

Official Journal

of the European Union

ISSN 1725-2555

L 111

Volume 46

6 May 2003

English edition

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COMMISSION

COMMISSION DECISION

of 9 April 2002

declaring a concentration to be compatible with the common market and the EEA Agreement

(Case COMP/M.2568 — Haniel/Ytong)

(notified under document number C(2002) 1396)

(Only the German text is authentic)

(Text with EEA relevance)

(2003/292/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Whereas:

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area, and in particular Article 57(2)(a) thereof,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings ⁽¹⁾, as last amended by Regulation (EC) No 1310/97 ⁽²⁾, and in particular Article 8(2) thereof,

Having regard to the Commission Decision of 30 November 2001 to initiate proceedings in this case,

Having regard to the opinion of the Advisory Committee on Concentrations ⁽³⁾,

Having regard to the final report of the Hearing Officer in this case ⁽⁴⁾,

(1) On 16 October 2001 Haniel Bau-Industrie Porenbeton Holding GmbH, which belongs to the Haniel group ('Haniel'), notified the Commission under Article 4 of Regulation (EEC) No 4064/89 ('the Merger Regulation') of a planned concentration whereby Haniel was, by share acquisition, to acquire sole control of Ytong Holding AG ('Ytong').

(2) The Commission examined the notification and found that the notified transaction fell within the scope of the Merger Regulation and raised serious doubts as to its compatibility with the common market and the EEA Agreement.

(3) On 30 November 2001, the Commission therefore decided to initiate proceedings under Article 6(1)(c) of the Merger Regulation. In so far as the proposed concentration concerned Germany, the Commission adopted a decision on the same day referring the case to the competent German authorities under Article 9(3) of the Merger Regulation.

(4) Following a detailed investigation of the case, the Commission has now come to the conclusion that by itself the proposed concentration would indeed create or strengthen a dominant position as a result of which effective competition would be significantly impeded in a substantial part of the common market. But the commitments entered into by Haniel allow the

⁽¹⁾ OJ L 395, 30.12.1989, p. 1; corrigendum OJ L 257, 21.9.1990, p. 13.

⁽²⁾ OJ L 180, 9.7.1997, p. 1.

⁽³⁾ OJ C 107, 6.5.2003.

⁽⁴⁾ OJ C 107, 6.5.2003.

competition concerns identified in respect of the concentration to be resolved.

concrete products and prefabricated houses in Germany, the Netherlands, Belgium, France and Austria.

- (10) Haniel intends to acquire all Ytong's business shares.

I. THE PARTIES AND THE TRANSACTION

- (5) Haniel is active in the construction materials industry, and specifically the manufacture and sale of wall-building materials such as sand-lime bricks, aerated concrete and ready-mixed concrete. Haniel's main centre of activities is Germany, but it is also active in the Netherlands through its indirect stake in the Dutch joint venture Coöperatieve Verkoop- en Productievereniging van Kalkzandsteenproducenten ('CVK'). Haniel has a stake in around 30 sand-lime brick factories in Germany, eight in the Netherlands, one in Belgium and two in Poland. It operates a sand-lime facing brick factory in Denmark, and has stakes in three ready-mixed concrete plants in France.

- (6) On 4 September 2001 Haniel notified its acquisition of Fels-Werke GmbH ('Fels'), a subsidiary of the German firm Preussag AG ('Preussag'), to the Commission as a concentration (COMP/M.2495 — Haniel/Fels). With regard to the German market, the Commission referred the case to the competent German authorities under Article 9 of the Merger Regulation on 30 November 2001. For the rest, the Commission declared the concentration compatible with the common market under Article 8(2) of that Regulation by decision dated 21 February 2002.

- (7) Fels manufactures and sells — either itself or through its subsidiary Hebel AG ('Hebel') — building materials such as aerated concrete, lime products, plaster fibre plates and dry mortar. The firm is also active in the manufacture and sale of prefabricated houses made of aerated concrete and in the planning and construction of aerated concrete production plants.

- (8) Haniel is party to another concentration too, notified on 24 January 2002 by Haniel and Cementbouw Handel & Industrie BV ('Cementbouw') (COMP/M.2650 — Haniel/Cementbouw/JV (CVK)). That notification had been requested by the Commission: Haniel and Cementbouw had acquired joint control of the Dutch sand-lime brick maker CVK. On 25 February 2002 the Commission took a decision initiating proceedings in the case under Article 6(1)(c) of the Merger Regulation. The proceedings are still pending.

- (9) Ytong is a subsidiary of Rheinisch-Westfälische Kalkwerke AG, which in turn is controlled by the British firm RMC plc. Ytong manufactures and sells aerated

II. CONCENTRATION

- (11) Haniel intends to acquire all the business shares in Ytong and hence sole control of that firm. The transaction therefore constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

III. COMMUNITY DIMENSION

- (12) The undertakings concerned have an aggregate worldwide turnover of over EUR 5 billion ⁽⁵⁾ (Haniel: EUR 18,7 billion, Ytong: EUR 0,4 billion). Both Haniel and Ytong have a Community-wide turnover of over EUR 250 million (Haniel: EUR 17,5 billion, Ytong: EUR 0,3 billion). Neither undertaking achieves more than two thirds of its aggregate Community-wide turnover within one and the same Member State. The notified concentration thus has a Community dimension.

IV. PROCEDURE

- (13) On 13 November 2001 the Commission received a request from the competent German competition authority, the *Bundeskartellamt*, to refer the planned concentration to it in so far as it concerned Germany. The request for referral concerns the market in wall-building materials for rising back-up masonry in Germany, but not the markets in wall-building materials outside Germany. By decision of 30 November 2001 the Commission referred the part of the case relating to Germany to the competent German authorities.
- (14) On 30 November 2001 the Commission decided under Article 6(1)(c) of the Merger Regulation to initiate proceedings in respect of that part of the case not referred to the German authorities.
- (15) A hearing took place on 21 February 2002. Haniel and Ytong attended, as did Cementbouw and CVK.

⁽⁵⁾ Turnover calculated in accordance with Article 5(1) of the Merger Regulation and with the Commission notice on calculation of turnover (OJ C 66, 2.3.1998, p. 25). Turnover achieved before 1 January 1999 has been calculated in accordance with the average ECU exchange rate and converted into euro at a rate of 1:1.

V. COMPATIBILITY WITH THE COMMON MARKET

A. THE RELEVANT PRODUCT MARKETS

(16) The parties' operations overlap in the production and sale of wall-building materials. Haniel produces and sells sand-lime bricks and sand-lime blocks; in the Netherlands it does so via the Dutch joint venture CVK. Ytong produces aerated concrete. Besides sand-lime, aerated concrete and gypsum products, concrete products and clay bricks are also used in wall-building, as are, to a limited extent, steel plates and wooden panels.

1. THE PRODUCTS

(17) Sand-lime bricks are masonry units prepared from lime and sand by adding water and then compressing and hardening them under steam pressure. The bricks are used exclusively for building walls. They are generally rendered, filled in with thin plaster or hidden from view by a facing wall. When sand-lime masonry is visible, it generally consists of facing bricks, which are produced only in small formats ⁽⁶⁾. These form a separate market, which will not be discussed in detail here, as the parties produce such facing bricks only in small quantities. Besides sand-lime bricks, other, larger sand-lime walling units are used (usually measuring up to 900 mm × 625 mm × 300 mm in the Netherlands).

(18) Aerated concrete is a building material made from sand, lime and cement, to which aluminium powder is added during the manufacturing process. The powder reacts with water to form a fine porous structure. Aerated concrete products (bricks, blocks and other units) are used mainly in the construction of buildings. They can be used for both load-bearing walls — particularly in the case of blocks and very dense units — and non-load-bearing walls.

(19) Gypsum is a light wall-building material used only for non-load-bearing walls, as it has a very low load-bearing capacity. It is used in the form of gypsum plasterboards and planks.

(20) Concrete is another widely used wall-building material. Concrete walls can be made by pouring mixed concrete on site ('in-situ concrete') or by using precast concrete walling units. A third form of concrete comes in small-format concrete blocks. Concrete walls are built almost exclusively as load-bearing walls.

(21) In-situ concrete can be cast either by the traditional method of using formworks specially made on site or by 'tunnel-forming' (*tunnelgietsbouw* in Dutch) using prefabricated tunnel formworks, whereby walls and ceilings are cast in a single process.

(22) Precast concrete walling units are produced in factories to precise specifications, then transported on site and built into the building for which they are intended. They generally constitute entire walls and are thus considerably larger than the sand-lime bricks or blocks predominantly used in masonry work and require heavy equipment.

(23) Brick — the classic masonry material — is manufactured from a mixture of clay and water by firing at temperatures of over 1 000 °C. However, the size of individual bricks is limited, as the firing process causes deformations such as shrinkage and warpage. Jointing is therefore generally necessary when working with these products in order to offset these deformations.

(24) Steel plates are used mainly in non-residential construction, and to a lesser extent in residential construction. For example, they are used to fill in wall space in load-bearing concrete or steel structures. In such cases the wall usually consists of two steel plates with insulating material between them (metal sandwich plates).

(25) Wooden panels are employed in industrial and residential construction, mainly in the form of prefabricated walling units used to close off the building on the outside where there are no load-bearing walls. In the Netherlands wood is used for load-bearing walls only in exceptional cases.

2. DEFINITION OF THE RELEVANT PRODUCT MARKET

(26) In determining the extent of a product market, the Commission has to consider various product market definitions. In this case it has to be borne in mind that the use and exchangeability of various wall-building materials depend to a not inconsiderable extent on national building practices and traditions and are thus in some respects very different in some EEA member countries. In its investigation, the Commission has focused essentially on conditions in the Netherlands since it is only in that Member State that the concentration leads to additional market shares which are significant from a competition point of view.

⁽⁶⁾ Maximum size — 240 mm × 175 mm × 113 mm.

(a) **Market definition proposed by the notifying party (wall-building materials)**

- (27) Haniel claims there is a single market in wall-building materials, given the existing conditions of competition, in particular the lack of any price difference based on use and the fact that they are invariably sold via the building-materials trade. This market includes all products which are used in the construction of walls: clay bricks, concrete blocks, sand-lime bricks, aerated concrete blocks, precast concrete walling units, other sand-lime and aerated concrete units, masonry mortar, in-situ concrete, steel plates, gypsum plasterboards and planks, and wooden panels. Haniel argues that, when a building is designed, there is generally a choice of various solutions for constructing the walls.
- (28) Haniel states that the architect or project developer generally defines the requirements to be met in relation to the building's load-bearing capacity, age resistance, ease of maintenance, thermal insulation, fire protection and noise insulation. In some cases the architect also makes a selection of building materials in the building's specifications, but, according to Haniel, these specifications leave ample room for alternative solutions. Building contractors have a free choice of building materials, provided that the specifications are met. In the project proposal they can opt for a specific building material or put forward several possible solutions.
- (29) Haniel does concede, however, that the various wall-building materials are not entirely interchangeable for every purpose. In view of the considerable differences in the demands made on building materials, depending on whether they are used for load-bearing or non-load-bearing walls, Haniel considers that there is a case for dividing the market in wall-building materials into materials for load-bearing and for non-load-bearing walls.

(b) **Previous Commission practice (masonry/load-bearing masonry)**

- (30) In its decision on Preussag/Hebel ⁽⁷⁾, the Commission looked at two alternative product market definitions, but without adopting any firm position. On the one hand, it considered the possibility of a market for all materials that can be used to build up walls by the 'brick-on-brick' method (masonry), including clay bricks, sand-lime bricks, aerated concrete blocks and pumice blocks. Its investigations at that time suggested that these products

were interchangeable at the building planning stage. Within this market definition, the Commission also considered that a further distinction could be made between load-bearing and non-load-bearing walls (load-bearing masonry). It took no account of precast concrete walling units or in-situ concrete.

(c) **Practice of the German Bundeskartellamt (masonry)**

- (31) The Bundeskartellamt has consistently defined the relevant market in wall-building materials in a similar manner to the Commission in its decision on Preussag/Hebel. In its decisions, the Bundeskartellamt assumes the existence of a market in building materials for rising back-up masonry which takes in aerated concrete products, sand-lime products, bricks, pumice blocks and concrete blocks (masonry). The Bundeskartellamt does not distinguish between load-bearing and non-load-bearing walls. As far as the Bundeskartellamt is aware, the materials used in Germany for both types of wall are essentially the same.

(d) **Practice of the Dutch competition authority, the NMa (building materials for load-bearing walls)**

- (32) By contrast, the Nederlandse Mededingingsautoriteit ('NMa', the Dutch competition authority) draws a distinction between load-bearing and non-load-bearing walls because, to its knowledge, different materials are used for each type of wall in the Netherlands ⁽⁸⁾. Because of this difference in uses, sand-lime bricks, which are used for both types of wall, are in competition with different materials in each case. The NMa has included all wall-building materials used for load-bearing walls in its definition of the market in wall-building materials for load-bearing materials. This covers not only the wall-building materials for masonry mentioned in recital 31 (the 'brick-on-brick' method), but also precast concrete units and in-situ concrete. However, it should also be pointed out that, in a subsequent decision, the NMa opened up the possibility of a distinction between in-situ concrete and other wall-building materials ⁽⁹⁾.

3. ASSESSMENT

- (33) On the basis of the information available to it and, in particular, the market investigation it carried out in this case, the Commission, like the NMa, concludes (as it did in its decision of 21 February 2002 in Case COMP/M.2495 — Haniel/Fels) that there is a relevant product market in the Netherlands for building materials for load-bearing walls and a separate one for building materials for non-load-bearing walls, but that within

⁽⁷⁾ Decision of 29 March 2000 in Case COMP/M.1866 — Preussag/Hebel (OJ C 142, 20.5.2000, p. 36); see also the decision of 21 February 2002 in Case COMP/M.2495 — Haniel/Fels (not yet published).

⁽⁸⁾ NMa, decision of 20 October 1998 in Case 124/CVK Kalkzandsteen.

⁽⁹⁾ NMa, decision of 29 February 2000 in Case 2427/NCD — Fernhout.

these markets a further subdivision into masonry building materials and other materials (concrete products in particular) is not appropriate. The market in wall-building materials for load-bearing walls includes all building materials used for load-bearing walls, such as clay bricks, sand-lime bricks, aerated concrete, concrete blocks, precast concrete wall units and, possibly, in-situ concrete. The result of the market investigation suggests that in-situ concrete, in particular that cast by tunnel-forming, should be excluded. However, it is not necessary to settle this matter conclusively since it does not affect the assessment of the concentration. Likewise, the market for building materials for non-load-bearing walls thus covers all building materials used for non-load-bearing walls, such as sand-lime bricks, aerated concrete, gypsum plasterboards and planks, steel sheets and wood. This result is based on the following key factors.

- (34) All the building materials included by Haniel in its proposed market definition are suitable for the building of walls and are actually used for this purpose. The Commission's market investigation in the Netherlands has shown, however, that not all of these materials are in competition with one another.

(a) Properties of the various wall-building materials

- (35) Each of the abovementioned wall-building materials has specific properties that are taken into account in the selection of a specific wall-building material for a specific building project.
- (36) Sand-lime bricks are in themselves a cheap building material which, though they cannot achieve the size of aerated concrete precast products, nevertheless, with dimensions of up to 900 mm × 625 mm × 300 mm, are larger than traditional bricks. Furthermore, sand-lime bricks, like aerated concrete, have a smooth surface that does not have to be evened out by jointing. The units can be cemented together. In addition, sand-lime products can be cut to shape at the factory in accordance with the building plans, so that units forming the gable or window openings can be pre-prepared. All these factors mean that less time and less expenditure on wage costs are needed than in the case of, for example, ordinary bricks. At the same time, sand-lime bricks do not require any large-scale investment in heavy cranes, as in the case of precast concrete wall units, or casting moulds, as in the case of in-situ concrete. In the Netherlands, because of their excellent load-bearing properties, sand-lime bricks are used for load-bearing walls and, to a lesser extent, also for non-load-bearing walls. In the Netherlands, something of the order of [60 to 80] (*) % of sand-lime bricks are used in load-bearing walls. When they are used in non-load-bearing walls, sand-lime bricks have

the disadvantage of being relatively heavy (about twice as heavy as aerated concrete). However, the material does have good sound-insulating properties and is suitable in particular for high, non-load-bearing walls, such as those often required in non-residential construction. Sand-lime bricks are the traditional and most popular wall-building material in the Netherlands.

- (37) Precast concrete sections do not require masonry work as they are already the size of the wall to be produced. Concrete as a product can be produced from relatively simple raw materials. However, fairly large-scale resources such as cranes must be used in erecting such walls, and this in its turn involves some investment costs. Precast concrete walling units are therefore used primarily for somewhat larger projects, chiefly in non-residential construction (*utiliteitsbouw*, abbreviated to *u-bouw* in Dutch) rather than residential construction (*woningbouw*, abbreviated to *w-bouw*). Even so, savings can also be made in medium-sized residential construction projects where around 10 or more units are used, since the wall is produced at the factory and erection at the building site requires relatively little labour and takes relatively little time. The bigger the project, the lower the costs for the precast wall.

- (38) In-situ concrete requires the largest amount of on-site investment in its use, particularly in-situ concrete used in tunnel-forming. The manufacture and use of the frameworks required for repeated casting in the tunnel-forming method are so costly that this method is worthwhile only if there is a minimum of 30 to 50 residential units and only if the latter are identical in form and size. There is therefore relatively little flexibility as to form and size in construction using in-situ concrete in the tunnel-forming method. However, flexibility is an important criterion in the Netherlands, even in the case of fairly large projects, so as to avoid uniformity. Tunnel-forming is therefore not a suitable alternative for smaller construction projects or those not involving rectangular shapes or repeated applications. In-situ concrete is also used in the construction of high-rises if their load-bearing capacity is ensured by means of a cast concrete skeleton to which non-load-bearing wall-building materials are attached.

- (39) Aerated concrete is in itself an expensive wall-building material. It is produced from high-grade, expensive basic materials with high energy costs. Large sections must be reinforced with steel, which further increases the price, since reinforced sections entail significant costs in the manufacture of the reinforcing elements. In contrast to steel reinforcement in the case of ordinary concrete, the steel used for reinforcement here has to be coated in order to protect against corrosion. The constructional properties of aerated concrete are somewhat more limited than those of sand-lime bricks, but it is possible to use it to build up to two stories with load-bearing walls. Aerated concrete does, however, have excellent thermal insulation properties. In Germany, some 80 %

(*) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

of the aerated concrete products used in wall-building is used for load-bearing walls, while only 20 % is used in non-load-bearing walls. In the Netherlands, however, the ratio is the reverse: something like 80 to 85 % of aerated concrete is used in non-load-bearing walls.

- (40) Gypsum is a light material. Because of this property, it is very well suited to non-load-bearing walls. The load-bearing demands placed on floors are small, and space is saved. Because of its lack of load-bearing capacity, gypsum is used only for non-load-bearing walls.
- (41) Bricks are relatively small wall-building materials, and because of their uneven surface they are usually jointed. Their use entails relatively high labour costs and is relatively time consuming, and this makes bricks unsuitable for industrial construction.

(b) *The distinction between wall-building materials for load-bearing and non-load-bearing walls*

- (42) The market investigation showed that the decision as to which building material to use for a specific project is influenced both by the client and the architect and by the building contractor. Exactly how much influence on the choice of wall-building material is exercised by each of these three groups of persons varies from case to case.
- (43) The client's precise preferences regarding, for example, aesthetics and buildings costs are factors here, as are the architect's specifications. Criteria which are of relevance in the selection of the various wall-building materials are quality, constructional properties, flexibility of use, appearance, the purchase price of the material and the costs involved in using it. The special requirements of the building project must be taken into account in this respect, as must the use to which the building is to be put, the necessary load-bearing capacity, resistance to ageing, fire protection, sound insulating properties, other technical capabilities, timetable and the overall costs of the project. The building contractor's main criteria, in so far as he has any options regarding the choice of wall-building materials, are costs and building speed. These in turn are influenced by his experience with specific building materials and the resources and facilities (e.g. cranes) available to him. As far as the cost factor is concerned, it must be borne in mind that the cost of materials is always just one part of the overall costs of erecting a wall.
- (44) In its market investigation, therefore, the Commission surveyed all these decision-makers to determine the basis of their conduct in selecting wall-building materials. Similarly, the manufacturers of the various building materials were asked to provide information. In the Netherlands, the survey showed that, in selecting building materials, a fundamental distinction was made between the choice of building materials for load-bearing walls and building materials for non-load-bearing walls.
- (45) The difference between load-bearing and non-load-bearing walls, as the terms already suggest, is the load-bearing function of the relevant wall-building material. Load-bearing walls ensure the stability of a building. The relevant walls are often external walls. However, internal walls too may perform a load-bearing function. Such walls must be distinguished from walls which do not have any function in supporting the building, but merely divide up the space or fill gaps inside a load-bearing framework (external or internal walls). Building materials used in load-bearing walls must meet certain requirements as to resistance to pressure, load-bearing capacity and stiffness. Building materials used in non-load-bearing walls, by contrast, must meet other, possibly contrary requirements. Lighter, non-load-bearing walls, for example, have the advantage of making fewer demands on the load-bearing capacity of the ceilings. Thin non-load-bearing walls for their part save space.
- (46) These varying requirements in respect of load-bearing and non-load-bearing walls result, in the Netherlands, in different building materials being selected for these different purposes. In the Netherlands, the main material used in load-bearing walls is sand-lime bricks. Sand-lime bricks are used in [50 to 60]* % of all load-bearing walls. Concrete is the next largest building materials category. In-situ concrete is used in 12 % of all load-bearing walls. At least two fifths of this building material is used in tunnel-forming ⁽¹⁰⁾. A total of 8 % is accounted for by load-bearing walls made from precast concrete wall units. Aerated concrete and bricks, accounting for proportions of 2 % and 5 % respectively, play a very minor role.
- (47) In the case of non-load-bearing walls, by contrast, gypsum products are the main materials used. They account for 44 % of the materials used in non-load-bearing walls. Next comes aerated concrete with 20 %, followed by sand-lime bricks with [15 to 20]* %.
- (48) This demand-side pattern is typical of the Netherlands and differs fundamentally from that in other countries, such as Germany. In Germany, the proportions in the use of aerated concrete for load-bearing and non-load-bearing walls are just the reverse of those in the Netherlands. Whereas in Germany 80 % of all aerated concrete products are used to construct load-bearing walls, in the Netherlands 85 to 90 % of all aerated concrete products are used in non-load-bearing walls. In Germany, concrete plays a minor role in load-bearing walls in residential construction, while bricks and other masonry units feature prominently. In Belgium, by contrast, concrete blocks appear to be much more widespread than in the Netherlands, and together with bricks to be the most common

⁽¹⁰⁾ According to the information provided by the parties, in-situ concrete accounts for 40 % of the materials used in tunnel-forming; the market investigation suggested that the proportion might be even higher than that.

wall-building material. The use of in-situ concrete in tunnel-forming is much less widespread in Germany and Belgium than in the Netherlands.

(49) The reasons for these differences in demand-side behaviour stem, firstly, from differences in building traditions and aesthetic approaches and, secondly, from the advanced industrialised building methods used in the Netherlands.

(50) In the Netherlands, building and construction activity is based on large-scale projects even in the residential sector. Less than 20 % of all new residential building relates to individual house building. In Germany, by contrast, the figure is more than 90 %. In the Netherlands, large areas are released by the Government for building purposes, and on such areas the building and construction industry erects as much as several thousand residential units (e.g. *VINEX locaties*). In building projects on this scale, building materials that require high investment but involve lower wage costs, such as in-situ concrete using the tunnel-forming method, are profitable. Consequently, bricks, which are labour intensive at the building site (small size and need for jointing, though methods of cementing bricks do exist) and hence entail higher wage costs and are more time consuming, are used to only a minor extent.

(51) Sand-lime bricks are the traditional building material in the Netherlands; they are relatively cheap, and can be used with great flexibility, speed and on favourable cost terms in the building process (large units, cut to the required shape in the factory, no jointing necessary).

(52) Aerated concrete, which is very widely used in Germany in load-bearing walls because of its good heat-insulating properties, is, despite this advantage, not so widely used in the Netherlands because of its substantially higher price compared to sand-lime. In Germany, 30 cm-thick aerated concrete units are used for load-bearing walls. These have then only to be plastered and painted to produce a complete wall that meets high heat-insulation requirements. There are no costs for facing masonry and additional insulation. In the Netherlands, by contrast, smooth, plastered external walls are not customary. The preference there is for facades which give the impression of brickwork. This is done by means of brickwork facing in front of the load-bearing wall. This means that the cost advantage of aerated concrete, which does not need insulation and facing, is forfeited and hence that aerated concrete is a much more expensive building material than sand-lime. Consequently, aerated concrete is used only to a limited extent in the Netherlands for load-bearing walls in residential construction.

(53) However, since aerated concrete costs about the same as gypsum walls, is relatively light, but affords better heat insulation, aerated concrete products are used in the

Netherlands for non-load-bearing walls. Sand-lime is also used here. This is because it has very good sound-insulating properties which may, in some cases, offset its disadvantages as a heavy building material. In addition, because of its constructional properties, it is particularly suitable for high, non-load-bearing walls, such as are required primarily in non-residential construction.

(54) There is therefore only limited competition in the Netherlands between, on the one hand, products used in load-bearing walls and, on the other, those used in non-load-bearing walls. This prompts the Commission to draw a distinction in the Netherlands between a relevant product market in load-bearing walls and one in non-load-bearing walls. This is despite the fact that some wall-building materials that are suitable for load-bearing walls may also be used in non-load-bearing walls and vice-versa. Sand-lime especially is in this category: it is the only wall-building material which is used to any significant extent equally in load-bearing and non-load-bearing walls. Firms which make products suitable for both types of wall are, in the market in load-bearing walls, in competition with a largely different set of competitors and faced with different competitive conditions than in the market in non-load-bearing walls.

(55) In setting its prices for products used in load-bearing walls, CVK, as the only sand-lime brick producer in the Netherlands, is not restricted by prices charged on the market in products intended for non-load-bearing walls. The Commission's market investigation shows that CVK often knows the specific use of its products⁽¹¹⁾ and might therefore be in a position to determine its prices on the basis of whether its sand-lime products are being used in load-bearing or non-load-bearing walls. If this is not the case, it is to be assumed that CVK tailors its pricing strategy primarily to the requirements of the market in load-bearing walls, since it sells [60 to 80]* % of its products on that market.

(56) The results of the market investigation raise the question of whether and to what extent in-situ concrete is also to be included in the market in wall-building materials for load-bearing walls. This applies in particular to in-situ concrete cast by tunnel-forming. As already explained in recital 38, this technique involves high fixed investment costs which become worthwhile only if at least some 30 to 50 residential units of identical form and size are to be built. This means that this method does not represent an alternative, not only in the case of small

⁽¹¹⁾ In particular for elements cut for a specific use or for specific deliveries; see recital 32. Haniel has also indicated that, generally, it must be assumed that, above a given wall strength, the product is used for load-bearing walls.

projects, but also in the case of large projects in which, for aesthetic and social reasons, a repetitive building style is to be avoided. Furthermore, as already explained, the tunnel-forming method allows not only walls but also, as part of the same process, ceilings to be produced. For these reasons, a decision to opt for the tunnel-forming method is not so much a price decision as a decision in favour of a particular system. However, the question of the inclusion of in-situ concrete and, in particular, in-situ concrete cast by tunnel-forming in the market in wall-building materials for load-bearing walls can be left open, as it does not affect the result of the assessment.

4. THE RESPONSE OF THE PARTIES TO THE STATEMENT OF OBJECTIONS

The views of the parties

- (57) In its answer to the statement of objections, and at the hearing, Haniel said it maintained its view that the relevant market had to include all wall-building materials. Haniel conceded, however, that a case could be made for the distinction drawn by the Commission between building materials for load-bearing and non-load-bearing walls.
- (58) The criticism Haniel regarded as essential concerned the possibility — which the Commission had raised but left open — that the product market might not include in-situ concrete, and more especially in-situ concrete cast by the tunnel-forming method. Haniel argued that these in-situ concrete products were in direct competition with other building products for load-bearing walls. Contrary to the view put forward by the Commission, this method of building did not entail any additional costs, and was not confined to large projects. The smallest number of residential units needed to make tunnel-forming worthwhile was 15, and not 30 to 50, as the Commission had stated. Tunnel-forming offered sufficient design flexibility to ensure that residential units built using it need not be identical in appearance.
- (59) Cementbouw and CVK agreed.

Assessment

- (60) In the statement of objections, the Commission left open the question whether and to what extent in-situ concrete ought to be included in the relevant market, and it will do so again in this decision. There is no need in this decision to settle the question since, even if one were to accept the broader definition of the relevant product market advocated by the parties, which includes all classes of in-situ concrete, Haniel would in any event hold a dominant position in the Netherlands, and that dominant position would be strengthened by the merger at issue here. Nevertheless, the Commission's market

investigation does provide evidence to suggest the possibility that in-situ concrete, and particularly in-situ concrete cast using the tunnel-forming method, does not form part of the relevant market.

- (61) The main grounds for this assertion have already been set out in detail. In addition, it should be borne in mind that if a builder working on a project decides to change over from sand-lime products for example to tunnel-formed in-situ concrete, the change will affect not only the wall-building materials but the flooring and roofing materials too. Thus changing over to tunnel-forming will mean changing the entire design of the building. For builders currently using sand-lime products, therefore, tunnel-formed in-situ concrete is a rather remote alternative.

- (62) It has also to be borne in mind that tunnel-formed in-situ concrete can be used only for fairly large projects. The parties have admitted this, but say that the smallest number of residential units for which this material is economical is about 15 rather than the 30 to 50 alleged by the Commission. In any event, though, it is clear that on smaller building projects sand-lime bricks do not face competition from in-situ concrete ⁽¹²⁾. Aerated concrete in particular, which is produced by Ytong, may be used in smaller building projects of one to two residential units.

5. CONCLUSION CONCERNING THE RELEVANT PRODUCT MARKETS

- (63) On the basis of the above considerations, the Commission takes the view that, for the purposes of assessing the notified concentration, a distinction has to be made in the Netherlands between a market in building materials for load-bearing walls and a market in building materials for non-load bearing walls. As far as the market in building materials for load-bearing walls is concerned, the question of whether in-situ concrete, in particular that used in tunnel-forming, is to be included in this market may be left open.

⁽¹²⁾ In many cases CVK knows the destination of its products, because it is itself responsible for the delivery of its products to a specific building site; for products which account for half of its turnover CVK has access to the architect's plans. The Commission therefore takes the view that CVK is in a position to differentiate its prices depending on the competition it observes. By means of discounts for volume and uniform transport prices it would be able to effect an implicit differentiation between large and small building projects. CVK has indicated that it grants dealers in building materials discounts which are specific to the project and the builder.

(64) In so far as the activities of Haniel and Ytong overlap in other Member States which, following the referral of part of the case to the German *Bundeskartellamt*, are still within the scope of the Commission's inquiries, the precise definition of the relevant product market can remain open, because whichever way the market is defined no competition concerns arise.

B. RELEVANT GEOGRAPHIC MARKETS

(65) Leaving aside Germany, the activities of Haniel and Ytong overlap in the Netherlands, Belgium and, possibly, France. As regards the part of the merger not referred to the *Bundeskartellamt*, the merger results in additions of market shares that are significant from a competition law point of view only in the Netherlands.

(66) Haniel defines the relevant geographic market with regard to the Netherlands as national. Although a few firms involved in the building-materials trade tend to operate on a regional basis, it argues, transport costs in the Netherlands are not of such significance that building materials cannot be supplied throughout the entire territory of the Netherlands. Haniel says that wall-building materials are transported by lorry, usually from the production site direct to the building site.

(67) The investigations have confirmed that the Dutch market is national. The market investigation has shown that the prices charged for most wall-building materials are calculated free at production site for delivery throughout the Netherlands, even though transport costs represent a not insignificant cost factor. CVK, as the only producer and supplier of sand-lime, can moreover supply any building site in the Netherlands direct from the nearest sand-lime works.

(68) Although in the Dutch border areas there are evidently imports of wall-building materials from Belgium and Germany into the Netherlands, these are marginal and do not justify the inclusion of parts of Belgium and Germany in the relevant geographic markets. The market investigation has revealed the existence of barriers to market entry based, in particular, on building and industrial safety regulations. For example, bricks laid manually may not weigh more than 18 kg in the Netherlands which is not the case in other Member States. On the other hand, building standards in Germany mean that walls of comparable wall thickness must be stronger and, given the extra materials that requires, are more expensive than in the Netherlands. All the important undertakings that operate on the Dutch market in wall-building materials are also established in the Netherlands. Belgian and German producers operating in the Netherlands also do so via Dutch subsidiaries.

(69) Accordingly, the Commission takes the view that the relevant geographic market, as far as the Netherlands is concerned is, for the purposes of this Decision, national.

C. COMPETITIVE ASSESSMENT

(70) The Commission considers that, through its shareholding in CVK — the only sand-lime brick manufacturer — Haniel already occupies a dominant position on the Dutch market in wall-building materials for load-bearing walls. This holds true irrespective of whether in-situ concrete as a whole or in-situ concrete cast by the tunnel-forming method is to be included in this market. This dominant position would be strengthened by the acquisition of Ytong. If Haniel also acquires Fels, this strengthening of a dominant position will be further accentuated.

(71) Haniel's and Ytong's activities overlap not only in the Netherlands but also in Germany, but the German markets are outside the scope of the Commission's inquiries in these proceedings. There is some small overlap in Belgium, and possibly in France too.

1. NETHERLANDS

(a) *Control of CVK by Haniel*

(72) The assessment of the merger in the Netherlands in the light of competition law depends on whether the market shares of the CVK cooperative, in which Haniel has an indirect shareholding of 50 %, are to be ascribed to Haniel.

(aa) *Structure of CVK*

(73) In the Netherlands there are altogether 11 sand-lime brickworks, all of which are members of CVK. Of these brickworks, five are wholly owned by Haniel, three are wholly owned by the Dutch building-materials group Cementbouw and the remaining three are owned 50/50 by Haniel and Cementbouw. The shares in CVK are apportioned among the 11 sand-lime brickworks that make it up in such a way that the wholly owned subsidiaries of Haniel and the wholly owned subsidiaries of Cementbouw together have equal-sized shareholdings in CVK, with the result that Haniel and Cementbouw each indirectly has a 50 % stake in CVK.

(74) CVK was originally set up to carry out joint marketing on behalf of its members; a pooling agreement concluded in 1999 transferred the management of the member companies to CVK. In the pooling agreement and in the statutes (*statuten*) of CVK, it is stipulated that CVK members are to be bound by CVK's instructions. There is only limited scope for the appointment of representatives of the shareholders to the governing bodies of CVK. On the managing board (*Raad van Bestuur*), no member may at the same time perform any function in a business belonging to any of the

shareholders, and on the supervisory board (*Raad van Commissarissen*) only a minority of the members may do so. CVK member companies are also required to appoint CVK as one of not more than two managers of the particular company. The other manager is appointed by the company's own shareholders.

- (75) Strategic decisions concerning CVK are taken by its managing board (*Raad van Bestuur*) by a simple majority. Members of the *Raad van Bestuur* and of the supervisory board (*Raad van Commissarissen*) are appointed and removed by the members' meeting. Pursuant to the pooling agreement and the statutes, no member of the *Raad van Bestuur* may perform any function in one of the parent companies of the CVK members (Haniel and Cementbouw), and no persons who perform any function in Haniel or Cementbouw may form a majority on the *Raad van Commissarissen*. The day-to-day management of CVK and its members is in the hands of the *Raad van Bestuur*; the *Raad van Commissarissen* exercises the supervisory powers normally vested in such an organ under Dutch company law without being able to exert a direct influence over strategic corporate decisions.

(bb) Joint control by Haniel and Cementbouw

- (76) Haniel takes the view that, owing to CVK's corporate structure as described above, the cooperative is, despite the 50 % indirect interest which Haniel and Cementbouw each have in it, controlled exclusively by itself and not by its member companies and/or their shareholders.
- (77) Pursuant to Article 3(3) of the Merger Regulation, the control of an undertaking consists in the possibility of exercising decisive influence on it. The question is whether the person or persons exercising control are in a position, alone or jointly, to determine the undertaking's strategic decisions. The decisive factor here as a rule is the composition and decision-making procedures of the body responsible for appointing and removing the management and approving any other strategic decisions.
- (78) In CVK's case, strategic corporate decision-making is a matter solely for the *Raad van Bestuur*. Whoever determines the composition of the *Raad van Bestuur* is therefore in a position to control the undertaking, for it is to be expected that, when taking strategic decisions, the members of the *Raad van Bestuur* take into account the interests of the person or persons who decide whether to appoint or remove them. Since the members of the *Raad van Bestuur* are appointed by the CVK

members' meeting by a simple majority, and since in the members' meeting the representatives of the member undertakings in which Haniel holds the entire share capital and the representatives of the member undertakings in which Cementbouw holds the entire share capital each have the same number of votes and hence the representatives of the member undertakings in which Haniel and Cementbouw each have a 50 % share have a casting vote, both Haniel and Cementbouw can indirectly block the appointment and removal of members of the *Raad van Bestuur*. Their joint agreement is accordingly needed for every appointment or removal of a member of the *Raad van Bestuur*.

- (79) This means that Haniel and Cementbouw jointly control CVK within the meaning of Article 3(3) of the Merger Regulation.

(cc) The response of the parties to the statement of objections

The views of the parties

- (80) In its answer to the statement of objections, and at the hearing, Haniel maintained its view that the rules of the pooling agreement and the statutes ensure that Haniel cannot exercise control over CVK. Haniel referred in particular to a decision taken by the Dutch competition authority, the NMa, dated 20 October 1998, which cleared a transaction giving CVK control of its member companies. At that time the shares in CVK's member companies were in the hands of three shareholders, namely Haniel, Cementbouw and RAG AG ('RAG').
- (81) In its decision the NMa found that the pooling agreement and the corresponding changes to the CVK statutes broke the original economic and organisational links between the member companies and their owners in such a way that CVK would now have control of its members. This also meant that the member companies would not be under the control of their shareholders (Haniel, Cementbouw and RAG). The NMa attached decisive importance to the fact that, under the rules laid down, no member of the *Raad van Bestuur* and only a minority of the members of the *Raad van Commissarissen* were permitted to perform any function in businesses belonging to the shareholders.
- (82) In support of its view, Haniel also refers to correspondence with the NMa in the first half of 1999, in which the NMa was informed that RAG proposed to withdraw from CVK and sell its shares in CVK member companies to Haniel and Cementbouw and was asked to

indicate whether this constituted a concentration under Dutch law. The NMa confirmed that the reduction in the number of shareholders in the CVK member companies from three to two did not in any event constitute a concentration under Dutch law if it took place after the transaction which the NMa had approved. The decisive consideration, in the NMa's view, was that after that transaction the shareholders would not be able to exercise control over the CVK member companies, so that the number of shareholders would no longer affect the question of control.

- (83) A further criticism made was that in its statement of objections the Commission had failed to consider the NMa decision and its reasoning. In addition, the Commission's decision would 'negate' a decision of a national competition authority.
- (84) This criticism was put forward by Haniel, Cementbouw and CVK jointly.

Assessment

- (85) In examining the question of control of CVK, the Commission applied the tests of the Merger Regulation in conjunction with the practice established in its own decisions. It considered the relevant agreements between CVK and its members and between the shareholders, and other relevant documents such as the statutes of the CVK and the correspondence between the parties and the NMa referred to.
- (86) The Commission concluded that control of CVK was exercised jointly by its shareholders Haniel and Cementbouw because each had a indirect 50 % holding in CVK and consequently a veto at the members' meeting, which acted by simple majority. It was the members' meeting that determined who would sit on CVK's governing bodies, which decided the strategy to be pursued by CVK, so that the veto rights at members' meetings gave their holders joint control of CVK: appointments could be decided only by the two acting in agreement.
- (87) The decisive test applied by the Commission to determine who controlled CVK, namely the right to decide appointments to its governing bodies, is therefore different from the test applied by the NMa, namely the composition of the governing bodies. The two authorities consequently came to different conclusions on the question of control. RAG's withdrawal from CVK was assessed differently for the same reason. In the NMa's view, RAG's withdrawal after the restructuring of CVK — an exercise it had examined and allowed to

happen — was irrelevant once CVK's member companies had been deprived of control whereas, in the Commission's view, it was RAG's withdrawal which conferred control on Haniel and Cementbouw. When there were three shareholders majorities at the members' meeting could shift. When one shareholder withdrew, the remaining shareholders were left with a 50 % holding each: it was this which gave them veto rights at the members' meeting, which was the point that decided the question of control. Under the system of the Merger Regulation, therefore, RAG's withdrawal was the transaction by which the two shareholders acquired control of CVK. The Commission does not question the fact that the pooling agreement and the amendments to CVK's statutes gave CVK control of its member companies, as the parties have pointed out and as was made clear in the NMa decision. But that does not affect the Commission's conclusion. The effect of CVK's acquisition of control of its member companies is rather that Haniel and Cementbouw, instead of exercising separate control of the member companies which are their respective wholly owned subsidiaries, and joint control of the member companies which they own jointly, now through their joint control of CVK exercise indirect joint control of all the member companies.

- (88) In its statement of objections the Commission set out the reasons for its conclusion. The European Court of Justice has held consistently and in a wide variety of cases that the Commission is not in its reasoning obliged specifically to counter differing views or to answer objections that might conceivably be raised against the measures it proposes to take ⁽¹³⁾.
- (89) Nor will the present decision negate a decision of a national competition authority. There is no need here to consider questions of the primacy of Community law and the exclusion of national powers to vet a transaction in the event that Community powers exist: this is because the Commission has concluded that the planned transaction which was approved by the Dutch competition authority is not the transaction entered into by Haniel and Cementbouw.
- (90) In 1998 a planned concentration was notified to the NMa by which the 11 member companies of CVK, which were owned by three shareholders, were to be brought under the control of CVK; CVK was not controlled by the shareholders because alternative majorities were possible at the members' meeting. But, by means of a single set of agreements concluded on 9 August 1999, the parties did in fact bring the 11

⁽¹³⁾ See, for example, the Court's judgment of 19 September 2000 in Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraphs 89 et seq.

member companies under CVK's control and at the same time — by selling RAG's shares in CVK member companies to Haniel and Cementbouw — convert CVK from an undertaking with three indirect shareholders to an undertaking with two shareholders with an indirect 50 % holding each, with these shareholders acquiring control of CVK. As part of this set of agreements, Haniel and Cementbouw also concluded a 'cooperation agreement' on cooperation in CVK which contained, *inter alia*, arrangements for the closure of plants. This agreement was not in the NMa's possession when it took its decision in 1998.

- (91) Even if one were to regard these steps as two separate transactions with a lapse of time in between, they are interdependent to a point where they have to be regarded as a single concentration. The legal steps which gave Haniel and Cementbouw joint control of CVK and the legal steps which gave CVK control of the 11 sand-lime brickworks were performed on the same day, 9 August 1999, and were recorded by the notary in a single document. The parties to the agreement wanted to link the two changes of control so that one could not take place without the other. The conclusion of the agreements that had been submitted to the Dutch competition authority was accordingly postponed until the negotiations on the transfer of RAG's shares were complete. Answering questions on this point put by the Commission at the hearing, Haniel expressly confirmed that the agreements that had been submitted for the NMa's approval were not implemented immediately in view of the desire that had since been expressed by RAG to withdraw from CVK. The implementation of these agreements was postponed until the negotiations with RAG regarding the transfer of its shares were complete since RAG did not want to take part in the new CVK structure. In economic terms, therefore, the two acquisitions of control form a unity and are to be regarded as a single concentration distinct from the concentration approved by the NMa.

- (92) Even if one assumes that CVK's acquisition of control over its member companies and the acquisition by Haniel and Cementbouw of control over CVK were two distinct mergers, this would not alter the assessment that, on completion of the transactions described, Haniel and Cementbouw acquired joint control of CVK.

(dd) **Conclusion**

- (93) The Commission is therefore of the opinion that for the purposes of this decision CVK's market shares must be assigned to Haniel.

(b) ***The market in wall-building materials for load-bearing walls***

- (94) Through its indirect holding in CVK, the sole manufacturer of sand-lime bricks, Haniel already holds a dominant position on the Dutch market in wall-building materials for load-bearing walls. This dominant position would be strengthened by the acquisition of Ytong. The grounds for this conclusion are set out below.

(aa) **The structure of the market**

- (95) In 2000 the Dutch market in wall-building materials as a whole had a total volume quantity-wise of 3,8 million m³ and value-wise of some EUR 640 million. The market in wall-building materials for load-bearing walls had a volume of 2,1 million m³ and was worth EUR 356 million. If in-situ concrete is excluded from the load-bearing walls market, the size of the market shrinks to 1,8 million m³ and EUR 276 million. If only in-situ concrete cast by the tunnel-forming method is excluded, the market has a volume of 1,9 million m³ and a value of EUR 322 million ⁽¹⁴⁾.

⁽¹⁴⁾ On the assumption that 40 % of the in-situ concrete used in the Netherlands is cast using the tunnel-forming method; see footnote 10.

- (96) Below are the market shares (by volume) of the parties and of their main competitors including all load-bearing wall-building materials and, alternatively, excluding in-situ concrete and in-situ concrete cast by the tunnel-forming method ⁽¹⁵⁾:

(in %)

Company	Building material	Market share		
		Load-bearing wall-building materials, including in-situ concrete	Load-bearing wall-building materials, excluding in-situ concrete used in tunnel-forming	Load-bearing wall-building materials, excluding in-situ concrete
CVK (Haniel/Cementbouw)	Sand-lime bricks	[50—60]*	[50—60]*	[60—70]*
Ytong	Aerated concrete	[0—2]*	[0—2]*	[0—2]*
CVK + Ytong		[50—60]*	[60—70]*	[60—70]*
Cementbouw	Precast concrete walling units In-situ concrete	[2—5]*	[2—5]*	[2—5]*
Mebin	In-situ concrete	[2—5]*	[2—5]*	0,0
NCD	In-situ concrete	[0—2]*	[0—2]*	0,0
Wienerberger	Clay bricks	[0—2]*	[0—2]*	[0—2]*
Hanson (Pioneer)	Clay bricks In-situ concrete	[0—2]*	[0—2]*	[0—2]*
Oudenallen	Precast concrete walling units	[0—2]*	[0—2]*	[0—2]*
CRH	Clay bricks	[0—2]*	[0—2]*	[0—2]*
Fels	Aerated concrete	[0—2]*	[0—2]*	[0—2]*

(bb) Existing dominant position of Haniel (CVK)

1. Grounds for assuming the existence of a dominant position

- (97) The Commission considers that, through its holding in CVK, Haniel has a dominant position on the Dutch market in wall-building materials for load-bearing walls. This applies regardless of whether or not in-situ concrete should be included in this market.

- (98) The European Court of Justice has defined a dominant position as a position of economic strength enjoyed by

an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately consumers. Such a position does not preclude some competition, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment.

- (99) The existence of a dominant position may derive from several factors which, taken separately, are not necessarily decisive, but among which the existence of very large market shares is highly important. Important evidence of the existence of a dominant position is, moreover, the relationship between the market shares of the undertakings involved in the concentration and their competitors, especially those of the next largest ⁽¹⁶⁾.

⁽¹⁵⁾ The calculation is based on estimates made by the parties on the shares of the various building materials in the consumption of wall-building materials as a whole and broken down as between load-bearing and non-load-bearing walls. Inasmuch as wall-building materials are used in load-bearing and non-load-bearing walls (e.g. sand-lime bricks, aerated concrete), only that part of such building materials which is estimated to be used in load-bearing walls was taken into account. On the basis of its market investigation, the Commission considers these estimates to be basically accurate; however, precise statistical data are not available.

⁽¹⁶⁾ Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 39; see also Case T-102/96 *Gencor v Commission* [1999] ECR II-753, paragraphs 201 and 202.

- (100) Haniel (CVK) has a share of more than [50 to 60]* % of the market in wall-building materials for load-bearing walls. Its main competitor is Cementbouw⁽¹⁷⁾, with a market share of just under [2 to 5]* %. This figure does not take account of Cementbouw's stake in CVK, which for the purposes of this assessment is assigned in its entirety to Haniel. Cementbouw's market share of approximately [2 to 5]* % is based solely on its precast concrete walling unit and in-situ concrete activities. The next-largest competitor is the in-situ concrete manufacturer Mebin, with a market share of around [2 to 5]* %. Other competitors have market shares of 2 % or less.
- (101) The market share of Haniel (CVK) is therefore more than 10 times bigger than that of the leading competitor. In view, however, of the close structural links between, and common interests of, Haniel and Cementbouw in CVK, it is by no means clear how far Cementbouw and Haniel are in competition with one another. The largest competitor with no links with Haniel is, with its [2 to 5]* % or so market share, much smaller, Haniel being [10 to 15]* times bigger than this competitor.
- (102) If in-situ concrete were not to be included in the definition of the market in wall-building materials for load-bearing walls, the market share of Haniel (CVK) would be [60 to 70] % as Haniel (CVK) does not supply in-situ concrete. Furthermore, the largest independent competitor, Mebin, would then not be active in the relevant product market. This would leave only a limited number of much smaller competitors whose market shares do not exceed 2 %, or much less, even, in some cases. If only in-situ concrete cast by the tunnel-forming method is excluded from the market definition, the market share of Haniel (CVK) would be [50 to 60] %.
- (103) None of Haniel's competitors in the Netherlands is active in the sand-lime brick sector. CVK is the only producer and supplier of this building material in the Netherlands. In that country, sand-lime bricks are, however, for the reasons given above, the traditional and, what is more, most popular wall-building material. Furthermore, they are the only wall-building material to be used to a significant extent in both load-bearing and non-load-bearing walls.
- (104) Substantial market entry barriers exist. CVK controls all the sand-lime brick works in the Netherlands and hence the production of by far the most important wall-building material assignable to the relevant product market. The Commission's market investigation has shown that it would be possible for manufacturers of other wall-building materials to undertake the manufacture of sand-lime brick products only at great expense in terms of time and investment; the same is also true of other wall-building materials such as aerated concrete. The production processes and hence the production plants are different for each wall-building material. For these reasons, a switch of production by competitors is not considered a serious possibility.
- (105) The customers of Haniel (CVK) have no buyer power. No one customer is potentially the buyer of a substantial part of CVK's output. In the case of sand-lime bricks, which are by far the most important of all the wall-building materials assignable to the relevant product market, there are no alternative suppliers.
- (106) Haniel's market position can thus be summed up as follows: Haniel (CVK) has, at well over [50 to 60]* %, by far the biggest market share and is linked to the next-largest competitor, which is 10 times smaller, through CVK. The remaining market volume is fragmented and divided among competitors with market shares of just a few percent. Haniel controls, moreover, in the form of CVK, the only Dutch supplier of the most important building material in the Netherlands. The market power available to Haniel (CVK) is not offset by buyer power on the other side of the market. The combination of all these factors gives Haniel (CVK) a dominant position on the market in wall-building materials for load-bearing walls in the Netherlands.

2. The response of the parties to the statement of objections

The views of the parties

- (107) In their answer to the statement of objections, and at the hearing, Haniel, Cementbouw and CVK maintained that CVK and hence Haniel did not have a dominant position in the Netherlands. They gave four main reasons for this:
- in-situ concrete is a material that exerts considerable competitive pressure on sand-lime bricks. In-situ concrete producers are invariably large enterprises,
 - CVK's direct customers — building-material dealers — have considerable buyer power. Of CVK's sales, [60 to 80]* % is accounted for by the five largest building-material dealers, the biggest customer alone being responsible for about 21 %,
 - market entry barriers are low. Haniel states that the investment in a sand-lime brickworks comes to about EUR [...] million. An in-situ concrete producing plant costs as little as EUR [...] million,
 - in its pricing, CVK must take into account competitive conditions on the neighbouring market

⁽¹⁷⁾ Until mid-2001, Cementbouw was a subsidiary of the Dutch building group NBM Amstelland NV. At the beginning of the year, the Cementbouw group was sold to CVC Capital Inc., a venture capital firm.

in wall-building materials for non-load-bearing walls, in which it has a weaker market position, inasmuch as in regard to a substantial part of its sales it does not know to what end use its products are put.

(108) To back up these arguments, CVK points out that in recent years it has lost market share to its competitors.

(109) Cementbouw takes the view that, despite its 50 % holding in CVK, it is to be regarded as a competitor independent of the latter.

Assessment

(110) The arguments advanced by the parties do not negate the grounds on which the Commission finds that CVK is in a dominant position. The following points are conclusive in this respect:

— in-situ concrete cannot be regarded as a material with which substantial competitive pressure can be brought to bear on CVK. In-situ concrete's share of the market in wall-building materials as a whole comes to only 12 %, Cementbouw's share being approximately [0 to 2] %. As indicated above, competitors on the wall-building-materials market are thinly spread. If, in line with the intervening parties' thinking, in-situ concrete is to be included in the relevant market, the largest competitor, the in-situ concrete producer Mebin, has a market share of only [2 to 5]* %, while the other competitors have less than 2 %. This can be contrasted with a [50 to 60]* % market share for CVK, the only supplier of sand-lime bricks. The competitive pressure on such a market depends not only on a product's market position but also on competitors' market positions. Of relevance to the market position of competitors is what products they supply. This is especially true in the present case because the relevant market is a differentiated product market in which different products compete for the same end-uses. The possibility of supplying a certain product that may be particularly appreciated by certain consumers or for certain uses may be of importance as far as a firm's position on such a market is concerned,

— the large building material dealers do not have any buyer power. First of all, even a [20 to 30]* % share of total purchases does not confer any buyer power on the largest customers because there are a sufficient number of other building-material dealers available as an alternative. A few of these

building-material dealers are, moreover, purchasing cooperatives (in Dutch: *inkoopcombinaties*). What matters is that building-material dealers are dependent on trade in CVK's products. Sand-lime bricks are the most important wall-building material in the Netherlands. The next most important wall-building material is — also in the parties' opinion — concrete. But this is not an alternative as far as the building-materials trade is concerned as neither in-situ concrete nor — in appreciable quantities — precast concrete walling units are distributed via that trade. No other building-material can therefore, from the building-material dealer's point of view, replace the distribution of sand-lime bricks. Moreover, CVK has more influence over pricing vis-à-vis building contractors than the parties admit. The following points are significant in this respect. Building-material dealers bear the financial risk inherent in distribution. It is not building-material dealers that choose the building material, but building contractors. As already indicated, CVK is generally well informed about the identity of users and the destination of its products. Deliveries are made direct from whichever sand-lime brickworks is closest to the building site. According to CVK, discounts are granted to building-material dealers, whereby the latter may be required to supply the goods to specific building contractors or for specific building projects. Building contractors are, however, dispersed and not in a position to exercise any buyer power themselves,

— the arguments adduced by Haniel to the effect that there are no market entry barriers are not sound. The investment costs to which Haniel refers are contradicted by competitors surveyed by the Commission in the course of its market investigation, who state unanimously that it is only with the greatest difficulty that they could expand their existing production capacities or embark upon the manufacture of another wall-building material. During the market investigation, even Cementbouw's estimate of the investment costs was significantly higher than Haniel's. According to the competitors, there had been a small number of market entries, but they were confined to the concrete segment. Entries in the sand-lime brick segment were non-existent,

— according to the information in the Commission's possession, CVK is in a position, in its pricing, to take account of whether its products are used in either load-bearing or non-load-bearing walls. As stated above, sand-lime bricks are used essentially in load-bearing walls. CVK is aware of the specific use to which its products are put partly through its knowledge of the building site that is being supplied. It also has access, as far as sand-lime units are concerned, to the architects' plans for the building projects supplied by it. Haniel has pointed out, moreover, that the thickness of a substantial part of sand-lime brick products indicates whether they are being used in load-bearing or in non-load-bearing walls.

(111) There is no evidence in the Commission's possession to suggest that there has been any weakening of CVK's market position in favour of its competitors. On the contrary, Haniel has stated more than once in its correspondence with the Commission that operators' market shares have scarcely changed in recent years. Nor is there any evidence to suggest that the situation will change in the foreseeable future.

(112) The Commission does not agree with Cementbouw's assertion that it is to be regarded as a competitor independent of CVK. The Commission has already explained at length above that Cementbouw controls CVK jointly with Haniel and, for that reason alone, cannot be regarded as an independent competitor. Even if, as is maintained by the intervening parties, Cementbouw does not control CVK, a 50 % stake in a company with a [50 to 60]*% market share is so important a source of revenue that it is improbable that Cementbouw would not take this into account in its behaviour in relation to its other activities.

(cc) Strengthening of the dominant position of Haniel (CVK) through the merger

(113) The Commission is of the opinion that the concentration would strengthen the dominant position of Haniel (CVK) on the Dutch market in wall-building materials for load-bearing walls. The reasons for this are as follows:

1. Acquisition of Ytong

(114) On the assumption that Haniel acquires only Ytong, Haniel's market share would be increased by only around [0 to 2]*% to [50 to 60]*% as a result of the concentration. If in-situ concrete were deemed not to form part of the market in wall-building materials for load-bearing walls, Haniel's market share would be increased by [0 to 2]*% to [60 to 70]*%; and if only in-situ concrete cast by the tunnel-forming method were to be excluded from the relevant market, the increase would be [0 to 2]*% and the joint market share [60 to 70]*%. An additional factor is that, with sand-lime bricks, CVK controls by itself the most important wall-building material in the Netherlands. Owing to the abovementioned high market entry barriers, it is not to be expected that other suppliers will enter this segment. All of Haniel's competitors supply other products as wall-building materials for load-bearing walls. Cementbouw, the only supplier on the relevant market with a share of just under [2 to 5]*%, is itself a controlling shareholder of CVK and cannot therefore be considered an independent competitor. The remaining competition is widely dispersed, no one competitor having a market share in excess of [2 to 5]*%. None of the competitors is thus of appreciably greater significance on this market than Ytong. This means that

positions on the Dutch market are already so well established that very little in the way of competition takes place there. Consequently, even a small increase in Haniel's market position in conjunction with other factors may significantly reduce the few remaining opportunities still open to competitors.

(115) The strengthening of the existing dominant position of Haniel (CVK) through the acquisition of Ytong cannot be assessed on the basis of the size of the increase in market share alone. In the wall-building materials sector as a whole, Ytong is the largest competitor operating independently of Haniel without structural links to Haniel. Ytong is, moreover, the leading supplier of aerated concrete in the Netherlands, a material which is used both in load-bearing and in non-load-bearing walls. With a total of some [...] m³, Ytong sold more than five times as much aerated concrete in the Netherlands in 2000 as the only other supplier, Fels. As a result of the concentration, Haniel would therefore, with Ytong, acquire the largest producer of aerated concrete. In a differentiated product market, Haniel would thus be not only the sole supplier of sand-lime bricks, which is by far the most important wall-building material in the Netherlands, but, with [> 80]*% of sales, would also become the main supplier of aerated concrete. It is true that aerated concrete is, in principle, in competition with sand-lime bricks and the other products belonging to the market in load-bearing wall-building materials. However, in a differentiated product market such as the present market, in which different products are in competition with one another for the same types of use, the ability to offer a specific product which is perhaps preferred by certain users or for certain purposes may be important to the market position of a firm.

(116) Customers surveyed as part of the market investigation stated that they saw a danger of significant price increases if Ytong, as an independent active supplier of aerated concrete, were to depart from the market.

(117) The market investigation has shown that Ytong is well established in particular as a supplier to the leading Dutch building-materials trading groups. The other supplier of aerated concrete in the Netherlands, Fels, has difficulties supplying them as well. Consequently, Fels is currently reliant on the 'independent' dealers, who make fewer sales and are less strong financially. Furthermore, in contrast to Fels, Ytong has its own production facilities in the Netherlands and does not operate on the market solely through imports.

(118) Ytong's favourable position is based on its strong position on the neighbouring market in non-load-bearing wall-building materials. As has already been pointed out, aerated concrete is the only other significant wall-building material apart from sand-lime bricks which is used both for load-bearing and for non-load-bearing walls. In 2000 the Dutch market in wall-building materials for non-load-bearing walls had a volume of 1,7 million m³ and was worth EUR 282

million. The following table shows the market shares (by volume) of the parties and of their main competitors, all non-load-bearing wall-building materials being included ⁽¹⁸⁾:

Non-load-bearing wall-building materials

(in %)

Company	Building material	Market share
CVK (Haniel/Cementbouw)	Sand-lime bricks	[15—20]*
Ytong	Aerated concrete	[15—20]*
CVK + Ytong		[30—40]*
GIBO	Gypsum plaster-boards and planks	[10—15]*
Lafarge	Gypsum plaster-boards and planks	[10—15]*
Gyproc	Gypsum plaster-boards and planks	[5—10]*
Fels	Aerated concrete, gypsum	[5—10]*
Knauf	Gypsum plaster-boards and planks	[2—5]*
Wienerberger	Clay bricks	[0—2]*
Hanson (Pioneer)	Clay bricks	[0—2]*
CRH	Clay bricks	[0—2]*

(119) After Haniel, Ytong is the strongest competitor on the market in non-load-bearing wall-building materials. As the only supplier of sand-lime bricks, Haniel (CVK) is once again the strongest competitor here, with a market share of more than [15 to 20]* %. Ytong is with aerated concrete the second strongest competitor with almost [15 to 20]* %. As a result of a concentration, Haniel (CVK)/Ytong would thus become about [2 to 5]* times as large as the next largest competitor. That competitor, GIBO, has a market share of [10 to 15]* %. Fels, the only alternative supplier of aerated concrete, has a market share of around [2 to 5]* %. All the other competitors supply only gypsum products.

(120) This strong position of Ytong on the market in non-load-bearing wall-building materials has a direct impact on its position on the market in load-bearing wall-building materials. Its turnover on the market in non-load-bearing wall-building materials gives Ytong access to customers for load-bearing wall-building materials too, since they are the same on both markets.

The marketing structure and distribution system can therefore be used equally on both markets. Other suppliers which — apart from Haniel and Fels — operate on only one of the two markets do not have this possibility. The same applies to investment in production facilities, which can be used for supplying both markets.

(121) Prior to the merger, Haniel (CVK) can supply only one wall-building material, sand-lime bricks. Following the merger, Haniel (CVK) plus Ytong would be in a position, through the supply of sand-lime bricks and aerated concrete, to cover the bulk of demand from building-material dealers for wall-building materials both for load-bearing and for non-load-bearing walls. This would increase Haniel's lead over the suppliers of materials competing with sand-lime bricks on the market in wall-building materials for load-bearing walls, since none of its competitors is similarly able to cover its customers' requirements so comprehensively.

(122) In these circumstances, it is to be expected that, through the takeover of Ytong, Haniel will be placed in a position to induce customers to a significant extent to obtain all their wall-building-material requirements from itself and thus to further restrict the scope of other suppliers. As a result, the competitive pressure emanating from other suppliers of wall-building materials for load-bearing walls would be further diminished, leading to higher prices.

2. Acquisition of Ytong and Fels

(123) If, as a result of exemption by the Commission and the *Bundeskartellamt*, Haniel is allowed to take over not only Ytong, but also Fels, competitors would be even less able to stand up to a market leader consisting of Haniel/Ytong/Fels. On the market in load-bearing wall-building materials, the market share of Haniel (CVK)/Fels amounting to [50 to 60]* % (or alternatively: [50 to 60]* % or [60 to 70]* %) ⁽¹⁹⁾ would be increased by about [0 to 2]* % through the acquisition of Ytong. On the market in non-load-bearing walls, the market share of Haniel (CVK)/Fels amounting to [20 to 30]* % would increase through the acquisition of Ytong to [40 to 50]* %.

(124) In the circumstances, Haniel would accordingly control not only the sole supplier of sand-lime bricks in the Netherlands, but also all producers of aerated concrete. As a result, the remaining competitive pressure exerted by aerated concrete on sand-lime bricks would disappear altogether. Haniel would then by itself be in control of the only two most important wall-building materials that can be used in both load-bearing and non-load-bearing walls. Moreover, Haniel would,

⁽¹⁸⁾ Inasmuch as wall-building materials are used in load-bearing and non-load-bearing walls (e.g. sand-lime bricks, aerated concrete), only that part of such building materials which is used in non-load-bearing walls was taken into account.

⁽¹⁹⁾ In so far as in-situ concrete cast by the tunnel-forming method or in-situ concrete not cast by the tunnel-forming method are not included in the market definition, the market shares of Haniel (CVK) increase accordingly; see table in paragraph 95.

through Fels, also supply what is currently the most important wall-building material used in non-load-bearing walls, i.e. gypsum. As the only competitor, Haniel would thus be in a position to supply these three important wall-building materials from one source.

materials. There is, moreover, no commercial incentive to supply such a combination as only 50 % of profits on CVK's sales go to Haniel, whereas Haniel would receive all of the profit on Ytong's sales.

Assessment

3. *The response of the parties to the statement of objections*

The views of the parties

(125) In its answer to the statement of objections, and at the hearing, Haniel maintained that the acquisition of Ytong would not lead to any strengthening of a dominant position. Haniel gave three main reasons for this:

- Haniel asserts that a [0 to 2]* % increase in market share is too small to justify the claim that a dominant position will be strengthened. It points to a number of Commission decisions in which market share additions of this order of magnitude were not considered sufficient for such a strengthening. It finds the Commission's attitude in this case to be inconsistent with its decision in Case COMP/M.2495 — Haniel/Fels. The Commission cleared Haniel's acquisition of Fels because it did not consider Fels's market position to be sufficient to strengthen a dominant position. Fels has a market share of [0 to 2]* %,
- the position of Ytong on the neighbouring market in non-load-bearing wall-building materials is not such as to influence Ytong's position on the market in load-bearing wall-building materials. Like the producers of other wall-building materials, Ytong has for decades had access to the building-material trade's distribution system. Owing to its considerable market share in the sand-lime brick segment, Haniel is already present in the neighbouring market in wall-building materials for non-load bearing walls, so any advantages stemming from a simultaneous presence in both markets already existed and would not be increased by the acquisition of Ytong. Moreover, apart from sand-lime bricks, aerated concrete is not the only wall-building material to be used in both load-bearing and non-load-bearing walls, as this also applies to clay bricks, concrete blocks and precast concrete units,
- Haniel can derive no advantage from being able to supply aerated concrete in addition to sand-lime bricks as in the building-materials trade a full product range includes more than just wall-building

(126) The arguments advanced by the parties cannot refute the grounds on which the Commission finds that CVK is in a dominant position. The reasons for this are as follows:

- the small size of the market share increase is not decisive as a means of excluding the strengthening of a dominant position. Haniel itself points out in its reply to the statement of objections that the market position cannot be inferred schematically from the market shares. As explained in detail above, the Commission was also influenced by this aspect when making its assessment. It focused on all factors constituting Ytong's market position, and explained in detail in this connection why the market positions of Ytong and Fels differ in such a way that it can rule out a strengthening in one case and rule it in in the other. The factors mentioned include the fact that Ytong is the leading supplier of aerated concrete in the Netherlands and sells five times more aerated concrete than Fels. Moreover, in assessing the size of the market shares and their ability to strengthen an existing dominant position, the size of the other market players has to be taken into account. None of the competitors is substantially larger than Ytong. Ytong's market share is twice the size of Fels's and there are a large number of substantially smaller suppliers of wall-building materials whose market shares are low, being well below [0 to 2]* %. The present case is characterised, furthermore, by a differentiated relevant product market. Every wall-building material has specific characteristics (see above for a detailed description), and any given wall-building material may be more suitable for some uses than for others. In-situ concrete, and in particular that cast by the tunnel-forming method, is, for example, better suited to larger projects, while aerated concrete is used in load-bearing walls in the Netherlands primarily in houses and hence in smaller-sized projects. On a scale depicting the magnitude of projects, in-situ concrete cast by tunnel-forming would therefore be right at the top, followed by in-situ concrete made by other methods. Aerated concrete would be at the bottom end of the scale, while sand-lime bricks would fill almost the entire scale. The acquisition of a product such as aerated concrete will therefore, by adding a further product, very likely strengthen an existing dominant position based on a single product such as sand-lime bricks,

— the arguments adduced by the intervening parties do not refute the considerations demonstrating that Ytong's position on the neighbouring market in non-load-bearing wall-building materials is quite likely to influence its position on the load-bearing walls market. The fact that Haniel already has, through CVK, a considerable market share on this neighbouring market with sand-lime bricks does not invalidate the above conclusion. As a result of the acquisition, Haniel could offer a further product in the form of aerated concrete on both markets. Ytong's established access to the large building-material dealers, through whom, as Haniel points out, almost all aerated concrete is distributed in the Netherlands, was expressly emphasised by the Commission, whereas Fels clearly does not have such access. Such access is, however, useful for purposes of distribution in both markets, with the result that a strong position on one of the two markets definitely strengthens the position on the other market. In contrast to other wall-building products such as clay bricks or concrete, aerated concrete is one of the three leading wall-building materials for non-load-bearing walls apart from sand-lime bricks, which are supplied by Haniel alone, and gypsum. These three products together make up more than [> 80]* % of the wall-building materials used in the non-load-bearing wall sector. Of these, only sand-lime bricks and aerated concrete are also used in load-bearing walls,

— nor does the fact that the building-materials trade supplies a large number of products stand in the way of the above advantages. On the contrary, the acquisition of the largest aerated concrete producer in the Netherlands would increase building-material dealers' existing dependence on CVK's sand-lime brick products even further as they would henceforth have to rely extensively on CVK also for the distribution of aerated concrete. Since, as has already been explained, concrete products are not distributed via the building-materials trade, the building-materials trade would have to obtain a substantial part of the wall-building materials it distributes from Haniel through CVK. An economic incentive for the parties stems from the fact that the total attainable earnings can be increased by selling both products under one roof.

4. Result

- (127) The Commission therefore concludes that the merger will strengthen the existing dominant position of Haniel (CVK) in the market for wall-building materials for load-bearing walls in the Netherlands — all the more so if Haniel simultaneously acquires Fels.

(c) *The market in wall-building materials for non-load-bearing walls*

- (128) As stated in recital 115, Haniel has in the Netherlands, through its indirect stake in CVK, the only producer of

sand-lime bricks, a strong, though not dominant, position on the market in wall-building materials for use in non-load-bearing walls. The acquisition of Ytong would not lead to the creation of a dominant position on this market. This would also be the case if Haniel were in addition to acquire Fels as well. The reasons for drawing this conclusion are as follows.

- (129) Haniel (CVK) is, with a market share of [15 to 20]* %, the market leader on the market in wall-building materials for non-load-bearing walls and — as already stated — the only supplier of sand-lime bricks, the main building material for both load-bearing and non-load-bearing walls. As the leading producer of aerated concrete for non-load-bearing walls, Ytong, with a [15 to 20]* % market share, is very close to the market position of Haniel (CVK), and the three main gypsum producers, GIBO, Lafarge and Gyproc, have substantial market shares of between [5 to 10]* % and [10 to 15]* %. Given this market structure prior to the merger, the possibility of Haniel (CVK) having a dominant position can be ruled out.

- (130) As a result of the merger with Ytong — a supplier of aerated concrete with a not insignificant market share of [15 to 20]* % — Haniel's market share would increase to [30 to 40]* %, thus widening the gap between it and its next largest competitors. Haniel would extend its product range to include aerated concrete, an important product for non-load-bearing walls. However, given the existence of strong competitors, especially in the gypsum segment, it is not to be expected that, as a result of the takeover of Ytong, Haniel would increase its competitive room for manoeuvre to such an extent that a dominant position would be created by the concentration.

- (131) The same points apply if Haniel were in addition to acquire Fels as well. Haniel's market share would admittedly then increase to [40 to 50]* % and its product range would be extended to include gypsum. Haniel would thereby not only consolidate its position as market leader, but it would also be the only competitor to be able to supply all three essential wall-building materials for non-load-bearing walls. Nevertheless, the market structure outlined in the preceding recital suggests that, even in these circumstances, Haniel would not acquire a dominant position on the market in wall-building materials for non-load-bearing walls.

2. OTHER NATIONAL MARKETS

- (132) Apart from in Germany, whose markets are not being examined by the Commission in these proceedings, and the Netherlands, the concentration would also lead to additions of market shares in Belgium, France and, if Haniel were to take over Fels, Austria.

(133) In Belgium, Haniel has one sand-lime brick factory. Ytong owns one aerated concrete plant there. The combined share of Haniel and Ytong in the sale of wall-building materials is [2 to 5]* % and, if all wall-building materials are included (including precast concrete products and in-situ concrete), less than [2 to 5]* %. Fels (Hebel) sells wall-building materials there but does not have any production plants of its own. The combined share of Haniel, Ytong and Fels in the sale of wall-building materials is [5 to 10]* % and, if all wall-building materials are included (including precast concrete products and in-situ concrete), less than [2 to 5]* %. Even if a distinction is made between building materials for load-bearing and non-load-bearing walls, these market shares are such that the possibility of their reaching competitively critical thresholds can be ruled out.

(134) In France, Haniel has a stake in ready-mixed concrete plants. Ytong owns one aerated concrete plant there. Market share additions will arise only if one assumes a larger market for wall-building materials that includes precast concrete products and in-situ concrete. In that case, the combined market share amounts to about [0 to 2]* %. Fels (Hebel) operates three aerated concrete plants in France. The combined share of Haniel, Ytong and Fels in the sale of wall-building materials is less than [2 to 5]* % and, if all wall-building materials are included (including precast concrete products and in-situ concrete), less than [2 to 5]* %. Even if a distinction is made between building materials for load-bearing and non-load-bearing walls and/or if a possible regional market definition is applied, these market shares are such that the possibility of their reaching competitively critical levels can be ruled out.

(135) Haniel is not active in Austria. Fels distributes in Austria, through a subsidiary, aerated concrete products and gypsum plasterboards. However the market is defined, Fels thus has market shares of less than 2 %. In the market in masonry materials, that market share is even less than [0 to 2]* %. Ytong operates one plant and sells aerated concrete products. In the market in masonry materials, the combined market share of Haniel, Fels and Ytong is about [5 to 10]* %, and in the market in wall-building materials about [2 to 5]* %. Even if a distinction is made between building materials for load-bearing and non-load-bearing walls, these market shares are such that the possibility of their reaching competitively critical levels can be ruled out.

(136) The concentration will not therefore lead to the creation or strengthening of a dominant position in Belgium, France and Austria.

3. RESULTS OF THE COMPETITIVE ASSESSMENT

(137) The Commission accordingly comes to the conclusion that the takeover of Ytong by Haniel would lead to a strengthening of a dominant position on the Dutch market in wall-building materials for load-bearing walls. If Haniel were in addition to acquire Fels as well, this

strengthening of a dominant position would be even further accentuated. The Commission draws this conclusion irrespective of whether in-situ concrete cast by the tunnel-forming method or in-situ concrete as a whole is to be included in this market.

VI. COMMITMENTS SUBMITTED BY HANIEL

(138) In order to remove the Commission's objections in relation to the market in wall-building materials for load-bearing walls in the Netherlands, Haniel has submitted the commitments described below. They are set out in full in the Annex.

(139) Ytong Holding AG holds all the shares in Ytong Nederland BV (hereinafter called 'Ytong Nederland'). Haniel undertakes to cause this shareholding in Ytong Nederland to be sold within a period fixed for that purpose. The purchaser must be in a position to operate Ytong Nederland as an active force in competition with Haniel.

(140) Haniel undertakes, moreover, to ensure that, in the contracts to be concluded with the purchaser of the shareholding in Ytong Nederland, a provision is included to the effect that Ytong Nederland may control permanently the 'Durox' trademark and, in the Netherlands for a transitional period provided for in the commitment, the 'Ytong' trademark.

(141) The period for fulfilment of the commitments starts to run at the time of service of the Commission decision in Case COMP/M.2650 — Haniel/Cementbouw/JV (CVK) (hereinafter called the CVK decision). If an action is brought against the CVK decision under Article 230 of the EC Treaty or if applications for suspension of execution or other interim measures are made under Articles 242 and 243 of the EC Treaty, the period will start to run at the time of service of the order on the applications for suspension of execution or other interim measures pursuant to Article 107 of the Rules of Procedure of the Court of First Instance.

(142) The commitments will be without effect if, within the period referred to in recital 141 and within the framework of proceeding COMP/M.2650 Haniel/Cementbouw/JV (CVK), CVK is dissolved or undertakings in which Haniel has a direct or indirect interest no longer have a stake in CVK. If these circumstances obtain after the sale of the shares in Ytong Nederland by Haniel, the Commission may at Haniel's request annul the obligation to sell or amend it in Haniel's favour.

(143) With the Commission's agreement, Haniel may be granted a repurchase right in the sales contracts should the circumstances referred to in recital 141 obtain.

- (144) The commitments also contain standard clauses on separate administration of the company to be sold and rules on trusteeship.

VII. COMPETITIVE ASSESSMENT OF THE NOTIFIED TRANSACTION IN THE LIGHT OF HANIEL'S COMMITMENT

A. ASSESSMENT OF THE COMMITMENT TO SELL THE SHAREHOLDING IN YTONG NEDERLAND

- (145) In the Commission's opinion, the commitments described in recitals 135 to 141 suffice suitably to remove the objections regarding the Dutch market in wall-building materials for load-bearing walls. This has also been confirmed by the market investigation.
- (146) As a result of the sale of Ytong's shareholding in Ytong Nederland, the combination, due to the concentration, of the market positions of Haniel (CVK) and Ytong on the relevant market will no longer occur. After the sale, Ytong Nederland will be in a position, as an independent competitor on the Dutch market in wall-building materials for load-bearing walls, to limit the room for manoeuvre of Haniel (CVK) in the same way as before the concentration.
- (147) Ytong is active on the Dutch market exclusively through Ytong Nederland, so that after the sale the combination, due to the concentration, of the market shares of Haniel (CVK) and Ytong on the relevant market will be completely eliminated. Ytong Nederland is a legally independent undertaking with two production plants for aerated concrete products and an independent marketing structure. Prior to its being taken over by Ytong, it was, moreover, active on the Dutch market as an independent undertaking with no parent company.
- (148) Ytong Nederland will be able to continue to use the 'Ytong' trademark, under which its products are currently marketed, for a limited period only. Nevertheless, the Commission is convinced that the period provided for will enable Ytong Nederland to switch from using the 'Ytong' trademark for marketing purposes to using the 'Durox' trademark. The 'Durox' trademark, under which the Dutch undertaking used to market its products before it was taken over by Ytong, continues to enjoy an excellent reputation among consumers of wall-building materials on the Dutch market.

B. TERMINATION OF THE OBLIGATION TO SELL YTONG NEDERLAND IF THE COMPETITION CONCERNS PUT FORWARD BY THE COMMISSION IN CASE COMP/M.2650 — HANIEL/CEMENTBOUW/JV (CVK) ARE RESOLVED

- (149) The Commission is currently seeking to establish whether the acquisition of joint control of CVK by

Haniel and Cementbouw in 1999 is to be considered a concentration within the meaning of the Merger Regulation with respect to its effects on the Dutch market in wall-building materials (Case COMP/M.2650 — Haniel/Cementbouw/JV (CVK)). On 25 February 2002 it decided to intimate proceedings in that case under Article 5(1)(c) of the Merger Regulation. The Commission must take a final decision on the compatibility of that concentration with the common market by 5 July 2002.

- (150) As things stand at present it seems possible that in its decision in Case COMP/M.2650 the Commission will either come to the conclusion that following modification the concentration it is compatible with the common market, as provided in Article 8(2) of the Merger Regulation, or require action that may be appropriate in order to restore conditions of effective competition, as provided in Article 8(4) of the Regulation. It may be that the dominant position which Haniel holds on the relevant market, and which has been identified here, will be brought to an end by any commitments entered into by the parties to the concentration in Case COMP/M.2650 with a view to a Commission decision under Article 8(2) of the Merger Regulation, or by any action required by the Commission under Article 8(4) of the Merger Regulation in order to restore conditions of effective competition; and in that event the concentration which is the subject of the present proceedings would no longer strengthen such a dominant position.
- (151) In the situation described in recital 150, the commitment entered into by Haniel would no longer be needed in order to prevent the concentration at issue here from strengthening a dominant position on the relevant market, and it seems appropriate in that event to release Haniel from its commitment to dispose of Ytong Nederland. The commitment entered into by Haniel therefore includes a clause stating that the promise to sell Ytong Nederland will be without effect if, in the proceedings in Case COMP/M.2650 and in accordance with the conditions set out in recitals 141 and 142, CVK is wound up or steps are taken to ensure that no firm participates in CVK in which Haniel already participates directly or indirectly.

C. OVERALL ASSESSMENT OF THE COMMITMENTS

- (152) The Commission has accordingly come to the overall conclusion that, provided Haniel complies with the commitment it has entered into, the notified concentration would not strengthen Haniel's dominant position on the market in wall-building materials for load-bearing walls in the Netherlands.

VIII. CONDITIONS AND OBLIGATIONS

- (153) The first sentence of the second subparagraph of Article 8(2) of the Merger Regulation states that the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.
- (154) Measures that effect a structural change to the market will be imposed in the form of 'conditions'; implementing steps necessary to achieve this result will take the form of 'obligations'. If a condition is not fulfilled, the Commission decision declaring the concentration compatible with the common market is null and void. Where the undertakings concerned commit a breach of an obligation, Article 8(5)(b) of the Merger Regulation empowers the Commission to revoke a clearance decision, and Articles 14(2)(a) and Article 15(2)(a) empower it to impose fines or periodic penalties on the parties ⁽²⁰⁾.
- (155) In accordance with this basic distinction, the Commission decision should be made subject to the condition that Haniel's commitments regarding the disposal of its stake in Ytong Nederland are complied with in full ⁽²¹⁾. These commitments serve to counterbalance the perceived strengthening of Haniel's dominant position on the Dutch market in wall-building materials for load-bearing walls and thereby to preserve competition on that market. By contrast, all the remaining parts of the statement of commitments, and in particular the commitment to temporary retention and separate management of the stake to be disposed of, and the detailed arrangements regarding the trustee to be appointed by Haniel are to be made subject to obligations since they are designed solely to apply the conditions mentioned previously.

IX. CONCLUSION

- (156) Provided the commitments entered into by Haniel are fully complied with, therefore, it can be accepted that the planned concentration would not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it. Always provided the commitments set out in the Annex

are complied with in full, the concentration should be declared compatible with the common market and the EEA Agreement under Articles 2(2) and 8(2) of the Merger Regulation and Article 57 of the EEA Agreement,

HAS ADOPTED THIS DECISION:

Article 1

The notified concentration by which Haniel Bau-Industrie Porenbeton Holding GmbH acquires sole control within the meaning of Article 3(1)(b) of the Merger Regulation of Ytong Holding AG is declared compatible with the common market and the EEA Agreement.

Article 2

Article 1 shall apply subject to the condition that the commitments entered into by Haniel Bau-Industrie Porenbeton Holding GmbH and set out in points 1, 2, 9 and 17 of the Annex are complied with in full.

Article 3

The obligation is attached to this decision that the other commitments entered into by Haniel Bau-Industrie Porenbeton Holding GmbH and set out in the Annex must be complied with in full.

Article 4

This decision is addressed to:

Haniel Bau-Industrie Porenbeton Holding GmbH

D-47119 Duisburg-Ruhrort

Done at Brussels, 9 April 2002.

For the Commission

Mario MONTI

Member of the Commission

⁽²⁰⁾ See the Commission notice on remedies acceptable under Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98 (OJ C 68, 2.3.2001, p. 3, point 12).

⁽²¹⁾ Annex, points 1, 2, 9 and 17.

ANNEX

The full original text of the conditions and obligations referred to in Articles 2 and 3 may be consulted on the following Commission website:

http://europa.eu.int/comm/competition/index_en.html

COMMISSION DECISION**of 11 December 2002****on the measures implemented by Spain in the agricultural sector following the increase in fuel prices***(notified under document number C(2002) 4378)***(Only the Spanish text is authentic)***(2003/293/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 invited interested parties to submit comments in accordance with the above Article ⁽¹⁾, and taking account of such comments,

Whereas:

(5) The Commission's decision to initiate the procedure was published in the *Official Journal of the European Communities* ⁽²⁾. The Commission invited interested parties to submit their comments on the measures concerned.

(6) By letters of 6 June and 20 December 2001, Spain sent a series of comments.

(7) The Commission has received comments from interested parties. It passed on those comments to Spain, giving it the opportunity to comment on them, and received its comments by letters of 1 and 30 October 2001.

I. PROCEDURE

- (1) By letter of 29 September 2000, the Spanish authorities notified the Commission, in accordance with Article 88(3) of the EC Treaty, of measures to support agriculture following the increase in fuel prices, as set out in the decision to initiate the procedure.
- (2) By fax of 20 November 2000, the Commission asked for further information. That information was supplied by letters of 9 January and 13 March 2001.
- (3) Since most of the measures covered by the notification had already been adopted, they were accordingly transferred to the register of unnotified aid measures (aid NN 19/2001). The notified measures which had not yet been adopted were entered in the register of notified aid (N 681/A/2000).
- (4) By letter of 11 April 2001, amended on 25 April 2001, the Commission notified Spain of its decision to initiate the procedure laid down in Article 88(2) of the Treaty concerning some of the measures, and to consider that others did not meet the requirements to fall within the scope of Article 87 of the Treaty.

II. DETAILED DESCRIPTION OF THE AID

- (8) Name of scheme: measures to support agriculture following the increase in fuel prices.
- (9) Budget: not specified.
- (10) Duration: varies according to the measures.
- (11) Beneficiaries: farmers and agricultural cooperatives.
- (12) Aim of the measures: to compensate the agricultural sector for the increase in fuel prices.
- (13) Possible impact of the measures: distorting competition, favouring the production of certain agricultural products and infringing the rules of the relevant common organisations of the market.
- (14) Rate of aid, costs qualifying for subsidies, accumulation: various according to the measures.

⁽¹⁾ OJ C 172, 16.6.2001, p. 2.

⁽²⁾ See footnote 1.

- (15) Reasons why the procedure was initiated: amendment of Law No 37/1992 on value-added tax ⁽³⁾.
- (16) This measure is contained in Royal Decree-Law No 10/2000 of 6 October 2000 on emergency support for agriculture, fisheries and transport ⁽⁴⁾. It increases the percentage of compensation payable to taxable persons covered by the special value added tax (VAT) arrangements for agriculture and fisheries with a view to offsetting an increase in VAT.
- (17) The measure falls under the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes ⁽⁵⁾ (hereinafter called the Sixth Directive), as last amended by Directive 2002/92/EC ⁽⁶⁾, and in particular Article 25 thereof.
- (18) An analysis of the changes in macroeconomic statistics in the sector relating to farmers covered by the scheme over the preceding three years showed that it was necessary to increase the compensation by no more than 2,5 percentage points on the volume of transactions to offset the VAT charged on purchases of goods and services. In accordance with Article 25(3) of the Sixth Directive, it was decided to introduce varying increases for agriculture, livestock farming and fisheries. The increase was of three points for agriculture and two points for stockfarming and fisheries, bringing the percentage of compensation up to 8 % for the former and 7 % for the latter.
- (19) The measure was introduced to restore the necessary balance between the VAT borne by and the VAT charged to taxable persons covered by the special VAT arrangements for agriculture and fisheries. According to the Spanish authorities it does not constitute State aid.
- (20) In initiating the procedure, the Commission took the following view:
- (21) Article 25 of the Sixth Directive provides that Member States may apply to farmers a flat-rate compensation scheme to offset the VAT charged on purchases of goods and services made by farmers subject to the scheme (flat-rate farmers). The Member States are to fix the flat-rate compensation percentages, where necessary, and notify the Commission before applying them. Such percentages are to be based on macro-economic statistics for flat-rate farmers alone for the preceding three years. They may not be used to obtain for flat-rate farmers refunds greater than the VAT charges previously in force. The Member States may reduce such percentages to a nil rate and round them up or down to the nearest half point. The Member States may fix varying flat-rate compensation percentages for forestry, for the different sub-divisions of agriculture and for fisheries.
- (22) According to the information available to it at the time, the Commission considered that the Spanish authorities had not notified it of the increase in the overall compensation percentages before implementing it, thereby failing to comply with Article 25 of the Sixth Directive. Consequently, the Commission had been unable to judge whether the amendment to Law No 37/1992 was in line with Article 25 of the Sixth Directive, or whether the increase had resulted in all the farmers covered by the flat-rate scheme receiving refunds greater than the VAT charges previously in force, in which case the amendment would constitute a selective tax measure that would affect the resources of the State.

Measures to support agricultural cooperatives

- (23) This measure is provided for in Royal Decree-Law No 10/2000, which amends Law No 27/1999 of 16 July 1999 on cooperatives ⁽⁷⁾ and Law No 20/1990 of 19 December 1990 on the tax arrangements applying to cooperatives ⁽⁸⁾. It abolishes the maximum limit of 50 % of turnover on which agricultural cooperatives must pay tax in their transactions with non-member third parties without losing their preferential tax treatment as granted by Law No 20/1990 for deliveries of B diesel to non-member third parties. Law No 34/1998 of 7 October 1998 on hydrocarbons ⁽⁹⁾ has also been amended to waive the requirement that agricultural cooperatives delivering B diesel to non-members must set up a legal entity to which the general tax arrangements apply.
- (24) In initiating the procedure, the Commission took the following view:

⁽³⁾ Official State Gazette No 312, 29.12.1992, p. 44247.

⁽⁴⁾ Official State Gazette No 241, 7.10.2002, p. 36614.

⁽⁵⁾ OJ L 145, 13.6.1977, p. 1.

⁽⁶⁾ OJ L 331, 7.12.2002, p. 27.

⁽⁷⁾ Official State Gazette No 170, 17.7.1999, p. 27027.

⁽⁸⁾ Official State Gazette No 304, 20.12.1990, p. 37970.

⁽⁹⁾ Official State Gazette No 241, 8.10.1998, p. 33517.

- (25) Royal Decree-Law No 10/2000 granted tax advantages to agricultural cooperatives which they did not enjoy previously.

Loans to farmers

- (26) The first advantage is the waiver of the requirement to set up a legal entity to which the general tax arrangements apply (i.e. higher tax rates) through which to sell B diesel to non-member third parties, whereby cooperatives pay less tax than before on their sales of diesel to non-members. In other words, before Law No 27/1999 was amended, in order to sell B diesel to non-members agricultural cooperatives had to set up a legal entity. Since the Law was changed, they are no longer required to set up a legal entity and so those transactions are subject to a lower rate of tax.
- (27) The second advantage is that agricultural cooperatives are no longer subject to the 50 % limit when selling B diesel to non-member third parties, above which they lose their preferential tax treatment. In other words, before Law No 27/1999 was amended, agricultural cooperatives had to restrict their sales to non-members to 50 % of their turnover if they did not want to lose their preferential tax treatment. Since the Law was changed, they can exceed that limit without losing their preferential tax treatment.
- (28) This would seem to be a specific measure applying only to agricultural cooperatives which confers a tax advantage whereby they now pay less tax than they did before Law No 27/1999 was amended. This advantage was granted in the context of the increase in fuel prices.
- (29) According to the information available at the time, the Commission considered that these measures conferred an advantage on recipients (agricultural cooperatives) which relieved them of charges that were normally borne from their budgets. A loss of tax revenue is equivalent to consumption of State resources in the form of fiscal expenditure (point 10 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation⁽¹⁰⁾). Accordingly, the measure should be considered a selective tax measure affecting the resources of the State.
- (30) This measure is provided for in a Ministry of Agriculture Decision of 15 November 2000⁽¹¹⁾ publishing a Council of Ministers agreement of 10 November 2000, which instructs the credit sections of agricultural cooperatives to sign agreements with the Ministry of Agriculture and the Institute of Official Credit (ICO) to grant to farmers through financial organisations loans of up to ESP 35 billion with an interest rate subsidised by the Ministry of Agriculture.
- (31) These loans are granted on the following terms: a duration of five years with a one-year exemption as regards the repayment of the principal; the interest rate is the ICO's lending rate to financial organisations, the ICO reference rate; the profit margin for the financial organisations is one percentage point; the interest-rate subsidy from the Ministry of Agriculture is three percentage points; the risk of the loans falls on the financial organisations and the maximum amount of loans is ESP 75 000 per hectare, up to a maximum per beneficiary of ESP 4,5 million for individuals and ESP 13,5 million for groups.
- (32) The Ministry of Agriculture may also subsidise the guarantees granted by the State Limited Company for Agricultural Guarantees, when such guarantees are required for the grant of subsidised loans. The guarantee subsidy is intended to cover the management costs and may not amount to more than 1 % of the amount outstanding on the guaranteed loan.
- (33) The Spanish authorities reported that the maximum aid which a farmer received each year averaged over the five-year loan period would be ESP 1 575 per hectare⁽¹²⁾. The average price of diesel was ESP 54,4 per litre in 1999 and ESP 79,8 per litre in 2000. The increase from 1999 to 2000 was thus 47 %.
- (34) According to the Spanish authorities, a comparison between the increase in costs and the annual average aid in the form of interest-rate subsidies (ESP 1 575 per hectare for five years) shows that the aim of the aid is not to compensate farmers for their losses but to allow them to benefit from loans from financial organisations in order to solve their cash-flow difficulties caused by

⁽¹¹⁾ Official State Gazette 276, 17.11.2000, p. 40088.

⁽¹²⁾ Interest rate subsidy: 3 %, duration of loan: five years. One-year exemption, maximum amount of the loan per hectare: ESP 75 000. $0,03 \times 75\,000 \times (1 + 1 + 1/4 + 2/4 + 3/4)^{1/5} = \text{ESP } 1\,575$ per hectare.

⁽¹⁰⁾ OJ C 384, 10.12.1998, p. 3.

the disproportionate increase in diesel costs. That increase, which caused public disturbances, strikes, energy and food shortages and difficulties for the free transit of goods across Community territory, should be considered an exceptional occurrence within the meaning of Article 87(2)(b) of the Treaty.

(35) The Spanish authorities argued that this measure cost less than the reduction in special taxes and VAT applied by other Member States and disapproved of by the Commission. If this aid were to be considered incompatible with the common market, Spanish farmers would be at a disadvantage compared to farmers in other Member States who had benefited from tax reductions.

(36) In initiating the procedure, the Commission took the following view:

(37) Subsidising the interest rate on loans is tantamount to granting State aid to farmers. Furthermore, some farmers would receive State aid in the form of a rebate on part of the administrative costs on guarantees on the subsidised loans. Consequently, these measures should be considered selective aid granted by the State.

Tax measures relating to personal income tax and VAT

(38) These measures are provided for in an Order of 29 November 2000 of the Ministry of Finance developing for 2001 the scheme for the objective assessment of personal income tax and the simplified special arrangements for VAT ⁽¹³⁾.

For 2000, a corrective index was applied to feed purchased from third parties in the case of certain livestock farming activities covered by the scheme for objective assessment of personal income tax

(39) A 5 % reduction in the calculation of the net yield of certain livestock farming activities subject to the objective assessment scheme by increasing the corrective index applied to fodder purchased from third parties.

(40) In initiating the procedure, the Commission took the following view:

(41) This change in the corrective index appeared to confer on its beneficiaries an advantage which relieved them of charges that were normally borne from their budgets. A loss of tax revenue is equivalent to the consumption of State resources in the form of tax expenditure. The Spanish authorities did not justify this measure by the nature or general scheme of the tax system.

(42) Consequently, on the basis of the information available at that time, the Commission considered that this tax measure, which was attributable to the State, affected the resources of the State and conferred a selective advantage, did not seem justified by the nature or general scheme of the tax system.

For 2001, a reduction in the net yield under the scheme for the objective assessment of personal income tax for farming activities

(43) All the farming activities for which the yield is determined using the objective assessment scheme are granted a 35 % reduction on the purchase price of the agricultural diesel needed to carry out those activities, duly documented by means of invoices.

(44) In initiating the procedure, the Commission took the following view:

(45) The Spanish authorities did not provide an explanation for the reduction in yield which would justify its introduction as a means of bringing tax into line with actual economic activity in the light of the exceptional circumstances caused by the increase in fuel prices.

(46) Consequently, according to the information available at that time, this measure did not appear to be justified by the nature or general scheme of the system, and was to be considered as selective aid granted by the State.

Also for 2001, reduction of the percentage for calculating quarterly VAT payments under the simplified arrangements for certain agricultural activities

(47) The reductions in the percentage applied for calculating quarterly VAT payments under the simplified arrangements for certain agricultural activities are as follows: intensive pig and poultry farming (for meat), 7 %; intensive farming of laying hens and sheep, goats and cows for dairy production, 1 %; intensive farming of

⁽¹³⁾ Official State Gazette 287, 30.11.2000, p. 41611.

beef cattle and rabbits, 14 %; intensive farming of breeding pigs and cattle and other forms of livestock farming, whether intensive or extensive, not explicitly included under other headings, 19 %; intensive farming of sheep and goats for meat, 24 %; breeding, keeping and fattening poultry, 24 %; other activities and related services carried out by farmers or stockfarmers, 28 %.

prejudge the Commission's position on the compatibility or incompatibility of aid granted before that period.

Increase in the percentage of expenditure which is difficult to substantiate in the context of personal income tax

(48) In initiating the procedure, the Commission took the following view:

(49) This reduction in the percentage used for calculating quarterly VAT payments under the simplified arrangements reduced payments and conferred on beneficiaries an advantage which relieved them of charges that were normally borne from their budgets. A loss of tax revenue is equivalent to the consumption of State resources in the form of tax expenditure. The Spanish authorities did not justify this measure by the nature or general scheme of the tax system. Consequently, according to the information available at the time, this tax measure did not seem justified by the nature or general scheme of the tax system.

Extension, for 2000 and 2001, of tax benefits applicable to personal income tax on the transfer of certain agricultural land and holdings

(50) This extension of tax benefits on the transfer of certain agricultural land and holdings, provided for in the sixth additional provision of Law No 19/1995 of 4 July 1995 on modernising agricultural holdings ⁽¹⁴⁾, is contained in the seventh transitional provision of Law No 14/2000 of 28 December 2000 on measures relating to taxation, administration and social order ⁽¹⁵⁾.

(51) In initiating the procedure, the Commission took the following view:

(52) This measure conferred on its beneficiaries an advantage which relieved them of charges that were normally borne from their budgets. A loss of tax revenue is equivalent to the consumption of State resources in the form of tax expenditure. Accordingly, this extension of tax benefits appeared to constitute State aid. This position related only to 2000 and 2001 and did not

(53) This was the only measure that had not yet been adopted when Spain sent its comments, and therefore constitutes notified aid. The percentage of expenditure which is difficult to substantiate in the context of personal income tax was increased from 5 % to 10 %, for agriculture only and for the 2000 and 2001 financial years only.

(54) In initiating the procedure, the Commission took the following view:

(55) The Spanish authorities had not given any data on this increase in the percentage of expenditure which is difficult to substantiate, as applied to farmers covered by the objective assessment scheme, that would justify it by the nature or general scheme of the tax system and demonstrate that it had been introduced to bring tax into line with actual economic activity in the light of the exceptional circumstances caused by the increase in fuel prices.

(56) Consequently, in the light of the information available at the time, this tax measure did not appear justified by the nature or the general scheme of the tax system and appeared to confer on its beneficiaries an advantage which relieved them of charges that were normally borne from their budgets. A loss of tax revenue is equivalent to the consumption of State resources in the form of tax expenditure.

In conclusion, the Commission took the following view when initiating the procedure:

(57) According to the information available to it at the time, all these measures were to be considered tax measures attributable to the State and affecting the resources of the State; they conferred a selective advantage and did not appear justified by the nature or general scheme of the tax system, and therefore constituted selective aid granted by the State.

(58) The information supplied by the Spanish authorities, according to which the price of fuel rose by 47 % between 1999 and 2000, provoking public disturbances, strikes and energy and food shortages, was not sufficient to allow the Commission to conclude, at that stage in the procedure, that the increase in fuel prices was an

⁽¹⁴⁾ Official State Gazette 159, 5.7.1995, p. 20394.

⁽¹⁵⁾ Official State Gazette 313, 30.12.2000, p. 46631.

exceptional occurrence within the meaning of Article 87(2)(b) of the EC Treaty.

III. COMMENTS FROM INTERESTED PARTIES

(59) The measure extending, for 2000 and 2001, tax benefits applicable to personal income tax on transfer of certain agricultural land and holdings could be considered an investment aid in the primary production sector, given that the tax benefit is linked to the transmission of farm land and agricultural holdings. However, Law No 14/2000, which provides the legal basis for the grant of that aid, laid down no requirement to meet any of the conditions set out in point 4.1 of the Community Guidelines for State aid in the agriculture sector ⁽¹⁶⁾.

(60) According to the information available at that time, the other measures appeared to constitute State aid measures which was simply intended to improve the financial situation of producers without contributing to the development of the sector (point 3.5 of the Community Guidelines for State aid in the agriculture sector). Consequently, at the time the procedure was initiated, it appeared that these measures were to be regarded as operating aid incompatible with the common market.

(61) Moreover, the aid in the form of guarantees made no provision for the conditions which such aid must meet in order to be compatible, as set out in the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees ⁽¹⁷⁾.

(62) Furthermore, it had to be borne in mind that the aid for agricultural products covered by Annex I to the Treaty concerned products most of which are covered by a common organisation of market, and that the Member States have limited power to intervene in the operation of such market organisations, which are the exclusive competence of the Community. This aid was to be considered as in breach of the common market organisations and hence of the Community rules.

(63) In view of the above, the Commission considered that the measures in question, in so far as they were aid, did not appear to be eligible for any of the exceptions provided for in Article 87(2) and (3) of the EC Treaty, and consequently decided to initiate the procedure laid down in Article 88(2) of the Treaty.

⁽¹⁶⁾ OJ C 28, 1.2.2000, p. 2. (Corrected version in OJ C 232, 12.8.2000, p. 19).

⁽¹⁷⁾ OJ C 71, 11.3.2000, p. 14.

(64) All the comments from interested parties concern the support measure for agricultural cooperatives.

Comments from the Association of Service Station Managers (Asociación de Gestores de Estaciones de Servicio)

(65) This Association considers that Royal Decree-Law No 10/2000 grants tax advantages to agricultural cooperatives.

(66) Firstly, waiving the requirement to set up a legal entity to which the general tax arrangements apply in order to distribute B diesel to non-member third parties confers a tax advantage enabling cooperatives to pay less tax than before when selling B diesel to non-members, in that it subjects those transactions to a lower rate of tax.

(67) The second tax advantage lies in the fact that agricultural cooperatives are no longer subject, when selling B diesel to non-member third parties, to the maximum limit of 50 % beyond which they lose their preferential tax treatment.

(68) The Association argues that Royal Decree-Law No 10/2000 encourages the creation outside the market of a parallel network for cooperatives, as 'State-assisted bodies', which are also exempt from fulfilling the legal requirements imposed on their competitors. The purpose of all this would be to enable cooperatives to offer prices lower than those prevailing under normal market conditions, without providing any compensation for holders of facilities selling to the general public (retail distributors), many of whom will be eliminated from the market.

Comments from the Association of Service Station Managers of Madrid, the Catalan Federation of Service Stations and the Spanish Confederation of Service Stations

(69) These associations, which represent practically all service stations in Spain, take the view that Royal Decree-Law No 10/2000 contains measures designed to relieve agricultural cooperatives of various tax charges on their

sales of B diesel to non-members by bringing that activity within a specially-protected tax system.

petroleum sector ⁽²⁰⁾ introduced a new system for the distribution of petroleum products.

(70) These associations argue that since Royal Decree-Law No 10/2000 came into force agricultural cooperatives have obtained the following tax advantages on their sales of B diesel to third parties:

(71) Tax on capital transfers and documented legal acts: cooperatives will not be required to pay tax on their instruments of incorporation, capital increases, fusions and divisions, taking out and cancelling loans (including long-term bonds), acquisition of goods and rights under their apprenticeship and training reserves for the fulfilment of their purpose and transactions to acquire goods and rights directly intended for the fulfilment of their social and statutory purposes.

(72) Company tax: given that that Royal Decree-Law No 10/2000 treats the sale of B diesel to non-member third parties as the economic result of cooperative activity, it will be taxed at the rate of 20 %; moreover, cooperatives are completely free to decide on the depreciation of their new physical fixed assets acquired during the three years following the date of their registration in the Register of Cooperatives, and what is more, they receive a 50 % rebate on their entire company tax bill.

(73) Cooperatives receive a 95 % rebate on their economic activities tax.

(74) Cooperatives receive a 95 % rebate on their immovable property tax.

Comments from the Spanish Confederation of Agricultural Cooperatives

(75) Most of Spain's agricultural cooperatives belong to this Confederation. Agricultural cooperatives began selling petroleum products following an Order of 31 July 1986 ⁽¹⁸⁾ of the Ministry of Economy and Finance amending the Regulation on the supply and sale of fuel and liquid fuel subject to the petroleum monopoly ⁽¹⁹⁾. Law No 34/1992 of 22 December 1992 regulating the

(76) The previous system had suddenly ceased to apply to agricultural cooperatives with the publication of Law No 34/1998 and, specifically, the fifteenth additional provision thereof, prohibiting cooperatives from selling petroleum products (both diesel and petrol) to third parties, unless they set up a legal entity for that purpose, to which the general tax arrangements would apply.

(77) The Confederation argues that Royal Decree-Law No 10/2000 merely removed — and then only partially — the restriction on free competition imposed by the prohibition introduced by the fifteenth additional provision of Law No 34/1998.

(78) The tax advantages enjoyed by cooperative societies must be seen in the light of the technical adjustment standards and the obligations which these impose on cooperatives.

(79) For the purposes of determining the taxable amount for the purposes of company tax, cooperatives must make a clear distinction between the two types of transactions they engage in: transactions with members and transactions with non-members or third parties. Under the technical adjustment standard, provided for in Article 16 of Law No 20/1990, for the purposes of determining the taxable amount the cooperative results of transactions with members are to be considered separately from the extra-cooperative results of transactions between the cooperative and non-members or third parties.

(80) Article 33 of Law No 20/1990 stipulates that the rate of company tax on cooperatives is differentiated, so that a rate of 20 % applies to the taxable amount for cooperative results, and the general rate of 35 % is applied to the taxable amount for extra-cooperative results, including, *inter alia*, the results of transactions between agricultural cooperatives and third parties. Therefore, there is no rebate on the amounts earned by agricultural cooperatives in their transactions with non-member third parties.

(81) Article 23 of Law No 20/1990 defines the amount of company tax payable by cooperatives as the algebraic sum of the amounts resulting from applying the corresponding tax rates to the taxable amounts, whether positive or negative, that amount being the amount payable when positive. Here, according to Article 34 of

⁽¹⁸⁾ Official State Gazette 188, 7.8.1986, p. 27907.

⁽¹⁹⁾ Official State Gazette 58, 9.3.1970, p. 3820.

⁽²⁰⁾ Official State Gazette 308, 24.12.1992, p. 43867.

the Law on specially protected cooperatives, which in principle covers agricultural cooperatives, the tax advantage consists in a 50 % rebate on the full tax payable as defined by Article 23 as mentioned above.

and may not be distributed among members, as in the case of the mandatory social reserves.

- (82) This tax advantage cannot be considered in isolation from the tax paid by cooperative members on their share of their cooperative's profits when they pay their personal income tax. The profits made by a cooperative are distributed among its members on the basis of the cooperative business each carries out during the financial year, not according to the capital each contributed; this is known as cooperative income and is completely different from the dividends paid out by companies with share capital.
- (83) Taking account of these special features, the 50 % rebate on the amount of company tax payable by specially protected cooperatives must be seen in the light of the fact that dividends/cooperative income are taxed twice, first through company tax and then through personal income tax. The alleviation of double taxation in the case of companies with share capital and their shareholders (dividends) has no counterpart in the case of cooperatives and their members (cooperative income), with the result that cooperative income is more heavily taxed than dividends.
- (84) This situation is reflected in Article 23 of Law No 40/1998 of 9 December 1998 on personal income tax and other tax rules ⁽²¹⁾, which ratifies the unequal treatment of dividends (specific to capital companies subject to the general tax system) in relation to returns (specific to cooperatives subject to special tax arrangements).
- (85) Moreover, under Article 66 of Law No 40/1988, personal income tax rebates also vary depending on the type of company involved; in the case of dividends, the rebate will be 40 % of the tax payable, while in the case of cooperative income, Article 32 of Law No 20/1990 applies, according to which the rebate for double taxation is 10 % for protected cooperatives and 5 % for specially protected cooperatives.
- (86) In addition, cooperatives are subject to some specific financial obligations introduced by Law No 27/1999 which do not affect companies subject to the general tax regime but which tie up the resources of cooperatives
- (87) Firstly, the mandatory reserve, as provided for in Article 55 of Law No 27/1999, which is specifically intended for the consolidation, development and guarantee of cooperatives and may not be distributed among the members. This reserve is part of the undistributable net assets and, should the cooperative be dissolved, would be transferred to the State treasury and used to set up a cooperative promotion fund. Under Law No 27/1999, at least 20 % of the cooperative's results and 50 % of extra-cooperative profits (such as income from its transactions with non-members) are paid into the mandatory reserve, as are membership dues and the amounts deducted from the compulsory share subscriptions when members leave the cooperative. This means that part of what each member contributes to the cooperative will never be recovered and that part of the cooperative's surplus is tied up.
- (88) Secondly, the apprenticeship and training reserve, governed by Article 56 of Law No 27/1999, is intended for the training and education of the cooperative's members and workers, dissemination of information about the cooperative movement and promotion of intercooperative relations and the cultural, professional and social welfare of the local community or society in general. According to Law No 27/1999, at least 5 % of the cooperative's results are to be paid into this reserve. Like the mandatory reserve, the apprenticeship and training reserve may not be distributed among the members, even if the cooperative is wound up.
- (89) Consequently, the maximum surplus which can be distributed to cooperative members is lower than what other companies with share capital can distribute to their shareholders because the latter are under no obligation to use the year's profits to fund the mandatory reserves.
- (90) The advantage that a cooperative might have enjoyed as a result of the company tax rebate is offset by the double taxation on personal income imposed on cooperative members and the increase in their tax burden in this way.
- (91) A general overview of the cooperative tax regime, showing both the advantages and the obligations, can be seen in the following practical examples.

⁽²¹⁾ Official State Gazette 295, 10.12.1998, p. 40730.

- (92) The first example analyses the net availability of funds received by a cooperative member as compared with a company shareholder subject to the general tax regime in Spain, starting from same initial results, namely 150 monetary units (mu).

Hypothesis: Cooperative results (50 %) and extra-cooperative results (50 %), applying Law No 27/1999 and assuming that the entire available profit goes to the member. Marginal rate of personal income tax: 48 %

	Cooperative	Company with share capital
Results	Cooperative result (CR): 75 (50 %) Extra-cooperative result (ER): 75 (50 %) Total: 150	150
Financing the social reserves	Apprenticeship and training reserve: 5 % CR = 3,75 Mandatory reserves: 20 % CR = 15 50 % ER = 37,5 Total: 56,25	0
Results after reserves have been financed	CR: 56,25 ER: 37,5 Total: 93,75	150
Company tax	CR: $(75 - 11,25) \times 20 \% = 12,75$ RE: $(75 - 18,75) \times 35 \% = 19,687$ Total: 32,437	$150 \times 35 \% = 52,5$
Available profit	$93,75 - 32,437 = 61,313$	$150 - 52,5 = 97,5$
Personal income tax	Taxable amount: $61,313 \times 100 \% = 61,313$ Tax payable (marginal rate): $61,313 \times 48 \% = 29,430$ Rebate: $61,313 \times 10 \% = 6,131$ Amount payable: $29,430 - 6,131 = 23,299$	Taxable amount: $97,5 \times 140 \% = 136,5$ Tax payable (marg. rate): $136,5 \times 48 \% = 65,52$ Rebate: $97,5 \times 40 \% = 39$ Amount payable: $65,52 - 39 = 26,52$
Net amount received	$61,313 - 23,299 = 38,014$	$97,5 - 26,52 = 70,98$

- (93) Taking a marginal personal income tax rate, for an identical initial result of 150 monetary units, a cooperative member would receive a net amount of 38 units, while a company shareholder subject to the general tax regime would receive 71 units. Moreover, as mentioned above, the double taxation of company tax and personal income tax cancels out the initial effect of the rebate on the full amount of company tax payable.
- (94) The second example, in which different rates are applied to the cooperative's transactions with members and with non-member third parties (i.e. cooperative and extra-cooperative results), shows how the higher the ratio of extra-cooperative to cooperative results, the larger the amount to be paid into the mandatory reserves, the higher the company tax and the smaller the percentage of available profit, so that the higher the extra-cooperative results, the lower the net amount received by each member.

Analysis of different breakdowns between cooperative and extra-cooperative results

	Protected cooperative				Company with share capital
Hypothesis	CR: 75 % ER: 25 %	CR: 66,66 % ER: 33,33 %	CR: 50 % ER: 50 %	CR: 25 % ER: 75 %	
Results	150	150	150	150	150
Financing the social reserves	46,875	50	56,25	65,625	0
Results after reserves have been financed	103,125	100	93,75	84,375	150
Company tax	28,97	30,125	32,437	35,906	52,5
Available profit	74,155	69,875	61,313	48,469	97,5
Personal income tax	28,179	26,55	23,299	18,418	26,52
Net amount received	45,976	43,325	38,014	30,051	70,98

- (95) In conclusion, the Spanish Confederation of Agricultural Cooperatives considers that the legislation on the taxation of agricultural cooperatives in Spain must be analysed as a whole. These tax arrangements make structural distinctions, and the advantages they confer are linked to specific obligations (financing the mandatory reserves, treatment of capital and double taxation).

of compensation must also be notified to the Commission. If this were indeed the conclusion to be drawn from the Sixth Directive, a separate monitoring system would have to be set up for this compensation scheme alongside the general arrangements already in place for monitoring the amendments which the Member States make to their laws, which would not be consistent. Moreover, the text of the Sixth Directive does not require the Commission to authorise the introduction of compensation, but only that it be informed.

IV. SPAIN'S COMMENTS

- (96) By letter of 11 June 2001, the Spanish authorities put forward the following arguments.

Amendment of Law No 37/1992

- (97) Article 25 of the Sixth Directive allows Member States to set up a flat-rate scheme for farmers engaged in farming and fishing. Spain has applied such a scheme since it joined the Community.

- (99) Despite the above, the Spanish Tax Authority notified the Commission (a copy of the document is attached), before the regulation increasing the compensation rate was approved and published in the Official State Gazette, of the Government's intention to increase the compensation rate and to differentiate it according to the product to which it was to be applied, an option expressly provided for in the second subparagraph of Article 25(3) of the Sixth Directive.

- (98) Article 25(3) of the Sixth Directive provides that the Member States may 'fix flat-rate compensation percentages, where necessary, and shall notify the Commission before applying them'. The sense of this provision is, firstly, that the Member States wishing to introduce this type of compensation must notify the amount of compensation before approving it. However, it does not follow from this that changes in the amount

- (100) Secondly, a further obligation on Member States can be construed from Article 25(3) of the Sixth Directive, namely that they must ensure that the amount of compensation does not exceed the tax charged on the taxable individuals covered by the scheme thereby conferring an economic advantage on them. The Spanish rules also comply with this requirement, as

confirmed by the data on which the Spanish authorities based their calculation of the new compensation rates, which were included in a study annexed to Spain's comments in the context of this procedure.

- (101) The method consists of two phases: the first is to calculate the amount of sales of products obtained on holdings subject to the special VAT regime for agriculture and fisheries, the second is to determine the total VAT paid by those holdings on purchases. The result of this exercise shows that the percentage of real compensation has largely exceeded the legally established level since 1987, standing at 8,28 % in 1999.
- (102) Spain concludes that the increase in the flat-rate compensation percentage has at all times complied with Article 25(3) of the Sixth Directive, in the sense that the increase at issue has not conferred an economic advantage on taxable persons covered by the arrangements by granting refunds greater than the charges borne.

Measures to support agricultural cooperatives

- (103) Spain maintains that the argument that the measures to support agricultural cooperatives constitute State aid because cooperatives will pay less tax than they did before the amendment does not stand up, for the following reasons:
- (104) The measures introduced by Royal Decree-Law No 10/2000 are actually measures to liberalise the supply of B diesel, in that they remove barriers that prevented agricultural cooperatives from supplying such fuel to third parties, without this involving a tax advantage to cooperatives that would imply favourable treatment.
- (105) The tax regime for agricultural cooperatives makes a distinction between cooperative business transacted with members and that transacted with non-members, revenue from the latter being known as extra-cooperative results, which are subject to company tax under the general regime, i.e. at the same rate as any other organisation carrying out the same activity.
- (106) The cooperative tax regime is governed by Law No 20/1990, Article 21 of which defines extra-cooperative returns as revenue from carrying out cooperative business with non-member third parties, such that extra-cooperative results are subject to the general rate of company tax as laid down in Article 26(3) of Law No 43/1995 of 27 December on company tax ⁽²²⁾. On the other hand, the sixth additional provision of Law No 27/1999 requires cooperatives to keep separate accounts for their transactions with non-member third parties.
- (107) The purpose of the measures introduced by Royal Decree-Law No 10/2000 is to liberalise the supply of B diesel by allowing agricultural cooperatives to supply such fuel, irrespective of what share of the cooperative's total business those transactions represent, without thereby losing their entitlement to preferential tax treatment for their cooperative business. The aim is to allow cooperatives to carry out this activity without having to set up a separate entity, since the same company tax is payable in both situations in so far as the revenue from sales of B diesel to third parties is subject to the general company tax regime.
- (108) Spain concludes that the measures introduced by Royal Decree-Law No 10/2000 are not State aid inasmuch as they do not alter or affect competition in the distribution of B diesel, since all firms, including agricultural cooperatives, engaging in this activity are subject to the same rate of company tax.
- (109) In addition to its comments on this measure in its letter of 6 June 2001, Spain also sent, by letters of 1 and 30 October 2001, comments on the comments from interested parties. In its letter of 1 October 2001, Spain added the following comments:
- (110) Both the increase in price of crude oil and the depreciation of the euro against the dollar led to events that substantially changed normal farming conditions and brought about a crisis in the sector. This affected farms by worsening their economic results and, if the trend continued, threatening the survival of many.
- (111) In view of the situation, the Spanish Government decided to introduce not only anticyclical measures but

⁽²²⁾ Official State Gazette No 310, 28.12.1995, p. 37072.

also structural measures, such as further liberalising fuel distribution so that farms could continue their activities while maintaining their competitiveness.

incorrectly interpret the impact of Royal Decree-Law No 10/2000 on the tax regime for protected cooperatives. Extra-cooperative results, including those arising from the distribution of B diesel to non-member third parties, are taxed at the general rate of 35 %.

- (112) The support measures introduced by Royal Decree-Law No 10/2000 are part of the objective to further liberalise the fuel sector. Specifically, they remove certain restrictions imposed by Spanish law on agricultural cooperatives, thereby also certainly opening up the market in the distribution of B diesel in Spain.
- (113) Hence the waiving of the requirement that cooperatives restrict their distribution of B diesel to non-members to less than 50 % of their transactions with members, and the abolition of the rule that cooperatives may only undertake retail sales of petroleum products to non-member third parties if they have previously set up a separate legal entity distinct from the cooperative. This latter requirement restricted the scope of agricultural cooperatives' activities and to some extent contradicted Law No 27/1999, which confirms that the societies it covers may embark on and engage in any economic activity whatsoever.
- (114) The amendment to the effect that cooperatives do not lose their specially protected status when they distribute B diesel to non-member third parties should be construed in its true meaning as removing a penalisation by restoring a pre-existing entitlement that had been taken away, without this conferring any special tax advantages in the distribution of agricultural fuel to third parties.
- (115) The assertion in the comments from the associations of service stations that liberalising the distribution of diesel by cooperatives to non-member third parties results in those transactions being charged only 20 % company tax is incorrect. All transactions between cooperatives and non-member third parties are taxed at the general rate of 35 %.
- (116) In its letter of 30 October 2001 supplementing its comments on the comments from interested parties made in letter of 1 October 2001, Spain added the following comments from the Ministry of Finance: The comments from the associations of service stations
- (117) The sole purpose of the amendments introduced by Royal Decree-Law No 10/2000 is to liberalise the distribution of B diesel by allowing agricultural cooperatives to sell such fuel, irrespective of what share of the cooperative's total business those transactions represent, without thereby losing their entitlement to preferential tax treatment for their cooperative business.
- (118) In any case, those amendments have in no way altered the tax arrangements applicable to the supply of B diesel by cooperatives, and so it should be concluded that there is no measure which might be considered to be State aid within the meaning of Article 87 of the Treaty.
- (119) Concerning the tax on capital transfers and documented legal acts, the comments of the associations of service stations indicate that those advantages predate Royal Decree-Law No 10/2000, so it cannot be said that cooperatives enjoy them as a result of the Decree-Law, but rather that those advantages are designed to encourage this type of society and the cooperative movement in Spain.
- (120) Lastly, concerning local taxes, the comments from the associations of service stations are aimed not so much at the tax advantages enjoyed by specially protected cooperatives themselves as at the change introduced by Royal Decree-Law No 10/2000, which alters the requirements to be met by agricultural cooperatives to qualify for specially protected status, specifically the fact of allowing such cooperatives to distribute B diesel to non-member third parties without restrictions.
- Loans to farmers**
- (121) Spain restricts itself to repeating the arguments already set out in the notification and insisting that this case concerns an exceptional occurrence (Article 87(2)(b) of the Treaty). While accepting that the Commission is right to interpret the notion restrictively, this does not detract from the fact that the exceptional occurrences and the resulting mitigating measure both came into being because the Spanish Government decided to

follow the public line taken by the Commission and not to give in to the Organisation of Petroleum Exporting Countries (OPEC) by cutting fuel taxes, deciding instead to leave the taxes unchanged and to find another way of compensating for the excessive rise in prices that was seriously threatening the survival of farms, provoking strikes, public disturbances and energy and food shortages.

- (122) In its letter of 6 June 2001, Spain confirmed that this type of loan was not being used. However, by letter of 20 December 2001 it reported that these loans had been in operation from 22 November 2001, that funds had already been made available to beneficiaries and that aid payments had accordingly also been made.
- (123) In any case, Spain argues that the cost of this measure is lower than the possible reduction in special taxes and VAT applicable to diesel advised against by the Commission.

Tax measures relating to personal income tax and VAT

Application of a corrective index for feed purchased from third parties to certain livestock farming activities subject to the flat-rate tax arrangements

- (124) This corrective index has existed since 1995 and is applied to certain stockfarming activities according to the percentage of fodder purchased from third parties used in farming operations. Since 2000, this corrective index has been extended to all stockfarming activities, provided that the market value of the fodder purchased from third parties represents more than 50 % of the value of the fodder consumed.
- (125) The use of this index was extended because the net yield indices applicable to these activities were not changed for 2000 or 2001, implying that no account was taken of the increase in the price of fodder when calculating the net return. Thus, when the consumption of fodder purchased from third parties is significant (more than 50 % of all fodder consumed) instead of reducing the net return index, a correcting index (0,95) was introduced.
- (126) Spain concludes that this cannot be considered a selective advantage, rather an objective means of

adjusting the net return to reflect the real yield from the activity.

A reduction in the net yield under the scheme for the objective assessment of personal income tax for farming activities

- (127) The objective assessment scheme for farming activities works by applying a number of net yield indices — determined on the basis of a standard operating account — to the income from the activity concerned. In determining the standard operating account for 2001, the diesel bill was calculated using January 1999 diesel prices. Since the price of diesel rose by around 35 % between January 1999 and 1 January 2001, it was decided to opt for this reduction instead of amending the standard operating account.
- (128) Spain concludes that this cannot be considered a selective State aid, but rather, it is an objective means of adjusting the net return to reflect the real yield from the activity.

Reduction in the percentage used for calculating quarterly VAT payments under the simplified arrangements for certain farming activities

- (129) Concerning the statement that reducing the percentages used for calculating quarterly VAT payments under the simplified arrangements reduces the amount of those payments and therefore confers an advantage to beneficiaries by reducing their tax burden, Spain indicates that this reduction does not affect the indices used to determine the quarterly payments, which are calculated provisionally and regularised at the end of the year.
- (130) The measure was justified by the increase in diesel prices during last six months of 2000, and is provisional, as indicated in the preamble to the Ministerial Order of 29 November 2000 on the simplified arrangements for 2001. That the measure is provisional can be seen in the fact that the reduction in the indices affects only the quarterly payments by instalment, not those used to determine the annual tax due. This means that at the end of the financial year, any difference between the amount due according to the annual indices and the amounts paid on a quarterly basis must be settled.

- (131) Spain concludes that there are no grounds for conceding that there was any reduction in the tax burden calculated for 2001.

Extension, for 2000 and 2001, of tax advantages applicable to personal income tax on the transfer of certain agricultural land and holdings

- (132) This measure, which extends until 31 December 2001 the tax advantages provided for in the sixth additional provision of Law No 19/1995, must be seen in the broader context of the advantages granted to transferors, which are granted only in certain circumstances, depending on the party acquiring the land and holdings which are being transferred.
- (133) Consequently, according to Spain, the measure is not exclusively a tax advantage, but rather an advantage granted when the purchaser meets certain conditions aimed at improving the management of agriculture in Spain and rationalising the size of holdings.

Increase in the percentage of expenditure which is difficult to substantiate in the context of personal income tax

- (134) Spain stated in its comments that the measure had not yet been adopted at the time of writing, and that if it were finally adopted, this would be in order to bring the percentage of expenditure applicable under the simplified method of the objective assessment scheme into line with the actual expenditure which that percentage is supposed to represent (expenditure which is difficult to substantiate and provisions), which has risen because of the increase in the price of diesel.

Conclusion

- (135) Spain considers that the measures adopted by the Spanish Government to support agriculture should not be considered as State aid since they are all fully compatible with Article 87(1) of the Treaty.

V. ASSESSMENT OF THE AID

Article 87(1) of the Treaty

Amendment of Law No 37/1992

- (136) The amendment to Law No 37/1992, provided for in Royal Decree-Law No 10/2000, increases the percentage

of compensation payable to taxable persons covered by the special VAT arrangements for agriculture and fisheries in order to offset an increase in VAT, and falls within the scope of the Sixth Directive, in particular Article 25 thereof.

- (137) The measure was introduced to restore the necessary balance between the VAT borne by and that charged to taxable persons covered by the special VAT arrangements for agriculture and fisheries.
- (138) Before the regulation increasing the compensation rate was approved, the Spanish Tax Authority notified the Commission of the Government's intention to increase that rate and differentiate it according to the product to which it is to be applied, an option expressly provided for in the second subparagraph of Article 25(3) of the Sixth Directive.
- (139) Spain also supplied the Commission, in accordance with Article 25(3) of the Sixth Directive, with the data which the Spanish authorities used to calculate the new compensation rates and which prove that the amount of compensation paid does not exceed their actual tax charges, and so does not confer any economic advantage on individuals taxable under these arrangements. The Commission has examined these data and made no comments concerning them.
- (140) Consequently, in view of the information supplied by Spain in its comments, the Commission considers that this measure falls within the scope of the Sixth Directive and does not constitute a selective tax measure.

Measures to support agricultural cooperatives

- (141) The changes made by Royal Decree-Law No 10/2000 to Law No 27/1999 and Law No 20/1999 merely restore the legal situation regarding the distribution of oil products by agricultural cooperatives prior to adoption of Law No 34/1998.
- (142) Spain has explained in its comments that, under Law 20/1990, agricultural cooperatives pay the general rate of company tax on income from their transactions with non-member third parties, so such transactions enjoy no rebate and the changes introduced by Royal Decree-Law

No 10/2000 do not alter the tax regime applicable to sales of B diesel by cooperatives to non-member third parties.

(143) The amendments made by Royal Decree-Law No 10/2000 allow agricultural cooperatives to distribute B diesel to non-member third parties without having to create a new legal entity for that purpose and allow those transactions to account for more than 50 % of their turnover in supply transactions with such third parties without losing their preferential tax treatment.

(144) While it is true that agricultural cooperatives pay the same rate of company tax as other firms on their income from transactions with non-member third parties, it is nevertheless also true that, since the amendments introduced by Royal Decree-Law No 10/2000, cooperatives may distribute B diesel to non-member third parties without any restriction in turnover and without having to set up a separate legal entity, thereby benefiting from the differentiated tax treatment as cooperatives.

(145) Since before Royal Decree-Law No 10/2000, cooperatives have enjoyed advantages under the tax on capital transfers and documented legal acts, economic activities tax, immovable property tax and company tax. In the case of company tax, transactions with members are subject to a reduced rate and specially protected cooperatives such as agricultural cooperatives, in principle, also receive a 50 % rebate on their overall company tax bill.

(146) But the tax advantages enjoyed by cooperatives must be seen in the light of the technical adjustment standards and the obligations which these impose on cooperatives. As stated by the Spanish Confederation of agricultural cooperatives in its comments, this tax advantage cannot be considered in isolation from the tax paid by cooperative members on their share of their cooperative's profits when they pay their personal income tax, which is completely different from the dividends paid out by companies with share capital. The alleviation of double taxation in the case of companies with share capital and their shareholders (dividends) has no counterpart in the case of cooperatives and their members (cooperative income), with the result that cooperative income is more heavily taxed than dividends. The advantage that a cooperative might have enjoyed as a result of the company tax rebate is offset by the double taxation on personal income imposed on

cooperative members and the increase in their tax burden in this way.

(147) The tax regime for agricultural cooperatives in Spain must be analysed as a whole since it makes structural distinctions so that the advantages it confers are linked to specific obligations (financing the mandatory reserves, treatment of capital and double taxation).

(148) Consequently, in view of the information provided by Spain and by the Spanish Confederation of agricultural cooperatives, the Commission considers that the changes introduced by Royal Decree-Law No 10/2000 to the legislation on agricultural cooperatives do not confer an advantage which alleviates the normal tax burden on their budgets and are not a selective tax measure affecting the resources of the State. This measure does not therefore constitute State aid within the meaning of Article 87(3) of the Treaty.

Loans to farmers

(149) Subsidising the interest rate on loans is tantamount to granting State aid to farmers. Furthermore, some farmers would receive State aid in the form of a subsidy on part of the administrative costs on guarantees on the subsidised loans. Consequently, the Commission believes that these measures are to be considered selective aid granted by the State.

Tax measures relating to personal income tax and VAT

Application of a corrective index for feed purchased from third parties to certain stockfarming activities subject to the flat-rate tax arrangements

(150) In its comments, Spain has explained that this corrective index, which had already existed since 1995, has been extended since 2000 to all stockfarming activities, provided that the market value of the fodder purchased from third parties represents more than 50 % of the value of the fodder consumed. This extension was granted because the net yield indices applicable to these activities were not changed for those years, implying that no account was taken of the increase in the price of fodder when calculating the net return. Thus, when the consumption of fodder purchased from third parties is significant, instead of reducing the net return index, a corrective index is applied. This corrective index was introduced to bring taxation into line with the actual costs created by the increase the price of fodder acquired from third parties. Had that adjustment not

been made, an overpayment of tax would have occurred. This measure is not, therefore, a selective advantage, but an objective method for adjusting the net return to reflect the real yield from the activity.

January 2001, it was decided to reduce the net yield instead of amending the standard operating account. This measure is not, therefore, a selective State aid, but an objective method for adjusting the net yield to reflect the real yield from the activity.

(151) Point 27 of the Commission Notice on the application of the State aid rules to measures relating to direct business taxation states that 'specific provisions that do not contain discretionary elements, allowing for example tax to be determined on a fixed basis (for example, in the agricultural and fisheries sectors), may be justified by the nature and general scheme of the system (...). Such provisions do not therefore constitute State aid'.

(152) The Spanish rules on the tax on earnings of producers subject to the objective estimate arrangements provide for a tax regime based on units corresponding to the economic results of farms under normal price, cost and income conditions. Those rules stipulate that in the event of exceptional circumstances which alter the economic reality, units can be adjusted to bring the situation back into balance. According to the Spanish authorities, the increase in fuel prices led to increased fodder prices, giving rise to exceptional circumstances that caused a substantial change in conditions, requiring the introduction of an index to correct the net yield for the activity.

(153) That adjustment was made in order to bring tax into line with actual economic activity. Had it not been made, an overpayment of tax would have occurred. This adjustment is therefore justified by the nature or general scheme of the objective estimate arrangements to bring the quantifiable yield into line with actual income for tax purposes.

(154) In view of the information provided in Spain's comments, the Commission consequently considers that these measures are tax measures justified by the nature or general scheme of the tax regime.

A reduction in the net yield under the scheme for the objective assessment of personal income tax for agricultural and stockfarming activities

(155) In its comments, Spain explained that under the objective assessment scheme for farming activities, the net yield is determined on the basis of a standard operating account. In determining the standard operating account for 2001, the diesel bill was calculated using January 1999 diesel prices. Since the price of diesel rose between January 1999 and 1

(156) Under the Spanish rules governing the tax on earnings of producers subject to the objective estimate scheme, the net yield for farming activities is determined on the basis of a standard operating account. Those rules stipulate that in the event of exceptional circumstances which alter the economic reality, units can be adjusted to bring the situation back into balance. According to the Spanish authorities, the increase in fuel prices led to exceptional circumstances that caused a substantial change in conditions, requiring the net yield to be reduced to bring it in line with the actual yield for the activity.

(157) That adjustment was made in order to bring tax into line with actual economic activity. Had that adjustment not been made, an overpayment of tax would have occurred. This adjustment is therefore justified by the nature or general scheme of the objective estimate arrangements, the aim of which is to bring the quantifiable yield into line with actual income for tax purposes.

(158) In view of the information provided in Spain's comments, the Commission consequently considers that these measures are tax measures justified by the nature or general scheme of the tax regime.

Reduction in the percentage used for calculating quarterly VAT payments under the simplified arrangements for certain farming activities

(159) Spain has explained in its comments that the reduction in the percentages used for calculating quarterly VAT payments under the simplified arrangements does not affect the indices used to determine the payments. The percentages were reduced provisionally because of the increase in diesel prices, and neutralised in the end-of-year payments. The reduction in the indices affects only quarterly payments on account, not those used to determine the annual tax due. This means that at the end of the financial year, any difference between the amount due according to the annual indices and the amounts paid on a quarterly basis must be settled. In conclusion, there was no reduction in the overall tax burden calculated for 2001.

- (160) Consequently, in view of the information provided by Spain in its comments, the Commission considers that these measures do not entail any reduction in the tax burden. This position is based on the specific features of the agricultural sector and does not prejudice decisions that the Commission might adopt in other sectors.

Extension, for 2000 and 2001, of tax advantages applicable to personal income tax on the transfer of certain agricultural land and holdings

- (161) Spain maintains that this measure is not exclusively a tax advantage, but rather that the advantage is granted when the purchaser meets certain conditions, which are designed to improve the management of agriculture in Spain and rationalise the size of holdings.

- (162) This extension of tax benefits for the transfer of certain agricultural land and holdings confers on its beneficiaries an advantage which relieves them of charges that are normally borne from their budgets. A loss of tax revenue is equivalent to the consumption of State resources in the form of tax expenditure.

- (163) Consequently, the Commission considers that this extension of tax benefits constitutes a selective aid granted by the State.

Increase in the percentage of expenditure which is difficult to substantiate in the context of personal income tax

- (164) Spain has explained in its comments that the reason for the increase in the percentage of expenditure which is difficult to substantiate in the context of personal income tax, which applied to agriculture and the 2000 and 2001 financial years only, was to bring the percentage of expenditure applicable under the simplified method of the objective assessment scheme into line with the actual expenditure which that percentage is supposed to represent (expenditure which is difficult to substantiate and provisions), which has risen because of the increased in the price of diesel.

- (165) This increase in the percentage of expenditure which is difficult to substantiate in the context of tax on personal income tax is justified in that this expenditure has increased for farmers because of the rise in the price of diesel, and if the percentage had not been increased, the said farmers would have been unable to deduct expenditure which they had actually incurred. The

increase was introduced to bring taxation into line with the actual costs, and had it not been made, an overpayment of tax would have occurred. This adjustment is therefore justified by the nature or general scheme of the objective estimate arrangements, the aim of which is to bring the quantifiable yield into line with actual income for tax purposes.

- (166) In view of the information provided in Spain's comments, the Commission consequently considers that these measures are tax measures justified by the nature or general scheme of the tax regime.

Conclusion

- (167) In view of the information provided by Spain in its comments, the amendment to Law No 37/1992, the measures to support agricultural cooperatives, the measure applying a corrective index to feed purchased from third parties in the case of certain stockfarming activities subject to the objective assessment scheme, the measure reducing the net yield in the scheme for the objective assessment of personal income tax for farming activities, the measure reducing the percentage for calculating quarterly VAT payments under the simplified arrangements for certain agricultural activities and the tax measure increasing the percentage of expenditure which is difficult to substantiate in the context of tax on personal income tax must be considered as tax measures which are justified by the nature or general scheme of the tax system, and therefore do not meet the criteria for falling within the scope of Article 87 of the Treaty.

- (168) Conversely, the subsidy on loans and guarantees to farmers and the tax measure extending, for 2000 and 2001, tax benefits applicable to personal income tax on transfer of certain agricultural land and holdings must be considered, in the first case as selective aid granted by the State, and in the second case as a tax measure attributable to the State and affecting the resources of the State, both of which entail a selective advantage and do not appear to be justified by the nature or general scheme of the tax system.

- (169) Articles 87 and 88 of the Treaty apply to all the agricultural products in Annex I to the Treaty subject to a common organisation of the market (all agricultural products except for potatoes not intended for the production of starch, horsemeat, honey, coffee, alcohol of agricultural origin, vinegar made from alcohol and cork) in accordance with the various Regulations governing the common organisations of the market.

(170) Under Article 87(1) of the Treaty, 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 is incompatible with the common market, in so far as it affects trade between Member States.

(171) In this case, the aid measures confer on beneficiaries an advantage that alleviates the normal burden on their budget. They are granted by the State or through State resources. They are specific or selective in that they favour certain companies or products, in this case farmers.

(172) To fall within the scope of Article 87(1) of the Treaty, aid must also affect competition and trade between Member States. This criterion implies that the beneficiaries of the measure must engage in an economic activity. The case law on this provision has repeatedly stated that international trade is considered to be affected when the beneficiary company engages in an economic activity which is the subject of trade between the Member States. By the very fact that the aid strengthens the position of the beneficiary company in relation to other companies competing in intra-Community trade, trade can be considered to be affected.

(173) In the case at issue, the beneficiaries engage in an economic activity which is the subject of trade between the Member States. Indeed, there is substantial trade in agricultural products between Spain and the Community. In 1999, Spain exported EUR 11 329 million worth of agricultural products to the Community and imported agricultural products worth EUR 7 382 million ⁽²³⁾.

(174) Indeed, the beneficiaries operate in a sector which is particularly open to competition. It must therefore be pointed out that there is intense competition in the farming sector between producers of the Member States whose products are the subject of intra-Community trade. Spanish producers participate fully in that competition by exporting substantial quantities of agricultural products to other Member States. Furthermore, the large number of beneficiaries of these aid measures will increase their impact on trade.

(175) Consequently, these aid measures can affect trade in agricultural products between Member States, as happens when aid confers an advantage on operators in one Member State to the detriment of producers in other Member States. The measures concerned have a

direct and immediate effect on the production costs of agricultural products in Spain. They therefore confer an economic advantage over farms in other Member States which do not have access to comparable aid. They thereby distort or threaten to distort competition.

(176) In view of the above, the aid at issue must be considered as State aid meeting the criteria of Article 87(1) of the Treaty. However, there are some exceptions to the principle of incompatibility laid down in Article 87(1).

Article 87(2)(b) of the Treaty

(177) Article 87(2)(b) the Treaty provides that aid to make good the damage caused by natural disasters or exceptional occurrences is compatible with the common market. According to Spain these aid measures are justified on the grounds that they were intended to make good the damage caused by an exceptional occurrence.

(178) Spain argues that the disproportionate rise in the cost of diesel caused public disturbances, strikes, energy and food shortages and difficulties for the free transit of goods across Community territory, which should be considered an exceptional occurrence within the meaning of Article 87(2)(b) of the Treaty.

(179) When considering exceptions from the general principle laid down by Article 87(1) of the Treaty that State aid is incompatible with the common market, the Commission holds that the notion of 'exceptional occurrence' contained in Article 87(2)(b) must be interpreted restrictively. Hitherto, the Commission has accepted as exceptional occurrences wars, internal disturbances or strikes and, with certain reservations and depending on their extent, major nuclear or industrial accidents and fires which result in widespread loss. Because of the inherent difficulties in foreseeing such events, the Commission evaluates the compatibility of such aid on a case-by-case basis, having regard to its previous practice and the scale of the occurrence at issue (point 11.2.1 of the Community guidelines for State aid in agriculture).

(180) The very wording of Article 87(2)(b) of the Treaty excludes any overcompensation of damage. Once the existence of an exceptional occurrence has been demonstrated, the Commission will permit aid of up to 100 % to compensate for material damage.

⁽²³⁾ Source: Eurostat.

Compensation should normally be calculated at the level of the individual beneficiary, and in order to avoid overcompensation, any payments due should be deducted from the amount of aid (point 11.2.2 of the Community guidelines for State aid in agriculture).

Member States and distortions of competition without any justification of Community interest and would consequently be granting illegal advantages to operators in certain Member States.

(181) In the case at issue, the aid was granted because of the rise in fuel prices, not the public disturbances, strikes and energy and food shortages. These circumstances did not cause the aid to be granted, but came about as a result of the increase in fuel price.

(182) Spain has not demonstrated any link between the aid granted and the damage sustained by beneficiaries as a result of the rise in fuel prices. It has not been demonstrated that all the beneficiaries of these aid measures suffered damage from that circumstance nor that the amount of the aid relates to and does not exceed the damage sustained by the farmers.

(183) According to the Spanish authorities, the aim of the aid is not to make good the losses borne by farmers but to enable them to take out loans with financial organisations in order to solve their cash-flow difficulties caused by the disproportionate increase in diesel costs.

(184) The information provided by the Spanish authorities does not conclusively show that all the beneficiaries of these aid measures have sustained damage from this cause or that the aid paid does not exceed the damage sustained. The Commission is not pronouncing in this decision on whether the increase in fuel prices constitutes an exceptional occurrence within the meaning of Article 87(2)(b) of the Treaty. This Decision does not prejudge other decisions the Commission might adopt in other sectors.

(185) Consequently, these aid measures do not qualify for exemption under Article 87(2)(b) of the Treaty as aid to make good the damage caused by exceptional occurrences.

Article 87(3) of the Treaty

(186) The exceptions provided for in Article 87(3) may be granted only when the Commission determines that the aid measure is needed to attain one of the listed objectives. To allow measures which do not meet that condition to benefit from these exceptions would be tantamount to allowing infringements of trade between

(187) The Commission considers that the aid measures in question were not intended as regional aid to encourage new investments or job creation, nor to compensate for disadvantages relating to infrastructure affecting all the producers in a region, but as aid to the agricultural sector. Consequently, this aid is eminently sectoral and must be evaluated in accordance with Article 87(3)(c).

(188) Article 87(3)(c) provides that aid to facilitate the development of certain economic activities or certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest may be considered compatible with the common market.

(189) The measure extending, for 2000 and 2001, tax benefits applicable to personal income tax on transfer of certain agricultural land and holdings could be considered an investment aid in the primary production sector, given that the tax benefit is linked to the transmission of farm land and agricultural holdings. However, Law No 14/2000, which provides the legal basis for the grant of that aid, lays down no requirement to meet any of the conditions set out in point 4.1 of the Community guidelines for State aid in the agriculture sector.

(190) Specifically, investment aid may be granted only to agricultural holdings the economic viability of which can be demonstrated by an assessment of the holding's prospects ⁽²⁴⁾ and where the farmer possesses adequate occupational skill and competence. In addition, the holding must comply with minimum Community standards regarding the environment, hygiene and animal welfare. No aid may be granted for investments having as their objective increased production for which normal market outlets cannot be found. The maximum rate of public support for investment is limited to 40 % (50 % in less-favoured areas as defined in Article 17 of

⁽²⁴⁾ Aid for agricultural holdings in financial difficulty may not be granted unless that aid meets the conditions set out in the Community guidelines on State aid for rescue and restructuring firms in difficulty (OJ C 288, 9.10.1999, p. 2).

Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund ⁽²⁵⁾), (see also Article 51(2) in conjunction with Article 7 of that Regulation).

(191) In its comments, Spain provided no information permitting verification of whether the investment aid at issue meets the conditions set out in the aforementioned guidelines. The Spanish authorities merely indicated that these measures must be seen in the broader context of the advantages granted to transferors, which are granted only under certain circumstances, depending on the party acquiring the land and holdings being transferred. This measure is not just a tax advantage, rather the advantage is granted when the purchaser meets certain conditions which are intended to improve the management of agriculture in Spain and rationalise the size of holdings.

(192) Moreover, the aid in the form of guarantees made no provision for the conditions which such aid must meet in order to be compatible, as set out in the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees.

(193) Consequently, the aid measures extending tax advantages on transfer of certain agricultural land and holdings and the aid in the form of subsidies on loans and guarantees must be regarded as incompatible with the common market. This type of aid has no lasting effect on development of the sector, since its immediate effects disappear once the measure is abolished (see the judgment of the Court of First Instance in Case T-459/93 *Siemens SA v Commission* ⁽²⁶⁾). The direct consequence of these aid measures is to improve the production and marketing prospects of the beneficiaries in relation to other operators not receiving comparable aid, both in Spain and in other Member States.

(194) It should also be borne in mind that these aid measures for agricultural products covered by Annex I to the Treaty (all agricultural products except for potatoes not intended for the production of starch, horsemeat, honey, coffee, alcohol of agricultural origin, vinegar made from alcohol and cork) are subject to common organisations of the market, and that the Member States have limited power to intervene in the operation of such market

organisations, which are the exclusive competence of the Community.

(195) Common market organisations are not restricted to provisions governing the price regime, but consist of a number of mechanisms and measures which, taken together, form a 'complete and exhaustive' framework to which the Commission confirms that there can be no exceptions and which, according to the consistent case law of the Court of Justice, does not allow the Member States to adopt measures which might undermine or create exceptions to it (See the judgment of the Court of Justice in Case 177/78 *Pigs and Bacon Commission v McCarren and Company Limited* ⁽²⁷⁾).

Conclusion

(196) In the light of the reasoning set out above and the Community rules applicable, the Commission considers that, with regard to the exceptions provided for in Article 87(2)(b) in the case of aid to make good the damage caused by natural disasters or exceptional occurrences, and in Article 87(3)(a) and (c) in the case of aid to promote or facilitate the economic development of certain regions or activities, the aid measures at issue can be deemed to adversely affect trading conditions to an extent contrary to the common interest and infringe Community rules and are not eligible for any of the exemptions provided for in Article 87(2) and (3) of the EC Treaty.

VI. CONCLUSIONS

(197) The Commission concludes that Spain has granted the aid at issue illegally, in breach of Article 88(3) of the Treaty. The aid was illegal because it was granted before the Commission had pronounced on its compatibility with the common market.

(198) Furthermore, for the reasons set out above, those aid measures are incompatible with the common market because they fall within the scope of Article 87(1), without being eligible for any of the exceptions provided for in Article 87(2) and (3).

(199) When aid is incompatible with the common market, the Commission must require the Member State to recover the aid granted illegally. The requirement to recover aid, which is also laid down in Article 14(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying

⁽²⁵⁾ OJ L 160, 26.6.1999, p. 80.

⁽²⁶⁾ ECR 1995, p. II-1675.

⁽²⁷⁾ ECR 1979, p. 2161.

down detailed rules for the application of Article 93 of the EC Treaty ⁽²⁸⁾, is necessary in order to re-establish the previous situation by removing all the financial advantages enjoyed unduly by the beneficiaries since the aid was granted.

- (200) The aid granted must be repaid in full.
- (201) Repayment must be made in accordance with Spanish law. The amounts to be repaid must include interest from the date the aid was granted to its actual recovery. The interest must be calculated on the basis of the commercial rate, taking as a reference the rate used to calculate the grant equivalent of regional aid, in accordance with the Guidelines on national regional aid ⁽²⁹⁾.
- (202) This Decision does not prejudice any conclusions the Commission might draw for the financing of the common agriculture policy by the European Agricultural Guidance and Guarantee Fund (EAGGF).

HAS ADOPTED THIS DECISION:

Article 1

The measures implemented by Spain, namely the amendment to Law No 37/1992 provided for in Royal Decree-Law No 10/2000, the measures to support agricultural cooperatives provided for in Royal Decree-Law No 10/2000 and the tax measures provided for in the Order of 29 November 2000 of the Ministry of Finance, which involve applying a corrective index to feed purchased from third parties in the case of certain stockfarming activities subject to the objective assessment scheme, reducing the net yield under the scheme for the objective assessment of personal income tax for farming activities, reducing the percentage for calculating quarterly VAT payments under the simplified arrangements for certain agricultural activities, and the tax measure increasing the percentage of expenditure which is difficult to substantiate in the context of tax on personal income tax, do not constitute State aid within the meaning of Article 87(1) of the EC Treaty.

Article 2

The State aid granted by Spain to farmers in the form of subsidies on loans and guarantees provided for in a Ministry of

Agriculture resolution of 15 November 2000 publishing a Council of Ministers agreement of 10 November 2000 and the measure extending, for 2000 and 2001, tax benefits applicable to personal income on transfer of certain agricultural land and holdings provided for in the seventh transitional provision of Law No 14/2000 are incompatible with the common market.

Article 3

Spain shall abolish the schemes referred to in Article 2.

Article 4

1. Spain shall adopt all measures necessary to recover from the beneficiaries all aid referred to in Article 2 which has been granted illegally.

2. Recovery shall be immediate and in accordance with the procedures laid down in Spanish law, provided that these permit the immediate and effective implementation of this Decision. The amounts to be repaid must include interest from the date the aid was made available to the beneficiaries to its actual recovery. The interest must be calculated on the basis of the reference rate used to calculate the grant equivalent of regional aid.

Article 5

Spain shall inform the Commission within two months from the date of notification of this Decision of the measures it has taken to comply with this Decision.

Article 6

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 11 December 2002.

For the Commission

Franz FISCHLER

Member of the Commission

⁽²⁸⁾ OJ L 83, 27.3.1999, p. 1.

⁽²⁹⁾ OJ C 74, 10.3.1998, p. 9.

COMMISSION DECISION**of 11 December 2002****on the application by Portugal of the financial and tax aid scheme for the free zone of Madeira in the period between 1 January and 31 December 2000***(notified under document number C(2002) 4825)***(Only the Portuguese text is authentic)****(Text with EEA relevance)**

(2003/294/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments pursuant to those Articles ⁽¹⁾ and having regard to those comments,

Whereas:

(2) By letter No 327 of 21 April 1998 from the Portuguese Permanent Representation, registered as received by the Commission on the same day, the Portuguese authorities requested an additional period of two weeks in which to submit their comments on the proposed appropriate measures. By letters No 409 of 4 June 1998 and No 423 of 10 June 1998 from their Permanent Representation, registered as received by the Commission on 10 and 12 June 1998 respectively, the Portuguese authorities transmitted to the Commission a letter dated 29 May 1998 from the Minister for Foreign Affairs stating that the Portuguese Government agreed with the principles underlying the Commission's action on regional aid and including certain comments on the guidelines on national regional aid. Since the letter from the Minister for Foreign Affairs did not make it clear to the Commission that the Portuguese authorities agreed with the proposed appropriate measures mentioned above, by letter D/52552 of 18 June 1998, transmitted to the Portuguese Permanent Representation, and by letter D/53161 of 23 July 1998, transmitted to the Portuguese Minister for Foreign Affairs, the Commission asked the Portuguese authorities to confirm their agreement.

I. PROCEDURE

(1) When the Commission adopted the guidelines on national regional aid ⁽²⁾, it took the view, pursuant to Article 88(1) of the EC Treaty, that the gradual development and operation of the common market meant that a reassessment had to be carried out with the Member States of regional aid schemes in existence before the date of adoption of the guidelines so as to allow the establishment, from 1 January 2000, of a transparent and equitable system of regional aid for all Member States, based on full compliance with the guidelines. By letter SG(98) D/1684 of 24 February 1998, which set out appropriate measures pursuant to Article 88(1) of the Treaty in respect of national regional aid, the Commission proposed that the Portuguese authorities should amend all existing regional aid schemes which were in force on 1 January 2000, so as to make them compatible with the provisions of the guidelines as from that date.

(3) By letter No 629 of 2 September 1998 from the Portuguese Permanent Representation, registered as received by the Commission on 7 September 1998, the Portuguese authorities transmitted to the Commission a letter dated 20 August 1998 from the Minister for Foreign Affairs stating that the financial and tax aid scheme for the free zone of Madeira ⁽³⁾ would expire on 31 December 2000, being subject to the appropriate measures for national regional aid. By letter D/53951 of 29 September 1998 to the Portuguese Permanent Representation, the Commission stated that, in view of the abovementioned letter from the Minister for Foreign Affairs, it considered that the Portuguese authorities had confirmed their agreement on the proposed appropriate measures. At the same time, it asked the Portuguese authorities either to give an assurance that the financial

⁽¹⁾ OJ C 301, 21.10.2000, p. 4.

⁽²⁾ OJ C 74, 10.3.1998, p. 9.

⁽³⁾ State aid E 19/94, ex E 13/91 and N 204/86.

and tax aid scheme for the free zone of Madeira would be limited in duration to 31 December 1999 or to notify the proposed amendments that would make the scheme compatible with the guidelines as from 1 January 2000.

- (4) Despite the numerous contacts to this end between the Commission and the Portuguese authorities ⁽⁴⁾, no information was communicated to the Commission enabling it to take the view that all the necessary amendments had been made to bring the scheme into line with the guidelines on national regional aid as from 1 January 2000. Accordingly, given the presumed acceptance of the aforementioned appropriate measures by the Portuguese authorities, the scheme in question was entered in the register of non-notified aid under NN 60/2000.
- (5) By letter SG(2000) D/105022 of 17 July 2000 the Commission notified Portugal that, having examined the information provided by the Portuguese authorities on the financial and tax aid scheme for the free zone of Madeira in connection with appropriate measures proposed pursuant to Article 88(1) of the Treaty for national regional aid, it had decided to initiate the procedure laid down in Article 88(2) of the Treaty in respect of the application of the scheme in the period between 1 January and 31 December 2000. At the same time, it asked Portugal to submit its comments and to provide all relevant information for assessing the aid concerned within one month of receipt of the abovementioned letter.
- (6) The Commission's decision to initiate the formal investigation procedure in respect of the aid concerned was published in the *Official Journal of the European Communities* ⁽⁵⁾. Interested parties were invited to submit their comments on the scheme concerned to the

Commission within one month of the date of publication.

- (7) By letters No 860 of 11 August 2000 and No 867 of 16 August 2000 from the Portuguese Permanent Representation, registered as received by the Commission on 11 and 17 August 2000 respectively, the Portuguese authorities asked for an additional period of one month in which to submit their own comments under the procedure laid down in Article 88(2) of the Treaty. By letter D/54485 of 31 August 2000 to the Portuguese Permanent Representation, the Commission granted that additional period. By letter No 932 of 18 September 2000 from their Permanent Representation, registered as received by the Commission on 19 September 2000, the Portuguese authorities communicated their comments to the Commission.
- (8) The Commission also received comments from 16 interested parties. The Commission forwarded these comments to the Portuguese authorities by letters D/56003 of 4 December 2000 and D/56048 of 6 December 2000, addressed to the Portuguese Permanent Representation, to allow them to give their opinion. The respective comments were received by letter No 82 of 10 January 2001 from the Portuguese Permanent Representation, registered as received by the Commission on 12 January 2001.

II. DESCRIPTION OF THE MEASURE IN RESPECT OF WHICH THE COMMISSION INITIATED THE PROCEDURE

- (9) Under the terms of the most recent Commission decision on the financial and tax aid scheme for the free zone of Madeira ⁽⁶⁾, tax aid was allowed for industrial, financial and service firms and for operators entered in the shipping register who set up in the free zone by 31 December 2000. These firms were exempt from all direct taxes up to the end of 2011, after which they were to be partially exempt (they would then be required to pay property and income taxes, which constitute the principal part of their tax burden).
- (10) Following the adoption of the guidelines on national regional aid, the Commission proposed, as appropriate measures pursuant to Article 88(1) of the EC Treaty and by letters of 24 February 1998, that Member States should amend all existing regional aid schemes which were in force on 1 January 2000, so as to make them compatible with the guidelines as from that date. The guidelines on national regional aid enshrine the

⁽⁴⁾ Letters No 9 of 5 January 1999, No 233 of 15 March 1999, No 848 of 25 August 1999, No 1156 of 18 November 1999 and No 19 of 5 January 2000 from the Permanent Representation, and No 853 of 4 April 2000 from the Portuguese Finance Minister (registered as received by the Commission on 7 January 1999, 18 March 1999, 27 August 1999, 24 November 1999, 7 January 2000 and 6 April 2000 respectively), and fax No 11684/99 of 14 December 1999 from the Portuguese Permanent Representation; letters from the Commission D/50399 of 27 January 1999 and D/51612 of 16 April 1999 to the Permanent Representation, and D/522 of 10 March 2000 to the Portuguese Finance Minister; bilateral meetings of 26 May 1999, 8 December 1999 and 15 December 1999 between the Commission and the Portuguese authorities.

⁽⁵⁾ See footnote 1.

⁽⁶⁾ State aid E 19/94 — letter SG(95) D/1287 of 3 February 1995.

principle that regional aid intended to reduce a firm's current expenses (operating aid) is normally prohibited, while exceptionally allowing such aid to be granted in regions eligible under the derogation in Article 87(3)(a) of the Treaty 'provided that it is justified in terms of its contribution to regional development and its nature, and its level is proportional to the handicaps it seeks to alleviate' (point 4.15). The guidelines also stipulate that 'with the exception of the cases mentioned in point 4.16,' (aid for transport in the outermost regions and regions of low population density) 'operating aid must be both limited in time and progressively reduced' (point 4.17).

(11) When it was called upon to assess the tax and financial aid scheme for the free zone of Madeira, the Commission stated that, apart from the exemption from tax on the acquisition of land and buildings, the tax aid granted by the Portuguese authorities constituted operating aid that might be granted for long periods or indefinitely. Given that the Madeira region is still covered by the derogation laid down in Article 87(3)(a) of the Treaty in the period between 2000 and 2006, compliance with the conditions laid down to that effect by the guidelines would thus be an obligation the Portuguese authorities would have to fulfil in applying the scheme and granting aid to firms established in the abovementioned free zone between 1 January and 31 December 2000.

(12) In general, in so far as it arose only in connection with some regional and/or minor taxes, the question of limitation in time did not appear to cause the Portuguese authorities much concern. On the other hand, as regards the progressive reduction of operating aid in the form of tax exemptions and its proportionality in relation to the handicaps it was intended to alleviate, the Portuguese authorities felt that the arrangements for implementing the financial and tax aid scheme for the free zone of Madeira should be re-examined only in the context of an overall agreement covering the period from 1 January 2000 to 31 December 2006, taking into account changes in the socioeconomic situation of the Madeira region.

(13) In this respect the Commission first pointed out that, under its decision on the matter ⁽⁷⁾, the financial and tax aid scheme for the free zone of Madeira was to expire on 31 December 2000. This being so, the scheme was subject to appropriate measures for national regional aid only for the year 2000, and any change in the implementation of the scheme during the period 2001 to 2006 still had to be notified to and

approved by the Commission. In this respect, given that Portugal had not submitted any new notification for the period 2000 to 2006, these two aspects were independent of each other. In so far as the only change envisaged by the Portuguese authorities in the conditions for granting the aid in 2000 were to restrict the number of new financial firms admitted to the free zone to not more than 20 % of the total number of such firms active the previous year, the proposal put forward by the Portuguese authorities did not seem capable of ensuring the scheme's conformity with the guidelines.

(14) In this context the Commission also noted that, even though it had already announced ⁽⁸⁾ that it was planning to amend the guidelines to make it possible to approve operating aid that was not progressively reduced and not limited in time in the outermost regions eligible for regional aid where such aid was intended to reduce the additional costs arising in the pursuit of the economic activity from the handicaps set out in Article 299(2) of the Treaty, the only exceptions then allowed to the principles of limitation in time and progressive reduction related to aid specifically designed to offset additional transport costs in the outermost regions and regions with low population density.

III. COMMENTS SUBMITTED BY THE PORTUGUESE AUTHORITIES

(15) The comments submitted by the Portuguese authorities under the formal investigation procedure first of all challenged the grounds of the decision to initiate the procedure. In this respect the Portuguese authorities pointed out in particular that Portugal had never accepted the guidelines on national regional aid, nor the appropriate measures proposed by the Commission in this area. Consequently, according to the Portuguese authorities, since such acceptance could not be inferred from any document transmitted to the Commission, the latter would have no grounds for considering the aid granted in accordance with the financial and tax aid scheme for the free zone of Madeira in the period between 1 January and 31 December 2000 to be unlawful and subject to recovery.

(16) The Portuguese authorities also considered the initiation of the procedure to be excessive and unjustified in any event for two reasons in particular:

— the Commission was obliged, at least from the entry into force of the Treaty of Amsterdam, to discriminate positively in favour of the outermost regions. In initiating the procedure laid down in

⁽⁷⁾ See footnote 6.

⁽⁸⁾ Report COM(2000) 147 final, 14 March 2000.

Article 88(2), the Commission was failing to comply with that obligation, in particular because the Commission itself subsequently considered it necessary to amend the guidelines on regional aid ⁽⁹⁾ in order to take full account of the new Article 299(2),

- the approach adopted in relation to the financial and tax aid scheme for the free zone of Madeira represented unequal treatment in comparison with other cases and/or regions. In this respect the Portuguese authorities considered in particular that the Irish International Financial Service Center had been allowed relatively flexible phasing out arrangements ⁽¹⁰⁾ while the Commission departments had rejected any possibility of compromise in relation to the free zone of Madeira.

- (17) In view of these comments, the Portuguese authorities considered in particular that the Commission should close the procedure by means of a decision confirming the authorisation of the scheme until 31 December 2000, in the same terms as the decision it took in 1995 ⁽¹¹⁾.

IV. COMMENTS FROM INTERESTED PARTIES AND RESPONSE OF THE PORTUGUESE AUTHORITIES

- (18) The comments submitted by interested parties came largely from the direct or indirect beneficiaries of the financial and tax aid scheme for the free zone of Madeira. Although they were relatively numerous, these comments contained virtually no relevant information for assessing the scheme in question, since they were generally confined to regretting that the procedure had been initiated and asking the Commission to refrain from taking decisions that could be detrimental to the efficient operation of the free zone. None of the interested parties, for example, seemed to share the doubts voiced by the Commission when the procedure was initiated (this element was in fact the only aspect stressed in the Portuguese authorities' responses to the abovementioned comments, as notified to the Commission by letter No 82 of 10 January 2001 from their Permanent Representation).

V. ASSESSMENT

- (19) The Commission examined the comments submitted both by the Portuguese authorities and by interested parties under the formal investigation procedure concerned.

- (20) As regards the alleged non-acceptance of the proposed appropriate measures in respect of national regional aid, the Commission would like to point out in particular that at no time during the period of 28 months between letter SG(98) D/1684 of 24 February 1998, which proposed appropriate measures in relation to national regional aid, and the decision to initiate the formal investigation procedure in respect of implementation of the financial and tax aid scheme for the free zone of Madeira during the year 2000 (which was taken on 28 June 2000) did the Portuguese authorities inform the Commission that they did not accept those appropriate measures. Quite the contrary, the Portuguese authorities always suggested, both by letters from the Portuguese Permanent Representation and during the various bilateral meetings held on the matter, that they were willing to cooperate fully with the Commission to identify the changes that had to be made to the scheme to ensure that it complied with the guidelines, and they were fully aware that the Commission considered their acceptance of the appropriate measures as given.

- (21) Notwithstanding the foregoing, the Commission nevertheless has to acknowledge that the Portuguese authorities never explicitly notified it of their unconditional acceptance of the appropriate measures transmitted by letter SG(98) D/1684 of 24 February 1998. The Commission is therefore not able to refute the comments submitted by the Portuguese authorities under the formal investigation procedure, according to which such acceptance was never given. Under these circumstances the procedure initiated in respect of Portugal's non-compliance with the appropriate measures proposed by the Commission with regard to the application of the financial and tax aid scheme in the free zone of Madeira in the period between 1 January and 31 December 2000 no longer serves any useful purpose.

- (22) The Commission also notes that the aid scheme for the free zone of Madeira expired on 31 December 2000. Under these circumstances, any observations the Commission could make either in relation to the other comments submitted by the Portuguese authorities or in relation to the comments submitted by interested parties would also no longer serve any useful purpose.

VI. CONCLUSION

- (23) In view of the foregoing, the Commission considers that the procedure initiated under Article 88(2) of the Treaty as regards the application of the financial and tax aid scheme for the free zone of Madeira in the period

⁽⁹⁾ OJ C 258, 9.9.2000, p. 5.

⁽¹⁰⁾ OJ C 395, 18.12.1998, p. 8.

⁽¹¹⁾ See footnote 6.

between 1 January and 31 December 2000 no longer serves any useful purpose. The Commission regrets, however, that the Portuguese authorities did not inform it in good time that they did not accept its proposal for appropriate measures pursuant to Article 88(1) of the Treaty as regards national regional aid, contrary to what would appear to be required by the principle of fair cooperation underlying the aforesaid Article 88(1),

the free zone of Madeira in the period between 1 January and 31 December 2000 no longer serves any useful purpose.

Article 2

This Decision is addressed to the Portuguese Republic.

HAS ADOPTED THIS DECISION:

Done at Brussels, 11 December 2002.

Article 1

The formal investigation procedure in respect of the application by Portugal of the financial and tax aid scheme for

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION**of 5 February 2003****on the ad hoc aid which the United Kingdom is planning to implement for CLYDEBoyd under the Freight Facilities Grant Scheme (FFG)***(notified under document C(2003) 388)***(Only the English text is authentic)****(Text with EEA relevance)***(2003/295/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 those provisions ⁽¹⁾,

Whereas:

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ⁽²⁾. The Commission called on interested parties to submit their comments.

(4) The United Kingdom submitted its comments to the Commission by letter dated 29 October 2002, registered on 4 November 2002.

(5) The Commission received no comments from interested parties.

2. DETAILED DESCRIPTION OF THE AID**1. PROCEDURE**

(1) By letter dated 14 March 2002, the United Kingdom notified the Commission of an ad hoc aid to CLYDEBoyd (Fort William) Ltd (hereinafter CLYDEBoyd) in accordance with the extended Freight Facilities Grant scheme, which was approved by the Commission on 20 December 2001 (State aid case N 649/01). The notification was registered by the Secretariat General of the Commission on 15 March 2002 under No N 221/2002. The notification was considered incomplete and, on 26 April 2002, the United Kingdom was asked to provide additional information. The Commission received the requested information on 28 May 2002. The Commission sent a second request for information on 1 July 2002. The reply received was registered by the Commission on 17 July 2002.

(2) By letter dated 2 October 2002, the Commission informed the United Kingdom that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid. This procedure was registered as C 62/2002.

A. Commission's decision of 20 December 2001, State aid — UK-N 649/2001 — Freight Facilities Grant Scheme

(6) On 20 December 2001 the Commission adopted Decision number N 649/01 approving the extended Freight Facilities Grant (FFG) scheme, which grants aid to operators of freight handling facilities for coastal/short-sea shipping. The aid is intended to tip the balance in favour of short-sea shipping and to financially support investments in expensive and specialised equipment required for sending freight by water, which would not be needed if the goods went by road.

(7) Grant intensity will be calculated by the United Kingdom competent authorities for each individual scheme following the FFG rules. The FFG scheme first assesses the environmental benefit using a standard formula which takes into account the lorry-miles that will be saved over the agreed period of the individual

⁽¹⁾ OJ C 269, 5.11.2002, p. 3.

⁽²⁾ OJ C 269, 5.11.2002, p. 3.

scheme and their monetary value. This monetary environmental benefit, calculated by the United Kingdom competent authorities using the FFG formula, constitutes the maximum amount of grant that can be offered by the United Kingdom Government to the applicants.

- (8) As a condition of FFG, operators are required to notify the tonnage to be moved each year during the agreed period of the scheme and to report to the government the actual tonnage moved each year. This is subject to verification by government audit of company records. This monitoring also allows the United Kingdom authorities to confirm the expected proportion of lorry journeys saved, and therefore to validate the lorry mile saving.
- (9) The FFG scheme contains an express provision which allows the Government to claw back a proportion of the grant paid in the event of a shortfall in the freight tonnage transferred from road to water. In the event of such a shortfall, the circumstances are examined to establish whether it is appropriate to extend the original time period in order to obtain the full environmental benefit or to require reimbursement of a proportion of the grant. Recovery is unlikely where the reason for the shortfall is outside the beneficiary's control and the beneficiary has made reasonable efforts to secure traffic.
- (10) The Commission's decision of 20 December 2001 stated that the aid intensity should not be higher than 50 % of the total project cost for facilities that are accessible on non-discriminatory terms for all existing and potential operators. Where access to the infrastructure is limited to one or more specific operators, the latter must be chosen through a transparent, fair and non-discriminatory public tendering procedure. Exceptionally, if the authorities can prove that the commitment agreed between the United Kingdom authorities and the beneficiary cannot be met through the aid amounts as described above, higher percentages may be granted after prior notification and approval by the Commission.

B. The notified aid

- (11) In line with the aim of the FFG scheme to secure a modal shift from road to water transport, CLYDEBoyd wishes to provide a larger berth and freight handling facilities at Corpach Pier, near Fort William, Scotland. CLYDEBoyd is a limited company. Its shareholders are Boyd Brothers Ltd (road haulage company) and Clydeport plc (port operator), who own 50 % each. Clydeport plc also owns and operates several ports on the Clyde estuary and the Firth of Clyde, namely Hunterston, Ardrossan, Greenock and Glasgow.

- (12) The existing facility has severe limitations due to the size of the pier (31 metres) and the lack of adjacent storage and handling facilities. CLYDEBoyd believe that any further loss of existing volumes will render the current facility uneconomic and lead to closure. In such circumstances CLYDEBoyd would be forced to close the facility and around 40 000 tonnes per annum of timber, pulp and wood chip would revert to road transportation. The work to be carried out with grant assistance would not only safeguard this existing traffic but would make it possible to secure the transport of an additional 50 000 tonnes per year.
- (13) In order to do this, the port must be enlarged to allow vessels of up to 6 000 tonnes dwt to berth safely, and the pier must be extended to accommodate two vessels at the same time. A greater area is needed close by the quayside for goods handling and placement during loading and unloading, plus a covered area for short term storage of vulnerable products. Finally, mobile freight handling equipment is required to load and unload the larger vessels quickly and efficiently.
- (14) Apart from the aid intensity, the proposal complies fully with the conditions of the approved FFG scheme (N 649/2001).

C. Aid intensity

- (15) The aid will take the form of a non-reimbursable subsidy. Financial analysis of the case in accordance with the provisions of the FFG scheme has determined that aid is required at the level of 85 % (GPB 3,332 million) of the eligible costs at Corpach (GBP 3,92 million). The environmental benefits calculated by the United Kingdom competent authority in line with the scheme rules are GBP 5,4 million.

INFRASTRUCTURE COSTS

(in GBP million)

Berth structure	2,19
Construction and fitting of freight handling facility	0,64
Mobile plant	1,02
Project management and legal fees	0,07
Total cost	3,92
Grant	3,332
Aid intensity	85 %

D. Market analysis**VOLUME OF TRAFFIC THROUGH CORPACH**

(Tonnes)

Year	1999	2000	2001	Pre- dicted	Of which is new traffic
Timber	8 180	15 155	14 379	23 000	8 600
Woodchip	9 000	13 540	25 091	25 000	0
Baled Pulp	4 000	3 000	6 000	30 000	24 000
Salt	600	4 170	13 622	8 000	0
Other	4 608	1 362	2 455		
Total	26 400	37 200	61 500	86 000	32 600

- (16) The additional timber is internal United Kingdom traffic, which otherwise would be moved by road. The baled pulp is imported into the United Kingdom through a number of different ports, but is now being brought mainly through Greenock (owned and operated by Clydeboyd, one of the partners in the Corpach project). The estimate of the average annual baled pulp handled by the various ports is as follows:

Greenock	12 000
Inverness	3 000
Montrose	2 500
Dundee	2 500
Aberdeen	2 000
Leith	2 000
Total	24 000

- (17) This project will be also able to unlock the potential for significant further volumes in the near future. CLYDEBoyd has identified a number of specific traffic flows which, it is actively pursuing with the relevant customers, and should be in a position to finalise these proposals shortly. For instance, the letter of support sent by Scanfiber AS ⁽³⁾ states that 'unless you are able to offer us better/longer quays ... we are afraid that Corpach in the future will have difficulties in competing with other export facilities, like Belfast and other Irish ports'.

⁽³⁾ Oslo, 1 March 2001.

- (18) In addition, although they are not part of the initial development of the port, additional round timber exports to different places in Ireland and Scandinavia are expected. CLYDEBoyd is also in discussion with Arjo Wiggins regarding the possibility of shipping paper to Belgium directly from Corpach. Finally, it is envisaged that CLYDEBoyd will use the facility for all types of traffic (except for timber/paper traffic ⁽⁴⁾).

E. Grounds for initiating the procedure

- (19) The Commission decision to initiate the procedure laid down in Article 88(2) of the Treaty and to request clarification from the United Kingdom authorities was the outcome of an initial examination of the notified project. Furthermore, concern was expressed regarding the proportionality of the aid. The Commission normally considers State aid beyond 50 % aid intensity for transport infrastructure as not compatible with the Treaty, unless a detailed and neutral commercial and financial analysis shows that the main beneficiary of the facilities is not capable of financing a higher amount without State intervention ⁽⁵⁾. It should be noted that CLYDEBoyd declined a 50 % grant of GBP 1,96 million to undertake the project.
- (20) The Commission expressed doubts regarding the following issues in particular:
- the necessity and proportionality of the aid for the realisation of the project. In addition, information was needed to show that the aid proposed is the least necessary to realise such port facilities and that the relevant market could not have provided a cheaper alternative.
 - the impact of the aided project on existing transport infrastructures in the area.

3. COMMENTS FROM THE UNITED KINGDOM

- (21) The United Kingdom authorities indicated that the project has been subject to scrutiny by both Scottish Executive and Department of Transport officials and third party consulting engineers appointed by the Scottish Executive. They stated that the proposed 85 % aid is both necessary and proportional for realisation of the project and that it will not proceed without this aid. In addition, no other port is in a position to provide the

⁽⁴⁾ Scottish Executive, Meeting notes — Visit to Corpach, 31 August 2001.

⁽⁵⁾ Commission Decision of 31 January 2001, N 597/2000 — The Netherlands; Commission Decision of 14 September 2001, N 208/2000, NL — SOIT; Commission Decision of 15 November 2000, N 755/1999 IT — Bozen.

service and benefits to the environment in the Corpach proposal, irrespective of the level of aid. As the BSW sawmill is adjacent to Corpach port, the use of any other port would generate additional road journeys to Corpach, defeating the purpose of the grant by causing negative environmental impact in this sensitive area on the periphery of the Community.

- (22) Regarding a possible distortion of competition, the United Kingdom stated that any possible distortion would be negligible and would not affect trade between Member States. Furthermore, there would be no adverse effect on the rail industry since there is no railway serving most of the points of origin of the traffic. Letters from the United Kingdom Strategic Rail Authority and English, Welsh and Scottish Railways, the main private sector United Kingdom rail freight operator, confirm this view. With respect to maritime competition, the redeveloped Corpach would seek to service small amounts of bale pulp not currently handled through ports owned by Clydeport (one of the joint partners in the CLYDEBoyd venture). This traffic only represents around one ship every two years.

4. ASSESSMENT OF THE MEASURE

A. Existence of aid within the meaning of Article 87(1) of the Treaty

- (23) According to Article 87(1) of the Treaty 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'.
- (24) The Treaty's State aid rules only apply to undertakings. The concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed ⁽⁶⁾. Any activity consisting in offering goods and services on a given market has to be considered as an economic activity ⁽⁷⁾.
- (25) Therefore, it is clear that CLYDEBoyd is an undertaking involved in the economic activity of providing services in a given market.

- (26) The provisions of the Treaty do not imply that all types of public financing fall under the notion of 'State aid' caught by Article 87(1). Community State aid rules apply only to measures that satisfy all the criteria listed in Article 87(1) of the Treaty. Since no two ports are identical with regard to their physical characteristics, specific responsibilities and commercial activities of their managing bodies, the applicability of those criteria has to be examined individually, on a case by case basis.

Transfer of State resources

- (27) The concept of State aid applies to any advantage granted directly or indirectly, financed out of State resources. Under the notified project, CLYDEBoyd will receive a State grant for the provision of a larger berth and freight handling facilities at Corpach Pier. Therefore, it is clear that the notified measure involves a transfer of state resources.

Conferring an advantage

- (28) The legal status of ports varies greatly among Member States. Private companies holding the ownership of the port are a feature of the United Kingdom, where privatisation of a considerable number of ports was carried out, mainly in the 1980s. Ports, irrespective of their legal status, are structured essentially as separate and fully commercial entities. Therefore, in general, they have to finance all port infrastructure investments from their revenues.
- (29) The notified project intends to provide a larger berth and freight handling facilities at Corpach Pier. The aid measure in question confers a measurable economic advantage to a particular undertaking involved in an economic activity in respect of its competitors, even though the subsidised infrastructure will be open to all potential operators on non-discriminatory terms.

Selectivity

- (30) The aid measure favours CLYDEBoyd and is therefore selective in nature.

Effects on trade and distortion of competition

- (31) Under the notified project, the port of Corpach will mainly constitute a timber hub port. Experience has shown that small ports engaged in local coastal trades serving local interest have not threatened to distort competition or affect trade between Member States to a significant extent.

⁽⁶⁾ Case C-41/90 Höfner and Elser v Macrotron [1991] ECR I-1979, paragraph 21; Case C-35/96 Commission v Italy [1998] ECR I-3851, paragraph 36.

⁽⁷⁾ Case 118/85 Commission v Italy [1987] ECR 2599.

- (32) Nevertheless, CLYDEBoyd envisages using the facility for any traffic not just traffic linked to the timber/paper industry. In view of CLYDEBoyd's intention to act on different goods traffic and the existence of cross-border maritime trade, the possibility of an impact on trade between Member States cannot entirely be ruled out.
- (33) In a sector with specific difficulties and a high degree of competition ⁽⁸⁾, as well as in sectors specially exposed to international competition, an effect on trade between Member States cannot be ruled out.
- (34) The measure in question therefore constitutes State aid within the meaning of Article 87(1) of the Treaty and is incompatible with the common market, unless it qualifies for exemption under Article 87(2) or (3) of the Treaty.
- meaning of Article 87(3)(c) of the Treaty. Article 87(3)(c) of the Treaty is therefore the appropriate legal basis to analyse aid for investments in the infrastructure for coastal/short sea shipping and to assess its compatibility with the common market.
- (38) Article 87(3)(c) states that aid to facilitate the development of certain economic activities or of certain economic areas, may be considered to be compatible with the common market where such aid does not adversely affect trading conditions to an extent contrary to the common interest.
- (39) It is thus necessary to verify if these requirements are fulfilled in order to apply Article 87(3)(c) of the Treaty.

B. Legal basis for the assessment

- (35) The aim of the notified aid measure is to provide a larger berth and freight handling facilities at Corpach Pier, in order to enable coastal/short sea shipping to compete on financial terms with road transport by providing the necessary infrastructure. The Commission considers that none of the exemptions in Article 87(2) of the Treaty apply to the scheme. Nor is the State aid in question destined to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State within the meaning of Article 87(3)(b) of the Treaty, or to promote culture and heritage conservation within the meaning of Article 87(3)(d).
- (36) Article 73 of the Treaty states that aids shall be compatible with the Treaty if they meet the needs of coordination of transport. The notion of coordination in Article 73 implies more than facilitating the development of an industry, it involves some form of planning by the State. Nevertheless, Article 80 of the Treaty limits the provisions under the transport chapter by stating that '(t)he provisions of this Title shall apply to transport by rail, road and inland waterway ...'. Thus, Article 73 does not apply to the maritime sector.
- (37) The development of activities shifting traffic from road to other modes is in the common interest within the
1. *Necessity of the aid*
- (40) The Community has for some time pursued a policy of promoting the achievement of a balanced intermodal transport system and a policy of fostering the transfer of goods from road to other more environmentally friendly modes ⁽⁹⁾. The Commission's White Paper on transport policy ⁽¹⁰⁾ states that water transport is not expensive and does less damage to the environment than road transport. Intra-Community maritime transport is a key component of intermodality, which must provide a means of coping with growing road congestion. It must be considered as a real competitive alternative to land transport. Therefore, efforts must be made to harness the advantages of short-sea shipping, for example by installing transshipment equipment and encouraging shipping routes between European ports to create networks.
- (41) The new Marco Polo proposal ⁽¹¹⁾ intends to shift the expected increase in international road freight of 12 billion tonne-kilometres per year, from congested roads to short sea shipping, rail and inland waterway services.

⁽⁸⁾ Case C-305/89; Italy v Commission [1991] ECR I-1603, paragraph 26, and Joined Cases C-278/92, 279/92 and 280/92, Spain v Commission [1994] ECR I-4103, paragraph 41.

⁽⁹⁾ See Commission's Green Paper on Fair and Efficient Pricing, COM (1995) 691 of 20 December 1995; Commission's White Paper on Fair Payment for Infrastructure Use, COM (1998) 466 of 22 July 1998 and Council Resolution of 14 February 2000 on the promotion of intermodality and intermodal freight transport in the European Union, OJ C 56, 29.2.2000, p. 1.

⁽¹⁰⁾ European transport policy for 2010: time to decide. COM (2001) 370.

⁽¹¹⁾ COM (2002) 54 final.

(42) The Commission's view is that in order to achieve an intermodal and sustainable transport system for the future, priority should be given to infrastructure investments.

(43) Sending freight by water can require expensive and specialised equipment, which would not be needed if the goods went by road. By contributing to the cost of such facilities coastal/short sea shipping may compete in financial terms with road transport. However, if intermodal terminal infrastructures were not cofinanced by the public sector, operators performing economic activities would not invest in them, as their viability could not be ascertained without State funding.

(44) The objective of the notified project is to safeguard the existing maritime traffic at the port of Corpach. Unless the port is improved, all existing Corpach traffic will be lost and revert to road transportation since any reduction below present volumes would render the activity totally uneconomical. As well as safeguarding the existing sea traffic, additional volumes of road traffic would be transferred to sea.

(45) No other port is in a position to provide the service and benefits to the environment in this area, irrespective of the level of aid, due to the location of the port of Corpach close to a number of forest product industries. The use of any other port would generate additional road journeys to Corpach, defeating the purpose of the grant by causing negative environmental impact in this sensitive area on the periphery of the Community. Thus, the proposal is in the Community interest.

2. Proportionality

(46) The Corpach project is an example where modal shift can not be obtained at a 50 % grant level. The substantial environmental benefit (GBP 5,4 million) can only be achieved by a significant investment in the new port infrastructure.

(47) The Commission has previously ⁽¹²⁾ recognised the possibility to allow a high degree of aid intensity if the market does not provide society with the public transport infrastructure necessary to achieve sustainable mobility.

(48) The United Kingdom authorities have verified, through a market analysis, that the objective of equalising the cost of road and water transportation could not be met with a lower amount of aid. The cost of the development has

been demonstrated in an economic appraisal carried out in March 2001 by economists from the Scottish Executive and Department of Transport officials, and by a third party appointed by the Scottish Executive (Scott Wilson Kirkpatrick & Co Ltd).

(49) In accordance with the terms of the general FFG scheme, the grant would be awarded against an annual tonnage commitment of 90 000 tonnes to be moved by water for 10 years. In the event that the target is not achieved or the recipient fails to comply with grant conditions, the grant may be recovered.

(50) The Commission considers that the subsidy of GBP 3,92 million is necessary for the realisation of the project and is justified by the environmental benefit (GBP 5,4 million), being in the interest of the Community.

3. No distortion of competition

(51) In order to ascertain that there is no undue distortion of competition, it is necessary to analyse competition between the notified project and road transport, other modes of transport and existing services.

(a) Competition between the notified project and road transport

(52) Road freight and coastal/short sea shipping transport traditionally respond to different user requirements. Road freight transport is more flexible and faster than coastal/short sea shipping transport. It is therefore used for high value general cargo, which is time sensitive, needed in smaller quantities and heterogeneous. As coastal/short sea shipping transport is slower, it can not ask the same prices as road and is as a rule relied on for less time-sensitive and regular transport flows of larger volumes.

(53) The aim of the subsidy is to equalise the cost of road and water transportation. Operators who choose to send freight by water do not gain a commercial advantage over competitors who use road.

(b) Competition between the notified project and other modes of transport

(54) An adverse effect on rail traffic must be ruled out since the rail network does not serve most of the points of

⁽¹²⁾ N 464/99 — The Netherlands: Grant of aid for the building and operation of the 'Pilot Transferium Sittard'.

origin of the traffic. The Scottish railway network is used to move timber for the long distance markets internally, while timber intended for transport by water is currently distributed locally.

(55) In 1993 the original FFG scheme was extended ⁽¹³⁾ to combined transport operators and international railway groupings.

(56) The Commission takes note that after the publication of the formal investigation procedure no comments were received by rail companies. Further, the main private sector United Kingdom rail freight operator, English, Welsh and Scottish Railways, stated by letter dated 17 October 2002 that it had no objections to the project.

(c) Competition between the notified project and existing services

(57) The volume of traffic through Corpach in 2001 was 61 500 tonnes. With the improvement of the port this volume will increase to 86 000 tonnes, of which only 32 600 tonnes will be new traffic. This added new traffic would mostly come from internal United Kingdom traffic currently moved through Scottish ports. The most substantial new traffic will be the balep pulp, which will only represent 12 000 tonnes for the Port of Greenock per year. The minor importance of this traffic is stressed if the Corpach traffic volume is compared with of other Community ports ⁽¹⁴⁾:

(a) Rotterdam (The Netherlands): 320 000 000 tonnes;

(b) Le Havre (France): 67 500 000 tonnes;

(c) Tees-Hartlepool (United Kingdom):
51 500 000 tonnes;

(d) Forth Port (Scotland): 41 100 000 tonnes;

(e) Liverpool/Mersey-side (United Kingdom):
30 600 000 tonnes.

(58) No comments have been received from interested third parties. Consequently, the Commission assumes that competitors providing existing services do not considered the planned project as a threat for the market.

(59) The environmental benefit of the project will be considerably higher than the potential impact on competition. The Commission considers that there will be a limited impact on competition, and that that impact is acceptable.

5. CONCLUSION

(60) The Commission concludes that the aid measure is compatible with the EC Treaty in accordance with Article 87(3)(c) thereof,

HAS ADOPTED THIS DECISION:

Article 1

The ad hoc aid which the United Kingdom is planning to implement for CLYDEBoyd (Fort William) Ltd under the Freight Facilities Grant Scheme is compatible with the common market within the meaning of Article 87(3)(c) of the Treaty. Implementation of the aid is accordingly authorised.

Article 2

This Decision is addressed to the United Kingdom of Great Britain and Northern Ireland.

Done at Brussels, 5 February 2003.

For the Commission
Loyola DE PALACIO
Vice-President

⁽¹³⁾ State aid N 162/93.

⁽¹⁴⁾ Source: Institute of Shipping Economics and Logistics, Bremen, *Shipping Statistics Yearbook 2001*.