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

REGULATIONS

COUNCIL REGULATION (EC) No 862/2009

of 15 September 2009

terminating the partial interim review of the anti-dumping measures imposed by Regulation (EC) No 1487/2005 on imports of certain finished polyester filament fabrics originating in the People's Republic of China

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community ⁽¹⁾ (the basic Regulation), and in particular Article 11(3) thereof,

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

Whereas:

1. MEASURES IN FORCE

- (1) By Regulation (EC) No 1487/2005 ⁽²⁾ (the original Regulation), the Council imposed a definitive anti-dumping duty on imports of certain finished polyester filament fabrics ('PFF' or 'the product concerned') originating in the People's Republic of China ('PRC' or 'the country concerned'). The investigation period used in the investigation that led to the aforesaid Regulation (the original investigation) was the period from 1 April 2003 to 31 March 2004 (the original IP).
- (2) Following an anti-absorption reinvestigation, these measures were amended by Regulation (EC) No 1087/2007 ⁽³⁾. The duty rates currently in force range from 14,1 % to 74,8 %.

2. PROCEDURE

2.1. Request for review

- (3) On 1 April 2008, the Commission received a request pursuant to Article 11(3) of the basic Regulation to

initiate a partial interim review to examine whether certain product types fall within the scope of the current anti-dumping measures.

- (4) The request was lodged by Hüpeden GmbH & Co. KG (the applicant), an importer located in Germany.

- (5) The applicant alleged that the product it imports is only used to produce a special adhesive tape for insulation of cables within the wiring harnesses of engines, mainly engines of cars (hereinafter 'tape' grade), and that the technical and chemical characteristics of this 'tape' grade are different from those of the product concerned as defined in the original investigation. In particular, the tensile strength and the colouring of 'tape' grade seemed to be different. The applicant alleged that 'tape' grade should therefore be considered as being outside the scope of the original investigation and thus not be subject to the abovementioned measures.

2.2. Initiation

- (6) Having determined, after consulting the Advisory Committee, that sufficient evidence existed to justify the initiation of a partial interim review, the Commission announced by a notice published on 26 June 2008 in the *Official Journal of the European Union* ⁽⁴⁾ the initiation of a partial interim review in accordance with Article 11(3) of the basic Regulation, limited to the examination of the product scope. In particular, the review had to determine whether or not 'tape' grade is part of the product concerned as defined in the original investigation.

⁽¹⁾ OJ L 56, 6.3.1996, p. 1.

⁽²⁾ OJ L 240, 16.9.2005, p. 1.

⁽³⁾ OJ L 246, 21.9.2007, p. 1.

⁽⁴⁾ OJ C 163, 26.6.2008, p. 38.

2.3. Review investigation

- (7) The Commission officially advised the authorities of the PRC, and all other parties known to be concerned, namely exporting producers in the country concerned, producers as well as users and importers in the Community, of the initiation of the partial interim review investigation. Interested parties were given the opportunity to make their views known in writing and request a hearing within the time limit set in the notice of initiation. All interested parties, who so requested and showed that there were particular reasons why they should be heard, were granted a hearing.
- (8) The Commission sent questionnaires to all parties known to be concerned and all other parties which made themselves known within the deadlines set out in the notice of initiation.
- (9) In view of the scope of the review, no investigation period was set for the purpose of this review. The information received in the questionnaire replies covered the period from 1 July 2007 to 30 June 2008 (the period considered). For the period considered, information concerning sales/purchases volume and value, production volume and capacity for 'tape' grade and all PFF types was requested. In addition, the parties concerned were asked to comment on any differences or similarities between 'tape' grade and other types of PFF with respect to their production process, technical characteristics, end-uses, interchangeability, etc.
- (10) Questionnaire replies were received from the applicant, one Chinese exporting producer of 'tape' grade, one Community producer of 'tape' grade, two Community producers of other types of PFF and one user of 'tape' grade.
- (11) The Commission sought and verified all information deemed necessary for the purpose of the assessment as to whether there was a need for amendment of the scope of the existing anti-dumping measures and carried out verification visits at the premises of the following companies:
- Hüpeden GmbH & Co. KG, Hamburg, Germany,
- TFE Textil, Nüziders, Austria,
- Wujiang Glacier Fabrics, Wujiang, PRC.
- (12) All parties were informed of the essential facts and considerations on the basis of which the conclusions of the present review investigation were drawn (final disclosure). They were also granted a period within which they could make representations subsequent to this disclosure.

- (13) The oral and written comments submitted by the parties have been duly considered and replied to in the recitals that follow.

3. PRODUCT CONCERNED

- (14) The product concerned is, as defined in the original Regulation, woven fabrics of synthetic filament yarn containing 85 % or more by weight of textured and/or non textured polyester filament, dyed (including dyed white) or printed, originating in the PRC, currently falling within CN codes ex 5407 51 00, 5407 52 00, 5407 54 00, ex 5407 61 10, 5407 61 30, 5407 61 90, ex 5407 69 10, and ex 5407 69 90.

4. FINDINGS OF THE INVESTIGATION

- (15) It was first examined whether 'tape' grade falls within the scope of the measures imposed on certain finished polyester filament fabrics originating in the PRC as described in the original Regulation. It was subsequently examined whether the product scope could be amended on the ground that 'tape' grade and the other types of PFF do not form a single product.

4.1. Scope of the original investigation

- (16) It is recalled that PFF are produced by weaving yarns of polyester into a fabric and applying a finishing to this fabric. The yarns can be pre-dyed or not. The finishing consists generally of printing or dyeing the woven fabrics but further finishing can be applied to produce a peach skin effect or make the fabric, for instance, water-repellent.
- (17) In recital 8 of the original Regulation it is mentioned that the product concerned should be distinguished from woven PFF of yarns of different colours, for which pre-dyed yarn is woven into cloth, and the design is created by weaving the pattern. These fabrics fall within CN codes 5407 53 00 and 5407 61 50 and are excluded from the scope of the product and thus from the anti-dumping measures in force.
- (18) The applicant alleged in its request for review that 'tape' grade does not fall within the scope of the product concerned as defined in the original Regulation because it is made of pre-coloured yarns and therefore corresponds to the product described in recital 17 above. The applicant also explained that it had been consistently declaring its imports of 'tape' grade originating in the PRC under the CN code 5407 53 00, even before the imposition of anti-dumping measures in 2005. As regards this claim, it should be noted that an anti-dumping Regulation such as the present one is not the appropriate legal instrument to define under which CN code particular shipments should have been classified. That is primarily a question for the national authorities, if necessary using binding tariff information

and/or with the help of a request for a preliminary ruling by the Court of Justice of the European Communities. Nevertheless, if none of the products imported by the applicant can possibly be covered by the anti-dumping duty imposed by the original Regulation, this review investigation would appear to have no practical sense. The investigation revealed in this regard that the 'tape' grade is made of pre-coloured yarns but that these yarns are not of different colour and that no apparent pattern is created by weaving these yarns. Therefore, for the purpose of this investigation, it is considered that 'tape' grade is distinguishable from the product described in recital 17 above.

(19) Subsequent to the final disclosure, the applicant claimed that 'tape' grade should be considered as made of yarns of different colours, because the carbon which is not homogeneously melted in the polyester yarn creates shades of black colour in the yarn. The applicant justifies this claim by a reference to the subheading notes to Section XI of Part two in Annex I of Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff⁽¹⁾, in which the definition of woven fabric of yarns of different colours includes woven fabric which consists of yarns of different shades of the same colour and by reference to opinions of independent experts.

(20) In reply to this claim, it is recalled that this Regulation does not aim at defining under which CN code imports of 'tape' grade should be declared. Therefore, this claim was considered irrelevant for the purposes of this investigation since, as mentioned above, questions regarding customs classifications are primarily for the competent national authorities.

(21) In its request for review, the applicant also claimed that at the initiation and provisional stages, the original investigation focused on PFF for apparel applications only, and that only these types of fabrics were supposed to be included in the definition of the product concerned and targeted by the anti-dumping measures. The applicant also maintained that the product scope of the original investigation was expanded only in the original Regulation imposing definitive anti-dumping measures to cover all types of uses. It further claimed that 'tape' grade is used for a very specific application by the automotive industry and should therefore not be considered as being part of the product concerned.

(22) As regards this claim, it is noted that the notice of initiation of the original investigation⁽²⁾ made reference to PFF 'normally used for apparel applications' and not to PFF exclusively used for apparel applications. This means that there has been no expansion of the product concerned between the initiation stage and the imposition of definitive measures, as alleged by the applicant. Moreover, apart from a clarification on the product scope regarding the inclusion of 'dyed white' PFF, there is no other difference between the product concerned as defined in Commission Regulation (EC) No 426/2005⁽³⁾ (the provisional Regulation) and the definitive Regulation of the original investigation (i.e. the original Regulation). In both Regulations, neither the operative part (Article 1(1)) nor the recitals regarding the definition of the product concerned exclude PFF imported for a specific end-use from the duty. In the provisional Regulation, particularly in the first sentence of its recital 11, the product concerned is described in terms of its physical characteristics. Again, it is merely stated that PFF are 'normally' used for apparel applications, without this being in any way a condition for them to be covered by the investigation and/or the (provisional) duty. Later, in view of the numerous possible applications that were discovered in the course of the original investigation, such as furniture or home decoration, it was explicitly recalled, in recital 6 of the original Regulation, that all PFF were covered by the product definition, regardless of their final use. Therefore, 'tape' grade and all other PFF, including PFF for automotive applications, were included in the definition of the product concerned in the original investigation.

(23) The applicant also claimed, along similar lines as the arguments described above, that it could not properly exercise its right of defence in the original investigation as the scope of the product concerned was broadened between the provisional and definitive stage while no specific information concerning this change was sent to possible interested parties. The applicant claimed that this was the reason why neither the applicant nor its Chinese supplier cooperated in the original investigation.

(24) It is recalled that, as mentioned in recital 22, the product definition was not expanded during the original investigation, as other possible uses than apparel were considered already as from the initiation stage. Moreover, the applicant is an experienced commercial importer which cooperated in other anti-dumping investigations and is therefore well aware of the procedures and information sources (such as the Official Journal) regarding these investigations. In this context, it is also

⁽¹⁾ OJ L 256, 7.9.1987, p. 1.

⁽²⁾ OJ C 160, 17.6.2004, p. 5.

⁽³⁾ OJ L 69, 16.3.2005, p. 6.

important to note that, as shown in recitals 9 and 10 of the original Regulation, subsequent to the publication of the provisional Regulation, several interested parties raised claims against the imposition of measures on PFF for non-apparel applications (e.g. furniture, home decoration, umbrellas). This shows that interested parties understood that the investigation was never restricted to PFF used for apparel applications. In view of the above, the claim had to be rejected.

- (25) Subsequent to the final disclosure, the applicant further claimed that it had submitted comments in the course of the original investigation and that in parallel it had also actively discussed the case with a number of textile associations involved in that investigation. According to the applicant, at no time was there any indication from the Commission that 'tape' grade fabric might fall within the scope of the investigation or the measures.
- (26) It is first noted that it is clear that the applicant was fully aware of the existence of the original investigation. Moreover, as explained above, that investigation did cover PFF from the very beginning. In addition, the applicant did not bring any evidence that the Commission ever excluded 'tape' grade from the scope of the original investigation or that any party ever suggested that the Commission should do so. Indeed, the comments submitted by the applicant during the original investigation concerned general Community interest aspects of the proceeding and issues related to the possible inclusion of bleached or unbleached fabrics in the scope of the anti-dumping measures. It may be that the applicant did not regard itself concerned by the original investigation as regards its 'tape' grade imports. If that was indeed the case, it would appear to be due to the fact that the applicant was declaring its imports of 'tape' grade under CN code 5407 53 00, a code not targeted by the original investigation. However, the scope of an investigation is not limited by the fact that one operator may have declared goods which fall within that scope under an incorrect CN code. On this basis, the claim of the applicant had to be rejected.
- (27) In view of the above, it is confirmed that imports of 'tape' grade originating from the PRC fall within the scope of the measures described in the original Regulation.

4.2. Comparison between 'tape' grade and other types of PFF

- (28) In order to examine whether 'tape' grade and the other types of PFF form a single product, 'tape' grade and other types of PFF were compared in terms of basic physical, technical and/or chemical characteristics. Other subsidiary

criteria such as production process, prices, end-uses and interchangeability were also examined.

4.2.1. Physical and technical characteristics of 'tape' grade

- (29) The investigation showed that the yarns used to prepare the threads before weaving the 'tape' grade contain a small proportion of carbon (under 3 %). To produce this yarn, chips containing carbon are melted with chips of pure polyester, and the melt is forced through small holes to produce black filaments. Those filaments are then spun into black yarns.
- (30) The addition of carbon in the raw material confers to the 'tape' grade a black colouring that resists various discolouring treatments, whether chemical (washing in soap or dipping in a solvent bath) or mechanical (dry or wet rubbing). The use of this raw material also lowers the tensile strength of the 'tape' grade fabric as compared to other types of PFF made of the same number of threads.
- (31) The applicant claimed that 'tape' grade could be further distinguished from other types of PFF as its lower tensile strength allows it to be torn by hand. This property of 'tape' grade is a specific requirement from the automotive industry so that workers can quickly cut the adhesive tape when preparing the insulated cables.
- (32) However, a Community producer of 'tape' grade is currently producing another type of 'tape' grade, also used by the automotive industry, that cannot be torn by hand. This fabric is also made of carbon-doped yarns but the proportion of carbon in the yarn is lower than for 'tape' grade produced by the cooperating Chinese exporting producer and imported by the applicant. This production activity and the specifications of the product sold by the Community producer were observed during the verification visit by the Commission. It was also found that other types of PFF can also be torn by hand if the number of threads in the fabric is low. Therefore, this property could not be considered as a genuine characteristic of 'tape' grade as opposed to other types of PFF or a characteristic which would allow the exclusion of 'tape' grade from the definition of the product concerned. The same applies for the comparison on tensile strength.
- (33) Subsequent to the final disclosure, the applicant insisted that 'tape' grade has a measurably lower tensile strength than PFF, as the tensile strength of 'tape' grade is 20 % lower than the tensile strength of PFF with identical yarn counts. It acknowledged that PFF with a low yarn count can be torn by hand, but that it is not suitable for glue coating as the glue would soak through the fabric due to its lower density.

- (34) As regards this claim, it is noted that, during the investigation no interested party could identify a clear and objective threshold as regards the tensile strength so that 'tape' grade can be distinguished from other types of PFF, and not only from PFF with the same yarn count. Moreover, the investigation has found that 'tape' grade with a higher tensile strength can be produced depending on the specifications requested by the customers of this product. Finally, no absolute thresholds for the tensile strength and for the density under which the glue would soak through the fabric were provided by the applicant. Therefore these claims had to be rejected.
- (35) As regards the nature of the raw material used in 'tape' grade, it is noted that the proportion of carbon in the yarn is very low: from 1 % to 3 % according to the 'tape' grade products examined during the investigation. The investigation further showed that it is not possible to measure the exact proportion of carbon once the yarn has been prepared. Therefore, it is very difficult to detect the carbon content in the fabric. This was also confirmed by the applicant in its comments submitted subsequent to the final disclosure.
- (36) Concerning the colour of 'tape' grade, it is first specified that, contrary to allegations from the applicant that 'tape' grade can only be black, the finished 'tape' grade fabric can be either black or greyish depending on the proportion of carbon in the yarn. It is stressed that PFF dyed in a black or greyish colour after weaving look exactly like 'tape' grade and that these different types are not distinguishable to the naked eye.
- (37) As regards the colour resistance of 'tape' grade, it is acknowledged that 'tape' grade fabric resists discolouring treatments, but it was also found during the investigation that PFF made of pre-coloured yarn can also be colour resistant. Furthermore, no measurable threshold could be identified in the course of the investigation to distinguish between fabrics considered as 'discolouring' and fabrics considered as 'non-discolouring', especially as regards PFF made of pre-dyed yarns. Indeed, it is noted that, according to the subheading notes to Section XI of Part two in Annex I to Regulation (EEC) No 2658/87, the definition of 'dyed woven fabrics' includes woven fabrics which consist of coloured yarns of a single uniform colour. According to the same document, the definition of 'coloured yarn' includes yarns which are dyed in the mass other than white. Therefore, colour resistance cannot be considered as a major difference between 'tape' grade and other types of PFF.
- (38) Subsequent to the final disclosure, the applicant provided a report from a technical institute specialised in textile and chemical products, aiming at proving that the colour resistance of 'tape' grade was a genuine characteristic of 'tape' grade. This report was based on the so-called 'Baumgarte method' that consists of dipping the fabric into a bath of solvent such as chlorobenzol. 'Tape' grade fabrics will keep their black colour after such a test, while PFF dyed black in surface would discolour and the bath would retain the colour.
- (39) In this regard, after reviewing the different reports provided by the applicant in the course of the investigation, it is noted that the experts distinguish two ways to dye PFF: either by dipping the yarn or the fabric itself in a colour bath (dyeing in surface) or by melting the colour within the polyester when the yarn is made (dyeing in the mass). The methodology proposed in the various reports enables to distinguish PFF dyed black in the mass from other black dyed PFF dyed in surface. However, these reports have not demonstrated that 'tape' grade is the only possible type of PFF dyed black in the mass. Therefore, the reports provided no means to distinguish 'tape' grade from PFF made of yarns dyed black in the mass. These reports even confirmed that the PFF dyed in the mass would also resist the discolouring test with solvent. As a consequence, the solvent resistance cannot be considered as a genuine characteristic of 'tape' grade as compared to other PFF, and this claim had to be rejected.
- (40) In view of the above, it was concluded that, in spite of some differences, there are no physical, technical and/or chemical characteristics which would allow 'tape' grade to be clearly distinguished from other types of PFF.
- #### 4.2.2. Production process
- (41) The investigation showed that the same production facilities can be used to produce 'tape' grade and other types of PFF since the same looms are used to weave all types of PFF and the finishing process is generally subcontracted for 'tape' grade as well as for other types of PFF. As a matter of fact, all producers of 'tape' grade visited during the investigation produce both 'tape' grade and other types of PFF.

- (42) The investigation showed, however, that there are some differences between the finishing of 'tape' grade and that of other types of PFF. As 'tape' grade will ultimately be coated with glue, it is flattened on one side before being sold so that the glue coating will stick only on the non-flattened side (the so-called 'calendering' process). Furthermore, 'tape' grade does not need dyeing or printing to get its black colour contrary to other dyed types of PFF. However, there is a large variety of possible finishing among the other types of PFF as well and all such types were nevertheless considered as a single product in the original investigation.
- (43) Subsequent to the final disclosure, the applicant claimed that common production facilities were no basis for a finding that PFF woven from pre-dyed yarns should be considered as a single product.
- (44) As regards this claim, it is recalled, as mentioned in recital 28, that the main basis to determine whether 'tape' grade and other types of PFF should be considered as a single product or two different products are indeed the physical, technical and/or chemical characteristics of the products. However, other subsidiary criteria such as the production process and the interchangeability between the various product types can be examined. It is also noted in respect of this claim that the purpose of this investigation is not to examine whether PFF woven from pre-dyed yarns are part of the product concerned, but more specifically whether 'tape' grade is part of the product concerned. On this basis, the claim has to be rejected.
- (45) The applicant further claimed that there are differences in the production process as a different raw material is used and no further dyeing or printing is needed to produce 'tape' grade, as compared to other types of PFF.
- (46) As regards the claim concerning the difference in the raw material used, it is already acknowledged in recital 29 that the raw material used for 'tape' grade is slightly different from other pre-dyed yarns used to weave PFF, as it contains a small proportion of carbon. However, it is recalled that all parties, including the applicant, agreed that it is impossible to measure the carbon content in the final fabric, so this slightly different raw material cannot be detected in the final product. Therefore, this claim had to be rejected.
- (47) The applicant also claimed that the absence of dyeing or printing was previously used to exclude the so-called 'grey fabrics' from the scope of the measures, and thus the same should apply to 'tape' grade.
- (48) As regards the claim concerning the absence of any dyeing or printing stage in the production process of finished 'tape' grade, it is noted that the same applies to PFF made of pre-dyed yarns and that PFF made of pre-dyed yarns is part of the product concerned. Grey fabric was indeed considered a different product than PFF but 'tape' grade cannot be considered as grey fabric as several finishing operations are applied after weaving, such as calendering (explained in recital 42) and stentering (a heating operation to prevent shrinkage of the fabric) and also deseizing (a washing operation to eliminate the strengthening agent added to the yarn before weaving). Therefore this claim had to be rejected.
- (49) In view of the above, it is concluded that the production process of 'tape' grade is very similar to the production process of other types of PFF.
- #### 4.2.3. Price differences
- (50) According to verified information collected during the investigation, there is no clear price difference between 'tape' grade and a black piece-dyed PFF: the higher cost of raw material used for 'tape' grade seems to be compensated by the absence of cost for dyeing or printing. Therefore, and contrary to the allegation of the applicant in its request for a review, 'tape' grade cannot be considered as a high value added product compared to other types of PFF.
- #### 4.2.4. End-uses and interchangeability
- (51) It is acknowledged that 'tape' grade is mainly used to produce adhesive tape for the insulation of cables in the automotive industry. 'Tape' grade is quite common for this type of use, as confirmed by the catalogues of the major producers of adhesive tape for automotive applications in the Community. Other types of PFF can also be used to produce coloured adhesive tape for the automotive industry, but for a different application, for example, marking.

- (52) However, at least another possible use for 'tape' grade was observed during the investigation: 'tape' grade can be silver coated to make opaque window shutters for mobile-homes and the investigation has established that sales of 'tape' grade for this specific application are currently taking place. It is recalled that PFF can be used for many types of applications other than apparel, including blackout curtain fabric, bags, upholstery, office furniture, etc. as demonstrated by public available information. In addition, one interested party claimed that the 'tape' grade could be used for apparel applications, e.g. to make lining. Moreover, in view of the low cooperation from 'tape' grade producers in the PRC, it cannot be excluded that other possible uses of 'tape' grade may exist.
- (53) It should also be noted that the technical characteristics of 'tape' grade allow it to be used for the upholstery of seats, which make it interchangeable with other types of PFF used for such application and subject to the anti-dumping measures.
- (54) Subsequent to the final disclosure, the applicant claimed that the characteristics of 'tape' grade are tailored for a specific use in the automotive industry and that the packaging in industrial jumbo rolls of 3 500 metres makes it a purely technical product not suitable for use in the apparel industry, where only up to 100 metre long rolls can be handled. The applicant further claimed that silver coated fabrics do not fall within the scope of the anti-dumping measures imposed on PFF and therefore should not be compared with 'tape' grade in the framework of this product scope review.
- (55) As regards this claim, it has already been acknowledged in recital 51 that the main use of 'tape' grade that was observed during the investigation was for the insulation of cables in the automotive industry. However, at least one other use was observed during the investigation, namely silver coating of 'tape' grade to make window shutters for mobile homes. Indeed, as the applicant claimed, silver coated fabrics do not fall within the scope of the anti-dumping measures imposed on PFF in the same way that adhesive tape does not fall within the scope of these measures since they are both end-use products of 'tape' grade. 'Tape' grade fabric is in both cases the input material to make window shutters (once silver coated) or adhesive tape (once glue coated) and therefore it is confirmed that there is at least one other possible use of 'tape' grade than the insulation of cables in the automotive industry. As regards the claim concerning the packaging of 'tape' grade, it is noted that it is also possible to make smaller rolls of 'tape' grade, would another final use than the automotive industry be targeted. Therefore, these claims had to be rejected.
- (56) The applicant further challenged the possibility to use 'tape' grade for lining purpose, and suggested to consult an independent textile institute in this respect. It challenged in the same way the possibility to use 'tape' grade for the upholstery of seats because of its low tensile strength and the fact it would increase the sweat of the person sitting on such seat.
- (57) It is noted that since only contradictory allegations could be provided by interested parties on the possibility to use 'tape' grade for lining or for upholstery purposes, the fact that 'tape' grade could be used for apparel purposes was not sufficiently demonstrated. However, it remains that at least another use of 'tape' grade was observed, namely silver-coated window shutters. It is reminded that the anti-dumping measures imposed after the original investigation cover PFF intended for all types of use and not only apparel purposes. Therefore, the claim had to be rejected.
- (58) In view of the above, it is concluded that 'tape' grade and other types of PFF are at least partially interchangeable.
- 4.2.5. Conclusion**
- (59) In view of the above findings, it is considered that any differences between 'tape' grade and the other types of PFF are not such as to lead to the conclusion that 'tape' grade is a different product with clearly distinguishable basic physical, technical and/or chemical characteristics. It has thus to be concluded that 'tape' grade and other types of PFF constitute a single product within the meaning of the basic Regulation.
- 5. OTHER COMMENTS**
- (60) Certain parties claimed that the examination of injury and of Community interest were not properly carried out for 'tape' grade in the original investigation, as no Community producer of 'tape' grade was detected at that time and because the automotive industry was not given an opportunity to react to the proposal to impose measures on 'tape' grade.

(61) In response to this claim, it is noted that it was not demonstrated that there was no Community producer of 'tape' grade in the Community and that it cannot be excluded that 'tape' grade was investigated in the original investigation without being identified as such. In any case, it is stressed that measures can be imposed on a product even if not all sub-types of the product have been investigated separately.

(62) As regards the current investigation, it is recalled that the purpose of this investigation is to assess whether 'tape' grade should be considered as a different product than other types of PFF and not to conduct an assessment of injury caused to the Community industry or to carry out a Community interest assessment. However, it should be stressed that the investigation revealed that there is at least one Community producer of 'tape' grade supplying the market since 2008 and which has been involved in the production process of unfinished 'tape' grade for many years. There was also at least one other company involved in the production of unfinished 'tape' grade during the period considered in the Community. It should also be noted that in the course of the present investigation, the automotive industry (European Automobile Manufacturers Association) was contacted and declared it was not an interested party. Therefore, this claim had to be rejected.

6. CONCLUSIONS ON THE PRODUCT SCOPE

(63) The above findings show that, despite certain differences, 'tape' grade and other types of product under measures share the same basic physical, technical and chemical characteristics. Moreover, it could not be demonstrated that 'tape' grade had one single possible use and that

'tape' grade and other types of product under measures were not interchangeable. On this basis, it is concluded that 'tape' grade and other types of PFF should be considered as one single product and that the partial interim review of the anti-dumping measures applicable to imports of certain finished PFF originating in the PRC should be terminated without amending the anti-dumping measures in force.

(64) All interested parties were informed of the essential facts and considerations on the basis of which the above conclusions were reached. Parties were granted a period within which they could make representations subsequent to this disclosure.

(65) The oral and written comments submitted by the parties were considered, but have not changed the conclusions not to amend the product scope of the anti-dumping measures on imports of PFF in force,

HAS ADOPTED THIS REGULATION:

Article 1

The partial interim review of the anti-dumping measures applicable to imports of certain finished polyester filament fabrics originating in the PRC is hereby terminated without amending the anti-dumping measures in force.

Article 2

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

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

Done at Brussels, 15 September 2009.

For the Council
The President
C. BILDT

COMMISSION REGULATION (EC) No 863/2009**of 21 September 2009****establishing the standard import values for determining the entry price of certain fruit and vegetables**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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

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

Whereas:

Regulation (EC) No 1580/2007 lays down, pursuant to the outcome of the Uruguay Round multilateral trade negotiations, the criteria whereby the Commission fixes the standard values for imports from third countries, in respect of the products and periods stipulated in Annex XV, Part A thereto,

HAS ADOPTED THIS REGULATION:

Article 1

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

Article 2

This Regulation shall enter into force on 22 September 2009.

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

Done at Brussels, 21 September 2009.

For the Commission

Jean-Luc DEMARTY

*Director-General for Agriculture and
Rural Development*

⁽¹⁾ OJ L 299, 16.11.2007, p. 1.

⁽²⁾ OJ L 350, 31.12.2007, p. 1.

ANNEX

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

(EUR/100 kg)

CN code	Third country code ⁽¹⁾	Standard import value
0702 00 00	MK	36,7
	ZZ	36,7
0707 00 05	MK	33,2
	TR	109,8
	ZZ	71,5
0709 90 70	TR	87,1
	ZZ	87,1
0805 50 10	AR	123,6
	CL	134,9
	TR	105,0
	UY	117,8
	ZA	86,3
	ZZ	113,5
0806 10 10	IL	115,4
	TR	94,9
	ZZ	105,2
0808 10 80	AR	124,5
	BR	71,0
	CL	72,9
	NZ	82,0
	US	81,3
	ZA	73,6
0808 20 50	ZZ	84,2
	CN	92,9
	TR	110,2
	ZA	71,1
0809 30	ZZ	91,4
	TR	118,2
	US	243,3
0809 40 05	ZZ	180,8
	IL	112,9
	ZZ	112,9

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

COMMISSION REGULATION (EC) No 864/2009**of 21 September 2009****on the issue of import licences for applications lodged during the first seven days of September 2009 under the tariff quotas opened by Regulation (EC) No 533/2007 for poultrymeat**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Whereas:

Having regard to the Treaty establishing the European Community,

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

Having regard to Commission Regulation (EC) No 1301/2006 of 31 August 2006 laying down common rules for the administration of import tariff quotas for agricultural products managed by a system of import licences ⁽²⁾, and in particular Article 7(2) thereof,

Having regard to Commission Regulation (EC) No 533/2007 of 14 May 2007 opening and providing for the administration of tariff quotas in the poultrymeat sector ⁽³⁾, and in particular Article 5(6) thereof,

(1) Regulation (EC) No 533/2007 opened tariff quotas for imports of poultrymeat products.

(2) The applications for import licences lodged during the first seven days of September 2009 for the subperiod from 1 October to 31 December 2009 relate, for some quotas, to quantities exceeding those available. The extent to which import licences may be issued should therefore be determined by establishing the allocation coefficient to be applied to the quantities requested,

HAS ADOPTED THIS REGULATION:

Article 1

The quantities for which import licence applications have been lodged under Regulation (EC) No 533/2007 for the subperiod from 1 October to 31 December 2009 shall be multiplied by the allocation coefficients set out in the Annex to this Regulation.

Article 2

This Regulation shall enter into force on 22 September 2009.

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

Done at Brussels, 21 September 2009.

For the Commission

Jean-Luc DEMARTY

*Director-General for Agriculture and
Rural Development*

⁽¹⁾ OJ L 299, 16.11.2007, p. 1.

⁽²⁾ OJ L 238, 1.9.2006, p. 13.

⁽³⁾ OJ L 125, 15.5.2007, p. 9.

ANNEX

Group No	Order No	Allocation coefficient for import licence applications lodged for the subperiod from 1.10.2009-31.12.2009 (%)
P1	09.4067	1,443361
P2	09.4068	3,86127
P3	09.4069	0,754159
P4	09.4070	8,163486

COMMISSION REGULATION (EC) No 865/2009**of 21 September 2009****on the issue of import licences for applications lodged during the first seven days of September 2009 under the tariff quotas opened by Regulation (EC) No 539/2007 for certain products in the egg sector and for egg albumin**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (single CMO Regulation) ⁽¹⁾,Having regard to Commission Regulation (EC) No 1301/2006 of 31 August 2006 laying down common rules for the administration of import tariff quotas for agricultural products managed by a system of import licences ⁽²⁾, and in particular Article 7(2) thereof,Having regard to Commission Regulation (EC) No 539/2007 of 15 May 2007 opening and providing for the administration of tariff quotas in the egg sector and for egg albumin ⁽³⁾, and in particular Article 5(6) thereof,

Whereas:

- (1) Regulation (EC) No 539/2007 opened tariff quotas for imports of egg products and egg albumin.
- (2) The applications for import licences lodged during the first seven days of September 2009 for the subperiod from 1 October to 31 December 2009 relate, for some quotas, to quantities exceeding those available. The extent to which import licences may be issued should therefore be determined by establishing the allocation coefficient to be applied to the quantities requested,

HAS ADOPTED THIS REGULATION:

Article 1

The quantities for which import licence applications have been lodged under Regulation (EC) No 539/2007 for the subperiod from 1 October to 31 December 2009 shall be multiplied by the allocation coefficients set out in the Annex hereto.

Article 2

This Regulation shall enter into force on 22 September 2009.

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

Done at Brussels, 21 September 2009.

For the Commission

Jean-Luc DEMARTY

*Director-General for Agriculture and
Rural Development*

⁽¹⁾ OJ L 299, 16.11.2007, p. 1.

⁽²⁾ OJ L 238, 1.9.2006, p. 13.

⁽³⁾ OJ L 128, 16.5.2007, p. 19.

ANNEX

Group No	Order No	Allocation coefficient for import licence applications lodged for the subperiod from 1.10.2009-31.12.2009 (%)
E2	09.4401	25,641128

COMMISSION REGULATION (EC) No 866/2009**of 21 September 2009****on the issue of import licences for applications lodged during the first seven days of September 2009 under the tariff quota opened by Regulation (EC) No 1385/2007 for poultrymeat**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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

Having regard to Commission Regulation (EC) No 1301/2006 of 31 August 2006 laying down common rules for the administration of import tariff quotas for agricultural products managed by a system of import licences ⁽²⁾, and in particular Article 7(2) thereof,

Having regard to Commission Regulation (EC) No 1385/2007 of 26 November 2007 laying down detailed rules for the application of Council Regulation (EC) No 774/94 as regards opening and providing for the administration of certain Community tariff quotas for poultrymeat ⁽³⁾, and in particular Article 5(6) thereof,

Whereas:

The applications for import licences lodged during the first seven days of September 2009 for the subperiod from 1 October to 31 December 2009 relate, for some quotas, to quantities exceeding those available. The extent to which import licences may be issued should therefore be determined by establishing the allocation coefficient to be applied to the quantities requested,

HAS ADOPTED THIS REGULATION:

Article 1

The quantities for which import licence applications have been lodged for the subperiod from 1 October to 31 December 2009 under Regulation (EC) No 1385/2007 shall be multiplied by the allocation coefficients set out in the Annex hereto.

Article 2

This Regulation shall enter into force on 22 September 2009.

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

Done at Brussels, 21 September 2009.

For the Commission

Jean-Luc DEMARTY

*Director-General for Agriculture and
Rural Development*

⁽¹⁾ OJ L 299, 16.11.2007, p. 1.

⁽²⁾ OJ L 238, 1.9.2006, p. 13.

⁽³⁾ OJ L 309, 27.11.2007, p. 47.

ANNEX

Group No	Order No	Allocation coefficient for import licence applications lodged for the subperiod from 1.10.2009-31.12.2009 (%)
1	09.4410	0,489018
3	09.4412	0,52034
4	09.4420	0,630128
5	09.4421	11,236147
6	09.4422	0,697231

COMMISSION REGULATION (EC) No 867/2009**of 21 September 2009****amending and correcting Regulation (EC) No 1242/2008 establishing a Community typology for agricultural holdings**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 79/65/EEC of 15 June 1965 setting up a network for the collection of accountancy data on the incomes and business operation of agricultural holdings in the European Economic Community ⁽¹⁾, and in particular Articles 4(4), 6(2), and 7(3) thereof,

Whereas:

- (1) Annex I, Part C to Commission Regulation (EC) No 1242/2008 ⁽²⁾ has defined types of farming. On the basis of those definitions certain grazing livestock farms cannot be classified by type of farming and for other farms the classification obtained is not the most appropriate.
- (2) Annex II, Part B to Regulation (EC) No 1242/2008 has laid down rules concerning the grouping of the economic size classes. Those rules limit the possibilities for the Member States to establish more suitable selection plans.
- (3) Some descriptions and names used in Annex I and Annex IV to Regulation (EC) No 1242/2008 lack legibility and need therefore to be clarified.
- (4) The description and the code of certain products referred to in Regulation (EC) No 1242/2008 and listed in Commission Regulation (EC) No 868/2008 of 3 September 2008 on the farm return to be used for

determining the incomes of agricultural holdings and analysing the business operation of such holdings ⁽³⁾ have been amended by Regulation (EC) No 781/2009 of 27 August 2009.

- (5) Furthermore the names of certain types of farming used in Annex I to Regulation (EC) No 1242/2008 should be corrected in some languages. To improve consistency the word holding should be suppressed from the name of a type of farming and for better legibility certain words related to poultry categories should be replaced in the name of certain types of farming.
- (6) Regulation (EC) No 1242/2008 should therefore be amended and corrected accordingly.
- (7) The measures provided for in this Regulation are in accordance with the opinion of the Community Committee for the Farm Accountancy Data network,

HAS ADOPTED THIS REGULATION:

Article 1

Annexes I, II and IV to Regulation (EC) No 1242/2008 are amended in accordance with the Annex to this Regulation.

Article 2

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

It shall apply from the accounting year 2010 for the Farm Accountancy Data Network and for the farm structure survey as of the 2010 survey.

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

Done at Brussels, 21 September 2009.

For the Commission

Mariann FISCHER BOEL

Member of the Commission

⁽¹⁾ OJ 109, 23.6.1965, p. 1859/65.

⁽²⁾ OJ L 335, 13.12.2008, p. 3.

⁽³⁾ OJ L 237, 4.9.2008, p. 18.

ANNEX

Annexes I, II and IV to Regulation (EC) No 1242/2008 are amended as follows:

(1) Annex I is amended as follows:

(a) Part A. Classification scheme is amended as follows:

(i) In the sub-part 'Specialist holdings — crops', the third column 'Particular type of farming' is amended as follows:

— point 361 is replaced by the following:

'361. Specialist fruit (other than citrus, tropical and subtropical fruits and nuts);

— point 364 is replaced by the following:

'364. Specialist tropical and subtropical fruits';

— point 365 is replaced by the following:

'365. Specialist fruit, citrus, tropical and subtropical fruits and nuts: mixed production';

(ii) In the sub-part 'Specialist holdings — animal production', the third column 'Particular type of farming' is amended as follows:

— point 521 is replaced by the following:

'521. Specialist laying hens';

— point 523 is replaced by the following:

'523 Laying hens and poultry-meat combined';

(iii) In the sub-part 'Mixed holdings', in the first column 'General type of farming', point '7. Mixed livestock holdings' is replaced by '7. Mixed livestock'.

(b) In the table of part B I. Correspondence between the headings of the farm structure surveys and the farm return of the Farm Accountancy Data Network (FADN), the rows 2.01.12.01 and 2.01.12.02 are replaced by the following:

2.01.12.01.	Fallow land without any subsidies	315. Fallow land without any subsidies
2.01.12.02.	Fallow land subject to the payment of subsidies, with no economic use	316. Fallow land subject to the payment of subsidies'

(c) Part C. Definitions of type of farming is amended as follows:

(i) Sub-part 'Specialist holdings — crop products' is amended as follows:

(aa) In the first column 'Types of farming', the third sub-column 'Particular' is amended as follows:

— point 361 is replaced by the following:

'361. Specialist fruit (other than citrus, tropical and subtropical fruits and nuts);

— point 364 is replaced by the following:

'364. Specialist tropical and subtropical fruits';

— point 365 is replaced by the following:

'365. Specialist fruit, citrus, tropical and subtropical fruits and nuts: mixed production';

(ab) In the second column 'Definition', Code '3 Specialist permanent crops', the eleventh row 'Tropical fruits > 2/3' is replaced by 'Fruit of subtropical climate zones > 2/3';

(ii) Sub-part 'Specialist holdings — Animal production' is amended as follows:

(aa) Rows 45 to 48 are replaced by the following:

45	Specialist dairying	450	Specialist dairying	Dairy cows > 3/4 of total grazing livestock; grazing livestock > 1/10 of grazing livestock and forage	3.02.06. > 3/4 GL; GL > 1/10 P4
46	Specialist cattle — rearing and fattening	460	Specialist cattle — rearing and fattening	All cattle (i.e. bovine animals under one year, bovine animals over one but under two and bovine animals two years old and over (male, heifers, dairy cows and other cows)) > 2/3 of grazing livestock; dairy cows ≤ 1/10 of grazing livestock; grazing livestock > 1/10 of grazing livestock and forage	P46 > 2/3 GL; 3.02.06. ≤ 1/10 GL; GL > 1/10 P4
47	Cattle — dairying, rearing and fattening combined	470	Cattle — dairying, rearing and fattening combined	All cattle > 2/3 of grazing livestock; dairy cows > 1/10 of grazing livestock; grazing livestock > 1/10 of grazing livestock and forage; excluding those holdings in class 45	P46 > 2/3 GL; 3.02.06. > 1/10 GL; GL > 1/10 P4; excluding 45
48	Sheep, goats and other grazing livestock			Holdings in class 4, excluding those in classes 45, 46 and 47	
		481	Specialist sheep	Sheep > 2/3 of grazing livestock; grazing livestock > 1/10 of grazing livestock and forage	3.03.01. > 2/3 GL; GL > 1/10 P4
		482	Sheep and cattle combined	All cattle > 1/3 of grazing livestock, sheep > 1/3 of grazing livestock and grazing livestock > 1/10 of grazing livestock and forage	P46 > 1/3 GL; 3.03.01. > 1/3 GL; GL > 1/10 P4
		483	Specialist goats	Goats > 2/3 of grazing livestock; grazing livestock > 1/10 of grazing livestock and forage	3.03.02. > 2/3 GL; GL > 1/10 P4
		484	Various grazing livestock	Holdings in class 48, excluding those in 481, 482 and 483'	

(ab) In the first column 'Types of farming', the third sub-column 'Particular' is amended as follows:

— point 521 is replaced by the following:

'521. Specialist laying hens';

— point 523 is replaced by the following:

'523 Laying hens and poultry-meat combined';

(ac) Row 53 is replaced by the following:

53	Various granivores combined	530	Various granivores combined	Holdings in class 5, excluding those in classes 51 and 52'	
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(iii) Sub-part 'Mixed holdings' is amended as follows:

(aa) In the first column 'Types of farming', in the first sub-column 'General', the code '7. Mixed livestock holdings' is replaced by '7. Mixed livestock'.

(ab) The row '8. Mixed crops — livestock' is replaced by the following:

8	Mixed crops — livestock					Holdings excluded from classes 1 to 7 and from class 9'	
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(ac) Sub-row '843 Apiculture' is replaced by the following:

				'843	Apiculture	Bees > 2/3	3.07. > 2/3'
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(iv) In the sub-part 'Non-classified holdings', row 9 is replaced by the following:

'9	Non-classified holdings	90	Non-classified holdings	900	Non-classified holdings	Non-classified holdings	Total Standard Output = 0'
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(2) In Annex II, part B, the second paragraph is replaced by the following:

'The rules laid down for the application in the field of the farm accountancy data network and the Community surveys of agricultural holdings may provide that size classes II and III or III and IV, IV and V, or from III to V, VI and VII, VIII and IX, X and XI, from XII to XIV or from X to XIV are grouped together.'

(3) In Annex IV, point (b) of point 2 is replaced by the following:

'(b) Geographical breakdown

— The SOs are determined at least on the basis of geographical units which are usable for the Community farm structure surveys and for the Farm Accountancy Data Network. These geographical units are all based on the general Nomenclature of Territorial Units for Statistics (NUTS) as defined in Regulation (EC) No 1059/2003 of the European Parliament and of the Council⁽¹⁾. These units are described as a regrouping of NUTS 3 regions. Less favoured or mountain areas are not considered as a geographical unit.

— No SO is determined for characteristics which are not engaged in the region concerned.

⁽¹⁾ OJ L 154, 21.6.2003, p. 1.'

COMMISSION REGULATION (EC) No 868/2009**of 21 September 2009****amending Regulation (EC) No 748/2008 on the opening and administration of an import tariff quota for frozen thin skirt of bovine animals falling within CN code 0206 29 91 and Regulation (EC) No 810/2008 opening and providing for the administration of tariff quotas for high-quality fresh, chilled and frozen beef and for frozen buffalo meat**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1095/96 of 18 June 1996 on the implementation of the concessions set out in Schedule CXL drawn up in the wake of the conclusion of the GATT XXIV.6 negotiations ⁽¹⁾, and in particular Article 1(1) thereof,

Whereas:

- (1) Commission Regulation (EC) No 748/2008 ⁽²⁾, provides that certificates of authenticity for meat from Argentina have to be issued before beef and veal may be imported into the Community. The list of authorities in Argentina empowered to issue these certificates is laid down in Annex III to that Regulation.
- (2) Commission Regulation (EC) No 810/2008 ⁽³⁾ lays down that certificates of authenticity have to be issued before beef and veal may be imported into the Community. The list of authorities in exporting countries empowered to issue these certificates is laid down in Annex II to that Regulation.
- (3) Argentina has changed the name of the issuing authority for certificates of authenticity under Regulations (EC) No 748/2008 and (EC) No 810/2008.
- (4) Regulations (EC) No 748/2008 and (EC) No 810/2008 should be amended accordingly.

(5) In order to avoid that the name of the authority mentioned on the certificates of authenticity recently issued does not correspond to the name of the authority listed in Regulations (EC) No 748/2008 and (EC) No 810/2008 this Regulation should apply as from 22 July 2009, the date on which Argentina notified to the Commission that new name.

(6) The measures provided for in this Regulation are in accordance with the opinion of the Management Committee for the Common Organisation of Agricultural Markets,

HAS ADOPTED THIS REGULATION:

Article 1

Annex III to Regulation (EC) No 748/2008 is replaced by the text in Annex I to this Regulation.

Article 2

Annex II to Regulation (EC) No 810/2008 is amended in accordance with Annex II to this Regulation.

Article 3

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

It shall apply from 22 July 2009.

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

Done at Brussels, 21 September 2009.

For the Commission

Mariann FISCHER BOEL

Member of the Commission

⁽¹⁾ OJ L 146, 20.6.1996, p. 1.

⁽²⁾ OJ L 202, 31.7.2008, p. 28.

⁽³⁾ OJ L 219, 14.8.2008, p. 3.

ANNEX I

Annex III to Regulation (EC) No 748/2008 is replaced by the following:

*'ANNEX III***List of authorities in Argentina empowered to issue certificates of authenticity**

Oficina Nacional de Control Comercial Agropecuario (ONCCA):

for thin skirt originating in Argentina as specified in Article 1(3)(a).'

ANNEX II

In Annex II to Regulation (EC) No 810/2008 the first indent is replaced by the following:

— Oficina Nacional de Control Comercial Agropecuario (ONCCA):

for meat originating in Argentina and meeting the definition in Article 2(a).'

COMMISSION REGULATION (EC) No 869/2009**of 21 September 2009****amending Regulation (EC) No 838/2009 fixing the import duties in the cereals sector applicable from 16 September 2009**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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

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

Whereas:

- (1) The import duties in the cereals sector applicable from 16 September 2009 were fixed by Commission Regulation (EC) No 838/2009 ⁽³⁾.

- (2) As the average of the import duties calculated differs by more than EUR 5/tonne from that fixed, a corresponding adjustment must be made to the import duties fixed by Regulation (EC) No 838/2009.

- (3) Regulation (EC) No 838/2009 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Annexes I and II to Regulation (EC) No 838/2009 are hereby replaced by the text in the Annex to this Regulation.

Article 2

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

It shall apply from 22 September 2009.

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

Done at Brussels, 21 September 2009.

For the Commission

Jean-Luc DEMARTY

*Director-General for Agriculture and
Rural Development*

⁽¹⁾ OJ L 299, 16.11.2007, p. 1.

⁽²⁾ OJ L 161, 29.6.1996, p. 125.

⁽³⁾ OJ L 244, 16.9.2009, p. 3.

ANNEX I

Import duties on the products referred to in Article 136(1) of Regulation (EC) No 1234/2007 applicable from 22 September 2009

CN code	Description	Import duties ⁽¹⁾ (EUR/t)
1001 10 00	Durum wheat, high quality	0,00
	medium quality	5,86
	low quality	25,86
1001 90 91	Common wheat seed	0,00
ex 1001 90 99	High quality common wheat, other than for sowing	0,00
1002 00 00	Rye	77,87
1005 10 90	Maize seed other than hybrid	35,69
1005 90 00	Maize, other than seed ⁽²⁾	35,69
1007 00 90	Grain sorghum other than hybrids for sowing	82,86

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

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

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

ANNEX II

Factors for calculating the duties laid down in Annex I

15.9.2009-18.9.2009

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

(EUR/t)

	Common wheat ⁽¹⁾	Maize	Durum wheat, high quality	Durum wheat, medium quality ⁽²⁾	Durum wheat, low quality ⁽³⁾	Barley
Exchange	Minneapolis	Chicago	—	—	—	—
Quotation	141,57	91,80	—	—	—	—
Fob price USA	—	—	137,66	127,66	107,66	58,65
Gulf of Mexico premium	—	16,44	—	—	—	—
Great Lakes premium	6,92	—	—	—	—	—

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

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

Freight costs: Gulf of Mexico–Rotterdam: 18,14 EUR/t

Freight costs: Great Lakes–Rotterdam: 23,51 EUR/t

COMMISSION REGULATION (EC) No 870/2009**of 21 September 2009****establishing a prohibition of fishing for hake in VIIIc, IX and X; EC waters of CECAF 34.1.1 by vessels flying the flag of France**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy ⁽¹⁾, and in particular Article 26(4) thereof,

Having regard to Council Regulation (EEC) No 2847/93 of 12 October 1993 establishing a control system applicable to common fisheries policy ⁽²⁾, and in particular Article 21(3) thereof,

Whereas:

- (1) Council Regulation (EC) No 43/2009 of 16 January 2009 fixing for 2009 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks applicable in Community waters and for Community vessels, in waters where catch limitations are required ⁽³⁾, lays down quotas for 2009.
- (2) According to the information received by the Commission, catches of the stock referred to in the Annex to this Regulation by vessels flying the flag of or registered in the Member State referred to therein have exhausted the quota allocated for 2009.

- (3) It is therefore necessary to prohibit fishing for that stock and its retention on board, transhipment and landing,

HAS ADOPTED THIS REGULATION:

*Article 1***Quota exhaustion**

The fishing quota allocated to the Member State referred to in the Annex to this Regulation for the stock referred to therein for 2009 shall be deemed to be exhausted from the date set out in that Annex.

*Article 2***Prohibitions**

Fishing for the stock referred to in the Annex to this Regulation by vessels flying the flag of or registered in the Member State referred to therein shall be prohibited from the date set out in that Annex. It shall be prohibited to retain on board, tranship or land such stock caught by those vessels after that date.

*Article 3***Entry into force**

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, 21 September 2009.

For the Commission

Fokion FOTIADIS

Director-General for Maritime Affairs and Fisheries

⁽¹⁾ OJ L 358, 31.12.2002, p. 59.

⁽²⁾ OJ L 261, 20.10.1993, p. 1.

⁽³⁾ OJ L 22, 26.1.2009, p. 1.

ANNEX

No	16/T&Q
Member State	France
Stock	HKE/8C3411
Species	Hake (<i>Merluccius merluccius</i>)
Zone	VIIIc, IX and X; EC waters of CECAF 34.1.1
Date	30 July 2009

II

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

DECISIONS

COMMISSION

COMMISSION DECISION

of 21 October 2008

concerning an investment by the municipality of Rotterdam in the Ahoy complex (State aid measure C 4/08 (ex N 97/07, ex CP 91/07))

(notified under document C(2008) 6018)

(Only the Dutch text is authentic)

(Text with EEA relevance)

(2009/713/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) On 20 December 2006 a meeting took place between the Commission and the Dutch authorities to discuss an investment by the municipality of Rotterdam in the Ahoy complex, before any formal notification of State aid. Following this meeting, the Dutch authorities formally notified the investment by a letter dated 22 February 2007, and which the Commission registered as incoming mail on the same day.

(2) On 22 March 2007, in a related case (CP 91/07), the Commission received a joint complaint from Mojo

Concerts BV (Mojo) and Amsterdam Music Dome Exploitatie BV (Music Dome), which related to the planned investment in the Ahoy complex but which also concerned other transactions already carried out by the municipality, namely the privatisation of the operation of Ahoy Rotterdam NV (hereinafter also referred to as the operator) and the lease of the Ahoy complex to the operator after privatisation. Further submissions from Mojo and Music Dome were received on 14 September 2007 and 5 October 2007.

(3) By letter dated 16 April 2007 the Commission requested the Dutch authorities to comment on the above mentioned complaint. The Dutch authorities submitted their comments on 20 June 2007. The Commission wrote to the Dutch authorities requesting additional information on 10 August and 16 November 2007. The Dutch authorities provided additional information on 17 September, 15 November and 7 December 2007.

(4) By letter dated 30 January 2008, the Commission informed the Netherlands that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the notified measure.

(5) Commission staff met the Dutch authorities on 12 February 2008. By letter of 15 February 2008, the Dutch authorities confirmed that the Commission's decision of 30 January 2008 did not contain confidential

⁽¹⁾ OJ C 68, 13.3.2008, p. 14.

information. The decision was accordingly sent to the complainants via email on 18 February 2008 and published in the *Official Journal of the European Union* ⁽²⁾. The Commission invited interested parties to submit their comments on the measure.

- (6) By letter of 28 February, the Dutch authorities requested an extension to 1 April 2008 of the deadline for an answer to the Commission's initiating decision. The Commission agreed to this extension by letter sent and registered as outgoing mail on 12 March 2008.
- (7) In April 2008, as part of the investigation procedure, an independent consultant, ECORYS Nederland BV, was commissioned to review certain aspects of the case. The report prepared by the independent consultant was approved by the Commission on 30 May 2008 ⁽³⁾.
- (8) By letter registered as incoming mail on 1 April 2008, the Dutch authorities submitted their comments on the Commission's decision to initiate the formal investigation procedure.
- (9) Following the initiation of the procedure, the Commission received comments from three interested parties, namely Ahoy Rotterdam NV, the alleged recipient of State aid ⁽⁴⁾; Mojo and Music Dome, which submitted joint observations ⁽⁵⁾; and one individual person ⁽⁶⁾. A meeting with Ahoy Rotterdam NV took place on 17 April 2008. By letter registered as incoming mail on 15 May 2008, the Commission forwarded the third-party comments to the Dutch authorities. The authorities submitted their observations by letter dated 20 June and registered as incoming mail on 24 June 2008.
- (10) The non-confidential version of the report prepared by the independent consultant was forwarded to the Dutch authorities by letter registered as outgoing mail on 24 June 2008. The Dutch authorities commented in a letter registered as incoming mail on 14 July 2008.

II. BACKGROUND INFORMATION AND DESCRIPTION OF THE MEASURE

- (11) The Ahoy complex, comprising the Ahoy Arena (a name given in English to the *Sportpaleis* or 'Sports Palace'), six exhibition halls, and a large meeting and congress centre, is designed to host a wide variety of events, including exhibitions, conferences, trade fairs, shows, concerts, and sports and social events. The operator of the complex,

Ahoy Rotterdam NV, is also active on the international market, and exports its own trade fair titles ⁽⁷⁾.

- (12) Until 1 July 2006 the Ahoy complex was managed by Ahoy Rotterdam NV, in which the municipality was the sole shareholder. Following a decision to separate ownership and operations, the municipality kept the ownership of the complex, but on 1 July 2006 sold the operation of Ahoy Rotterdam NV, via a management buy-out, for EUR 1,7 million. In the absence of a public tender, the sale price was based directly on a market valuation performed by the independent consultant, Deloitte Financial Advisory Services BV, Real Estate Valuation in Rotterdam (Deloitte).
- (13) At the same time, the municipality leased the Ahoy complex to the now privatised Ahoy Rotterdam NV for a period of 15 years (with an option for extension), starting on 1 July 2006. The lease imposed strict obligations on the lessee regarding the preservation and promotion of the multifunctional nature of the Ahoy complex ⁽⁸⁾. The initial rent of EUR 2,6 million per year stipulated in the lease was based directly on the market valuation of rent for the Ahoy complex carried out by Deloitte ⁽⁹⁾.
- (14) As part of the lease, the municipality committed to invest up to EUR 42 million in the renovation and upgrading/expansion of the Ahoy Arena. This investment is the subject of the project notified. The municipality's investment was intended in part for the maintenance of the Arena and in part for its modernisation and expansion. The emphasis was on the modification of the following aspects of the Arena: improvement of the acoustics, the air conditioning system, the layout and accessibility, the strengthening of the roof construction in order to facilitate the suspension of sound equipment and video walls, the improvement of backstage facilities and the expansion of the number of seats. Originally, it was planned to expand the capacity of the Arena by an additional 5 000 seats. This has now been reduced to [...] seats.
- (15) The management considered that this investment was necessary to maintain the value of the complex, but that it would not lead to additional revenues for the operator. During the negotiations with the municipality, therefore, the management argued that this aspect should not be taken into account in establishing the price of the shares in Ahoy Rotterdam NV or the rent for the complex.

⁽²⁾ See footnote 1.

⁽³⁾ In a letter sent and registered as outgoing mail on 30 May 2008.

⁽⁴⁾ By letter registered as incoming mail on 30 April 2008, following an extension of the deadline for comments on the Commission decision to initiate the formal investigation procedure.

⁽⁵⁾ By letter registered as incoming mail on 21 April 2008, following an extension of the deadline for comments on the Commission decision to initiate the formal investigation procedure.

⁽⁶⁾ By letter registered as incoming mail on 27 March 2008.

⁽⁷⁾ [...] (*) (*): (The information omitted here is covered by the obligation of business secrecy).

⁽⁸⁾ Under clause 4.1 of the lease, the programme carried out in years 2003/2004 and 2004/2005 (public and trade exhibitions, events etc.) is to be continued for the duration of the contract.

⁽⁹⁾ The lease states that the rent is to be adjusted on the basis of the most recent monthly consumer price index published by the Central Statistical Office.

- (16) The municipality accepted this argument, and did not require an adaptation to the price of the shares in Ahoy Rotterdam NV or the rent fixed for the Ahoy complex. However, in order to ensure that after the planned investment the rent would be at a market level, the municipality had a profit-sharing mechanism included in the lease, whereby the operator, Ahoy Rotterdam NV, would pay a surcharge on the rent if its gross margin were to exceed a predetermined level. This surcharge would be due if the gross margin, less the rent payable for the relevant year, exceeded EUR 16,5 million. The surcharge would be determined in accordance with the following table:

Tranche	Gross margin (net of rent)	Surcharge
First tranche	EUR 16,5 to EUR 18,0 million	50 %
Second tranche	EUR 18,0 to EUR 21,0 million	35 %
Third tranche	EUR 21,0 to EUR 25,0 million	20 %

The three tranches are cumulative. If, for example, the gross margin achieved in one year, net of the rent paid to the municipality, is EUR 20 million, the rent will be subject to a surcharge consisting of 50 % of EUR 1,5 million (the first tranche) and 35 % of EUR 2 million (the remaining amount falling into the second tranche), giving a total surcharge of EUR 1,45 million.

III. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (17) On 30 January 2008 the Commission decided to initiate the formal investigation procedure because the Dutch authorities had not provided sufficient evidence to allow the Commission to conclude that the notified investment by the municipality of Rotterdam did not constitute State aid or that any such aid was compatible with the EC Treaty.
- (18) In particular, the Commission doubted whether the design of the profit-sharing arrangement stipulated in the lease concluded between Ahoy Rotterdam NV and the municipality was adequate to ensure that the operator of the Ahoy complex would not be granted an economic advantage beyond normal market conditions as a result of the notified investment.
- (19) The investigation also covered the sale of Ahoy Rotterdam NV and the lease of the Ahoy complex to the privatised operator, transactions which had been carried out by the municipality of Rotterdam but which had not been notified to the Commission by the Dutch authorities. Given that these transactions were closely interlinked with the notified investment, the

Commission considered it necessary to verify whether any of them comprised any element of State aid. The Commission also took account here of the fact that the Deloitte valuation reports used as a basis for these transactions were themselves to a certain extent based on the information provided by the management of Ahoy Rotterdam NV, which as a prospective buyer and lessee faced a conflict of interest.

- (20) Finally, the Commission also initiated the formal investigation procedure in order to give the Dutch authorities and third parties the opportunity to submit their comments on its provisional assessment of the measure described and to give the Commission any relevant information related to the measure.

IV. COMMENTS BY THIRD PARTIES

- (21) Following the initiation of the procedure, the Commission received comments from three interested parties, namely Ahoy Rotterdam NV, the alleged recipient of State aid; Mojo and Music Dome, which submitted joint observations; and one individual person⁽¹⁰⁾.
- (22) According to Ahoy Rotterdam NV, the sale of Ahoy Rotterdam NV and the lease of the Ahoy complex were at worst on market terms and might even be more generous to the municipality. The alleged recipient drew attention to the restrictions and conditions included in the lease and price agreements, which considerably limited the value of the lease and the purchase price.
- (23) Ahoy Rotterdam NV stated that the investment in the Ahoy Arena related mainly to maintenance and renovation, and was aimed only to a limited extent at an increase in capacity⁽¹¹⁾. In so far as the increase in capacity would lead to better operating possibilities, Ahoy Rotterdam NV asserted, on the basis of the financial data supplied, that the profit-sharing arrangement would ensure that the municipality would benefit more than would be required by the market economy investor principle.
- (24) Mojo and Music Dome maintained the position they had put forward in the complaint they submitted before the initiation of the formal investigation⁽¹²⁾, to the effect that the planned investment in the Ahoy complex and the related transactions (the privatisation of the operation of Ahoy Rotterdam NV and the lease of the property) involved illegal State aid.

⁽¹⁰⁾ The comments submitted by the individual person were not directly relevant for the assessment of the measure, but focused instead on the motives behind the complaint lodged by Mojo and Music Dome. For this reason they are not considered further in this Decision.

⁽¹¹⁾ According to Ahoy Rotterdam NV, under the current plans maintenance and renovation accounted for 83 % of the cost of the investment, and the increase in capacity for 17 %.

⁽¹²⁾ See footnote 1.

- (25) Mojo and Music Dome argued that the planned investment conferred an advantage on the operator of the complex, in particular because the expansion of the capacity of the Ahoy Arena would increase the operator's revenues. Even if the operator's revenues did not increase, the improvement of the facilities would still confer a competitive advantage on Ahoy Rotterdam NV, as it would have the benefit of an improvement in the facilities free of charge, whereas any private undertaking would have had to pay the cost itself. The improvement would help the operator to consolidate its position in the market or even to improve it. Furthermore, the investment was not profitable for the municipality of Rotterdam and therefore could not satisfy the market economy investor test.
- (26) According to Mojo and Music Dome, the profit-sharing mechanism did not remove the operator's advantage. It was clear that the final profit-sharing arrangement had not been tested by any independent consultant. Furthermore, the mechanism would not be consistent with the market: even if the operator were to repay the investment in full under the profit-sharing mechanism, the operator would still receive an economic advantage, because the municipality of Rotterdam was to bear the entire economic risk of the investment. If the investment did not result in increased revenue, the municipality would get nothing at all. Only if there was indeed extra revenue would the municipality recover part of its investment. No private investor would have accepted such conditions.
- (27) As regards the price of shares in Ahoy Rotterdam NV and the rent for the Ahoy complex, Mojo and Music Dome argued that the conflict of interest faced by the management and prospective buyer when it submitted the information to Deloitte had resulted in a valuation of the shares in Ahoy Rotterdam NV that was too low. They again questioned the reliability of the forecasts by the management of Ahoy Rotterdam that were used by Deloitte to value the shares of the company.
- (28) According to Mojo and Music Dome, the management report accompanying the financial accounts for 2004/2005 suggested that there was a trend in Ahoy's turnover in which 'good' years alternated with 'moderate' years. The operator had indicated this trend to Deloitte as well, but in the light of the very small differences in the number of events scheduled each year the alleged trend could not be considered credible⁽¹³⁾. This trend did not correspond to the actual turnover either, because the financial year 2005/2006, which would have been expected to be 'moderate', had in fact turned out to be a 'good' year. It was not realistic to suppose that the operator could not have envisaged the high turnover in the year 2005/2006, especially given that the events organised in Ahoy were booked well in advance.
- (29) The theoretical series of future cash flows in the Deloitte report was artificial. The forecast in the Deloitte report began with a 'bad' year and ended with a 'good' year. If it had started with a 'good' year and ended with a 'bad' year, the present value of the future cash flow, and thus the value of the shares, would have been much more positive.
- (30) Finally, if Deloitte had made an accurate forecast of the expected result for the financial year 2005/2006, the value of the company would have been put considerably higher. It could be argued that other things being equal the difference between the actual EBITDA, EUR 5,745 million, and the forecast EBITDA, EUR 1,252 million, constituted extra cash flow in the first forecast year, which would result in an increase of EUR 4,493 million in the indicative value of the company⁽¹⁴⁾.

V. POSITION OF THE DUTCH AUTHORITIES

- (31) By letter registered as incoming mail on 1 April 2008, the Dutch authorities submitted their comments on the Commission's decision to initiate the formal investigation procedure. The Dutch authorities also replied to the third-party observations on the decision to initiate the procedure, and commented on a non-confidential version of the ECORYS NV report.
- (32) Throughout their submissions, the Dutch authorities maintained the position they had put forward before the formal investigation was initiated⁽¹⁵⁾, to the effect that neither the investment in the Ahoy complex by the municipality of Rotterdam nor the sale of Ahoy Rotterdam NV and lease of the complex constituted State aid.

⁽¹³⁾ Mojo and Music Dome referred to Annex 3 to the lease (years 2003/2004 and 2004/2005) and provided an overview for the period 2003/2004–2007/2008.

⁽¹⁴⁾ The complainants submitted the calculations leading to this result. They also provided other calculations using different multiples to show that if Deloitte had carried out an accurate forecast of the expected result for the financial year 2005/2006, the value of the company would have been considerably higher.

⁽¹⁵⁾ See footnote 1.

Comments on the decision to initiate the procedure

- (33) The Dutch authorities for the most part referred back to information submitted before the decision to initiate the procedure, and maintained their position that the planned investment did not contain any State aid component. They reiterated that the investment should be regarded as an investment in public infrastructure, which did not confer a selective advantage on any undertaking and which guaranteed the multifunctional character of the complex. The contractor who would carry out the investment was to be selected through an open tender procedure. The investment, including the expansion of capacity, was needed to maintain the value of the Ahoy complex; of the total EUR 42 million, only EUR 7 million was to be used to increase the capacity of the Ahoy Arena.
- (34) The rent and share price calculated in the Deloitte reports would ensure a price consistent with the market. The Dutch authorities said that Deloitte confirmed that it undertook its own analyses of the available information, and that its conclusions differed from those of the management on a number of points. The Deloitte reports consequently provided a firm basis for drawing conclusions regarding a rent and share price consistent with the market.
- (35) The profit-sharing mechanism was an effective way of ensuring that no undue advantage was conferred even after the completion of the investment. The threshold triggering the profit-sharing mechanism was set in nominal terms, and was not subject to indexation. If the latest results of Ahoy Management NV were simply increased by an expected annual inflation rate of 2 %, additional rent would be received under the profit-sharing mechanism from 2010/2011 onwards. From 2013/2014, in that scenario, the rent paid by Ahoy Management NV would be higher than the rent calculated by the complainants Mojo and Music Dome. The profit-sharing mechanism was thus an effective tool for ensuring that the rent was consistent with the market.

Comments on the third-party observations and the independent consultant's report

- (36) The Dutch authorities specifically reaffirmed that, contrary to the views of Mojo and Music Dome, there was indeed a trend in the year-to-year turnover of Ahoy Rotterdam NV. The number of events was not an indication of the existence of such a trend, because it did not take into account the commercial value of the individual

events. A significant proportion of the events were organised on a two-yearly basis, and some of them produced substantial additional income⁽¹⁶⁾. In addition, the turnover of an event could easily differ from expectations. The Dutch authorities therefore rejected the view put forward by Mojo and Music Dome.

- (37) As regards the independent consultant's report, the Dutch authorities noted that the observations in the report were largely in line with the Deloitte reports. In particular, the report concluded that the profit-sharing mechanism ensured that the operator would not derive an economic advantage from the planned investment. The report thus confirmed that the agreements concluded were consistent line with market conditions.

VI. THE INDEPENDENT CONSULTANT'S STUDY

- (38) As part of the investigation, the Commission selected an independent consultant, ECORYS Nederland BV, to carry out a review of the valuation reports prepared by Deloitte⁽¹⁷⁾, which had served as a basis for the municipality when it sold the operation of Ahoy Rotterdam NV and leased the Ahoy complex. The consultant was also requested to review the valuation report of DTZ Zadelhoff (DTZ) that had been submitted by the complainants before the initiation of the investigation⁽¹⁸⁾, and to assess whether the profit-sharing arrangement stipulated in the lease between Ahoy Rotterdam NV and the municipality was consistent with the market. For all of these valuation reports, the consultant was requested to state a view on the correctness of the methodology applied.
- (39) The consultant found that in the Deloitte reports valuing the shares in Ahoy Rotterdam NV and determining the rent for the Ahoy complex, the methodology applied was correct. It was reasonable for Deloitte to make use among other things of the information provided by the management, but Deloitte had based its final valuation on its own forecasts, which differed from the management's expectations.

⁽¹⁶⁾ Examples being Europort Maritime, Industrial Maintenance and InfraTech.

⁽¹⁷⁾ One report, entitled 'Project Nadal', valued the shares in Ahoy Rotterdam NV at EUR 1,7 million; the other, 'Waardering Ahoy', put the market level of rent for the Ahoy complex at EUR 2,6 million.

⁽¹⁸⁾ DZT's 'Taxatiereport' valued the market level of rent for the Ahoy complex at EUR 3,9 million.

- (40) According to the consultant, the discrepancy between the valuations of the rent for the Ahoy complex arrived at by Deloitte and DTZ resulted from the different methods they had applied. The consultant approved of the approach taken by Deloitte⁽¹⁹⁾. Underlining the close relation between Deloitte's valuation of the shares in Ahoy Rotterdam NV and the determination of the rent for the complex, the independent consultant confirmed that given that Deloitte's valuation of the shares was fair the method Deloitte had followed provided the most accurate estimate of the market level of the rent for the Ahoy complex.
- (41) The independent consultant's report confirmed that the assumption in the Deloitte report that an increase in the capacity of the Ahoy Arena as a result of the intended investment would not automatically produce additional value for the operator was a defensible one⁽²⁰⁾. As regards the profit-sharing arrangement, the consultant concluded that the mechanism guaranteed a reasonable rent increase in conformity with market conditions in return for the planned investment by the municipality of Rotterdam. As the thresholds set in the profit-sharing arrangement were not subject to indexation, the municipality, as the lessor, might well secure a windfall profit even if the operator, as the lessee, did not exploit the investment in the complex.

VII. ASSESSMENT IN THE LIGHT OF THE STATE AID RULES

State aid within the meaning of Article 87(1) of the EC Treaty

- (42) The Commission has considered whether the measure constitutes State aid within the meaning of Article 87(1) of the EC Treaty, which provides that 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market'.
- (43) It will be seen that if it is to be classed as State aid the notified investment by the municipality of Rotterdam must meet all of the following conditions: (1) the measure must be funded out of State resources; (2) it must confer an economic advantage on undertakings; (3) the advantage must be selective and distort or threaten to distort competition; and (4) the measure must affect trade between Member States.

⁽¹⁹⁾ The consultant did not accept that the DTZ report provided a better indication, because in the consultant's view the Ahoy complex could not be classed as 'easily marketable' (*goed courant*) and the methods used by DTZ were based on unclear comparisons and less appropriate or less developed assumptions.

⁽²⁰⁾ The independent consultant's report took account of the forecasting period, the dynamics of the events market, the possibility of new competitors and the related uncertainties and risks. The independent consultant also indicated that as a defensive strategy the renovation and expansion of the complex was not unique.

1. State resources

- (44) The municipality of Rotterdam plans to invest up to EUR 42 million in the renovation and expansion of the Ahoy Arena, which forms part of the Ahoy complex. Since a municipality is a public authority, the investment must be considered an investment using State resources within the meaning of Article 87(1) of the EC Treaty.
- (45) The other transactions carried out by the municipality, namely the sale of the operation of Ahoy Rotterdam NV to the management and the lease concluded with the private operator, may thus likewise have involved State resources within the meaning of Article 87(1).

2. Advantage

Economic advantage to the operator

- (46) As was pointed out in the decision initiating the procedure, the sale of the operation of Ahoy Rotterdam NV and the lease of the Ahoy complex would confer an economic advantage on the buyer/lessee only if the price of shares in Ahoy Rotterdam NV or the rent for the Ahoy complex were set below their market level. In the decision initiating the procedure the Commission noted that the price for Ahoy Rotterdam NV and the level of rent for the Ahoy complex had been determined directly on the basis of valuation reports prepared by an independent valuer, Deloitte. However, in view of the close link between these transactions and the notified investment, the Commission considered it necessary to verify the terms of the transactions, and in so doing to take account of the fact that Deloitte's reports were to a certain extent based on information provided by the management of Ahoy Rotterdam NV, which as a prospective buyer/lessee faced a conflict of interest.
- (47) As part of the investigation, the Commission decided to obtain an independent consultant's opinion on the reliability of the Deloitte reports, which had served as a basis for the municipality when it carried out these transactions. As has been explained in recitals 38, 39 and 40, the study carried out by this independent consultant confirmed that the methodology followed in the reports was correct, and that Deloitte had based its final valuation on its own forecasts⁽²¹⁾. The Dutch authorities have also indicated that Deloitte has confirmed that it undertook its own analysis of the available information and that its conclusions differed from those of the management on a number of points.

⁽²¹⁾ The independent consultant also observed that it was reasonable for Deloitte to make use among other things of information provided by the management. Deloitte had not relied on this information only, but also used independent market research.

- (48) The Commission has carried out its own in-depth assessment of these reports, and finds that Deloitte correctly applied the discounted cash flow method⁽²²⁾ to guide it in valuing the shares in Ahoy Rotterdam NV and the income approach to guide it in determining the rent for the complex. The Commission likewise finds that the reports correctly took into account the special features of the operating company that made it difficult to draw a proper comparison with other companies and transactions. Finally, the Commission finds that in its valuations Deloitte took proper account of the close link between the sale of the operation and the lease of the Ahoy complex. On the basis of its own assessment and of the findings of the independent consultant, the Commission takes the view that there are no reasonable grounds to challenge Deloitte's reports.
- (49) Both before and after the formal investigation was initiated Mojo and Music Dome argued that the results of the Deloitte reports were vitiated because Deloitte had applied the wrong methodology and because it had used biased information provided by the management; the Commission finds that these arguments have not been properly substantiated. As has been explained, the Commission has concluded that Deloitte applied the correct methodology and that it based its valuation on its own forecasts, which differed from the management's expectations.
- (50) Mojo and Music Dome further contend that some of the results actually achieved by Ahoy Rotterdam NV differ from the results forecast in Deloitte's valuation of the shares in Ahoy Rotterdam NV⁽²³⁾, and that if these forecasts were to be updated the result of the valuation, and thus the price for the shares in Ahoy Rotterdam NV, would be significantly higher. It should be pointed out that the valuation was based on forecasts made by Deloitte on the basis of the information available at the time. There is no evidence that Deloitte used incorrect information to assess the market value of Ahoy Rotterdam NV. The fact that some financial indicators turned out to be different from what had originally been forecast did not affect the circumstances and the information available to Deloitte at the time when it drew up its valuation report, and therefore could not affect the outcome of that valuation. The Commission finds, therefore, that the differences between the forecasts and the actual financial indicators supplied *ex post* by Mojo and Music Dome do not vitiate the correctness of the valuation carried out by Deloitte.
- (51) On the basis of this assessment, the Commission considers that Deloitte's market valuation reports presented a reliable basis for the prices that were set for purposes of the sale of the operation of Ahoy Rotterdam NV and the lease of the Ahoy complex by the municipality. Taking into account the relevant obligations imposed by the municipality in the lease, the Commission concludes that these transactions were carried out in conformity with market conditions and did not confer an undue economic advantage on the operator of the complex.
- (52) As regards the part of the notified investment relating specifically to the upgrading and expansion of the capacity of the Ahoy Arena, in the decision initiating the procedure the Commission said it could not rule out the possibility that this investment might confer a selective advantage on the operator of the complex going beyond normal market conditions, even when account was taken of the safeguard provided by the profit-sharing mechanism laid down in the lease concluded between the municipality and Ahoy Rotterdam NV.
- (53) In particular, according to the Commission's initial assessment, the arguments put forward by the Dutch authorities did not show that the design of the profit-sharing arrangement was such as to ensure that the rent would be at a market level following the investment; those arguments consequently did not show that there would be no economic advantage to the operator of the complex after the completion of the investment.
- (54) As part of the investigation, the Commission carried out an in-depth analysis of the profit-sharing mechanism in the light of the additional information provided by the Dutch authorities and the third parties. The Commission also asked the independent consultant to assess whether the profit-sharing arrangement laid down in the lease was in line with market conditions.
- (55) As explained in recitals 15 and 16, the privatisation of the operation of Ahoy Rotterdam NV and the lease of the complex were based on the assumption that the planned investment⁽²⁴⁾ was necessary to maintain the
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- ⁽²²⁾ The discounted cash flow (DCF) method is a commonly used method of valuing a project, company or asset by calculating the present value of a future cash flow, taking into account both the risk and the time expected to elapse before the cash is received.
- ⁽²³⁾ The complainants argue that given that the valuation was carried out in the middle of the financial year 2005/2006, the forecast should have been more accurate.
- ⁽²⁴⁾ In particular the expansion of the capacity of the Arena by the addition of extra seats.

value of the complex but would not produce any additional revenues for the operator⁽²⁵⁾. In this respect, the Commission would point out that the independent consultant has confirmed that the assumption made in the Deloitte report that an increase in the capacity of the Ahoy Arena as a result of the intended investment would not automatically produce additional value for the operator was a defensible one, in view of the dynamics of the events market, possible new competitors, and the related uncertainties and risks. The Commission agrees with the findings of the independent consultant, and concludes that this assumption was justified, taking into account among other things Ahoy's unique market position, the presence and behaviour of other operators in the market⁽²⁶⁾, and the fact that the operation of the complex could be hampered by the renovation work for a fairly long time.

(56) The Commission would also point out that the municipality included a profit-sharing mechanism in the lease as a safeguard. This arrangement was designed to ensure that the level of the rent for the complex would rise if the notified investment were to increase the value of the complex to the operator. According to the independent consultant the profit-sharing arrangement guarantees a reasonable rent increase in conformity with market conditions in return for the planned investment by the municipality of Rotterdam. The independent consultant has confirmed that both the degressive structure of the mechanism and the differentiation of the pace of the rent increase are reasonable. The independent consultant has also pointed out that as the thresholds set in the profit-sharing arrangement are not subject to indexation, the municipality, as the lessor, may well secure a windfall profit even if the operator, as the lessee, does not exploit the investment in the complex.

(57) The mechanism increases the rent once the operator's gross margin, as defined for this purpose, exceeds the threshold of EUR 16,5 million. In order to assess whether this threshold is appropriate, the Commission has compared it over the period of the lease with the operator's gross margins as forecast in the Deloitte report⁽²⁷⁾, after deducting, as the mechanism provides, the rent payable to the municipality in a given financial year.

[...]

⁽²⁵⁾ This assumption was used in the Deloitte report determining a market rent for the Ahoy complex.

⁽²⁶⁾ According to the independent consultant, Amsterdam RAI, for example, was investing up to EUR 105 million in upgrading its complex in the period 2003–2008.

⁽²⁷⁾ These gross margins are based on the assumption that the investment will only maintain the value of the complex to the operator, and will not produce additional revenues.

(58) [...] Over the period of the lease, the gross margins forecast by Deloitte (less the rent) are on average higher than the EUR 16,5 million threshold in the financial years following the projected completion of the investment, even when no account is taken of possible additional gross margin generated by the increase in value of the complex. The Commission concludes that the threshold is at a level likely to capture potential increases in the operator's gross margin that might arise if the investment were to increase the value to the operator, rather than merely preserving it.

(59) Once the gross margin threshold of EUR 16,5 million is exceeded, the additional rent for the municipality substantially increases, although at a decreasing pace, until the operation is achieving a gross margin of EUR 25 million⁽²⁸⁾. At that point the rent received by the municipality is EUR 5,2 million, double the figure determined by Deloitte⁽²⁹⁾. As the effect of the upgrading/expansion of the Ahoy Arena on the operator's revenues cannot be expected to be unlimited, the Commission takes the view that it is justified in this case to differentiate the pace of the rent increase and at the same time to put a cap on the maximum rent surcharge⁽³⁰⁾.

(60) The Commission therefore accepts the independent consultant's opinion and concludes that the design of the profit-sharing mechanism laid down in the lease is in line with market conditions and provides an effective safeguard to ensure that the rent for the complex following the planned investment is at a market level.

(61) Mojo and Music Dome have argued that even if the investment (and in particular the expansion of the Ahoy Arena) did not increase the operator's revenues, the improvement of the facilities would still confer a competitive advantage on Ahoy Rotterdam NV, as it would have the benefit of an improvement in the facilities free of charge, whereas any private undertaking would have had to pay the cost itself; the Commission does not consider this argument convincing. In its valuations Deloitte itself worked with a scenario according to which the investment would not generate additional revenues but was nevertheless necessary in order to preserve the value of the complex. When the price for Ahoy Rotterdam NV and the rent for the complex were set, the investment was taken into account. Thus the investment does not confer an economic advantage on the operator.

⁽²⁸⁾ See recital 16.

⁽²⁹⁾ The additional rent is calculated as follows: 50 % × EUR 1,5 million + 35 % × EUR 3 million + 20 % × EUR 4 million = EUR 2,6 million.

⁽³⁰⁾ The independent consultant's report confirms that it is reasonable to structure the mechanism in this fashion.

(62) Mojo and Music Dome also argue that the arrangement cannot be in line with the market, since even if the operator were to repay the investment in full under the profit-sharing mechanism, the operator would still receive an economic advantage, as the entire economic risk of the investment would be borne by the municipality of Rotterdam. According to Mojo and Music Dome, the municipality will receive nothing if the investment does not generate additional income: it will recover its investment only if extra income is indeed generated. With regard to the argument put forward by Mojo and Music Dome here, the Commission cannot exclude the possibility that in its decision to invest in the project the municipality did not behave as a profit-maximising private investor. The conditions imposed on the operator regarding the multifunctionality of the complex and the types of events that are to take place there in effect reduce the value of the investment. However, the Commission's assessment has demonstrated that the operator did not receive any undue advantage from its contractual relationship with the municipality, taking into account the restrictions imposed in the contracts. As explained above, the level of the rent and the price of the shares in Ahoy Rotterdam NV were in line with market conditions. The profit-sharing mechanism presents is an additional safeguard to rule out any potential undue advantage if the investment, rather than merely preserving value, were to generate additional value for the operator.

(63) Accordingly, taking into account the uncertainty of the potential advantage to the operator resulting from the upgrading/expansion of the Ahoy Arena, as well as the effective safeguard in the form of the profit-sharing arrangement implemented by the municipality, the Commission concludes that the planned investment does not confer on the operator an economic advantage going beyond normal market conditions.

An economic advantage conferred on the undertaking carrying out the project

(64) The Dutch authorities have given a commitment that the undertaking or undertakings carrying out the investment project will be selected by public tender in full compliance with Parliament and Council Directive 2004/18/EC⁽³¹⁾. As it said in its decision to initiate the investigation procedure, if this commitment is met the Commission can rule out the possibility that an economic advantage going beyond normal market conditions might be conferred on any such undertaking or undertakings.

Economic advantage conferred on undertakings using the complex

(65) It must be concluded that the investment will not confer any economic advantage beyond normal market

conditions on undertakings using the services provided by the operator of Ahoy. Since the investment is focused on the renovation and development of the Ahoy Arena, the undertakings concerned will be organisers of concerts, festivals, and sports and social events. Given that the operator of the Ahoy complex is a private undertaking, there is no reason to doubt that its clients will be charged a market price.

Economic advantage conferred on specific economic activities

(66) In the decision initiating the procedure, the Commission made an initial finding, on the basis of the information in its possession, that no selective advantage would be conferred on any specific undertaking or group of undertakings or on any specific activity, given the multi-purpose layout of the complex and the obligations imposed on the operator in the lease regarding the nature and promotion of its multifunctional character.

(67) The comments submitted by the Dutch authorities in the course of the investigation have confirmed the multifunctional nature of the Ahoy complex and the variety of activities carried on there. The lease requires the operator to guarantee that the facility will continue to be available for different users and activities. The Commission would observe that the investment in the Ahoy Arena aims at maintaining the multifunctional character of the complex, so as to provide facilities for various types of activity which are not for the benefit of specific undertakings or specific activities. In addition, the investment in the Arena is intended to provide a venue at which activities will take place that are aimed at the general public. The provision of a sports venue of this type can be regarded as a matter for which the authorities are responsible to the general public, provided its multifunctional character is maintained. In addition, there is nothing to suggest that with regard to other activities and events the Ahoy complex would not be operated on market terms.

(68) The Commission takes the view, therefore, that the investment will not favour specific undertakings or economic activities, and is consequently not selective.

Conclusion on economic advantage

(69) The Commission accordingly finds that neither the planned investment in the Ahoy complex nor the related sale of the operation and lease of the Ahoy complex by the municipality confer an economic advantage going beyond normal market conditions on the operator of the complex or on any other undertaking. The Commission also finds that the investment does not selectively favour specific undertakings or economic activities.

⁽³¹⁾ OJ L 134, 30.4.2004, p. 114.

VIII. **OVERALL CONCLUSION**

- (70) Since the initiation of the formal investigation procedure, the doubts that the Commission expressed in the initiating decision have been addressed in a satisfactory manner by the Dutch authorities and the independent consultant. In particular, further information has been provided with respect to the design of the profit-sharing arrangement, which has enabled the Commission to assess the mechanism in depth. Furthermore, the Commission has assessed the reliability of the Deloitte valuations which served as a direct basis for the sale of the operation of Ahoy Rotterdam NV and the lease of the Ahoy complex, and has confirmed that these transactions were consistent with the market.
- (71) The Commission concludes, therefore, that neither the notified investment in the renovation and upgrading/expansion of the Ahoy complex, nor the related sale of the operation of Ahoy NV and lease of the complex, constitutes State aid within the meaning of Article 87(1) of the EC Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The investment by the municipality of Rotterdam in the Ahoy complex, notified to the Commission by letter of 22 February 2007, with subsequent amendments, does not constitute State aid within the meaning of Article 87(1) of the EC Treaty.

The measure may accordingly be implemented.

Article 2

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 21 October 2008.

For the Commission

Neelie KROES

Member of the Commission

COMMISSION DECISION**of 21 September 2009****nominating two public policy members of the Supervisory Board of the European Financial Reporting Advisory Group**

(2009/714/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Whereas:

- (1) In accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards ⁽¹⁾, an accounting technical committee should provide support and expertise to the Commission in the assessment of international accounting standards. The role of that accounting technical committee is fulfilled by the European Financial Reporting Advisory Group (EFRAG).
- (2) EFRAG was founded in 2001 by European organisations representing issuers, investors and the accountancy profession involved in the financial reporting process.
- (3) Following the reforms of EFRAG's governance structure, EFRAG's Supervisory Board includes four public policy members specifically selected on the basis of their experience in public policy making at either national or European level. In accordance with Section 3.2 of Appendix 1 to the EFRAG Statutes effective from 11 June 2009, it is for the Commission to nominate

those public policy members. EFRAG's Supervisory Board members are appointed by the EFRAG's General Assembly.

- (4) After a public call for applications ⁽²⁾ the Commission has selected the candidates to be nominated as public policy member of EFRAG's Supervisory Board.
- (5) By Commission Decision 2009/549/EC of 13 July 2009 nominating a public policy member of the Supervisory Board of the European Financial Reporting Advisory Group ⁽³⁾ one candidate has been nominated,

HAS DECIDED AS FOLLOWS:

Sole Article

The Commission hereby nominates two members to be appointed as public policy members of the Supervisory Board of the European Financial Reporting Advisory Group, whose names are listed in the Annex.

Done at Brussels, 21 September 2009.

For the Commission

Charlie McCREEVY

Member of the Commission

⁽¹⁾ OJ L 243, 11.9.2002, p. 1.

⁽²⁾ OJ C 74, 28.3.2009, p. 61.

⁽³⁾ OJ L 182, 15.7.2009, p. 63.

ANNEX**LIST OF NOMINATED PUBLIC POLICY MEMBERS**

Ms Aldona KAMELA-SOWINSKA

Mr Angelo PROVASOLI

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