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Message 202

Communication from the Commission - SG(2005) D/51016
Directive 98/34/EC
Translation of the message 201
Notification: 2004/0446/D

Forwarding of the response of the Member State notifying a draft (Germany) to comments (8.2) and detailed opinion (9.2) of Sweden, Danmark, Luxemburg, France, Spain, Austria, United Kingdom, Commission.

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ОГРАНИЧЕН - OMEZENÝ PŘÍSTUP - BEGRÆNSET - ZUGANGSBESCHRÄNKT - ΕΣΩΤΕΡΙΚΗ ΧΡΗΣΗ - LIMITED - LIMITADO - PIIRATUD - RAJOITETTU - LIMITÉ - KORLÁTOZOTT HOZZÁFÉRÉS - RISERVATO - RIBOTO NAUDOJIMO DOKUMENTAS - IEROBEŽOTAS PIEEJAMĪBAS DOKUMENTS - RISTRETT - RESTRITO - LIMITAT - OBMEDZENÝ - OMEJENO - BEGRÄNSAT

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(MSG: 200501016.EN)
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2. Germany

3a. Bundesministerium für Wirtschaft und Arbeit, Ref. X A 2, 11019 Berlin
Tel.: 0049-30-2014-6353, Fax: 0049-30-2014-5379, e-mail: infonorm@bmwa.bund.de

3b. Bundesministerium für Umwelt, Naturschutz und Reaktorsicherheit, Referat WAII3, 53175 Bonn
Tel.: 0049-228-305-2595, Fax 0049-228-305-3332

4. 2004/0446/D - S10E

5. Article 8(2) and Article 9(2) of Directive 98/34/EC

6. In respect of the comments issued by the European Commission and Sweden, as well as the detailed opinions issued by Austria, Luxembourg, Spain, France, the United Kingdom and Denmark, the Government of the Federal Republic of Germany issues the following opinion:

I. Comments by the Commission

1. The Commission welcomes the fact that the Third Order amending the Packaging Order brings about compliance with requirements of Community law and the case-law of the European Court of Justice. Moreover, the Commission recognises that some of the arguments made by the Commission in its detailed opinion within the context of notification 2003/232/D have been taken into account. The Commission proposes that consideration be given to amending the rules in Section 8 (1) sentence 7 of the notified draft so as to ensure with the highest degree of legal certainty that the outcome is not a listing of products.

The Federal Government begs to point out that the ruling in Section 8 (1) sentence 7 came about in close consultation with the offices of the Commission in connection with the infringement proceedings 2003/2133. As agreed with the Commission, the aim of the ruling is to bring the so-called isolated applications to an end on 1 May 2006 and thereby to create incentives for further expansion of the existing deposit/return systems. Actual developments in practice since the decision on the Third Order amending the Packaging Order confirm this effect. The relevant sectors of industry have already begun - ahead of the entry into force of the ruling - to take action to expand and standardise the existing deposit/return systems. Thus they have begun creating the conditions for ending isolated applications and integrating them into compatible deposit/return systems. These activities by the relevant sectors of industry have been brought together in a working group comprising representatives of the industry associations and of enterprises in the beverage industry, packaging industry and commerce. It has been made clear to the Federal Government that further steps towards expansion of the existing deposit/return systems will be realised in the coming weeks and that it is the aim of the relevant sectors of industry to include in their range non-reusable drinks packaging that is uniformly labelled and can be returned to any point of sale for reimbursement of the deposit in all areas of the food trade at latest by the date laid down in law for the ending of the isolated applications. The Federal Government assumes that this further development will also be visible in practice after the ruling has entered into force.

Section 8 (1) sentence 7 of the notified draft will thus have the effect intended by the Federal Government and the Commission. Although the wording of the provision talks of a "restriction" of the take-back obligation, it must be emphasised that following the entry into force of this ruling the final-stage distributors of non-reusable drinks packaging will not longer be able to refuse to take back other drinks packaging from other distributors by restricting their range of products to individual packaging of a specific type, shape and size. The statements and activities by the relevant sectors of industry are clear evidence of their increased interest in marketing beverages in non-reusable packaging in Germany.

2. In addition, the Commission calls for a detailed explanation of the reasons why fruit and vegetable juices and nectars are excluded from the deposit obligation. It states that this information is necessary in order to be able to check that this exclusion will not have a discriminatory effect on competing products such as flavoured waters that are subject to the deposit obligation.

The demarcation between drinks sectors subject to the deposit obligation and drinks sectors exempted from the deposit obligation is made by weighing up the costs of a deposit obligation for the relevant sectors of industry and the benefits of the deposit obligation to the environment. There are particular features of the wine, spirits, fruit and vegetable juice/nectar and milk segments of the market which would lead to a disproportionate relationship between the benefit accruing to the environment and the cost of establishing a return and deposit scheme. As a result, a deposit obligation only appears justified in the case of the beer, mineral water and refreshment drinks sectors listed.

In the case of fruit and vegetable juices, the low market volume and the fact that according to the Federal Government's information, 85.4% of fruit and vegetable juices were already marketed in environmentally sound drinks packaging in 2001 suggest that a deposit obligation is not appropriate. A comparable situation applies to fruit and vegetable nectars.

Therefore, fruit and vegetable juices or fruit and vegetable nectars as well as corresponding drinks which, on account of very low levels of additives such as minerals, for example, may no longer be designated as fruit and vegetable juices or fruit and vegetable nectars in the strict sense of the law relating to food production and distribution are excluded from the deposit obligation. In the opinion of the Federal Government, this exclusion upholds the necessary

competitive framework. Types of drinks in a drinks sector that can also be defined under the law relating to food production and distribution are in each case subject to the deposit obligation or excluded from it. The provisions of the law relating to food production and distribution are in turn based on the corresponding provisions of EU law. This ensures that all types of drinks that are in competition with each other within a drinks sector are all subject to the deposit obligation. The Federal Government is of the opinion that the "flavoured waters" mentioned by the Commission are not a product associated with the drinks sector of fruit and vegetable juices and fruit and vegetable nectars and therefore in competition with these. Rather they form a separate drinks sector in this respect. This applies both in respect of their treatment under food law and in practice in real life. Consumers interested in consuming waters or flavoured waters will not weigh up their purchase decision based on the aspect of the alternative consumption of fruit or vegetable juice or even perhaps non-alcoholic wine. In the same way, the drinks sectors of beer and wine, for example, are not in competition with each other. Finally, the Federal Government begs to refer also to comparable differentiations in other Member States. Thus in Denmark and Sweden certain drinks sectors such as fruit juices or milk are also - at least currently - excluded from the deposit scheme.

II. Detailed opinions and comments of the Member States

Several Member States have submitted detailed opinions on the draft Third Order amending the Packaging Order. The Federal Government has received detailed opinions from Austria, Luxembourg, Spain, France, the United Kingdom and Denmark. In addition, Sweden has issued a comment.
Since the statements by the Member States of Austria, Luxembourg, Spain, France, the United Kingdom and Sweden in large part relate to the same aspects, these will be examined jointly below.

1. Objections by Austria, Luxembourg, Spain, France, the United Kingdom and Sweden

a) Hindering of intra-Community trade justified by overriding reasons relating to protection of the environment

Where Austria, Luxembourg, France, the United Kingdom and Spain assert that the free competition of beverages in non-reusable drinks packaging and reusable drinks packaging is distorted by the deposit obligation and that this disadvantages imported beverages in particular, the government of the Federal Republic of Germany begs to point out that the players in the industry, particularly the importers, can participate in the existing deposit/return systems and that the cost of this is comparable to their previous participation in the domestic "Green Point" collection system. Moreover, the Federal Government refers to the corresponding statements by the European Court of Justice in its decisions in cases C-309/02 and C-463/01 of 14 December 2004.
In these decisions the European Court of Justice established that the deposit obligation for non-reusable drinks packaging is fundamentally compatible with European law and that this also applies to imported beverages, cf. in particular judgment C-309/02, margin numbers 74 - 78.

Here the European Court of Justice states that whilst the German deposit ruling is capable of hindering intra-Community trade, this is justified by overriding requirements relating to protection of the environment. The proportion of empty packaging returned is liable to increase. It encourages more precise sorting of packaging waste, thus helping to improve its recovery. Since the charging of a deposit encourages consumers to return empty packaging to the points of sale, it contributes to the reduction of waste in the natural environment. Inasmuch as the rules on deposits encourage the producers and distributors concerned to have recourse to reusable packaging, they also contribute towards reducing the amount of waste to be disposed of.

b) Sufficient transitional periods

With regard to the proportionality of the deposit ruling, in case C-463/01 the European Court of Justice's criticism was that the six-month transitional period for the introduction of the deposit after notification of reuse data was disproportionately short only for imported mineral waters, which under European law are to be bottled at source. Luxembourg, France, the United Kingdom and Spain object that the transitional periods provided for the introduction of the deposit system in Germany are too short and that in this respect the ECJ judgments of 14 December 2004 on the German deposit rules have not been observed.

In this connection the Federal Government begs to refer to Article 2 of the notified draft Order, which regulates its entry into force. Accordingly, the deposit obligation for the newly added drinks sectors (non-carbonated refreshment drinks) and for abolition of the isolated applications will not enter into force until the first day of the twelfth month following promulgation. This transitional period of practically one year was included in the draft Order precisely in consideration of the ECJ judgment of 14 December 2004 in case C-463/01.

c) Workable deposit and return system

Austria, Luxembourg, France, the United Kingdom and Spain object that as yet no workable deposit/return and clearing system exists in Germany that would meet the requirements set out by the European Court of Justice in its judgments of 14 December 2004 on the German deposit scheme.

In this regard the government of the Federal Republic of Germany begs to refer to the fact that the European Court of Justice made it clear that a Member State may leave it to the producers and distributors to introduce a deposit/return system. However, the Member State must ensure that at the time of the system changeover all the producers and distributors affected are actually able to participate in a workable system. It must be ensured that there are a sufficient number of points of return so that consumers are able to get back their deposits without having to revisit the place of the initial purchase.

The examination of these three preconditions

- workability of the deposit and return systems,
- openness of the deposit and return systems to all producers and distributors of beverages in packaging subject to the deposit obligation,
- a sufficient number of return points so that the consumers do not have to revisit the place of the initial purchase,

is, according to the ECJ judgment in case C-309/02, a matter for the competent domestic courts.

The ECJ drew no conclusions of its own concerning the workability of the deposit and return system; rather the ECJ referred the matter back to the national court submitting the matter - the Administrative Court, Stuttgart - for a decision.

In the opinion of the Federal Government, workable deposit/return systems have in fact been set up throughout Germany. They provide a comprehensive network of points of return and allow consumers to return their used packaging to any point of sale affiliated to one of these systems.

These are for the time being the P System from the companies Lekkerland-Tobaccoland GmbH & Co KG and Vfw AG and the system established by Westpfand-Clearing GmbH/ISD Interseroh Entsorgungsdienstleistungs GmbH. The P System has been established since 1 October 2003. In April 2004 Vfw AG's return system became a partner in the P System. Even prior to this, with effect from 1 October 2003 Vfw also accepted packaging from the P System and reimbursed the deposits on such packaging. The Westpfand system, which was initially launched regionally, has offered its service nationwide in cooperation with Interseroh since 11 September 2003. These systems are fully workable and are compatible with each other.

Large retail chains, specialist drinks retailers as well as filling station and kiosk outlets are all affiliated to these systems.

At present the P System not only has a nationwide network of over 25,000 points of sale and return, but also offers extensive additional services right through to recycling of non-reusable packaging. The Westpfand/Interseroh system is also in a position to offer clearing services throughout the Federal Republic of Germany. It is entirely compatible with the P System. Distributors using these return systems also have to accept returned packaging from the other system and reimburse the deposit. The enterprises regulated this in a clearing agreement dating from 2003. This clearing is also carried out in practice. The possibility of concluding clearing agreements with the said system providers is also available to other providers and indeed this possibility is exploited. Thus, for example, the P System has concluded a clearing agreement with the company "Übermorgen", which as an importer of drinks packaging operates its own "CanBack" system.

The systems are open to all producers and distributors of beverages in non-reusable packaging. This applies equally to domestic bottling plants and to foreign drinks producers or drinks importers, to small retailers and drinks markets as well as large supermarket operators and discounters. They can all utilise these systems. The entire product range of drinks subject to the deposit obligation is covered.

Participation in these systems is inconceivably easy. Each distributor or producer of non-reusable drinks packaging that is subject to the deposit obligation is free to make contact with the return systems and sign the appropriate contractual agreements. This can be done on the Internet at the address www.p-system.de for the P System and at www.westpfand.de for the Westpfand system.

Indeed, a large number of drinks importers have actually jointed these deposit systems. As can already be seen from the customer listing on the Internet for the P System from the companies

Lekkerland-Tobaccoland GmbH & Co KG and Vfw AG, both large and smaller foreign drinks producers are members of this deposit/return system. The Westpfand system, which originally focused on western Germany, is increasingly active throughout the Federal Republic and offers membership to both domestic and foreign drinks producers.

The product lists for the P System that are available on the Internet document the fact that foreign products are represented in all the drinks sectors subject to the deposit obligation.

Just as every distributor has been free to include in their range packaging licensed under the "Green Point" collection system, since 1 October 2003 they have been able to include in their range drinks packaging subject to the deposit obligation and to realise the return of the packaging, its disposal and the settlement of the deposit amounts via one of the existing deposit systems. If he decides not to include drinks packaging that is subject to the deposit obligation, this is due not to the lack of any return system but solely to his preference for reusable alternatives for which he is also involved in a deposit system or by his decision not to offer a drink. Insofar as such decisions are influenced by the deposit obligation on non-reusable drinks packaging, in the opinion of the ECJ there is no objection to this on legal grounds. The ECJ has also described encouragement to switch to reusable packaging as being compatible with European law.

Sales opportunities in the discount sector are essentially determined by factors other than the deposit obligation. This sales channel is characterised by own-brands and little product variety. The prospects of a producer becoming listed with a German discounter are therefore rather limited. This applies in particular to producers of branded goods, which basically had no way into some discounters even before the entry into force of the deposit obligation. There has therefore been no significant change in the opportunities for foreign bottlers to sell drinks via German discounters either as a result of the introduction of the deposit obligation or through the establishment of the isolated applications. Neither will they change substantially as a result of the ending of the isolated applications.

Just like the European Commission, the ECJ does not demand that an overall system for the return of packaging subject to the deposit obligation be made available by a single system provider or by several providers in competition. Where there is more than one system operator, however, the systems must be sufficiently compatible to ensure that consumers do not have to revisit the initial point of sale in order to get their deposit refunded. This is in fact achieved by the established systems.

Moreover, in practice importers in particular are intensively involved in the so-called isolated applications, the bottler-specific deposit/return systems of the food and drink retail trade and the discounters, which offer consumers return facilities at over 17,000 points of sale in a comprehensive nationwide network. The notified draft Order will end these isolated applications in spring 2006 as agreed with the offices of the Commission. The current activities of the relevant sectors of industry in respect of the expansion of the existing deposit/return systems and the integration of the isolated applications into such models was mentioned in our opening remarks.

Overall, it may be stated that the established deposit and return system for non-reusable packaging subject to the deposit obligation is entirely comparable with the reusable systems which still dominate in the German drinks market, not only in respect of compatibility but also as regards the number and density of points of return.

d) Definition of environmentally sound non-reusable drinks packaging

Austria, Luxembourg, France, the United Kingdom and Spain object to the planned definition of environmentally sound non-reusable drinks packaging in Section 3 (4) of the amending order. In some cases it is stated in this regard that "environmentally sound" is not defined and that this term is not included in Directive 94/62/EC either, which jeopardises the harmonisation of the national legal provisions, causes barriers to trade and distorts competition. Moreover, the existing life cycle assessments are said to be unable to distinguish reliably between "environmentally sound" and "unsound", since they take into consideration only domestic drinks producers and their sales structures and that only using limited transport routes.

Whilst it is true that Directive 94/62/EC does not distinguish between "environmentally sound" and "environmentally unsound", the Directive does not prevent Member States from introducing such terms in order to distinguish from the point of view of environmental protection between non-reusable drinks packaging that is subject to the deposit obligation and that which is deposit-free. This does not jeopardise the harmonisation of national legal provisions in Europe.

It is also incorrect to say that the life cycle assessments take into consideration only limited transport routes and sales structures of domestic drinks producers. The Federal Government points out once more that the life cycle assessments of the Federal Environmental Agency are in-depth analyses of the drinks packaging in circulation in the market prepared in accordance

with international standards with the involvement of the relevant sectors of industry and which also take into account the environmental effects of the relevant transportation, including return transportation of reusable packaging to the bottler.

The transport distances on which the life cycle assessment studies are based reflect the actual circumstances in the market. They therefore represent a realistic sum expressed as a round amount. However, they apply a method of accounting for distribution distances that favours non-reusable packaging: on average, drinks packaging is transported over longer distances in Germany than reusable packaging. In the life cycle assessment, however, the same transport distance is used for reusable and non-reusable systems. An average distance is used that is calculated from the data for non-reusable and reusable systems. Thus the assessment of non-reusable systems in the life cycle assessment is based on a transport distance that is shorter (i.e. more favourable) than is in reality the case; in the case of reusable systems, on the other hand, a greater (i.e. less favourable) distance than the actual distance is used. Moreover, the Federal Government begs to point out that the environmental framework data for transportation has changed considerably in recent years. Due to the marked increase in the market share of lightweight PET bottles in the reusable sector and the use of low-emission means of transport it must be assumed that modern reusable packaging is now environmentally sound overall even when transported over very long distances.

Since Section 3 (4) expressly and specifically mentions those types of non-reusable drinks packaging that are currently classified as environmentally sound, there can be no legal uncertainty in this respect. If it should emerge from more recent technical developments and new life cycle assessments that other non-reusable types of drinks packaging are to be classified as environmentally sound, Section 3 (4) of the Packaging Order will be amended accordingly. The procedure for this is described in the explanatory statement on the notified draft Order. Taking into consideration life cycle assessment investigations and particular waste management and other sustainability criteria, the regulatory body will make decisions on classification as environmentally sound non-reusable drinks packaging or will decide to remove a classification of this nature that has been bestowed in the past. Life cycle assessment investigations must meet the requirements of ISO Standards 14040 et seq and must be conclusively examined by the Federal Environmental Agency. Producers and distributors of non-reusable drinks packaging are free to present to the Federal Environmental Agency life cycle assessment investigations which they themselves have carried out and which conform to ISO standards.

2. Objection by Denmark to Section 8 (1) sentence 2

Denmark expresses the view that the wording of Section 8 (1) sentence 2 of the notified amending order is not sufficiently unambiguous, and that the translations will only add to this. Denmark states that moreover it is not clear to what extent the amendment creates a legal basis for allowing the deposit obligation to be implemented in respect of German border trade outlets selling to Danish consumers irrespective of whether or not these consumers sign a so-called export declaration. Denmark states that from an environmental viewpoint it is not acceptable if the German deposit ruling continues to be unable to be implemented where the consumer declares that he intends to export the non-reusable packaging from Germany and thus the empty packaging ends up as waste in another Member State. This would also increase the costs of disposal of packaging waste in Denmark. Moreover, the effectiveness of the Danish deposit and return system would be reduced if a large share of Danish consumption of beer and refreshment drinks were to be packaged in German non-reusable drinks packaging on which no deposit is levied. Moreover, by demanding no deposit from Danish consumers the German traders would secure an impermissible competitive advantage over Danish traders, who are required to levy a deposit on all packaging for beer and refreshment drinks.

Regarding the latter point, the government of the Federal Republic of Germany begs to point out that Denmark cannot demand on the basis of European law that, because of the Danish deposit, all Danes acquiring beer and refreshment drinks in another Member State must also be charged a deposit in all other Member States, in order that the Danish trade in such drinks is not at a disadvantage. The aim of the German Packaging Order is not to protect the Danish trade in non-reusable drinks on which a deposit is payable.

In other respects the government of the Federal Republic of Germany begs to state that in both its wording and its intent Section 8 (1) sentence 2 of the notified draft Order unambiguously rules that every sale of non-reusable drinks packaging that is subject to the deposit obligation to a consumer in Germany is subject to the deposit obligation. This applies even if this consumer is a foreigner or declares verbally or in writing that he will not consume the drink in non-reusable packaging until in another Member State. This interpretation of Section 8 (1) sentence 2 has been explained by the German Minister for the Environment, Nature Conservation and Nuclear Safety in two letters to the Danish Minister for the Environment. The Federal Government assumes that this legal situation will be enforced in Schleswig-Holstein just as elsewhere in Germany following the entry into force of the amending order, and that the German courts will observe this provision in their future decisions.

David O'Sullivan
General Secretary
European Commission

Contact point Directive 98/34
Fax: (32-2) 296 76 60
email: Dir83-189-central@cec.eu.int

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sent to :

BELNotif Qualité et Sécurité
Mme Descamps

BundesMinisterium für Wirtschaft Referat XA2
Frau Christina Jäckel

Bundesministerium für Wirtschaft und Arbeit - Abteilung C2/1
Frau MARKL Iris

Bundesministerium für Wirtschaft und Arbeit - Abteilung C2/1
Frau Brigitte WIKGOLM

Cyprus org. for the promotion of quality Ministry of Commerce, Industry & Tourism
M. Antonis Ioannou

Czech Office for Standards, Metrology and testing
Mrs. Fofonkova Helena

Department of Trade and Industry STRD2
Mr Philip Plumb

Délégation Interministérielle aux Normes
Mme Piau

ELOT
M.Mourtzanos K

EU internal market coordination (Ministry of Economics)
Mrs Zanda Liekna

Erhvervs- og Boligstyrelsen
Lene Hald Nielsen

Hungarian Notification Centre Ministry of economy & transport
Mr Zsolt Fazekas

Institut Belge de Normalisation
Mme F. Hombert

Instituto Portugês da Qualidade
Sra Cândida Pires

Kauppa-ja teollisuusministeri
M. Tuomas Mikkola

Kommerskollegium
Mme Kerstin Carlsson

Lithuanian Standards Board
Daiva Lesickiene

Malta standards Authority
Dr Lorna Cachia

Min. de Asuntos Exteriores
Esther Perez Pelaez

Min. of Economic Affairs & Communication

Mr. Karl Stern

Min. of Industry, Energy & Technology
Mr K. Polychronidis

Ministerie van Financien Belastingsdienst - Douane / CDIU
De Heer IJ.G. van der Heide

Ministero delle attivit produttive F1 - Ispettorato tecnico industria
Signor Vincenzo Correggia

Ministry of Economy, Labour and Social Dept for Europe & multilateral relations
Mrs Barbara Nieciak

NSAI
Mr Tony Losty

National Agency for Enterprise & Housing
Mrs Birgitte Spühler Hansen

Office of standards, metrology & Testing Director of the department of European I
Mrs Kvetoslava STEINLOVA

Service de l'Energie de l'Etat
Mr J.-P. Hoffmann

Slovenian Institute for Standardization SIST
Mrs Vesna Stazisar

---
sent to :

Bundesministerium für Wirtschaft und Arbeit - Abteilung C2/1
Frau MARKL Iris

Cyprus org. for the promotion of quality Ministry of Commerce, Industry & Tourism
M. Antonis Ioannou

Czech Office for Standards, Metrology and testing
Mrs. Fofonkova Helena

Department of Trade and Industry STRD2
Mr Philip Plumb

EFTA Surveillance Authority
Mr. Gunnar Thor PETURSSON

ELOT
M.Mourtzanos K

EU internal market coordination (Ministry of Economics)
Mrs Zanda Liekna

European Free Trade Association
.

Hungarian Notification Centre Ministry of economy & transport
Mr Zsolt Fazekas

Instituto Portugês da Qualidade
Sra Cândida Pires

Kauppa-ja teollisuusministeri
M. Tuomas Mikkola

Kommerskollegium
Mme Kerstin Carlsson

Lithuanian Standards Board
Daiva Lesickiene

Malta standards Authority

Dr Lorna Cachia

Min. of Economic Affairs & Communication
Mr. Karl Stern

Min. of Industry, Energy & Technology
Mr K. Polychronidis

Ministerie van Financien Belastingsdienst - Douane / CDIU
De Heer IJ.G. van der Heide

Ministero delle attivit produttive F1 - Ispettorato tecnico industria
Signor Vincenzo Correggia

Ministry of Economy, Labour and Social Dept for Europe & multilateral relations
Mrs Barbara Nieciak

NSAI
Mr Tony Losty

National Agency for Enterprise & Housing
Mrs Birgitte Spühler Hansen

Office of standards, metrology & Testing Director of the department of European I
Mrs Kvetoslava STEINLOVA

Représentation Permanente du Royaume-Uni
.

SL
.

Slovenian Institute for Standardization SIST
Mrs Vesna Stazisar

Undersecretariat of Foreign Trade General Directorate of Standardisation
Mr Mehmet COMERT

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