

***Case No COMP/M.5508 -  
SOFFIN/ HYPO REAL  
ESTATE***

Only the German text is available and authentic.

**REGULATION (EC) No 139/2004  
MERGER PROCEDURE**

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Article 6(1)(b) NON-OPPOSITION  
Date: 14/05/2009

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EUROPEAN COMMISSION

Brussels, 14.5.2009  
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C(2009) 3994

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PUBLIC VERSION

MERGER PROCEDURE  
ARTICLE 6(1)(b) DECISION

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SIMPLIFIED PROCEDURE

**To the notifying party:**

Dear Madam(s) and/or Sir(s),

**Subject: Case No COMP/M.5508 – SOFFIN/ HYPO REAL ESTATE  
Notification of 14 April 2009 pursuant to Article 4 of Council Regulation (EC)  
No 139/2004<sup>1</sup>  
Publication in the Official Journal of the European Union No C 91/17,  
21.4.2009, p. 17**

1. On 14 April 2009, the Commission received notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 by which the Financial Market Stabilisation Fund (commonly known as "Sonderfonds Finanzmarktstabilisierung" and further referred to below as "SoFFin", Germany), controlled by the Federal Republic of Germany, acquires within the meaning of Article 3(1)(b) of the Council Regulation control of the whole of the undertaking Hypo Real Estate Holding AG ("HRE", Germany) by way of public bid announced on 9 April 2009.

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<sup>1</sup> OJ L 24, 29.1.2004, p. 1.

## I. THE PARTIES AND THE OPERATION

### *Parties*

2. On 17 October 2008 the Federal Republic of Germany adopted a legislative package, the German Financial Market Stabilisation Act (Finanzmarktstabilisierungsgesetz, "FMStG"), aimed at stabilising the financial markets in the current economic crisis. SoFFin, the Special Fund Financial Market Stabilisation, was created via this measure with a view to acting as a vehicle for state interventions to avert the implications of the current financial crisis and to stabilising the financial system in Germany. For this purpose SoFFin is entitled to take measures to help financial institutions overcome liquidity squeezes and strengthen their equity basis. These measures also include the acquisition of shareholdings in individual financial institutions by SoFFin, including controlling stakes within the meaning of the Merger Regulation. SoFFin is administered by the Financial Market Stabilisation Agency (Finanzmarktstabilisierungsanstalt).
3. HRE is the holding company of the HRE Group, a Germany-based financial institution. HRE is mainly active in financing of commercial real estate, financing of activities of the public sector (including public infrastructure and asset based finance) as well as capital markets and asset management. As regards its refinancing, HRE is entitled to and active in issuing covered bonds ("Pfandbriefe").

### *Operation*

4. SoFFin has made a public takeover bid to acquire all of the shares in HRE. In the event that the takeover bid is not successful, SoFFin may alternatively acquire all of the shares in HRE by nationalisation by law. The SoFFin acquired 38.65% of the shares of HRE by the take-over bid. Given that it had already 8.65% it has now a share of 47.31%. The presence in the general assembly in the last three years ranged between 40% in 2006 and 55% in 2007 while in 2008 50% of the shareholders attended. Due to these attendance rates, SoFFin acquired de facto control over HRE. SoFFin will not in any way be constrained in its exercise of the voting rights in HRE post-transaction. The proposed transaction, independently of its precise final structure, will therefore enable SoFFin to acquire sole control of HRE. Thus, the proposed transaction constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

### *Assessment of Commission's jurisdiction – calculation of relevant turnover based on economic units with independent power of decision*

5. In the present case the Commission follows a two step approach for determining whether or not the acquisition by the German Federal State (further referred to as "Bund") via SoFFin of control of HRE is notifiable under the Merger Regulation. This approach consists (i) in establishing whether HRE will post-transaction make up an economic unit that retains an independent power of decision<sup>2</sup>; (ii) if this is not clearly the case, establishing which is the

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2 Recital 22 of Merger Regulation: Recital 22 of the EC Merger Regulation makes clear that the principle of non-discrimination between the public and private sectors requires the Commission "to take account of undertakings making up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them" in order to establish which undertakings, amongst all those controlled by the State, should be considered for the establishment of jurisdiction under the EC Merger Regulation.

ultimate acquiring entity (SoFFin or an entity ultimately controlling SoFFin if SoFFin itself cannot be considered having an independent power of decision) and, which other undertakings controlled by this ultimate acquiring entity need to be considered for the purpose of calculating relevant turnover.

***Assessment of Commission's jurisdiction – assessment of independent power of decision of HRE post-transaction***

6. SoFFin will acquire sole control of HRE and there will be no holding arrangement, special provisions or other safeguards in place post-transaction that would ensure that HRE retains an independent power of decision. There are no provisions that would ensure that HRE would despite public ownership autonomously decide about its strategy, business plan and budget and decide independently of SoFFin or the entity ultimately controlling SoFFin. Consequently, HRE will post-transaction be subject to coordination of commercial conduct and will not constitute an economic unit with an independent power of decision within the meaning of the Merger Regulation.

***Assessment of Commission's jurisdiction – assessment of independent power of decision of SoFFin post-transaction***

7. As HRE will not retain an independent power of decision post-transaction, the Commission needs to identify the ultimate acquiring entity and whether there are other undertakings controlled (directly or indirectly, solely or jointly) by this entity. Other undertakings controlled by the same ultimate acquiring entity within the meaning of the Merger Regulation may be subject to coordination with HRE and will therefore need to be considered for the purpose of calculating relevant turnover.
8. Since there are no special holding arrangements in place that would ensure independent power of decision for banks over which SoFFin has control within the meaning of the Merger Regulation, SoFFin will be the starting point for the assessment. The Commission needs to assess whether SoFFin constitutes an economic unit with independent power of decision or whether the true centre of decision making is with a public entity at a higher level than SoFFin.
9. While SoFFin has been created with a view to executing the measures aimed at stabilising the financial system in Germany, the German Federal Government has defined a governance structure according to which the task to manage SoFFin is transferred to the Financial Market Stabilisation Fund Agency (Finanzmarktstabilisierungsanstalt, further referred to below as "the Agency"). This public law agency does not constitute an independent legal entity and is established at the German Central Bank (Deutsche Bundesbank), whereas its organisation is separated from the Central Bank.
10. The Agency itself is managed by a Management Committee consisting of three members who are appointed by the Federal Ministry of Finance ("BMF") in consultation with the German Central Bank. The Management Committee manages the Agency. However, insofar as general principles, matters of particular importance or decisions on substantial obligations are concerned, an inter-ministerial Steering Committee ("Steering Committee") instead of the Agency/its Management Committee shall decide on a proposal made by the Management Committee. The Steering Committee in turn is composed of several representatives of the German Federal Government and one representative of the German Federal States.
11. The Agency is furthermore bound to conform to instructions and decisions issued by BMF or the Steering Committee.

12. However, regardless of the exact division of tasks between SoFFin and the Agency and regardless of the precise organisational structure of the management of SoFFin and the Agency, both SoFFin and the Agency are subject to legal and substantive supervision by BMF. This provides for supervision of SoFFin and the Agency by BMF in all legal respects, but also as to the appropriateness of its activities.
13. In addition to its supervisory powers, BMF is entitled, based on the Law on the Financial Market Stabilisation Fund (Finanzmarktstabilisierungsfondsgesetz, "FMStFG") and the Regulation on the Financial Market Stabilisation Fund (Finanzmarktstabilisierungsfondsverordnung, "FMStFV")<sup>3</sup>, to take decisions in general or in individual cases instead of decisions of the Agency. In other words BMF can on its own initiative substitute SoFFin or the Agency in the decision making.
14. Furthermore, the FMStFV<sup>4</sup> provides BMF with a number of rights, which include BMF's right to give instructions to SoFFin or the Agency in general and in individual cases whereas other entities such as the Steering Committee do not have these rights.
15. In light of the above the Commission finds that none of SoFFin, the Agency, the Management Committee, the Steering Committee or the Board related to the Financial Market Stabilisation Fund constitute an economic unit that has an independent power of decision. On the contrary the Commission concludes that BMF has sufficient powers to define the conduct of SoFFin and the Agency.
16. BMF, as part of the Federal Government, is therefore the starting point for the further assessment of Commission jurisdiction over the proposed transaction. Whether the BMF, the Federal Government as a whole or the Bund constitute the appropriate economic unit does not need to be decided for the case at hand since, even on the assumption that the Bund were the appropriate level to look at, competition problems do not arise.

***Assessment of Commission's jurisdiction – assessment of BMF***

17. It follows from the above that the further assessment of Commission jurisdiction over the proposed transaction will take BMF as the starting point upstream of SoFFin/the Agency.
18. BMF supervises, amongst others, Kreditanstalt für Wiederaufbau ("KfW"). As regards the shareholding of KfW, 80% of the shares in KfW are held by the Bund, while 20% are held by the Federal States ("Länder"). In the view of the notifying party the Federal Republic of Germany controls KfW.
19. KfW is a Germany-based bank under public law, which provides financial services for a variety of projects considered to be in the public interest. In line with previous decisions regarding state aid and referring to Art. 86 EG, KfW is considered as an undertaking<sup>5</sup>. KfW is also active in lending directly to commercial private-sector undertakings. For instance KfW participates in banking consortia for general corporate financing or acquisition finance to private-sector undertakings. KfW thereby underwrites [...] of the total financing and provides its financing strictly on the same terms and conditions as the commercial banks participating in the consortium. KfW therefore has a presence in certain markets for financial services to clients in Germany. In addition, KfW, through its wholly-owned subsidiary KfW IPEX-Bank GmbH, competes with commercial banks in certain markets for financial services such as project and export finance.

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<sup>3</sup> § 1 (3) No. 3 FMStFV.

<sup>4</sup> § 1 (3) FMStFV.

<sup>5</sup> State Aid decision No. E10/2000 by 8 May 2001 and 27 March 2002.

20. Regardless of the corporate governance of KfW, BMF is, according to § 12 (1) KfWG, empowered to supervise KfW in consultation with the Federal Ministry for Economics and Technology. BMF in its quality as the supervisory authority is empowered to adopt all measures necessary to keep the conduct of KfW's business in conformity with the laws, By-Laws and other regulations. The Commission therefore finds that BMF has a broadly defined supervisory right related to the entirety of KfW's activities. In addition according to § 8 (2) KfWG the Board of Supervisory Directors may adopt amendments to the By-Laws. Such amendments must, however, be approved by BMF in its capacity as the supervisory authority of KfW.
21. According to § 1a KfW the Federal State ("Bund") guarantees substantially all of KfW's liabilities. According to § 2 (4) KfWG the Federal Government is furthermore entitled to decide for which activities certain limitations on KfW (e.g. accepting deposits, conduct current account business, dealing in securities for third parties) are not applicable. This means the Federal Government is empowered to assign certain activities to the KfW if they consider these activities in the public interest.
22. With regard to the corporate governance of KfW, according to § 5 (1) of the law on KfW ("KfWG"), the governing bodies of KfW are the Board of Managing Directors and the Board of Supervisory Directors.
23. The Board of Managing Directors is in charge of managing the business, whereas the Board of Supervisory Directors appoints and dismisses members of KfW's Board of Managing Directors and supervises the conduct of KfW's business. The Board of Supervisory Directors may give general or specific instructions to the Board of Managing Directors. The Board of Supervisory Directors consists of 39 members and generally takes its decisions by a simple majority of the votes cast. In case of a tie the Chairman has the casting vote. The Federal Government is represented by 9 members, amongst which the Federal Minister of Finance. The Federal Minister of Finance holds on a rotating basis the positions of Chairman and Deputy Chairman of the Board of Supervisory Directors. Moreover, the Federal Government appoints further 16 members of the Board of Supervisory Directors.<sup>67</sup>
24. On the basis of the far-reaching supervisory powers exercised by BMF KfW cannot be considered an entity constituting an economic unit with an independent power of decision. In addition the Federal Government, especially via BMF, exercises substantial influence on KfW's Board of Supervisory Directors. In summary BMF has sufficient power to determine the commercial conduct of KfW. Even though the parties argue that the affairs of SoFFin and KfW are managed by different departments within the FMF, coordination at least at the level of the FMF state secretary and above cannot be excluded. Therefore it cannot be concluded that KfW and SoFFin are *de facto* managed separately by the FMF.
25. For the purpose of assessing jurisdiction over the present case, it is already sufficient to include the turnover of KfW at the level of BMF in order to meet the turnover thresholds and to conclude that the transaction has a Community dimension. It can therefore be left open whether the appropriate economic unit with an independent power of decision is at the level of BMF or at a higher level such as the Federal Government or the Bund.

## II. COMMUNITY DIMENSION

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<sup>6</sup> § 7 KfWG.

<sup>7</sup> The remaining members are appointed by the first and second chamber of German parliament, i.e. 7 members are appointed by the Bundestag and 7 members by the Bundesrat.

26. In light of the above, the undertakings concerned have a combined aggregate world-wide turnover for the year 2008 of more than EUR 5 billion<sup>8</sup> (HRE: [...], Bund (considering KfW only): [...]). Each of the undertakings has a Community-wide turnover for the year 2008 in excess of EUR 250 million (HRE: [...], Bund (considering KfW only): [...]). Neither HRE nor KfW achieved more than two-thirds of their aggregate Community-wide turnover within one and the same Member State.
27. The notified operation therefore has a Community dimension within the meaning of Article 1(2) of the Merger Regulation.

### **III. COMPETITIVE ASSESSMENT**

#### **A. Relevant product and geographic markets**

28. HRE and KfW are active in commercial mortgaging, credit to public authorities including financing of infrastructure like Public-Private-Partnerships and in issuing covered bonds ("Pfandbriefe"). The BMF, Federal Government and Bund do not control any other undertakings active in these areas and therefore giving rise to a horizontal overlap.

##### *Commercial mortgaging*

29. Commercial mortgaging covers the financing of real estate assets for commercial use.
30. The parties are of the opinion that commercial mortgaging constitutes a separate product market.
31. In its previous cases, the Commission indicated that commercial mortgaging was a potential sub segment of corporate banking services<sup>9</sup> without finally deciding the product market definition. The German Bundeskartellamt has defined the markets for mortgaging as follows: (i) Financing of residential construction by private persons; (ii) Financing of residential construction by companies and (iii) Commercial mortgaging.<sup>10</sup>
32. The parties are of the opinion that the market for commercial mortgaging is EEA-wide in geographic scope.
33. In a previous case the Commission concluded that corporate banking services for small and medium enterprises ("SME") and for large corporate customers ("LCCs") belonged to separate relevant product markets<sup>11</sup>. In its previous decisions, the Commission indicated that the market for corporate banking for SME is national in geographic scope while recognizing that certain corporate banking services have a strong international dimension, in particular for large corporate customers<sup>12</sup>. Accordingly, the geographic scope of the market for services to LCCs has been left open<sup>13</sup>.
34. For the purpose of the current case, the relevant market definition can be left open.

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8 Turnover calculated in accordance with article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice of 10 July 2007.

9 Case COMP/M.3894 – Unicredito/HVB, decision of 18 November 2007, para 18; Case COMP/M.4484 – Danske Bank/Sampo Bank, decision of 31 January 2007, para 13.

10 Bundeskartellamt, decision of 19 June 2002 (B4-37/02), p. 10.

11 Case COMP/M.4844 – Fortis/ABN AMRO Assets, decision of 3 October 2007, para 16.

12 Case COMP/M.3894 – Unicredito/HVB, decision of 18 November 2007, para 41; Case COMP/M.4484 – Danske Bank/Sampo Bank, decision of 31 January 2007, para 13.

13 Case COMP/M.4844 – Fortis/ABN AMRO Assets, decision of 3 October 2007, §§75-81

### *Credit to public authorities*

35. Credit to public authorities covers credits to domestic but also foreign public authorities, including the financing of infrastructure.
36. The parties are of the opinion that credits to public authorities constitute the relevant product market.
37. In a previous decision, the Commission considered credit to local authorities to be a product market in its own right, given that customers and conditions of the loans differ from normal bank loans.<sup>14</sup> The German Bundeskartellamt has also regarded credit to local authorities as a separate market due to the legal requirements of the public budget law.<sup>15</sup>
38. In its previous decisions, the Commission indicated that the market of credit to local authorities is national in geographic scope.<sup>16</sup>
39. For the purpose of the current case, the relevant market definition can be left open, including the question whether financing of infrastructure constitutes a separate relevant market.

### *Covered bonds ("Pfandbriefe")*

40. "Pfandbriefe" are covered bonds which are issued and placed in the capital markets by banks with a permission to issue them. Their function is to refinance the issuing banks.
41. In a previous decision, the Commission has left open whether the market for issuing "Pfandbriefe" (jumbo covered bonds issued under German law) constitutes a separate market. The Bundeskartellamt stated in one decision<sup>17</sup> that there is a single market for public "Pfandbriefe" and mortgage "Pfandbriefe", given that they are interchangeable. Both decisions left open whether jumbo covered bonds (volume of at least EUR 1 billion) and bonds with a lower volume constitute separate markets.
42. In the parties' view, the geographic market for "Pfandbriefe" covers at least the EEA.
43. In its previous decision, the Commission left the geographic market definition open.<sup>18</sup>
44. For the purpose of the current case, the relevant market definition can be left open.

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14 Case COMP/M.2400 – Dexia/Artesia, decision of 14 June 2001, para 8.

15 Bundeskartellamt, decision of 19 June 2002 (B4-37/02), p. 10 f.

16 Case COMP/M.2400 – Dexia/Artesia, decision of 14 June 2001, para 12.

17 Bundeskartellamt, decision of 19 June 2002 (B4-37/02), p. 11.

18 Case COMP/M.2400 – Dexia/Artesia, decision of 14 June 2001, para 12.



## **B. Assessment**

45. The proposed transaction does not give rise to affected markets and would have generally fallen within the scope of paragraph 5(c) of the Commission Notice on a simplified procedure for treatment of certain concentrations under the Merger Regulation<sup>19</sup>.
46. The activities of HRE and the KfW, mainly via its subsidiary IPEX, horizontally overlap in commercial mortgaging and financing, financing of public infrastructure and re-financing via covered bonds ("Pfandbriefe"). However, there are no horizontally affected markets.

### ***Commercial mortgaging***

47. With respect to the total commercial mortgaging in Germany, the combined market share of the parties would be around [10-20]% (HRE: [10-20]%, IPEX: below [0-5]%). In a European market, the combined market share of the parties would be significantly lower; and would reach [0-5]%. Taking into account a limitation applied to new business in 2008, the combined market share of the parties would be around [5-10]% (HRE: [5-10]%, IPEX: below [0-5]%) in Germany and [0-5]% in Europe.
48. The parties stress that HRE and IPEX are not close competitors in commercial mortgaging. HRE is mainly active in structuring of financing, i.e. in particular project structuring while IPEX's activity is limited at present in the business concerning financing tranches, i.e. only in partial financing while the structuring of the financing is in the hands of other banks.
49. Given the low market shares of the parties, in particular the low increment and the fact that the parties are not close competitors, it can be concluded that the transaction will not significantly impede effective competition in the common market or in a significant part of it.

### ***Credit to public authorities***

50. The parties' activities within credit to public authorities overlap only with respect to proximate financing of public infrastructure ("kommunalnahe Finanzierungen"). In geographic terms, the activities of the parties in the EU overlap only in Germany where the combined market share is [0-5]%. According to the estimates of the parties, the combined market share in a European market would not be substantially higher given that IPEX is only active in Germany and HRE is not active in all Member states. The combined market share of the parties would be below 15% in any event.
51. The parties stress that HRE and IPEX are not close competitors in geographic regard. HRE focuses on financially strong markets in Western Europe and the US while IPEX is mainly active in emerging markets and economically less developed countries. This is the reason why their activities within the EU only overlap in Germany.
52. Given the low market shares of the parties and the fact that the parties are not close competitors, the Commission concludes that the proposed transaction does not raise competition concerns in relation to credit to public authorities.
53. Assuming a separate relevant product market for financing of infrastructure, the combined market share of the parties on a European market for financing of infrastructure would be around [0-5]% (IPEX: [0-5]%, HRE: [0-5]%). It can be assumed that the combined market

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19 OJ C 56, 05.3.2005, p. 32.

share of the parties would be below 15% in the individual Member States in which they are active.

54. The parties point out that HRE intends to wind up this business in the following years. HRE will not be active in new infrastructure financing business. HRE is not concluding new contracts in this business.
55. Given the low combined market shares and the fact that HRE is not active in new business now and in the future, the Commission concludes that the proposed transaction does not raise competition concerns in relation to financing of infrastructure.

#### *Covered bonds ("Pfandbriefe")*

56. HRE, in particular via the Depfa-Group, is issuing "Pfandbriefe". KfW is not issuing "Pfandbriefe" but holding them within its re-financing and asset management. KfW (including IPEX) has invested a volume of EUR [...] in HRE "Pfandbriefe". In relation to the total investment of the KfW this amounts to only [0-5]%.  
57. Given the fact that KfW is not issuing "Pfandbriefe" itself and that holding them represents only a marginal part of KfW's total investment, there is no overlap. Therefore the Commission concludes that the proposed transaction does not raise competition concerns in relation to issuing of "Pfandbriefe".

#### **C. Vertical issues**

58. There are no vertically affected markets.
59. There is conveyance business between HRE and KfW to a certain extent, mainly concerning the financing of residential real estate assets. The share of HRE in relation to KfW's total conveyance business is only [0-5]%.  
60. The KfW runs platforms for securitisation, particularly the platform PROMISE/PROVIDE, which is also used by HRE. KfW only gets a fee for the use of the platform. The parties state that there were [...] between HRE and KfW in 2008.  
61. There are also no vertically affected markets in relation between HRE and further companies that may be controlled by the Federal State of Germany within the meaning of the Merger Regulation. The only companies that have – at least theoretically - commercial relationships with HRE are [...].  
62. Between HRE and [...] there is only one historical relationship due to a long-term financing agreement which has been agreed before [...]. At present there is no demand for the financing of real estate assets by [...] or any of its subsidiaries. There were no new business relationships in 2008 between HRE and [...]. In any event, the financing of commercial mortgages does not represent an important input for [...]. In light of [...] business strategy and cost structure, a vertical relationship with HRE in relation to financing of commercial mortgages would therefore not be material to [...].<sup>20</sup>  
63. Between HRE and [...] there is only one historical relationship. At present there is hardly any demand for the financing of real estate assets by [...] or any of its subsidiaries. There were no new business relationships in 2008 between HRE and [...]. In any event, the

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20 For a qualification of "important input" in vertical relationships within the meaning of the Merger Regulation see paragraph 34 of the Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008, p. 6–25

financing of commercial mortgages does not represent an important input for [...]. In light of [...] business strategy and cost structure, a vertical relationship with HRE in relation to financing of commercial mortgages would therefore not be material to [...].

64. [...] is active in the letting, administering, development as well as purchase and sale of residential and commercial real estate. In 2008 there were no new business relationships between [...] and HRE. Moreover, with respect to commercial real estate, [...] is a small player and its investment in new real estate is marginal.

#### **IV. CONCLUSION**

65. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EC) No 139/2004.

For the Commission  
(signed)  
Lowri Evans  
Deputy Director General  
for Philip Lowe  
Director General