesetz*) by Law No 158/2002, Article 6 of which entitles all businesses from 1 January 2002 to a refund of the energy taxes on natural gas and electric power if those taxes together exceed 0,35 % of their net production value. Net production value is defined as the difference between turnover within the meaning of paragraph 1 subparagraph 1 numbers 1 and 2 of the Turnover Tax Act 1994 and turnover according to the same definition supplied to the company. The Turnover Tax Act 1994 defines turnover as supplies and other services undertaken against payment by an entrepreneur in Austria. It includes own use. Imports are excluded. The first EUR 363 is not refunded.

(13) The rebate is applicable for the period 1 January 2002 until 31 December 2003.

(14) The rebates paid by the State amount to about EUR 330 million per year.

(15) The Commission initiated the procedure because of its doubts with regard to the nature of the measure as State aid and to the compatibility of the alleged aid. The Commission considered that the tax refund system favoured de facto energy-intensive companies and was

therefore selective. The Commission had doubts about the compatibility of the alleged aid with the Community guidelines on State aid for environmental protection ⁽⁵⁾.

III. COMMENTS BY INTERESTED PARTIES

Comments by the Austrian Industry Association

(16) The Austrian Industry Association considers the measure not to be selective and therefore not to be State aid. Austria has implemented the *Adria-Wien* ruling of the European Court of Justice, whereby national measures which provide for a rebate of energy taxes on natural gas and electricity do not constitute State aid 'where they apply to all undertakings in national territory, regardless of their activity'. The Austrian Constitutional Court had reasoned in its second question to the Court of Justice that Austria might be in a position to extend the energy tax rebates to all companies. Thus, the Court of Justice was well aware of the function of the rebate and certainly considered potential legal effects in Austria. The only material question is therefore 'whether a distinction is made with regard to the advantage'.

(17) The Austrian Industry Association considers the measure also not to be de facto selective. The measure benefits about 2 500 to 3 000 undertakings in all sectors of the economy regardless of the size of the undertaking.

(18) Furthermore, the measure is applicable not only to energy-intensive undertakings. The tax rebate is calculated on the basis of net production value. This value depends on the economic situation of the company. Losses or heavy investments lead to a low net production value. In these cases also companies with a low energy consumption benefit from the tax rebate. Viewed over a longer period, the scheme benefits not always the same group of beneficiaries.

(19) The Austrian Industry Association contests the comparison the Commission made with other cases where, despite a legal non-selectivity, the measure was de facto selective. The aid objective in these cases was always support for large industrial undertakings, and in some cases even for an individual company. By contrast, the Austrian measure does not limit the circle of beneficiaries, either by size of company, or by sector, activity or investment sum.

(20) On the question of compatibility, the Austrian Industry Association notes that compliance with the minimum rates laid down by Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity ⁽⁶⁾ (hereinafter called the energy taxation Directive) should be regarded as a significant amount of the tax.

⁽⁴⁾ Case C-143/99 *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten* [2001] ECR I-8365.

The Austrian Constitutional Court referred two questions to the Court of Justice for a preliminary ruling:

1. Are legislative measures of a Member State which provide for a rebate of energy taxes on natural gas and electricity but grant that rebate only to undertakings whose activity is shown to consist primarily in the manufacture of goods, to be regarded as State aid within the meaning of Article 92 of the EC Treaty?
2. If the answer to Question 1 is in the affirmative, is such a legislative measure to be regarded as State aid within the meaning of Article 92 of the EC Treaty even if it applies to all undertakings, regardless of whether their activity is shown to consist primarily in the manufacture of goods?

⁽⁵⁾ OJ C 37, 3.2.2001, p. 3.

⁽⁶⁾ OJ L 283, 31.10.2003, p. 51.

Comments by Stahl- und Walzwerk Marienhütte GmbH

- (21) Stahl- und Walzwerk Marienhütte GmbH describes the economic context of energy taxation, in particular for steel, and claims that application of the normal Austrian energy tax rates to energy-intensive undertakings would lead immediately to closure of production in Austria.
- (22) The correction mechanism for energy-intensive undertakings has no negative impact on the steering effect of the energy tax system. Energy costs themselves are a sufficient incentive to take any possible substitution measures and an energy tax has no additional steering effect. This will have to be taken into account when assessing whether the measure is justified by the nature of the tax system.
- (23) The Court of Justice of the European Communities apparently wanted to rule in Case C-143/99 also on the distinction between energy-intensive and other undertakings. Otherwise it would not have answered the second question referred by the Austrian Constitutional Court, this question being irrelevant to the settlement of the case pending before the Austrian court.
- (24) Even if a measure is classified as State aid, the Commission has to respect the legitimate expectations of the undertakings concerned. These undertakings could rely on a law which was explicitly adopted in Austria in order to implement the Adria-Wien ruling. It cannot be asked of an undertaking that it examine questions of European law in greater depth than a bona fide legislator. Furthermore, the Court of Justice itself, as an EU institution, raised legitimate expectations by answering the second question referred by the Austrian Constitutional Court.

Comments by Jungbunzlauer GmbH

- (25) Jungbunzlauer GmbH points out that the energy tax rebate is not aid in the sense of a direct monetary payment by the State. The economic burden of the energy taxation is meant to be on the end-user of energy. In order to achieve this, the legislator chose between several administrative options. In order to facilitate the administration of the tax, the tax is levied at the level of the energy supplier. Undertakings pay the tax together with the price for energy to the energy supplier and are repaid afterwards by the State the amounts exceeding their tax obligation. It is due to this structure that the energy tax rebate law is designed in the form of a rebate. The legislator could also have chosen to levy the tax directly at the level of the end user. In that event, a rebate would not have been necessary.

- (26) The national legislator is free to set a maximum tax burden. The upper limit established by the criterion of 0,35 % of net production value is irrelevant from a State aid point of view, but establishes the energy tax burden, where energy is used for business purposes, at 0,35 % of net production value. This also applies to the minimum tax burden of EUR 363 set by the measure.
- (27) The European Court of Justice decided in its Adria-Wien ruling on the Austrian measure in its entirety. If this had not been the intention, the Court would have first asked whether the energy tax rebate was per se selective and only then would it have dealt with the question whether the exclusion of the service sector made the measure selective. In addition, paragraph 36 of the ruling makes clear that the Austrian measure, with which the European Court was fully acquainted, does not constitute State aid.
- (28) The measure is not selective but is a general economic measure. This view was also shared by the Advocate General in Case C-143/99.
- (29) The measure does not distort competition and does not affect trade.
- (30) Similar measures exist in other Member States. Furthermore, the energy taxation Directive provides for tax reductions and rebates for businesses in order to protect investments and employment.

IV. COMMENTS BY AUSTRIA

Austria considers the energy tax rebate to be a general measure

- (31) By letter dated 4 July 2003, received by the Commission on 4 July 2003, Austria confirms its view that the energy tax rebate is a general measure. By asking its second question, the Austrian Constitutional Court also explained its motive, namely that, if the original measure constituted State aid, the Constitutional Court might abolish the restriction to those companies whose activity consists primarily in the manufacturing of goods. The Austrian court needed to know whether, by removing the restriction, it would create or extend an illegal State aid. The European Court was aware of this motive, as can be seen from the report by the Rapporteur, Mr Wathelet, who notes: 'The Constitutional Court assumes that, in case of removing the restriction ..., an extension to all undertakings is only allowed if this does not constitute a new aid which has to be notified beforehand.' Without this motive, the second question would have been theoretical and would have had to be rejected by the European Court.

(32) As a consequence, the Austrian Constitutional Court abolished only the restriction to the original group of beneficiaries and did not abolish the entire Energy Tax Rebate Act.

(33) Knowing this background it cannot be argued that the European Court did not know or erred about the design of the Austrian measure. On the contrary, the Court itself described in paragraph 7 of the ruling the Austrian system correctly and replied in paragraph 36 to the second question that 'national measures such as those at issue in the main proceedings do not constitute State aid.'

Austria commits itself to retroactively modifying the energy tax rebate

(34) By letter dated 5 December 2003, Austria informed the Commission that the Ministry of Finance would be proposing to the Austrian Parliament that it modify retroactively the rebate of the energy taxes on electricity and natural gas for the two groups of beneficiary.

(35) Undertakings to which the Energy Tax Rebate Act was not applicable until 31 December 2001 will be entitled to a 100 % tax rebate for the tax exceeding 0,35 % of their net production value in 2002. In 2003, these companies will pay 20 % of the national tax rates on natural gas and electricity. This minimum tax burden will respect the minimum tax rates of the energy taxation Directive, which entered into force on 1 January 2004. The ratio between the minimum tax under the Directive and the national tax is about 3,3 % for electricity and about 14 % for natural gas.

(36) Undertakings to which the Energy Tax Rebate Act was applicable before 31 December 2001 will pay in 2002 and 2003 120 % of the minimum tax rates on natural gas and electricity as established by Annex I, table C, of the energy taxation Directive (the 120 % provision).

The tax burden of 120 % of the minimum tax rates on natural gas and electricity corresponds statistically to the average tax burden on companies under the energy taxation Directive, including taxation on electricity, gas and coal. The 120 % provision will lead to an additional tax burden of about 10 to 15 % of current net tax revenue. The additional burden is not so high as most of the companies concerned already pay significantly

more than the 120 % under the current rules. However, those companies for which the 120 % provision leads to an increase in the tax burden will pay on average about 50 % more than before, while for some companies the financial impact will even be far greater.

(37) Austria informed the Commission that all payments under the current provisions had been stopped immediately after the initiation of the formal investigation procedure. However, Austria could not provide information on the number of companies which will have to repay a part of the rebate already paid to them, or about the amounts involved. Austria confirmed that every repayment will bear interest according to the applicable EU reference rate.

V. ASSESSMENT OF THE AID

Assessment for the years 2002 and 2003

(38) Although the Commission initiated the procedure in respect of the provisions of Law No 158/2002 applicable in 2002, it considers it justified to assess also the year 2003 without taking a separate decision extending the formal investigation procedure to this period. The Commission notes that Law No 71/2003 leaves the provisions laid down by Law No 158/2002 completely unchanged. Thus, the provisions applicable in 2002 and 2003 are identical. The Commission considers, therefore, that interested parties had the opportunity to comment on all aspects relevant to the assessment of the provisions.

(39) The extension in time was put into effect by Austria after the Commission decided to initiate the formal investigation procedure. This situation is comparable to a situation where a Member State modifies legislation which is the subject of an infringement procedure, but by this modification does not remove all of the alleged infringement, or where facts as described in the reasoned opinion occur after the submission of that opinion. In such cases, the Court allows the Commission to continue the procedure and to adapt its conclusions to the changed circumstances ⁽⁷⁾.

(40) In its letter of 5 December 2003, Austria referred explicitly to the period 1 January 2002 to 31 December 2003. It exercised its rights of defence therefore with regard to the whole period.

⁽⁷⁾ See Judgment of the Court of Justice in Case C-105/91 *Commission v Greece* [1992] ECR I-5871; Judgment in Case C 11/95 *Commission v Belgium* [1996] ECR I-4115; Judgment in Case C-365/97 *Commission v Italy* [1999] ECR I-7773; and Judgment in Case C-113/86 *Commission v Italy* [1998] ECR 607.

- (41) In practice, third parties were also able to comment on the application of the scheme both for 2002 and for 2003. In particular, the Austrian Industry Association presented its written comments on the energy tax rebate for 2002 on 12 August, i.e. before the publication of Law 71/2003 extending the duration of the energy tax rebate. Subsequently, the Association was represented at several meetings between the Commission and the Austrian Government and commented on these occasions also on the year 2003. Its right to submit observations has therefore been respected.
- (42) The comments made by Jungbunzlauer GmbH on 14 August 2003 described the situation of the company, noting that the described facts were valid 'in particular (also) for the year 2002'. The company commented on the existence of aid, submitting arguments which are in substance independent of the year of application. Its right to submit observations has therefore been respected.
- (43) Marienhütte GmbH commented on the initiation of the procedure on 18 August 2003, hence also before the publication of Law 71/2003. Its comments are also in substance independent of the year of application of the energy tax rebate provisions. Its right to submit observations has therefore been respected.
- (44) The Commission did not receive any late submissions or any requests to submit comments after the expiry of the deadline laid down in the decision to initiate the procedure.

Existence of aid

- (45) After an in-depth examination, the Commission concludes that the measure under examination constitutes State aid within the meaning of Article 87(1) of the EC Treaty.
- (46) The Commission considers that the tax rebate, even if it is, in theory, applicable to all undertakings reaching the threshold of 0,35 % of net production value, *de facto* benefits undertakings which have a high energy consumption in relation to their net production value and is therefore selective.
- (47) The Commission considers that in Case C-143/99 the Court of Justice did not rule on all aspects of the original tax rebate measure, but only on the restriction to undertakings whose activity consisted mainly in the production of goods. In order to answer the two questions referred by the Austrian Constitutional Court, it was not necessary for the Court to assess any other aspects of the measure. The questions did not refer to the Austrian system as a whole, but concentrated on its limited scope. It cannot be assumed that, simply because more extensive information was presented to the Court, it implicitly took a position on a question

which had not been asked. The Court explicitly ruled on 'national measures which provide for a rebate of energy taxes' in general. If it had been the Court's intention to rule on all aspects of the Austrian measure, it can be assumed that it would have made this more explicit.

- (48) The Commission does not share the view that the Court would not have answered the second question referred by the Austrian Constitutional Court if it had not intended to rule on all aspects of the energy tax rebate. The Court first of all answered the second question referred by the Austrian Constitutional Court. This question did not refer to the case under examination by the Court. The Court therefore clearly placed its reply to the first question on the case in point in a more general context and replied, repeating established case law, that a State measure which benefits all undertakings in national territory, without distinction, cannot constitute State aid.
- (49) Several precedents demonstrate that a measure can be selective in its effect even if by law it is applicable to all sectors of the economy. These are only examples of how *de facto* selectivity can occur. It is true that the measure under examination does not restrict the support according to size of undertaking, sector, activity or investment sum. However, the threshold has the effect that the measure is *de facto* tailored to energy-intensive users. Although the Austrian Industry Association claimed that companies with a low energy consumption can also benefit from the tax rebate if they make large investments or incur heavy losses, it in no way substantiated this argument. On the contrary, during the formal investigation procedure, demonstrations of the effects of different solutions were based on examples of companies in energy-intensive sectors. This is also confirmed by comments made by Marienhütte, which explicitly refers to the measure as a correction mechanism for energy-intensive undertakings. The Commission also notes that Austria did not comment on the argument raised by the Austrian Industry Association. In particular, Austria did not provide any information on actual beneficiaries, including information on whether the actual beneficiaries have significantly changed following the amendment of the law. The Commission therefore has no information in its possession allowing it to conclude that the effects of the measure are substantially different from the effects of the measure in place before 1 January 2002, which was restricted to companies active in the production of goods. In addition, the Commission notes that Austria calculated the 120 % provision also on the basis of a sample of about 240 energy-intensive companies, claiming that information on all companies receiving a rebate was not available. All these elements together are a strong indication that the measure indeed targets energy-intensive users.

- (50) The Commission furthermore does not share the view of Jungbunzlauer GmbH that the criterion of 0,35 % of net production value corresponds to a maximum tax burden and that such a cap is not relevant from a state aid point of view. Without it being necessary to examine the latter argument in general terms, in this case the criterion does not establish a general maximum tax burden for all undertakings without distinction. Undertakings normally have to pay the full tax rates, with the exception of those achieving a threshold that is *de facto* tailored to apply only to energy-intensive users. The measure gives rise to a different treatment, by establishing objective criteria, in the form of a tax cap only for certain businesses, which in the present case is the specific group of energy-intensive users. This is different from the minimum tax burden of EUR 363, to which Jungbunzlauer GmbH refers, and which indeed applies to all undertakings without distinction.
- (51) In the decision to initiate the procedure, the Commission expressed doubts about whether the widening of the scope would in reality alter the effects of the measure. The Commission notes that neither Austria nor any of the intervening parties submitted information which would have alleviated these doubts. In particular, Austria did not submit figures demonstrating that significantly more companies in all sectors of the economy benefited from the widened scope. In any case, the large number of beneficiaries of a measure is not on its own, according to the case law of the Court of Justice, proof that the measure can be classified as a general measure.
- (52) The Commission also takes into account that in several Member States measures having the same effect are applied, for which Member States sought State aid approval or which the Commission examined *ex officio* ⁽⁸⁾.
- (53) The Commission considers that the selectivity of the measure is not justified by the nature and logic of the system because it is not consistent with the internal logic of the tax. On the contrary, the rebate represents a clear deviation from the overall structure and functioning of the tax system. The Commission further notes that the objective of an energy tax is twofold. First, it is intended to induce undertakings to take energy-saving measures. Even if the undertakings concerned take energy-reduction measures already to a large extent in order to reduce their energy costs, it cannot be said that the energy taxation has no additional steering effect. Energy consumption is in general technology-dependent and hence only fixed in the short term. In the long term, *inter alia*, through technological progress and innovation, it is to be expected that it is possible to achieve further efficiency gains. The Commission notes, furthermore, that Marienhütte GmbH did not substantiate the alleged lack of a steering effect in any way. Second, even where energy consumption cannot be reduced further in the short term, the tax is levied in order to raise State funding for general purposes and also to take account of the fact that the consumption of energy causes costs for society for which the State has to take remedial action. In this respect, any exemption from an energy tax for energy-intensive users, which by definition are also polluters, cannot be in the nature and logic of the system.
- (54) The Commission does not share the opinion expressed by Jungbunzlauer GmbH that the measure would not constitute State aid if the legislator had levied the tax at the level of the end user. The administrative design of the measure in this case is without influence on its State aid nature. Even if the legislator had levied the tax directly at the level of the end user, and presumably introduced distinct treatments for different types of user, this differentiation would also have constituted State aid.
- (55) All the other criteria of a State aid measure within the meaning of Article 87(1) of the EC Treaty are fulfilled. The measure relieves undertakings of costs they would otherwise have to bear and by doing so confers an advantage on those undertakings. The measure is imputable to the State and financed by State resources as the State accepts a loss of tax revenue. By granting a tax rebate only to certain undertakings, the measure favours them in comparison with other undertakings, which has the potential to distort competition. At least some beneficiaries are engaged in sectors where trade between Member States takes place. Therefore the measure is liable to affect trade. By way of conclusion, the measure constitutes a State aid scheme and must be considered new aid because it was established after Austria's accession to the European Union and was never approved by the Commission.

Compatibility of the aid

- (56) The Commission assessed the compatibility of the aid under the Community guidelines on State aid for environmental protection (hereinafter called the guidelines). In the decision to initiate the procedure, the Commission at that stage considered that no other derogations as provided for in Article 87(2) or (3) of the EC Treaty seemed applicable. During the formal investigation procedure, no new elements were put forward which might have removed the doubts that the Commission expressed in its decision to initiate the formal investigation procedure. The Commission therefore comes to the following conclusion:

⁽⁸⁾ E.g. N 449/2001 — Germany, N 123/2000 — United Kingdom, C 42/2003 — Sweden.

(57) As regards undertakings to which the Energy Tax Rebate Act was not applicable until 31 December 2001, the modifications made by Law No 158/2002 introduced a new derogation from an existing tax. Point 51.2 of the guidelines allows the application of the provisions in point 51.1 in such a case where the tax has an appreciable positive impact in terms of environmental protection and where the derogation has become necessary as a result of a significant change in economic conditions that placed the firms in a particularly difficult competitive situation. Austria has not submitted any information as to whether this was the case. Austria has also not significantly increased the tax, and therefore point 52 of the guidelines is not applicable. Under these circumstances, a Member State can grant tax exemptions only in accordance with point 53, second paragraph, which refers to points 45 and 46 of the guidelines. These provisions allow operating aid for up to five years if the aid is limited to 50 % of the extra costs or if it is reduced degressively over a period of five years. The Austrian law neither limits the tax refund to 50 % of the extra costs nor does it require any reduction on a progressively sliding scale.

(58) As regards undertakings to which the Energy Tax Rebate Act was applicable before 31 December 2001, the tax refund system remains unchanged. The measure in this respect establishes a derogation from an existing tax which was decided on when the tax was adopted. It falls therefore under point 51.2 of the guidelines, which refer to the compatibility criteria of point 51.1. Of this latter provision, only point 51.1.b second indent is applicable. This provision requires beneficiary companies to pay a significant proportion of the national tax. Austria did not submit any data for the period under examination which would make it possible to assess the actual proportion of the tax that the undertakings concerned have to pay. The Commission therefore cannot conclude that undertakings pay a significant proportion of the national tax.

(59) In the light of the above considerations, the Commission concludes that the Energy Tax Rebate Act 1996, as modified by Article 6 of Law No 158/2002 and extended without further modification until 31 December 2003, does not comply with the requirements of the guidelines and is incompatible with the common market.

Compatibility of the announced modification of the aid ⁽⁹⁾

(60) As regards undertakings to which the Energy Tax Rebate Act was not applicable until 31 December 2001, the

measure in the modified form promised by Austria is compatible with points 53 and 45 of the guidelines. The aid amounts to 100 % of the extra costs in the first year and will be reduced to 80 % in the second year. It will thus fall in a linear fashion over the period under examination. In addition, the Commission considers that the tax reduction in the second year will leave the beneficiaries with a tax amount to bear which is still higher than what the energy taxation Directive requires from 2004 onwards.

(61) As regards undertakings to which the Energy Tax Rebate Act was applicable until 31 December 2001, the Commission considers that the aid complies with point 51.1.b second indent of the guidelines. Point 51.1.b second indent requires beneficiaries to pay a significant proportion of the national tax. The reason for this is that they should be left with an incentive to improve their environmental performance. This follows from the wording of point 51.1.b first indent, which allows for tax reductions from a harmonised tax if the beneficiaries pay more than the Community minimum rates 'in order to provide firms with an incentive to improve environmental protection'. While for the period under examination the Austrian energy tax was a national tax, from 1 January 2004 the energy taxation Directive establishes harmonised taxation, setting minimum tax rates for the use of the energy products taxed and subject to the rebate under the Austrian energy taxation legislation. The energy taxation Directive takes the objective of environmental protection explicitly into account (see in particular the third, sixth, seventh and twelfth recitals). The Commission therefore considers that the compliance with the minimum rates of the energy taxation Directive will provide undertakings with an incentive to improve environmental protection. For this reason the Commission can accept the compliance with the minimum rates also as being equal to a significant proportion of the national tax as required under point 51.1.b second indent of the guidelines. Austria sets the minimum tax burden on companies in a way which complies with the minimum tax rates not only on natural gas and electricity, but also on coal, which has not been subject to energy taxation in Austria. By doing so, Austria ensures that the minimum tax burden in 2002 and 2003 corresponds to the taxation level, and also has the minimum environmental effect, envisaged by the Directive as a whole.

Legitimate expectations

(62) Where unlawfully granted State aid is found to be incompatible with the common market, it must be recovered from the beneficiary. Through recovery of the aid, the competitive position that existed before it was granted is restored as far as is possible. However, Article 14(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of

⁽⁹⁾ The Commission notes that these modifications have not yet entered into force.

Article 93 of the EC Treaty⁽¹⁰⁾ states that 'the Commission shall not require the recovery of the aid if this would be contrary to a general principle of Community law'. The case-law of the Court of Justice and the Commission's own decision-making practice have established that, where, as a result of the Commission's actions, a legitimate expectation exists on the part of the beneficiary of a measure that the aid has been granted in accordance with Community law, then an order to recover the aid would infringe a general principle of Community law.

- (63) It is the responsibility of a Member State to make national measures compatible with Community State aid rules in order to prevent distortions of competition, to notify any State aid measures to the Commission in accordance with Article 88(3) of the EC Treaty and to refrain from implementing it pending its examination. In principle, undertakings cannot claim legitimate expectations in respect of illegal State aid. If undertakings could successfully base themselves on a national law, even adopted in good faith, but which does not comply with the State aid rules and therefore has the effect of distorting competition, the aim of Community State aid control could not be attained.

- (64) In its Judgment in *Van den Bergh en Jurgens* ⁽¹¹⁾, the Court of Justice held:

'The Court has consistently held that any trader in regard to whom an institution has given rise to justified hopes may rely on the principle of protection of legitimate expectation. On the other hand, if a prudent and discriminating trader could have foreseen the adoption of a Community measure likely to affect his interests, he cannot plead that principle if the measure is adopted.'

- (65) Austria has not presented the Commission with any argument based on the existence of legitimate expectation on the part of the beneficiaries under the scheme. However, it transpires from the Court's case-law that the Commission is required to take into consideration on its own initiative the exceptional circumstances that provide justification, pursuant to Article 14(1) of Regulation (EC) No 659/1999, for it to refrain from ordering the recovery of unlawfully granted aid where such recovery is contrary to a general principle of Community law, such as respect for the legitimate expectation of beneficiaries.
- (66) In the present case, on the one hand, the Commission notes that the national measures at issue imposed a significant burden on Austrian undertakings in the

interests of environmental protection. Such a burden would have been particularly heavy for energy-intensive undertakings without the tax rebate assessed in this Decision. When the national measure was drawn up, there was no established practice regarding the legal assessment of exemptions from or reductions in such taxes which formally apply to different sectors of the economy but which are nevertheless selective, because they grant an intrinsic, de facto and specific advantage to certain sectors. On the other hand, it is conceivable that, in the present case, the wording of the Court's answer to the second question in *Adria-Wien* may have led some beneficiaries to believe in good faith that the national measures at issue before the national court would cease to be selective, and therefore cease to constitute State aid, if their benefit were extended to sectors other than the manufacture of goods. Taking all these considerations into account, the Commission comes to the conclusion that, in the present case, recovery would be contrary to the principle of protection of legitimate expectations. Therefore, in accordance with Article 14 of Regulation (EC) No 659/1999, the Commission decides that recovery shall not be required.

Aid for agricultural primary production

- (67) The tax refund system is applicable to agriculture and forestry under the same conditions as for other beneficiary sectors. The Community guidelines on State aid for environmental protection do not apply to agriculture. When assessing multi-sectoral State aid in the context of energy taxes ⁽¹²⁾, the Commission has, however, accepted equal treatment for agriculture and forestry with other sectors subject to the general environmental aid guidelines. The above considerations therefore also apply to the assessment of aid to the agricultural sector.

VI. CONCLUSION

- (68) The Commission finds that Austria has unlawfully implemented the Energy Tax Rebate Act 1996 in the form of Law 158/2002 and without modification extended it until 31 December 2003 in breach of Article 88(3) of the Treaty.
- (69) As regards undertakings to which the Energy Tax Rebate Act was not applicable until 31 December 2001, the aid scheme is incompatible with the Community guidelines on State aid for environmental protection, and in particular points 52 and 45 thereof, and any other derogations from Article 87(2) and (3) of the EC Treaty.

⁽¹⁰⁾ OJ L 83, 27.3.1999, p. 1.

⁽¹¹⁾ Case C-265/85 *Van den Bergh en Jurgens BV v Commission* [1987] ECR 1155, paragraph 44.

⁽¹²⁾ See, in particular, the Commission decisions on the German ecotax, NN 47/99 (OJ C 166, 12.6.1999) and N 575/A/99 (OJ C 322, 11.11.2000).

(70) As regards undertakings to which the Energy Tax Rebate Act was applicable already before 31 December 2001, the aid scheme is incompatible with the Community guidelines on State aid for environmental protection, and in particular point 51.1.b second indent thereof, and any other derogations from Article 87(2) and (3) of the EC Treaty. Since no other grounds for compatibility can be envisaged for the scheme as such, the latter is incompatible with the common market.

(71) Nevertheless, in view of the specific circumstances of the present case and in accordance with Article 14 of Regulation (EC) No 659/1999, recovery shall not be required.

(72) The Commission takes note of the commitment of the Austrian Government to retroactively modify the energy tax rebate. The Commission considers the modifications as described above to be compatible with the Community guidelines on State aid for environmental protection, and in particular point 52 read in conjunction with point 45 and point 51.1.b second indent thereof,

HAS ADOPTED THIS DECISION:

Article 1

The tax rebate granted by Austria for the year 2002 under the Energy Tax Rebate Act 1996 as amended by Law 158/2002 and extended without modification until 31 December 2003 is

an unlawful State aid scheme incompatible with the common market.

Article 2

Austria shall abolish the scheme referred to in Article 1 in so far as it continues to produce effects.

Article 3

Austria shall take all necessary measures to modify the measure retroactively as promised by the Austrian authorities in their letter of 5 December 2003.

Article 4

Austria shall inform the Commission, within two months following notification of this Decision, of the measures taken to comply with it.

Article 5

This Decision is addressed to the Republic of Austria.

Done at Brussels, 9 March 2004.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION**of 9 December 2004****relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement
(Case No C.37.533 — Choline Chloride)***(notified under document number C(2004) 4717)***(Only the English, French and German texts are authentic)****(Text with EEA relevance)**

(2005/566/EC)

On 9 December 2004, the Commission adopted a decision relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement. In accordance with the provisions of Article 30 of Council Regulation (EC) No 1/2003 ⁽¹⁾, the Commission herewith publishes the names of the parties and the main content of the decision, including any penalties imposed, while having regard to the legitimate interest of undertakings in the protection of their business interests. A non-confidential version of the full text of the decision can be found in the authentic languages of the case and in the Commission's working languages at DG COMP's website at the following address: http://europa.eu.int/comm/competition/index_en.html

I. SUMMARY OF THE INFRINGEMENT**1. Introduction**

- (1) This Decision is addressed to Akzo Nobel N.V., Akzo Nobel Nederland B.V., Akzo Nobel Chemical Internationals B.V., Akzo Nobel Chemicals B.V. and Akzo Nobel Functional Chemicals B.V., jointly and severally (hereinafter Akzo Nobel), BASF A.G. (hereinafter BASF), Bioproducts Incorporated (hereinafter Bioproducts), Chinook Group Limited Partnership and Chinook Group Limited, jointly and severally (hereinafter Chinook), DuCoa L.P. (hereinafter DuCoa) and UCB S.A. (hereinafter UCB).
- (2) The addressees participated in a single and continuous infringement of Article 81(1) of the Treaty establishing the European Community (hereinafter the EC Treaty or the Treaty) and, from 1 January 1994, Article 53(1) of the Agreement on the European Economic Area (hereinafter EEA Agreement), covering the whole of the EEA territory.
- (3) The Commission initiated an investigation into the global choline chloride industry after it received a leniency application in April 1999 from the US supplier Bioproducts. The investigation covered the period from 1992 to the end of 1998 (hereafter referred to as the period of investigation).

2. The market for choline chloride

- (4) Choline chloride belongs to the B-complex group of water-soluble vitamins (vitamin B4). It is mainly used in the animal feed industry as a traditional feed additive, especially for poultry and swine, to increase growth, reduce mortality rates, increase feed efficiency, increase egg production and improve meat quality.
- (5) At the start of the period of investigation, choline chloride was produced mainly in Europe and North America (United States and Canada), although there was also choline chloride production capacity in China, India, Japan, Korea and Taiwan. The North American producers were exporting to Central and South America, Europe, the Far East and South-East Asia. The European producers were starting to export to Central and South America, Africa, South-East Asia and the Far East. European and North American producers also had production facilities in different areas of the world and were expanding local production in order to cut transportation and storage costs and better penetrate local markets. In particular, BASF established production facilities in Mexico, Brazil and Thailand, Akzo Nobel and UCB in China, DuCoa in Mexico and Chinook in Singapore.
- (6) The size of the worldwide market for choline chloride was estimated at EUR 183,7 million in 1997, the last full year of the infringement, the EEA accounting for EUR 52,6 million. During the period of investigation, the producers involved in the infringement controlled more than 80 % of the world market. The European producers concerned controlled close to 80 % of the EEA area.

⁽¹⁾ OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p. 1).

3. Description of the cartel

- (7) In so far as the EEA is concerned, the choline chloride cartel operated at two different, but closely related levels, the global level and the European level. At the global level, all producers subject to this proceeding participated in anti-competitive activities concerning the EEA between June 1992 and April 1994. These activities included the setting and increase of worldwide prices, the allocation of worldwide markets, the control of distributors and converters and the exchange of commercially sensitive information.
- (8) The North American producers did not participate in a series of further anti-competitive meetings strictly among the European producers to coordinate their behaviour on the European market. These meetings took place in the period between March 1994 and October 1998. Activities included the setting and increase of prices (both for the EEA as a whole, for particular national markets and for individual customers), the allocation of individual customers among the participating undertakings, the allocation of markets shares for each undertaking for the EEA market as a whole, the control of distributors and converters and the exchange of commercially sensitive information.
- (9) The Commission has found that the arrangements at the global and European levels together were part of an overall scheme which laid down the lines of action in the EEA of the members of the cartel and restricted their individual commercial conduct in order to pursue a single anti-competitive economic aim, namely the distortion of normal competitive conditions in the EEA for choline chloride. The North American producers participated in this scheme for some time (between October 1992 and April 1994, a period of one year and six months) and the European producers for the entire period (between October 1992 and September 1998, a period of five years and eleven months).

II. FINES

1. Limitation period

- (10) The North American producers ended their participation in the infringement at the end of the global meeting which took place between 14 and 20 April 1994. The first action taken by the Commission to investigate the infringement was on 26 May 1999. As this action took place more than five years after the North American producers had ended their participation to the infringement⁽¹⁾, no fines can be imposed on the North American producers, Bioproducts, Chinook and DuCoa.

⁽¹⁾ See Article 1 of Council Regulation (EC) No 2988/74 (OJ L 319, 29.11.1974, p. 1) and Article 25 of Council Regulation (EC) No 1/2003.

2. Basic amount

Gravity

- (11) The infringement in this case consisted primarily of secret collusion among cartel members to fix prices in the EEA, supported by market sharing and agreed actions against competitors there. These kinds of horizontal restrictions are, by their very nature, among the worst kinds of violations of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement. Taking into account the nature of the infringement committed and the fact that it covered the whole of the common market and, following its creation, the EEA in its entirety, the Commission considers that Akzo Nobel, BASF and UCB have committed a very serious infringement of Article 81(1) of the Treaty and 53(1) of the EEA Agreement. In the Commission's view these factors are such that the infringement must qualify as very serious, even if the actual impact of the infringement cannot be measured.

Differential treatment

- (12) Within the category of very serious infringements, the scale of likely fines makes it possible to apply differential treatment to undertakings in order to take account of the effective economic capacity of the offenders to cause significant damage to competition. Taking into account that the infringement started at the global level, with the participation of North American companies which agreed, *inter alia*, to withdraw from the European market, the Commission considers it appropriate in this case to use the global market shares of the undertakings participating in the infringement to determine their respective weight. Chinook was the largest market operator in the world, with a market share of 19,3 %. It is therefore placed in a first category. DuCoa, with a market share of 16,3 %, is placed in a second category. UCB, Bioproducts and Akzo Nobel, with market shares of 13,4 %, 12,2 % and 12 % respectively, are placed in a third category. Finally, BASF, with a market share of 9,1 %, is placed in a fourth category.

Sufficient deterrence

- (13) Within the category of very serious infringements, the scale of likely fines also makes it possible to set the fines at a level which ensures that they have sufficient deterrent effect, taking into account the size of each undertaking. In this respect, the Commission notes that in 2003, the most recent financial year preceding this Decision, the turnover of UCB was EUR 3 billion, that of Akzo Nobel EUR 13 billion and that of BASF EUR 33,4 billion. Accordingly, the Commission considers it appropriate to multiply the fine for Akzo Nobel with a factor of 1,5 and that of BASF with a factor of 2.

Duration

- (14) Akzo Nobel N.V., together with Akzo Nobel Nederland B.V., Akzo Nobel Chemicals International B.V., Akzo Nobel Chemicals B.V. and Akzo Nobel Functional Chemicals B.V., BASF A.G and UCB S.A participated in the infringement at least from 13 October 1992 until 30 September 1998, a period of five years and eleven months.

3. Aggravating circumstances*Recidivism*

- (15) At the time the infringement took place, BASF had already been subject to previous Commission prohibition decisions for cartel activities in Decisions 69/243/EEC ⁽¹⁾ and 94/599/EC ⁽²⁾. The fact that BASF repeated the same type of conduct, albeit in a sector other than those in which it had previously incurred penalties, shows that the first penalties did not prompt BASF to change its conduct throughout the undertaking. This constitutes for the Commission an aggravating circumstance. This aggravating circumstance justifies an increase of 50 % in the basic amount of the fine to be imposed on BASF. A 50 % rate is the normal rate employed by the Commission in cases involving recidivism.

4. Attenuating circumstances*Early termination of the infringement*

- (16) BASF and UCB claim a reduction for early termination. Cartel infringements are by their very nature hard-core anti-trust violations. Participants in these infringements normally realise very well that they are engaged in illegal activities. In the Commission's view, in such cases of deliberate illegal behaviour, the fact that a company terminates this behaviour before any intervention of the Commission does not merit any particular reward other than that the period of infringement of the company concerned will be shorter than it would otherwise have been.

Non-implementation

- (17) Akzo Nobel, BASF and UCB claim that the infringement or elements thereof were not, not fully or not effectively implemented. In the Commission's view, the arrangements, in so far as they pertained to the EEA market, were implemented, at least by the European

producers. They were implemented in particular in respect of the key elements of prices and allocation of clients in Europe and the control of converters, even if such implementation may have been less than fully successful in achieving an actual impact on the market because of remaining competition on that market. None of the three producers concerned have provided any indication that they had any desire, and undertook any action, to deliberately abstain from implementing the agreements they concluded in respect of the EEA during the period in which they adhered to them.

Length of the investigation

- (18) BASF argues that a reduction should be granted because of the long duration of the investigation. The Commission observes that in general there is no requirement on the Commission to reduce the fine because of the length of an investigation. The normal limitation periods spelled out in Article 25 of Regulation (EC) No 1/2003 apply. In particular, paragraph 5 of that Article states that the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a periodic penalty payment. This period is far from having expired in this proceeding.

Crisis situation

- (19) BASF argues that a reduction should be granted for the alleged fact that the choline chloride industry was in a crisis situation. The Commission observes that the fact that an undertaking may not happen to make profits on a certain commercial activity is no licence for it to enter into secret collusion with competitors to cheat customers and other competitors. As a general rule, cartels risk coming into play not when undertakings make large profits but precisely when a sector encounters problems.

Disciplinary measures and compliance programme

- (20) BASF argues that it should receive a reduction for having taken disciplinary measures against employees involved in the infringement and for having introduced a compliance programme. While the Commission welcomes measures taken by undertakings to avoid cartel infringements in the future, such measures cannot change the reality of the infringement and the need to sanction it appropriately in this Decision.

⁽¹⁾ OJ L 195, 7.8.1969, p. 11.

⁽²⁾ OJ L 239, 14.9.1994, p. 14.

Effective cooperation outside of the 1996 Leniency Notice

- (21) UCB was the first undertaking to voluntarily inform the Commission of the fact that in addition to meetings at the global level, the European producers had held a number of meetings among themselves at the European level. The evidence voluntarily provided by UCB on these meetings allowed the Commission to determine the duration of the infringement as five years and eleven months. Had the Commission remained aware only of the arrangements at the global level, the duration of the infringement would have been one year and six months. In order to reward UCB for this increase in the duration, the Commission considers it appropriate to grant UCB a reduction for attenuating circumstances equal to 25,8 % of the basic amount. This reduction corresponds to the 40 % increase in the basic amount resulting from a duration of the infringement of five years and eleven months instead of one year and six months.

5. Application of the 1996 Leniency Notice

Significant reduction of a fine ('Section D': reduction from 10 % to 50 %)

- (22) Akzo Nobel, BASF and UCB all co-operated with the Commission at different stages of the investigation with a view to receiving the favourable treatment set out in the 1996 Leniency Notice, which applies in this proceeding ⁽¹⁾.

BASF

- (23) BASF was the third company to voluntarily submit evidence on the global arrangements. When BASF submitted its evidence, the Commission already had at its disposal evidence regarding these arrangements submitted by Chinook and by Bioproducts. Irrespective of the value of the evidence submitted by Chinook, Bioproducts' evidence in itself was clearly sufficient to constitute decisive evidence of the cartel's existence within the meaning of section B of the 1996 Leniency Notice. Therefore, when BASF made its submissions, it was not the first undertaking to provide decisive evidence of the cartel's existence to the Commission. As a result, sections B and C of the 1996 Leniency Notice do not apply to BASF, nor to the other two European producers.
- (24) As to its substance, the evidence submitted by BASF, which was limited to the global arrangements, may be said to have materially contributed to establishing the existence of the infringement within the meaning of

section D of the 1996 Leniency Notice, which provides for possible reductions of between 10 % and 50 %. But the value of these submissions remained quite limited taking into account the extensive evidence on the global arrangements already in the Commission's possession.

- (25) After receiving the Statement of Objections, BASF informed the Commission that it did not substantially contest the facts on which the Commission based its allegations, except for certain factual corrections which the Commission has accepted.
- (26) Taking into account the different elements of cooperation mentioned, the Commission considers that BASF is entitled to a 20 % reduction of the fine that would otherwise have been imposed.

UCB

- (27) UCB voluntarily informed the Commission of nine cartel meetings held at the European level, from March 1994 until October 1998. It mentioned the participants and provided a brief general description of the contents of these meetings. It also added contemporaneous reports of the first two of these cartel meetings, which took place in 1994. At the time when UCB made this submission, the Commission was not aware of any meetings at the European level. Together, this evidence constituted a significant material contribution to the establishment of the infringement, even if no written contemporaneous evidence was provided for the period from 1995 to 1998.
- (28) After receiving the Statement of Objections, UCB informed the Commission that it did not substantially contest the facts on which the Commission based its allegations, except for certain factual corrections which the Commission has accepted. However, in the same submission UCB claimed that, although it participated in a number of meetings at the global level, it was never a party to any agreement at the global level. In the Decision, the Commission has rejected this claim as unfounded. Therefore, as UCB did in fact, after receiving the Statement of Objections, contest an essential element of the facts on which the Commission based its allegations, it does not receive any reduction for not contesting the facts on which the Commission bases its allegations.

⁽¹⁾ According to point 28 of the 2002 Leniency Notice, from 14 February 2002, the 2002 Notice replaces the 1996 Notice for all cases in which no undertaking has contacted the Commission in order to take advantage of the favourable treatment set out in that notice. As in this case several undertakings applied for leniency with the Commission before 14 February 2002, the 1996 Leniency Notice applies.

- (29) Taking into account the different elements of cooperation mentioned, the Commission considers that UCB is entitled to a 30 % reduction of the fine that would otherwise have been imposed.

Akzo Nobel

- (30) In January 2002, Akzo Nobel submitted a voluntary report on the European arrangements. This report gave a detailed description of the contents of the arrangements at the European level, including considerable information that UCB had not provided. However, the fact that Akzo Nobel filed this report two and a half years after UCB had made its submission on these arrangements should be taken into account in the leniency reduction granted.
- (31) After receiving the Statement of Objections, Akzo Nobel informed the Commission that it did not substantially contest the facts on which the Commission based its allegations, except for certain factual corrections which the Commission has accepted.
- (32) Taking into account the different elements of cooperation mentioned, the Commission considers that Akzo Nobel is entitled to a 30 % reduction of the fine that would otherwise have been imposed. This assessment takes into account, on the one hand, that Akzo Nobel's report on the European arrangements was about as valuable to the Commission as the information and evidence on those arrangements supplied earlier by UCB, but arrived two and a half years later and, on the other hand, that Akzo Nobel, as opposed to UCB, did not contest the facts on which the Commission based its allegations. As a result, both undertakings merit the same percentage reduction.

6. Decision

- (33) The following undertakings infringed Article 81(1) of the Treaty and, from 1 January 1994, Article 53(1) of the EEA Agreement by participating, for the periods indicated, in a complex of agreements and concerted practices consisting of price fixing, market sharing and agreed actions against competitors in the choline chloride sector in the EEA:

- (a) Akzo Nobel N.V., together with Akzo Nobel Nederland B.V., Akzo Nobel Chemicals International B.V., Akzo Nobel Chemicals B.V. and Akzo Nobel

Functional Chemicals B.V., from 13 October 1992 until 30 September 1998;

- (b) BASF A.G., from 13 October 1992 until 30 September 1998;
- (c) Bioproducts Incorporated, from 13 October 1992 until 14 April 1994;
- (d) Chinook Group Limited Partnership, together with Chinook Group Limited, from 13 October 1992 until 14 April 1994;
- (e) DuCob, L.P., from 13 October 1992 until 14 April 1994;
- (f) UCB S.A., from 13 October 1992 until 30 September 1998.

- (34) For these infringements, the following fines are imposed:

- (a) Akzo Nobel N.V., Akzo Nobel Nederland B.V., Akzo Nobel Chemicals International B.V., Akzo Nobel Chemicals B.V. and Akzo Nobel Functional Chemicals B.V., jointly and severally EUR 20,99 million;
- (b) BASF AG EUR 34,97 million;
- (c) UCB SA EUR 10,38 million.

- (35) The undertakings listed in recital 33 shall immediately bring their infringement to an end, insofar as they have not already done so. They shall refrain from repeating any act or conduct as the infringement found in this case, and from any act or conduct having the same or similar object or effect.

COMMISSION DECISION

of 8 July 2005

suspending the examination procedure concerning obstacles to trade consisting of measures imposed and practices followed by the Eastern Republic of Uruguay affecting trade in Scotch whisky

(2005/567/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organisation ⁽¹⁾, and in particular Article 11(2) thereof,

Whereas:

- (1) On 2 September 2004, the Scotch Whisky Association (SWA) lodged a complaint pursuant to Article 4 of Regulation EC No 3286/94 (hereinafter referred to as the Regulation)
- (2) SWA claimed that Community exports of whisky to the Eastern Republic of Uruguay were hindered by a number of obstacles to trade within the meaning of Article 2(1) of the Regulation.
- (3) The alleged obstacles to trade were all linked to the Uruguayan internal excise tax system.
- (4) The Commission decided, after due consultation of the Advisory Committee established by the Regulation, that the complaint contained sufficient evidence to justify the initiation of an examination procedure. A Notice of Initiation was therefore published in the *Official Journal of the European Union* on the 23 October 2004 ⁽²⁾.
- (5) During the investigation, the Government of Uruguay expressed its readiness to seek a negotiated solution to the issues raised in the complaint, and proposed:

- (a) to withdraw the requirement that whisky be aged less than three years to be included in the lowest tax category. The measure will take effect from 1 July 2005;

- (b) to apply the same treatment to domestic and imported whiskies as regards the requirement to affix strip stamps. The Eastern Republic of Uruguay will amend its regulations by 30 June 2005 and the measure will enter into force after a transitional period of 90 days;

- (c) to promote a change in the structure of the IMESI tax in order to bring it in line with the most usual tax systems at the international level. This change would help to address the issue of the alleged lack of transparency and predictability. The reform process is expected to be finalised by the end of 2006.

- (6) The Commission considers therefore that it is appropriate to suspend the procedure.

- (7) The Community will monitor the implementation of the negotiated solution and will terminate the procedure when the Government of Uruguay has fulfilled its commitments.

- (8) The measures provided for in this Decision are in accordance with the opinion of the Advisory Committee,

HAS DECIDED AS FOLLOWS:

Sole Article

The examination procedure concerning obstacles to trade, consisting of measures imposed and practices followed by the Eastern Republic of Uruguay affecting trade in Scotch whisky, is hereby suspended.

Done at Brussels, 8 July 2005.

For the Commission

Peter MANDELSON

Member of the Commission

⁽¹⁾ OJ L 349, 31.12.1994, p. 71. Regulation as amended by Regulation (EC) No 356/95, OJ L 41, 23.2.1995, p. 3.

⁽²⁾ OJ C 261, 23.10.2004, p. 3.

COMMISSION DECISION

of 11 July 2005

concerning a request from the Republic of Hungary to apply a reduced rate of VAT to the supply of natural gas*(notified under document number C(2005) 2514)***(Only the Hungarian text is authentic)**

(2005/568/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment ⁽¹⁾, as last amended by Directive 2004/66/EC ⁽²⁾, and in particular Article 12(3)(b) thereof,

Whereas:

- (1) By letter registered at the Commission on 12 April 2005 the Republic of Hungary informed the Commission of its intention of applying a reduced rate of VAT to the supply of natural gas.
- (2) According to Annex X of the Accession Treaty, Hungary is allowed to apply the reduced VAT rate for the supply of natural gas and electricity until one year after accession to the EU. As from 1 January 2004, Hungary has applied the standard VAT rate to the supply of electricity.
- (3) Hungary intends to continue to apply a reduced rate to the supply of gas (15 %) and the standard rate to electricity (25 %). This differentiation of rates neither causes distortion of competition, nor a shift from the consumption of electricity to the consumption of gas. This is mainly due to national rules for the establishment of prices, which are quite different between natural gas and electricity, and to the fact that, from a technical-technological point of view, the two products can be substitute goods only for heating purposes. According to the information given by Hungarian authorities, the price for electricity is about three times the one for natural gas.

(4) Moreover, the VAT rules regarding the place of supply of natural gas, as laid down in the Sixth VAT Directive, were amended by Directive 2003/92/EC ⁽³⁾. The supply of natural gas in the final stage, from traders and distributors to final consumer, is taxed at the place where the customer has effective use and consumption of the goods, in order to ensure that taxation takes place in the country where actual consumption takes place.

(5) The planned measure is a general one applying a reduced rate of VAT to the supply of natural gas under Article 12(3)(b) of the Sixth VAT Directive.

(6) Since the measure is a general one with no provision for exceptions, the risk of distortion of competition must be deemed non-existent. Since the condition laid down by Article 12(3)(b) of the Sixth Directive is thus fulfilled, Hungary should be able to apply the measure concerned as soon as this Decision is notified,

HAS ADOPTED THIS DECISION:

Article 1

Hungary may apply the measure notified in its letter of 12 April 2005, applying a reduced rate of VAT to the supply of natural gas irrespective of the conditions of production and supply.

Article 2

This Decision is addressed to the Republic of Hungary.

Done at Brussels, 11 July 2005.

For the Commission

László KOVÁCS

Member of the Commission

⁽¹⁾ OJ L 145, 13.6.1977, p. 1.

⁽²⁾ OJ L 168, 1.5.2004, p. 35.

⁽³⁾ OJ L 260, 11.10.2003, p. 8.

COMMISSION DECISION

of 18 July 2005

adjusting the weightings applicable from 1 August, 1 September, 1 October, 1 November and 1 December 2004 and from 1 January 2005 to the remuneration of officials, temporary staff and contract staff of the European Communities serving in third countries and of certain officials remaining in post in the 10 new Member States for a maximum period of 15 months after accession (Article 33(4) of the Treaty on the accession of the 10 new Member States)

(2005/569/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Staff Regulations of officials of the European Communities and the conditions of employment of other servants of the Communities laid down by Council Regulation (EEC, Euratom, ECSC) No 259/68 ⁽¹⁾, and in particular the second paragraph of Article 13 of Annex X thereto,

Having regard to the Treaty of Accession of the 10 new Member States, and in particular Article 33(4) thereof,

Whereas:

- (1) Council Regulation (EC, Euratom) No 257/2005 ⁽²⁾ fixed, pursuant to the first paragraph of Article 13 of Annex X to the Staff Regulations, the weightings to be applied from 1 July 2004 to the remuneration payable in the currency of the country of employment of officials, temporary staff and contract staff of the European Communities serving in third countries and of certain officials remaining in post in the 10 new Member States for a maximum period of 15 months after accession.
- (2) Some of these weightings need to be adjusted in accordance with the second paragraph of Article 13 of Annex X to the Staff Regulations, with effect from 1 August, 1 September, 1 October, 1 November and

1 December 2004 and from 1 January 2005 because the statistics available to the Commission show that in certain third countries the variation in the cost of living measured on the basis of the weighting and the corresponding exchange rate has exceeded 5 % since weightings were last laid down or adjusted,

HAS DECIDED AS FOLLOWS:

Sole Article

From 1 August, 1 September, 1 October, 1 November and 1 December 2004 and 1 January 2005 the weightings applicable to the remuneration payable in the currency of the country of employment of officials, temporary staff and contract staff of the European Communities serving in third countries and of certain officials remaining in post in the 10 new Member States for a maximum period of fifteen months after accession shall be adjusted as shown in the Annex hereto.

The exchange rates for the calculation of such remuneration shall be those used for implementation of the general budget of the European Union for the month preceding the dates referred to in the first paragraph.

Done at Brussels, 18 July 2005.

For the Commission

Benita FERRERO-WALDNER

Member of the Commission

⁽¹⁾ OJ L 56, 4.3.1968, p. 1. Regulation as last amended by Regulation (EC, Euratom) No 31/2005 (OJ L 8, 12.1.2005, p. 1).

⁽²⁾ OJ L 46, 17.2.2005, p. 1.

ANNEX

Place of employment	Weighting August 2004
Not applicable	
Place of employment	Weighting September 2004
Eritrea	45,5
Zimbabwe	55,0
Place of employment	Weighting October 2004
Gambia	39,4
Madagascar	61,0
Zimbabwe	57,0
Place of employment	Weighting November 2004
Mauritania	59,0
Sierra Leone	68,7
Place of employment	Weighting December 2004
Algeria	79,9
Costa Rica	64,0
Place of employment	Weighting January 2005
Botswana	72,0
Cambodia	61,6
Djibouti	89,5
Eritrea	47,0
Gambia	41,2
Georgia	91,3
Ghana	64,9
Guatemala	68,9
Guinea	58,1
Jamaica	78,6
Kazakhstan	100,8
Laos	66,4
Lebanon	94,1
Madagascar	65,3
Mali	95,4
Maurice	69,6
Mauritania	60,8
Nigeria	69,3
Russia	104,4
Tanzania	58,4
Chad	122,4
Ukraine	91,3
Venezuela	63,3
Zimbabwe	56,4