



EUROPEAN COMMISSION

Brussels, 27.03.2014
C(2014) 1805 final

PUBLIC VERSION

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Subject: State aid SA.37954 (2013/N) – Greece
Sale of certain assets of Larco General Mining & Metallurgical Company S.A.

Sir,

1. PROCEDURE

- (1) Following informal contacts, the Greek authorities notified, for legal certainty, to the European Commission ('Commission') by SANI notification of 16 December 2013 their plans to sell certain assets of Larco General Mining & Metallurgical Company S.A. ('Larco').
- (2) Additional information was requested by letter of 17 January 2014 and 24 February 2014. The Greek authorities provided additional information by letters of 31 January 2014, 21 February 2014 and 5 March 2014.
- (3) By their notification of 16 December 2013, the Greek authorities informed the Commission that they agree with the adoption of the decision in English.

2. DESCRIPTION

2.1. The company

- (4) Larco is specialised in the extraction and processing of laterite ore, extraction of lignite and production of ferronickel and by-products. Its activities include

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exploration, development, mining, smelting and trading of its products worldwide. Larco is one of the largest ferronickel producers in the world. On 31 December 2013 it had 912 employees and therefore qualified as a large enterprise.¹

- (5) At the time of the notification, 55.2% of Larco's shares were owned by the Greek State through the Hellenic Republic Asset Development Fund S.A. ('HRADF'), 33.4% by the National Bank of Greece ('NBG', a private financial institution) and 11.4% by Public Power Corporation S.A. ('PPC', the incumbent electricity producer in Greece, of which the State is the majority shareholder).
- (6) Larco operates a smelting plant in Larymna, in central Greece. Larco also holds mining rights in various locations in Greece in four bundles: the Agios Ioannis mines (near Larymna), the Evia mines, the Kastoria mines and the Servia lignite mine. At the time of the notification, some of these mining rights were leased from the State or third parties, whereas others were owned by Larco.

2.2. Background

- (7) In the context of its economic adjustment programme, Greece has undertaken an extensive privatisation programme since 2012.² Larco has been earmarked as a State-owned company for privatisation.
- (8) Since March 2012, the Commission has been discussing with the Greek authorities the state aid issues that could arise in that privatisation project.
- (9) On 6 March 2013, the Commission initiated the formal investigation procedure in relation to six state aid measures in favour of Larco ('the formal investigation procedure').³ The measures appeared to constitute state aid within the meaning of Article 107 of the Treaty on the Functioning of the European Union ('TFEU'). The Commission expressed doubts as regards the legality of the aid, as well as the compatibility with the TFEU. The main grounds for opening the formal investigation procedure were that the measures appeared to have been granted to a company in financial difficulty, whereas the Greek State had not notified a restructuring plan, as required by the Rescue and Restructuring Guidelines.⁴ on
- (10) The Commission will conclude its formal investigation procedure by a separate decision.

2.3. The notification

- (11) The Greek authorities have notified to the Commission their plan to sell certain assets of Larco and place the remaining company in bankruptcy ('the sales structure'). The Greek authorities refer to these transactions as "privatisation of

¹ Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, OJ L 124, 20.05.2003, p.36.

² See the Second Economic Adjustment Programme for Greece – Third Review July 2013 http://ec.europa.eu/economy_finance/publications/occasional_paper/2013/pdf/ocp159_en.pdf.

³ Case SA.34572 (2013/C), decision published in OJ C 136, 15.5.2013, p.27.

⁴ Communication from the Commission – Community guidelines on state aid for rescuing and restructuring firms in difficulty, OJ C 2044, 1.10.2004, p.2.

Larco". They will not implement the privatisation of Larco before they have received a relevant Commission decision approving it.

- (12) In view of a potential conclusion of the formal investigation procedure by a negative Commission decision requesting the recovery of incompatible aid, the Greek authorities have requested the Commission to confirm that a recovery obligation imposed on Larco would not concern the buyer(s) of certain assets, sold through the notified sales structure.
- (13) According to the notification, the Greek State, as the main shareholder of the company and major lessor, has decided the following sales structure:

2.4. Tender A

- (14) Larco has been exploiting the Larymna smelter and approximately 40%⁵ of the rights over the Agios Ioannis laterite ore mining area on the basis of a lease agreement with the Greek State. This constitutes Larco's main operating facility. The lease agreement was concluded in 1976 for a period of 35 years, expiring in end June 2012.⁶ The contract between the Greek State and Larco has been subsequently extended since the end of 2012 on a 6-months basis.
- (15) Under the sales structure, the Greek State as the legal owner of the assets (the Larymna smelter and part of the Agios Ioannis mining area), will terminate the 1976 lease agreement. The Greek State will then initiate an open, transparent, non-discriminatory and non-conditional tender process (Tender A') for the lease of these assets to the highest bidder.
- (16) The Greek State will prevent the current shareholders of Larco or their affiliates from participating in Tender A, in order to ensure that these entities will not use the sales process as a means to continue Larco's economic activity, while avoiding liabilities related to Larco. It will therefore exclude the following entities from the bidding process: the owners/shareholders of Larco, the legal entities having a link under corporate law with the owners/shareholders of Larco, the legal entities being under (*de jure* or *de facto*) control of the owners/shareholders of Larco either through positive rights or through veto rights; the legal entities in which Larco has any direct or indirect shares; the legal entities with which Larco has links under corporate law.

2.5. Tender B

- (17) Larco owns 48% of the Agios Ioannis remaining mining rights; 73% of the Evia laterite ore mining rights; 100% of the Kastoria laterite ore mining rights and 100% of the Servia lignite mining rights.⁷
- (18) Under the sales structure, at the same time as Tender A, Larco will launch a parallel but separate open, transparent, non-discriminatory and non-conditional tender process ('Tender B') for certain own mining rights and in particular (i)

⁵ Provided by the Greek authorities, based on Larco's proven reserves as on 31 December 2010.

⁶ Ratified by law 371/1976 (Official gazette 167/A/1.7.1976).

⁷ Percentages provided by the Greek authorities and based on Larco's proven reserves as on 31 December 2010.

73% of the Evia laterite ore mining rights and (ii) 100% the Kastoria laterite ore mining rights mines, to be sold to the highest bidder.

- (19) Larco will also make sure that current shareholders of Larco or their affiliates will be prevented from participating in Tender B. Just like the Greek State in Tender A, Larco will therefore exclude the same entities described in recital (16) above from participating in Tender B.
- (20) The two tenders will not be conditional upon each other. No bidder in one tender will be obliged to participate in the other tender. If one of the tenders is unsuccessful, the other tender will proceed normally to conclusion. The best bidder in any tender will be selected as the preferred bidder.
- (21) However, a "shoot-out clause" will be included in each of the two tenders. According to this clause, if the preferred bidder in Tender A is not the same as the preferred bidder in Tender B, then the preferred bidder of each of the tenders will have the right, but not the obligation, to outbid the preferred bidder in the other tender, until the highest consideration in each of the tenders is offered.
- (22) In order to justify the "shoot-out" clause, the Greek authorities have explained that investors interested in this type of activity aim securing a minimum supply of raw material. That is because the smelter is already adjusted to the laterite provided by the mines currently held by Larco. This quality may not be immediately available in the market and technical re-adjustment of the smelter may result in high costs. Thus, a minimum security of supply has the potential to maximize proceeds from the sale of the smelter.
- (23) In total, 33% of Larco's assets net book value will be tendered through Tenders A and B, representing approximately 60% of the company's total ore extraction capacity.⁸
- (24) The two Tenders will not include any obligation on the buyer(s) to take over any of the employees of Larco. Any transfer of employees or employment contracts associated with the tendered assets will only be governed by the applicable provisions of EU and Greek law.
- (25) The proceeds from Tender A will be paid to the Greek State, which is the legal owner of the assets, whereas the proceeds from Tender B will be paid to Larco.

2.5.1. Interim period

- (26) The Greek State will extend the 1976 lease agreement with Larco for a limited period, until the closing of the transaction for the sale of the assets under Tender A.
- (27) This extension will guarantee the continued operation of the smelter during the tender process, and thereby preserving its value. The Greek authorities have explained that cooling and re-starting the smelter would entail high costs for a new investor, due to technical specifications related to the production of ferronickel (smelting). Thus, a sale of the smelter in operation has the potential to maximize proceeds.

⁸ Percentage provided by the Greek authorities and based on Larco's average extraction capacity during the 2010-2012 period.

- (28) Under the extended lease agreement, Larco will continue paying to the Greek State a remuneration set at 1.5% of the total revenue generate from the the output of the smelter. According to the Greek authorities, this remuneration is in line with the applicable Greek Mining Code provisions.⁹ The amount will be paid from Larco's own cash resources.
- (29) Finally, the Greek authorities have explained that specific legislation with a limited time frame (in force only during the interim period) will be put in place in order to protect Larco's assets from creditors' possible actions and to ensure that the assets remain in working condition during the interim period.

2.5.2. Post-tender

- (30) After the conclusion of the two tenders and irrespective of their outcome, Larco will be placed in bankruptcy, according to the relevant national legislation. Its remaining assets will be disposed of as part of the liquidation process by an administrator.¹⁰ The proceeds will be used to cover any outstanding liabilities of Larco, including the recovery of any potentially incompatible state aid, following a relevant Commission decision.
- (31) The mining rights that have been leased from third parties will return to their respective owners. The Greek authorities have explained that the owners of these mining rights will have access to their respective part of the mines and will be able to exploit them, thus making sure that they have a real value post-bankruptcy.

3. POSITION AND COMMITMENTS OF THE GREEK AUTHORITIES

- (32) In their notification the Greek authorities maintain that the sales structure does not involve state aid either to Larco or the buyer(s) of the assets. In addition, the Greek authorities argue that the sales structure will interrupt the economic continuity of Larco. Thus, in their view, if the formal investigation procedure concluded with a negative Commission decision requesting the recovery of incompatible aid, a recovery obligation imposed on Larco would not concern the buyer(s) of those assets that are sold through the notified sales structure.
- (33) To avoid state aid to Larco or the buyer(s), the Greek authorities undertake the commitment that the two tenders will be open, transparent, non-discriminatory and non-conditional and will the assets will be leased or sold to the highest bidder.
- (34) To avoid economic continuity, the Greek authorities undertake the commitment to exclude the following entities from the bidding process: the owners/shareholders of Larco, the legal entities having a link under corporate law with the owners/shareholders of Larco, the legal entities being under (*de jure*

⁹ Article 84(2) of the legislative Decree 210/1973, published in FEK 277/A/5.10.1973, as modified by Article 63(1) of the law 4042/2012. According to the Greek authorities, Larco falls under the provision (e).

¹⁰ Apart from the 48% of the Agios Ioannis remaining mining rights, which are owned by Larco, the company also co-owns and has leased through lease agreements with third party individuals other than the Greek State the remaining 12% of the Agios Ioannis mines and 27% of the mining rights in the Evia mines. Larco also owns secondary assets such as inventories, movable assets of the smelter, stock and cash.

or *de facto*) control of the owners/shareholders of Larco either through positive rights or through veto rights; the legal entities in which Larco has any direct or indirect shares; the legal entities with which Larco has links under corporate law. In addition, they also undertake the commitment that the tenders will not include any obligation to transfer employment contracts or employees to the new owners.

- (35) As regards the interruption of economic continuity, the Greek authorities point to the following elements:
- a. In their view, the assets to be sold through the two tenders only represent a fraction of the scope of the activities of Larco;
 - b. The sale is carried out through open, transparent, non-discriminatory and non-conditional tenders to the highest bidder;
 - c. The new owner(s) of the assets will not have any economic or corporate link to Larco;
 - d. The tenders will not include any obligation to transfer employment contracts or employees to the new owners. Any transfer of employees or employment contracts associated with the tendered assets will be governed by the applicable provisions of EU and Greek law;
 - e. As regards timing, their decision on the sales structure was taken before any negative Commission decision and will not have an effect on the remaining Larco assets, which will be disposed under bankruptcy proceedings to service the company's liabilities;
 - f. Given the nature of the mining business and the tendered assets, the Greek authorities consider that any successful buyer(s) will be engaged in activities similar to Larco's. However, any new owner(s) will have the possibility to manage their activities under different operating conditions than Larco's and will apply their own business model.
- (36) In conclusion, the Greek authorities argue that through this process there is no economic continuity between Larco and the assets tendered under Tenders A and B. Thus, any potential incompatible state aid to Larco would have to be recovered by that company, following a relevant Commission decision, and would not concern any buyer(s) of the assets under sale.
- (37) The Greek authorities have notified the sales structure, in order to obtain legal certainty that the sale of the assets will not involve state aid and that any successful buyer(s) will not be held liable for recovery of incompatible state aid.
- (38) The Greek authorities have also undertaken the commitment to provide regular reports regarding the implementation of the sales procedure. The reports will confirm that sales process is taking place as notified. They will also provide information about the potential bidders, the ongoing Tenders, the final sales price and any other relevant issue.
- (39) The reports will be submitted on a regular basis (every six months) following the date of this decision. A final report will be submitted when the Tenders A and B are concluded and Larco is put in liquidation.

4. ASSESSMENT

4.1. Existence of state aid benefiting Larco or the buyer(s) of the assets

- (40) By virtue of Article 107(1) TFEU, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.
- (41) In order to decide on whether there is state aid benefiting Larco or the buyer(s) of the assets, the Commission needs to confirm that the sale of any assets will take place at their market price.
- (42) According to the 1993 Competition Report,¹¹ the Commission communication 97/C 209/03 on state aid elements in sales of land and buildings by public authorities,¹² the Commission Guidance Paper on state aid compliant financing, restructuring and privatisation of State-owned enterprises¹³ and established case practice¹⁴, a sale results in the market price if it is carried out through an open, transparent and unconditional tender procedure and the assets go to the highest or only bidder. Bidders must be given enough time and information to carry out a proper valuation of the assets. If this procedure is not used, an independent assessment must be carried out in order to establish the market value.
- (43) In the case at hand, the Greek authorities have undertaken the commitment to carry out the sale of any assets through open, transparent, non-discriminatory and non-conditional tender processes to the highest bidders.
- (44) Thus, the Commission concludes that the sales structure will not result in state aid to Larco or its buyer(s).

4.2. Economic continuity of Larco through the sale of certain assets

- (45) In the event of a negative Commission decision regarding the recovery of incompatible aid to an undertaking in the context of Articles 107 and 108 TFEU, the Member State in question is required to recover the incompatible aid. The recovery obligation may be extended to a new company, to which the company in question has transferred or sold part of its assets, where that transfer or sale structure will trigger the conclusion that there is economic continuity between the two companies.¹⁵
- (46) The Council Regulation (EC) No 659/1999 ('Procedural Regulation')¹⁶ does not foresee the possibility for a Commission decision establishing the absence of

¹¹ European Commission, XXIIIrd Report on Competition Policy 1993, 1994, p. 255.

¹² OJ C 209, 10.7.1997, p. 3.

¹³ SWD (2012) 14 final, 10.02.2012, available at http://ec.europa.eu/competition/state_aid/studies_reports/studies_reports.html

¹⁴ See for example Commission decision of 30 January 2002 – Germany – *State aid to Gothaer Fahrzeugtechnik GmbH*, OJ L 314, 18.11.2002, p.62, point 30.

¹⁵ Judgment of the General Court of 28 March 2012, *Ryanair Ltd v European Commission*; Case T-123/09, point 155.

¹⁶ *Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty*, OJ L 83, 27. 3. 1999, p.4 and subsequently amended.

economic continuity. However, according to case practice, the Commission can cooperate with a Member State, in case the Member State inquires whether it should extend the recovery obligation to other entities.¹⁷

- (47) Thus, the present decision is a *sui generis* decision, in the context of the competences attributed to the Commission for state aid control, according to Article 108 TFEU, which is also the legal basis for the recovery of incompatible aid, in case of violation of Article 108(3) TFEU, as well as according to the principle of sincere cooperation, enshrined in Article 4(3) of the Treaty on the European Union.
- (48) According to the Court decision on *Italy and SIM 2 v. Commission*,¹⁸ on which the Commission founded its decisions on *Olympic Airlines*, *Alitalia* and *SERNAM*,¹⁹ the assessment of economic continuity between the "old" entity and the new structures is established based on a set of indicators. The following factors may be taken into consideration: the scope of the sold assets (assets and liabilities, maintenance of workforce, bundle of assets), the sale price, the identity of the buyer(s), the moment of the sale (after the initiation of preliminary assessment, the formal investigation procedure or the final decision) and the economic logic of the operation. This set of indicators was confirmed by the Court in its decision of 28 March 2012 *Ryanair v. Commission*,²⁰ which confirmed the *Alitalia* decision.
- (49) The Commission considers that the assets to be sold that are relevant for the assessment of economic continuity are the combined assets of Tenders A and B. This is because the "shoot-out" clause is a structural provision enhancing the likelihood that the same buyer may succeed in both tenders. In other words, the "shoot-out clause" creates conditions, that allow the same buyer to succeed in both tenders. For this reason the Commission considers that it is not sufficient to assess economic continuity for the assets under Tenders A or B separately. However, the assessment of the Commission also applies in case a buyer only acquires the assets from either Tender A or B.

4.2.1. Scope of assets to be sold

- (50) In order to avoid economic continuity, the assets to be sold under Tenders A and B would have to represent only a part of the previous company or its activities.
- (51) First of all, the Commission notes that according to Greece the assets under Tender A will no longer belong to Larco, as the lease agreement will anyway expire and the ownership of the assets will return to the State (see recital 15 above). Therefore, for Tender A, it is the State selling its assets through an ex novo open tender, while for Tender B the assets are sold by Larco.

¹⁷ Commission decision of 4 April 2012 SA.34547 – France – *Reprise des actifs du groupe SERNAM dans le cadre de son redressement judiciaire*, paras. 51-61.

¹⁸ Judgment of the Court of 8 May 2003, *Italian Republic and SIM 2 Multimedia SpA v Commission of the European Communities*, Joined cases C-328/99 and C-399/00.

¹⁹ Commission Decision of 17 September 2008, State aid N 321/2008, N 322/2008 and N 323/2008 – Greece – *Vente de certains actifs d'Olympic Airlines/ Olympic Airways Services*; Commission decision 12 November 2008 State aid N 510/2008 – Italy – *Sale of assets of Alitalia*; Commission decision of 4 April 2012 SA.34547 – France – *Reprise des actifs du groupe SERNAM dans le cadre de son redressement judiciaire*.

²⁰ Judgment of the General Court of 28 March 2012 in Case T-123/09, *Ryanair Ltd v. Commission*;

- (52) The Commission observes that the combined scope represents only a part of the assets and the activity of Larco. In particular, the lignite extraction, one of the main activities of Larco (see recital (4) above), will not be included. In addition, parts of the mining rights for laterite ore will also not be part of the sales. Overall, The combined assets would only amount to 33% of Larco's assets net book value and approximately 60% of the company's total ore extraction capacity before the sale.
- (53) The Commission considers that the book value of the assets and the company's ore extraction capacity appear to be adequate tools measuring the relative importance of Larco's activity sold through Tenders A and B. They also reflect the type of activities currently performed by Larco, as described in recital (4) above.
- (54) As regards the employees, the tenders will not include any specific obligation to transfer employment contracts or employees to the new owner(s), apart from what is required by relevant EU or national legislation.
- (55) The Commission concludes that the scope of the assets to be sold will be limited in comparison to that of Larco and its previous activity.

4.2.2. The sale price

- (56) In order to avoid economic continuity, the assets under Tenders A and B have to be sold at their market price.
- (57) As explained already in recitals (40)-(44) above, the Greek authorities have undertaken the commitment to sell the assets of the Tenders A and B through open, transparent, non-discriminatory and non-conditional tender processes to the highest bidder.
- (58) Thus, the Commission concludes that the sale of these assets through open, transparent, non-discriminatory and non-conditional tender processes to the highest bidder leads to the market price.

4.2.3. The identity of the buyer(s)

- (59) The Commission has to establish that the new owner(s) of the assets under Tenders A and B will not have any economic link with Larco, in order to avoid that the new owner(s) will be liable for any recovery of incompatible state aid.
- (60) The Commission takes note of the undertaking by the Greek authorities and of Larco that they will exclude from the tenders any entities having an economic or corporate law link with Larco.
- (61) Thus, the Commission concludes that there are sufficient elements to conclude that the buyer(s) will be independent entities from Larco.

4.2.4. The moment of the sale

- (62) The Commission needs to assess whether the moment of the Tenders A and B may lead to a circumvention of a decision by the Commission to recover incompatible state aid.
- (63) In this case, the Commission observes that Larco had already been earmarked as a State-owned company for privatisation, in the context of the Greek economic

adjustment programme since 2012. In addition, the decision and the notification by the Greek authorities on the sale of certain assets of Larco took place at the end of 2013, prior to any Commission decision regarding the conclusion of the formal investigation procedure.

- (64) In addition, the Commission considers that Larco will still exist as a company and will be placed in bankruptcy, where its remaining assets and activities will be disposed of, in order to service any outstanding liabilities, including a potential recovery order for incompatible state aid. The Commission therefore concludes that, irrespective of the outcome of the pending state aid investigation, the notified sales structure will not lead to a circumvention of a potential recovery decision by the Commission.

4.2.5. The economic logic of the operation

- (65) The criterion of economic logic aims at assessing whether the buyer(s) of the assets will employ them in the same way as the previous owner or whether it will use them to establish a different activity or strategy.
- (66) The Commission agrees with the Greek authorities that the assets sold under Tenders A and B indeed seem to have a specific usage, serving in the activities of the extraction of laterite ore and the process and production of ferronickel, currently performed by Larco. However, the lignite extraction activity which currently also forms part of Larco's strategy will not be included in Tenders A and B.
- (67) In addition, the Commission considers that the new owner(s) who will not be obliged to take over any employees or employment contracts from Larco, will have the possibility to manage their activities under different operating conditions than Larco's and will apply their own business model.
- (68) Thus, the Commission concludes that the economic logic of the operation is to allow new owner(s) to use certain assets of Larco under different conditions and not to continue the strategy of Larco.

4.2.6. Conclusion on the economic continuity of Larco through the sale of certain assets

- (69) The Commission has assessed whether the assets sold under the Tenders A and B may be seen as the economic continuity of Larco in the event of a negative Commission decision requiring the recovery of incompatible state aid.
- (70) The Commission recalls that the economic continuity is assessed against a set of indicators: the scope of the sold assets (assets and liabilities, maintenance of workforce, bundle of assets), the sale price, the identity of the buyer(s), the moment of the sale the economic logic of the operation. Yet, as the Court suggested in the case *Ryanair v. Commission*, "[the] case-law does not require the Commission to take into account the whole of the above factors, as is demonstrated by use of the expression 'may be taken into consideration'".²¹
- (71) The Commission has found that the scope of the assets to be sold will be limited in comparison to that of Larco and its previous activity. The assets will be sold at

²¹ Judgment of the General Court of 28 March 2012, *Ryanair Ltd v European Commission*; Case T-123/09, point 156.

their market price, as established through open, transparent, non-discriminatory and non-conditional tender processes to the highest bidder. Greece and Larco have committed to ensure that the buyer(s) will not have economic or corporate link to Larco. The decision on the sale was taken prior to any potential negative Commission decision regarding the formal investigation procedure. Finally, the new owner(s) will have the possibility to use the assets under different conditions and a different business model than Larco, albeit in a context relevant to the nature of the assets.

- (72) In light of the above and provided that the sale of certain assets of Larco takes place as notified by Greece, the Commission has concluded that there will not be economic continuity between Larco and the owner(s) of the assets under either Tender A, B or both.
- (73) The Commission notes that Greece has agreed the present decision to be adopted in the English language.

5. CONCLUSION

The Commission has accordingly decided that:

- The notified sale of certain assets of Larco does not constitute state aid;
- The notified sale of certain assets of Larco will not lead to economic continuity between Larco and the owner(s) of the assets under either Tender A, B or both. Thus, any potential recovery of incompatible state aid will not concern the buyer(s) of the assets under Tender A, B or both.

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site <http://ec.europa.eu/competition/elojade/isef/index.cfm>.

Your request should be sent by registered letter or fax to:

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Yours faithfully,
For the Commission

Joaquín ALMUNIA

Vice-president