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⁽¹⁾ Text with EEA relevance

I

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

REGULATIONS

COMMISSION REGULATION (EC) No 869/2008**of 4 September 2008****establishing the standard import values for determining the entry price of certain fruit and vegetables**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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

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

Whereas:

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

HAS ADOPTED THIS REGULATION:

Article 1

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

Article 2

This Regulation shall enter into force on 5 September 2008.

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

Done at Brussels, 4 September 2008.

For the Commission

Jean-Luc DEMARTY

*Director-General for Agriculture and
Rural Development*

⁽¹⁾ OJ L 299, 16.11.2007, p. 1.

⁽²⁾ OJ L 350, 31.12.2007, p. 1.

ANNEX

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

(EUR/100 kg)

CN code	Third country code ⁽¹⁾	Standard import value
0702 00 00	MK	21,7
	ZZ	21,7
0707 00 05	JO	156,8
	MK	64,6
	TR	89,6
	ZZ	103,7
0709 90 70	TR	96,0
	ZZ	96,0
0805 50 10	AR	58,8
	UY	74,4
	ZA	74,5
	ZZ	69,2
0806 10 10	IL	235,4
	TR	106,8
	US	188,9
	XS	61,0
	ZZ	148,0
0808 10 80	BR	55,2
	CL	100,7
	CN	111,7
	NZ	99,3
	US	95,3
	ZA	81,2
0808 20 50	ZZ	90,6
	AR	123,5
	CN	60,9
	TR	138,1
	ZA	92,9
0809 30	ZZ	103,9
	TR	133,7
	US	166,3
	XS	61,2
0809 40 05	ZZ	120,4
	IL	137,9
	MK	53,9
	TR	53,9
	XS	53,4
	ZZ	74,8

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

COMMISSION REGULATION (EC) No 870/2008**of 4 September 2008****amending the representative prices and additional duties for the import of certain products in the sugar sector fixed by Regulation (EC) No 1109/2007 for the 2007/08 marketing year**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 318/2006 of 20 February 2006 on the common organisation of the markets in the sugar sector ⁽¹⁾,

Having regard to Commission Regulation (EC) No 951/2006 of 30 June 2006 laying down detailed rules for the implementation of Council Regulation (EC) No 318/2006 as regards trade with third countries in the sugar sector ⁽²⁾, and in particular of the Article 36,

Whereas:

- (1) The representative prices and additional duties applicable to imports of white sugar, raw sugar and certain syrups

for the 2007/08 marketing year are fixed by Commission Regulation (EC) No 1109/2007 ⁽³⁾. These prices and duties have been last amended by Commission Regulation (EC) No 842/2008 ⁽⁴⁾.

- (2) The data currently available to the Commission indicate that the said amounts should be changed in accordance with the rules and procedures laid down in Regulation (EC) No 951/2006,

HAS ADOPTED THIS REGULATION:

Article 1

The representative prices and additional duties on imports of the products referred to in Article 36 of Regulation (EC) No 951/2006, as fixed by Regulation (EC) No 1109/2007 for the 2007/08 marketing year are hereby amended as set out in the Annex to this Regulation.

Article 2

This Regulation shall enter into force on 5 September 2008.

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

Done at Brussels, 4 September 2008.

For the Commission

Jean-Luc DEMARTY

*Director-General for Agriculture and
Rural Development*

⁽¹⁾ OJ L 58, 28.2.2006, p. 1.
⁽²⁾ OJ L 178, 1.7.2006, p. 24.

⁽³⁾ OJ L 253, 28.9.2007, p. 5.
⁽⁴⁾ OJ L 229, 28.8.2008, p. 3.

ANNEX

Amended representative prices and additional duties applicable to imports of white sugar, raw sugar and products covered by CN code 1702 90 95 applicable from 5 September 2008

(EUR)

CN code	Representative price per 100 kg of the product concerned	Additional duty per 100 kg of the product concerned
1701 11 10 ⁽¹⁾	24,91	3,84
1701 11 90 ⁽¹⁾	24,91	9,08
1701 12 10 ⁽¹⁾	24,91	3,68
1701 12 90 ⁽¹⁾	24,91	8,65
1701 91 00 ⁽²⁾	26,80	11,83
1701 99 10 ⁽²⁾	26,80	7,31
1701 99 90 ⁽²⁾	26,80	7,31
1702 90 95 ⁽³⁾	0,27	0,38

⁽¹⁾ Fixed for the standard quality defined in Annex I.III to Council Regulation (EC) No 318/2006 (OJ L 58, 28.2.2006, p. 1).

⁽²⁾ Fixed for the standard quality defined in Annex I.II to Regulation (EC) No 318/2006.

⁽³⁾ Fixed per 1 % sucrose content.

II

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

DECISIONS

COUNCIL

COUNCIL DECISION

of 8 July 2008

on the existence of an excessive deficit in the United Kingdom

(2008/713/EC)

THE COUNCIL OF THE EUROPEAN UNION,

strong sustainable growth conducive to employment creation.

Having regard to the Treaty establishing the European Community, and in particular Article 104(6) thereof,

Having regard to the recommendation from the Commission,

Having regard to the observations made by the United Kingdom,

Whereas:

(1) Article 104 of the Treaty lays down an excessive deficit procedure (EDP) to ensure that Member States avoid excessive government deficits or that they correct such deficits when they occur.

(2) Pursuant to point 5 of the Protocol on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland, the obligation under Article 104(1) of the Treaty to avoid excessive general government deficits does not apply to the United Kingdom unless it moves to the third stage of economic and monetary union. While in the second stage of economic and monetary union, the United Kingdom shall endeavour to avoid excessive deficits, pursuant to Article 116(4) of the Treaty.

(3) The Stability and Growth Pact is based on the objective of sound government finances as a means of strengthening the conditions for price stability and for

(4) The excessive deficit procedure under Article 104 of the Treaty, as clarified by Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure⁽¹⁾, which is part of the Stability and Growth Pact, provides for a decision on the existence of an excessive deficit. The Protocol on the excessive deficit procedure annexed to the Treaty sets out further provisions relating to the implementation of the excessive deficit procedure. Council Regulation (EC) No 3605/93⁽²⁾ lays down detailed rules and definitions for the application of the provision of the said Protocol.

(5) Article 104(5) of the Treaty requires the Commission to address an opinion to the Council if the Commission considers that an excessive deficit exists in a Member State or may occur. Having taken into account its report in accordance with Article 104(3) of the Treaty and having regard to the opinion of the Economic and Financial Committee in accordance with Article 104(4), the Commission concluded that an excessive deficit exists in the United Kingdom. The Commission therefore addressed such an opinion to the Council in respect of the United Kingdom on 2 July 2008.

(6) Article 104(6) of the Treaty states that the Council should consider any observations which the Member State concerned may wish to make before deciding, after an overall assessment, whether an excessive deficit exists. In the case of the United Kingdom, this overall assessment leads to the following conclusions.

⁽¹⁾ OJ L 209, 2.8.1997, p. 6.

⁽²⁾ OJ L 332, 31.12.1993, p. 7.

- (7) The United Kingdom undertook strong fiscal consolidation efforts during the late 1990s. Thereafter, the government adopted a looser fiscal stance, mainly as a result of an explicit policy objective to raise expenditure on public services. As a result, the general government balance moved from a surplus position in the late 1990s to a deficit of 3,2 % of GDP in 2003/04 and 3,5 % in 2004/05. With the output gap remaining positive throughout this period, this was equivalent to a deterioration of the structural balance by 4¾ percentage points of GDP ⁽¹⁾ between 1999/00 and 2004/05. On 21 September 2005 the Commission initiated an EDP for the UK with the adoption of a report under Article 104(3) of the Treaty and on 24 January 2006 the Council decided that an excessive deficit existed in the United Kingdom. The budgetary position improved in 2005/06 and 2006/07, with the headline deficit in the latter year falling to 2,6 % of GDP. On 12 September 2007, taking into account the 2006/07 deficit outturn and the spring 2007 forecast, the Commission adopted a recommendation for a Council decision abrogating the EDP against the UK. On 9 October 2007, ECOFIN decided to abrogate the EDP in accordance with Article 104(12) of the Treaty.
- (8) According to the EDP data notified by the UK authorities in March 2008, the United Kingdom's general government deficit in 2008/09 was planned to reach 3,2 % of GDP, thus exceeding the 3 % of GDP reference value; this ratio was identical to that published in the United Kingdom's March 2008 budget, which also presented budgetary plans showing a general government deficit of 2,8 % of GDP in 2009/10. The deficit figure in the latter year is lower than the corresponding figure in the Commission services' spring forecast of 3,3 % of GDP, mainly due to differences in expected GDP growth in 2009/10. Following the publication of the March 2008 budget, a policy announcement on 13 May reducing personal income tax in 2008/09 will cost GBP 2,7 billion in 2008/09. Adding this to the Commission services' spring 2008 forecast would imply a deficit of 3,5 % of GDP. Although above the 3 % of GDP Treaty reference value, the deficit planned for 2008/09, as notified in March 2008, is close to it. The excess over the 3 % of GDP reference value is not exceptional in the sense of Article 104(2) of the Treaty. In particular, it does not result from an unusual event outside the control of the United Kingdom authorities, nor is it the result of a severe economic downturn. The Commission services' spring 2008 forecast projects UK growth to slow in 2008 and 2009 to annual rates below potential. Nevertheless, GDP growth is expected to reach 1,7 % in 2008 and 1,6 % in 2009. The excess over the 3 % of GDP reference value is also considered not temporary, with the Commission services forecasting, on the basis of unchanged policies, a deficit ratio in 2009/10 still higher than 3 % (at 3,3 %). This indicates that the Treaty requirement concerning the deficit criterion is not fulfilled.
- (9) The general government debt ratio remains well below the 60 % reference value (the March EDP data reported a ratio of 43,0 % of GDP ⁽²⁾ in the 2007/08 financial year), although projected to be on a rising trend up to 2009/10. In the Commission services' forecast, the debt ratio is projected to reach around 47½ % of GDP in 2009/10.
- (10) According to Article 2(4) of Regulation (EC) No 1467/97, 'other relevant factors' can only be taken into account in the Council decision on the existence of an excessive deficit in accordance with Article 104(6) if the double condition — that the deficit remains close to the reference value and that its excess over the reference value is temporary — is fully met. This double condition is not met. Therefore, other relevant factors are not taken into account in the steps leading to this Decision,
- HAS ADOPTED THIS DECISION:
- Article 1*
- From an overall assessment it follows that an excessive deficit exists in the United Kingdom.
- Article 2*
- This Decision is addressed to the United Kingdom of Great Britain and Northern Ireland.
- Done at Brussels, 8 July 2008.
- For the Council*
The President
C. LAGARDE

⁽¹⁾ Estimated by the Commission services, applying the common methodology on estimating output gaps.

⁽²⁾ Using GDP adjusted for Financial Intermediation Services Indirectly Measured (FISIM).

COMMISSION

COMMISSION DECISION

of 14 December 2004

amending Commission Decision 2002/610/EC on the aid scheme which France is planning to implement for the start-up of new short sea shipping services

(notified under document number C(2004) 4519)

(Only the French text is authentic)

(Text with EEA relevance)

(2008/714/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

de transport maritime à courte distance (Aid scheme for the start-up of new short sea shipping services).

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,

Whereas:

1.3. Objectives of the amendments

- (4) The main objective of the proposed amendments is to take into account the new legal framework provided by the Community guidelines as regards aid for the start-up of short sea shipping services and to make the conditions imposed by the final decision compatible with these new Community guidelines on State aid.

1. PROCEDURE

1.1. Procedural overview

- (1) On 30 January 2002, after a formal investigation procedure, the Commission adopted Decision 2002/610/EC ⁽¹⁾ approving, subject to certain conditions set out below, an aid scheme to promote the start-up of new short sea shipping services, hereinafter referred to as the 'final decision'. The 26th recital of the final decision states that France accepts procedural conditions which are in particular binding on projects granting aid to an intra-Community sea shipping service between a French port and a port of another Member State and not on those involving sea shipping services between two French ports.
- (2) On 18 November 2004 the French authorities asked the Commission to amend the final decision to take account of the new, more favourable provisions of the Community guidelines on State aid to maritime transport ⁽²⁾, hereinafter referred to as 'the Community guidelines'.

1.2. Title of the measure

- (3) The measure to which the final decision refers is entitled: régime d'aides en faveur du lancement de nouvelles lignes

- (5) Recital 26 of the final decision states that 'To ensure transparency and equal treatment of operators during the project selection procedure, the French authorities have given an undertaking to observe the following procedures:

- (a) a call for expressions of interest will be published periodically (for example, at the beginning of each year) in the form of a notice in the *Official Journal of the European Communities* giving details of the arrangements for the aid scheme, the procedure to be followed and the selection criteria;
- (b) in the case of projects between a port in France and a port in another Member State, a declaration of intent will be published in the *Official Journal of the European Communities* giving details of the objective of the project and of the aid ceiling envisaged. This will invite interested parties to express their interest within 15 working days. If any interested party opposes the aid scheme, stating the reasons, the scheme will have to be notified to the Commission for prior authorisation.'

⁽¹⁾ OJ L 196, 25.7.2002, p. 31.

⁽²⁾ OJ C 13, 17.1.2004, p. 3.

- (6) According to the French authorities, the procedures referred to in particular in paragraph (b) of this recital turn out to take a long time to implement and are therefore prejudicial to the smooth progress of such projects.

2. DETAILED DESCRIPTION OF THE AMENDMENT

- (7) The French authorities would like to see the final decision amended so as to reflect Chapter 10 of the Community guidelines on State aid to maritime transport, which is the chapter dealing with aid to short sea shipping services.

3. EVALUATION OF THE PROPOSED AMENDMENTS

3.1. Provisions of the new Community rules

- (8) The Commission notes first of all that the previous Community guidelines⁽¹⁾, which were applicable when the final decision was adopted, laid down no particular rule on aid for the start-up of short sea shipping services. Accordingly, it was not illogical for the Commission to lay down in its final decision particular ad hoc rules for approving the specific French scheme designed to support the start-up of short sea shipping services.
- (9) The Commission also notes that in the mean time it has adopted new Community guidelines and that the latter now provide a framework for State aid for the start-up of short sea shipping services modelled on the objectives pursued by Regulation (EC) No 1382/2003 of the European Parliament and of the Council of 22 July 2003 on the granting of Community financial assistance to improve the environmental performance of the freight transport system (Marco Polo Programme)⁽²⁾, which was likewise adopted after the final decision.
- (10) Chapter 10 of the new Community guidelines provides that individual aid for short sea shipping services is to be considered compatible with the common market if it fulfils the following conditions:

‘— the aid must not exceed three years in duration and its purpose must be to finance a shipping service

connecting ports situated in the territory of the Member States,

- the service must be of such a kind as to permit transport (of cargo essentially) by road to be carried out wholly or partly by sea, without diverting maritime transport in a way which is contrary to the common interest,
- the aid must be directed at implementing a detailed project with a pre-established environmental impact, concerning a new route or the upgrading of services on an existing one, associating several shipowners if necessary, with no more than one project financed per line and with no renewal, extension or repetition of the project in question,
- the purpose of the aid must be to cover, either up to 30 %⁽³⁾ of the operational costs of the service in question, or to finance the purchase of trans-shipment equipment to supply the planned service, up to a level of 10 % in such investment,
- the aid to implement a project must be granted on the basis of transparent criteria applied in a non-discriminatory way to shipowners established in the Community. The aid should normally be granted for a project selected by the authorities of the Member State through a tender procedure in compliance with applicable Community rules,
- the service which is the subject of the project must be of a kind which can be commercially viable after the period in which it is eligible for public funding,
- such aid must not be combined with public service compensation (obligations or contracts).’

- (11) In particular, the Commission notes that the new Community guidelines make no distinction as to whether the shipping service assisted plies between two ports of two different Member States or of the same Member State. The Commission considers that there is no longer any objective reason for maintaining the distinction between the two types of situations, as explained in recital 26 of the final decision.

⁽¹⁾ OJ C 205, 5.7.1997, p. 5.

⁽²⁾ OJ L 196, 2.8.2003, p. 1. This Regulation establishes the Marco Polo Programme which enables the Commission to grant a financial contribution from the Community to projects for the start-up of short sea shipping services to shift part of freight transport from road to maritime transport. Specifically, Article 9 of the said Regulation provides that ‘Community financial assistance for the actions defined by the Programme shall not exclude those actions being granted State aid at national, regional or local level, insofar as such aid is compatible with the State-aid arrangements laid down in the Treaty and within the limits established for each type of action in Article 5(2), Article 6(4) and Article 7(3) respectively.’

⁽³⁾ For Community financing or eligibility under various aid schemes, the 30 % ceiling applies to the combined total of the aid and financial assistance. It should be noted that the intensity of the aid is the same as for modal shift actions within the framework of the Marco Polo programme: see Article 5(2) of Regulation (EC) No 1382/2003.

- (12) Moreover, the Commission considers that the Community guidelines do not prevent a Member State from implementing a scheme providing aid to short sea shipping services if the individual aid granted under this scheme meets the abovementioned conditions.

3.2. Consequences of applying the final decision without amendment

- (13) The option of not changing the final decision would, on the one hand, enable France to grant individual aid to services between French ports under conditions more favourable than those provided in the new Community guidelines and, on the other hand, penalise France in setting up projects for services between a French port and a port of another Member State through formal procedures as envisaged in recital 26 of the final decision. Not only do these formal procedures lack any *raison d'être* in the light of the new Community guidelines but they also place France in a position of inequality in relation to other States which on the basis of the new Community guidelines wish to establish aid schemes or grant individual aid on an *ad hoc* basis to short sea shipping services with their neighbours.
- (14) In accordance with Article 88(1) of the Treaty, the Commission must also keep existing schemes under constant review. To this end, it must verify that the rules governing State aid apply uniformly to all existing schemes in the Member States. In particular, the Commission must propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market when more restrictive Community rules enter into force. Otherwise, the Commission would not be able to maintain, pursuant to one of its earlier conditional final decisions, a constraint on a scheme of one Member State while the other Member States implementing similar schemes would not be subject to such a constraint.

3.3. Advantage of the change

- (15) The option of changing the final decision would make it possible to anticipate the application of the new Community guidelines to the scheme existing in France for the start-up of short sea shipping services before the deadline laid down by the Commission in the new Community guidelines, namely 30 June 2005, so that Member States can, through appropriate measures,

bring all their existing schemes into line with the new Community guidelines.

4. CONCLUSION

- (16) In conclusion the Commission considers that Decision 2002/610/EC should be amended. The proposed amendment will enable France to bring its scheme into line with the provisions laid down in the new Community guidelines in respect of sea shipping services between a French port and a port of another Member State and will also enable projects granting aid to sea shipping services between two French ports to be made subject to the conditions laid down in the new Community guidelines. More generally, this amendment will mean that France will be implementing its scheme under conditions identical to those prevailing in all the other Member States in pursuance of the said guidelines,

HAS ADOPTED THIS DECISION:

Article 1

The following third subparagraph shall be added to Article 1 of Decision 2002/610/EC:

'France shall make the granting of individual aid within the framework of this scheme subject to compliance with Chapter 10 of the Community guidelines on State aid to maritime transport (*).

(*) OJ C 13, 17.1.2004, p. 3.'

Article 2

This Decision is addressed to the French Republic.

Done at Brussels, 14 December 2004.

For the Commission
Jacques BARROT
Vice-President

COMMISSION DECISION**of 11 March 2008****on State aid (Germany) exemption from mineral oil tax for greenhouse undertakings***(notified under document number C(2008) 860)***(Only the German version is authentic)****(2008/715/EC)**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

interested third parties. Germany commented on these by letter of 14 June 2006, and provided further information by letter of 12 December 2007.

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

Having called on interested parties to submit their comments pursuant to the provision cited above and having regard to their comments ⁽¹⁾,

Whereas:

II. DESCRIPTION

(4) On 16 August 2001, by means of the Law amending the Mineral Oil Tax Law, Germany introduced a two-year tax reduction for fuels (heating oil, natural gas, liquid gas) for use in greenhouses and covered growing areas. The aid was granted in the form of a tax refund.

(5) By means of the Law on the further development of the ecological tax reform of 23 December 2002, the tax refund, which had originally been granted for fuels used between 1 January 2001 and 31 December 2002, was extended until 31 December 2004.

I. PROCEDURE

(1) By letter of 19 April 2005, registered as received on 20 April 2005, Germany notified a measure granting a tax refund for greenhouses in 2005 and 2006. The measure contains a suspensive clause making its implementation dependent on approval by the Commission. The State aid case was registered under the number N 189/05.

(2) The measure is an extension of a non-notified scheme (2001-2002), which was already the subject of an extension (2003-2004), itself also non-notified. Both those non-notified measures were entered in the register of non-notified aid under the number NN 36/2005.

(3) By letter of 20 October 2005 the Commission opened the formal investigation procedure in accordance with Article 88(2) of the EC Treaty ⁽²⁾. In response Germany commented by letter of 22 November 2005. The Commission received several observations from

(6) By means of the Law on the implementation of the guidelines of 9 December 2004, Germany intended to retain that tax refund until the end of 2006 and notified the extension measure as State aid N 189/05.

(7) The tables in Annex I show the refund rates and financial impact of the tax refund in favour of greenhouses, compared to the rest of the agricultural sector.

(8) The Commission opened the formal investigation procedure for the following reasons:

(9) The measure constitutes State aid. The German authorities argued that this case was covered by the exemption contained in the Council Directives on the taxation of energy products (Directive 92/81/EEC, replaced from 2003 by Directive 2003/96/EC). Under those Directives, Member States could grant tax reductions on mineral oils used in horticulture.

⁽¹⁾ OJ C 67, 18.3.2006, p. 23.

⁽²⁾ See footnote 1.

- (10) The Commission expressed doubts in respect of this view. Under the Directives on energy products, and in particular Directive 2003/96/EC, the tax measures which Member States may adopt must be compatible with Community law and derogating provisions are to apply without affecting the rules on competition. The measures must not impair the smooth operation of the internal market or lead to distortions of competition.
- (11) Moreover, this aid would appear to have distorted competition, since a reduced tax burden on energy products in a highly energy-intensive economic sector such as greenhouse cultivation had a direct effect on production costs and hence on competitiveness.
- (12) It was emphasised that this refund had been granted selectively since it differentiated between open-air and greenhouse cultivation within the horticultural sector.
- (13) The Commission emphasized that tax reductions could be granted, subject to the rules on competition. At that stage, there seemed to be no provisions under the State aid rules which would enable Member States to grant fiscal aid of that nature.
- (14) The Commission at that stage considered that this measure constituted operating aid which was incompatible with the common market.
- (15) Germany commented both on the matter itself and on the procedure.
- (16) Germany argued that the tax reduction was not selective, and that it was in the nature of the matter that heating materials would be used only in covered areas.
- (17) In Germany's view, if there were selectivity, and therefore aid were being granted, that aid would be justified under Article 87(3)(c) of the EC Treaty. Germany claimed that there was special justification for the aid under Article 8(2)(f) of Directive 92/81/EEC and under its successor provision, Article 15(3) of Directive 2003/96/EC. Germany was of the opinion that the measure constituted 'implementation of the authorisation granted to Member States (...) [by the above-mentioned Directives] (...)'. In Germany's view, it would be contradictory for the Commission (which, after all, proposed those Directives) to put the counter argument to Germany that the measure posed a risk to the common market. According to Germany, the competition-law aspects of the Directives in question did not have priority.
- (18) The German Government was of the opinion that point 52 of the Community guidelines on State aid for environmental protection⁽³⁾ was applicable because an existing tax had been increased significantly. It argued that the Mineral Oil Tax Law, and the Energy Tax Law which had taken its place, should be seen as an existing environmental tax. They stated that the energy tax rates contained therein had been increased significantly as of 1 April 1999 through the ecological tax reform (as shown in the overview in Annex I).
- (19) The objective of those provisions had been to increase demand for energy-saving, resource-efficient products and drive the development of environmentally friendly procedures and technologies. The German Government argued that the legislation relating to the taxation of energy had thus had a significant effect on environmental protection.
- (20) In this context, the German Government made reference to a study on energy efficiency in greenhouse cultivation which had been conducted by the Centre for Business Management in Horticulture at the Institute of Biological Production Systems at Hannover's Leibnitz University.

III. GERMANY'S COMMENTS

- (15) Germany commented both on the matter itself and on the procedure.

⁽³⁾ OJ C 37, 3.2.2001, p. 3.

- (21) Higher taxation on energy, it was claimed, was a particular burden on undertakings which heated greenhouses or other covered areas, as the operations of those undertakings were energy-intensive. In view of this, it was argued, there had been cause to lessen the burden on those undertakings temporarily by introducing a fiscal incentive. It was also argued that there had still been a need for this measure after 31 December 2002 (the date on which the original tax reduction had been due to expire). For this reason, the Law on the further development of the ecological tax reform extended the validity of the tax reduction by two years until 31 December 2004. In light of the particularly difficult competitive situation in 2005 and 2006 faced by agricultural and forestry undertakings which heated their greenhouses or covered areas for the purpose of cultivating plants, it had been decided to grant the tax reduction for that period also.
- (22) The German Government considered the requirements laid down in point 52 of the Community guidelines to have been satisfied. Consequently, it was argued that the provisions of point 51(1)(b) of the Community guidelines could be used as justification for having granted State aid in the form of a tax reduction for the period 2001-06.
- (23) The German Government argued that, where the tax reduction affected a Community tax which had been harmonised in accordance with Directive 92/81/EEC or Directive 2003/96/EC, the tax reduction was compatible with the common market, at least in cases where it was not below the minimum Community tax rate. The same applied to the tax reduction (i.e. compatibility with the common market) according to Germany, if a Community tax was not involved, at least in cases where the reduction was over 20 % of the domestic tax.
- (24) Germany also stated that, during consultations on the draft law introducing the ecological tax reform, the issue had arisen of reducing the burden on agricultural and forestry undertakings which heated their greenhouses or covered areas for the purpose of cultivating plants because those undertakings would have been affected significantly by higher taxation due to their energy-intensive operations. Due to the enormous time pressure on passing this legislation through parliament, and the fact that the legislation had originally been due to enter into force on 1 January 1999, it had been decided to include the agricultural and forestry sector in the tax reduction mechanism for the manufacturing sector. The introduction of the tax reduction in question was the result of a separate amendment to the Law on mineral oil tax, which had entered into force on 1 January 2001. The first extension of the tax reduction (for the period 2003-2004) was adopted under the Law on the further development of the ecological tax reform.
- (25) Germany argued that it had been led to believe that the tax reduction in question was lawful during its communications with the Commission beforehand. Germany referred in particular to verbal statements made by Commission officials during a meeting of the working group 'Competition conditions in agriculture' on 26 and 27 October 1999. In any event, the Commission had, at the latest, been made aware of the facts of the case by Germany's communication of 29 August 2001, to such an extent that at that juncture the Commission would have been able to assess the compatibility of the tax reduction with the common market. Germany expressly invoked Article 10(1) and the second sentence of Article 14(1) of Regulation (EC) No 659/1999⁽⁴⁾. Any recovery of the aid could not, Germany argued, be compatible either with the principles of the protection of legitimate expectations and legal certainty or with the principles of proper administration. According to Germany the observations by interested third parties showed that their expectations were legitimate.
- #### IV. THIRD PARTY OBSERVATIONS
- (26) The interested third parties essentially put forward arguments which Germany had already used. They argued that the measures were also not selective because they were open to all agricultural and forestry undertakings operating greenhouses and covered areas. They also argued that Community trade was not disrupted. The area under glass had been drastically reduced in the years concerned and imports to Germany of competing products had increased. In any case, Germany's production volumes were hardly significant, compared to intra-Community trade in vegetables. Furthermore, open-air crops and those under glass were not in direct competition with each other and most of them could not be substituted for each other. If aid existed, it could be justified on the basis of Article 87(3)(c) of the EC Treaty since it helped the development of the horticultural sector. The aid enabled the horticultural sector to adjust to increased

⁽⁴⁾ OJ L 83, 27.3.1999, p. 1.

energy prices and reduced the 'distortions of competition' resulting from the significantly lower gross energy prices in other Member States and adversely affecting undertakings producing in Germany. It could not be claimed that the German aid was 'distorting competition'. On the contrary, it (partially) compensated for an existing 'distortion of competition' which put Germany's greenhouse cultivation at a disadvantage. Because they were limited in time, the measures gave the sector a powerful incentive to adapt to increasing energy prices by implementing energy-saving and rationalisation measures and making the appropriate investment. As a result the measures had to be admissible because otherwise the intention of Directive 92/81/EEC and Directive 2003/96/EC would be undermined or inadmissibly restricted. In the alternative, with reference to the RSV judgment ⁽⁵⁾ of the European Court of Justice it was argued that protecting the legitimate expectations of the beneficiaries precluded any recovery of the aid, since the Commission already knew about the aid on 29 August 2001 but did not make it the subject of an investigation procedure until 20 April 2005 when it requested information. Moreover, in the event of recovery, a large number of undertakings risked becoming insolvent.

V. ASSESSMENT OF THE MEASURE

- (27) Under Article 43 of Regulation (EC) No 2200/96 of 28 October 1996 on the common organisation of the market in fruit and vegetables ⁽⁶⁾, Articles 87, 88 and 89 of the EC Treaty apply to the production of the goods specified in the Regulation and to trade in those goods. The production of, and trade in, fruit and vegetables is therefore subject to the Community provisions on granting State aid.
- (28) Under Article 87(1) of the EC 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, insofar as it affects trade between Member States, to be deemed incompatible with the common market.
- (29) The ECJ has ruled that, when considering whether a State measure constitutes aid within the meaning of Article 87

of the EC Treaty, it is to be determined whether the recipient undertaking has received economic advantage which it would not have received under normal market conditions ⁽⁷⁾ or has been spared costs which it would normally have had to bear from its own resources ⁽⁸⁾.

- (30) The measure in the form of tax refunds gives the undertakings which receive them economic advantages in the form of a lower tax burden. This saves them costs which, under normal circumstances, they would have had to bear from their own resources. The aid is granted from public funds to certain undertakings, namely agricultural and forestry undertakings engaged in production using greenhouses and covered areas.
- (31) The aid is not granted to all undertakings and is therefore selective. It follows that the measure constitutes aid within the meaning of Article 87(1) of the EC Treaty.
- (32) The tax refund is also likely to distort competition ⁽⁹⁾ and to affect trade between Member States ⁽¹⁰⁾.
- (33) Germany is a significant producer of greenhouse products. Trade in these products is also significant, as the following statistics show.

⁽⁷⁾ Case C-39/94, SFEI and others, [1996] ECR I-3547, paragraph 60.

⁽⁸⁾ Case C-301/87, France v Commission, [1990] ECR I-307, paragraph 41.

⁽⁹⁾ According to the case law of the ECJ, the improvement of an undertaking's competitive position by means of State aid generally entails a distortion of competition vis-à-vis competing undertakings not in receipt of such support (Case C-730/79 [1980] ECR 2671, paragraphs 11 and 12).

⁽¹⁰⁾ See statistics below (source: Eurostat).

⁽⁵⁾ Case 223/85 Rijn-Schelde-Verolme (RSV) Machinefabriken en Scheepswerven N.V. v Commission [1987] ECR 4617.

⁽⁶⁾ OJ L 297, 21.11.1996, p. 1.

	2001	2002	2003	2004	2005
Vegetables					
<i>Import</i>					
Value (in thousands of euro)	6 705 483	6 936 685	7 049 757	6 845 103	6 979 459
Quantity (in tonnes)	5 346 123	5 365 972	5 599 183	5 621 769	5 464 528
<i>Export</i>					
Value (in thousands of euro)	867 832	985 187	1 030 880	1 045 543	1 122 869
Quantity (in tonnes)	2 227 612	2 243 611	2 133 544	2 164 328	2 345 796
Flowers					
<i>Import</i>					
Value (in thousands of euro)	3 413 206	3 614 349	3 673 148	3 691 913	3 723 794
Quantity (in tonnes)	1 285 460	1 442 078	1 547 266	1 573 104	1 671 568
<i>Export</i>					
Value (in thousands of euro)	405 250	482 993	546 938	526 374	573 022
Quantity (in tonnes)	235 333	326 613	286 080	283 426	355 969

- (34) Germany's greenhouse products are in competition with the greenhouse products of other Member States. Not only have Germany and the interested third parties not disputed this, but it has also been explained that greenhouse undertakings were exempted from the tax precisely in order to improve their competitive position vis-à-vis Dutch competitors which, according to the same information, enjoy more favourable production conditions because of lower gross prices for energy. Direct competition is therefore involved. An interested third party's assertion that greenhouse products were not in direct competition with open-air products is therefore immaterial considering that there is competition between German greenhouse products and greenhouse products of other Member States, including Dutch greenhouse products.
- (35) Consequently, the exemption from taxes otherwise due is likely to distort competition. The argument that energy prices are more favourable in other Member States is unimportant⁽¹¹⁾. Even if it were true that the starting points differed as regards this production factor, this would not alter the fact that the tax refund granted by Germany is likely to distort competition.
- (36) The aid is also likely to impair trade between the Member States. This is shown by the not insignificant trade flows,

as demonstrated above. Even if it were true, as has been argued, that the area under glass has been drastically reduced and imports to Germany have increased, that in no way proves that trade has not been disrupted. It cannot be ruled out that without the measure the growing area would have been even more drastically reduced and/or imports to Germany would have increased still further. Since intra-Community trade with Germany in greenhouse products exists, it is not a matter of how significant Germany's production quantities are to be regarded.

- (37) The ban on granting State aid under Article 87(1) of the EC Treaty does not apply without exception, however. The Commission has examined whether any of the exceptions to the ban in principle on aid under Article 87(1) of the EC Treaty apply.
- (38) The exceptions provided for in Article 87(2) of the EC Treaty, which concern aid of a social character granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences and aid granted to the economy of certain areas of the Federal Republic of Germany, are irrelevant in the present context regardless of who the beneficiaries of the scheme at issue are.

⁽¹¹⁾ Case 173/73 Italy v Commission, [1974] ECR 709, paragraphs 36-40.

- (39) The Commission considers that the exceptions provided for in Article 87(3)(a) of the EC Treaty concerning the development of certain areas are not applicable to the scheme at issue because the measure does not comprise aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment.
- (40) As for the exception provided for in Article 87(3)(b) of the EC Treaty, it is sufficient to note that the tax scheme at issue is not an important project of common European interest and does not seek to remedy a serious disturbance in the German economy. Nor does it seek to promote culture and heritage conservation within the meaning of the exception provided for in Article 87(3)(d) of the EC Treaty.
- (41) The Commission would point out in this connection that neither the German authorities nor any interested parties invoked the above-mentioned exceptions in the course of the investigation procedure.
- (42) The only exception that could be considered is therefore that contained in Article 87(3)(c), according to which an aid may be considered compatible with the common market if it is found to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.
- (43) The Community guidelines for State aid in the agriculture sector ⁽¹²⁾ apply to the measures at issue here ⁽¹³⁾.
- (44) However, neither those Community guidelines nor any other rules relating to agriculture provide in respect of the measures described above for express exemptions from the ban in principle on aid contained in Article 87(1) of the EC Treaty. In particular the Commission notes that point 4 of the Community guidelines, which relates to investment aid, does not apply in the present case. The tax refund is not linked to carrying out investment.
- (45) Germany and a number of interested third parties are of the opinion that a special justification for the aid results from Article 8(2)(f) of Directive 92/81/EEC and Article 15(3) of its successor, Directive 2003/96/EC, and that this would be permitted under point 3.4 of the Community guidelines for State aid in the agriculture sector.
- (46) Having regard to Directive 2003/96/EC, it is stated in recitals (15) and (24) that measures introducing differentiated rates of taxation must be in accordance with the rules on the internal market and competition in order not to result in distortions of competition. The fact that the competition rules must be applied is also confirmed in Article 26 of Directive 2003/96/EC by pointing out to Member States that measures such as tax refunds within the meaning of the Directive might constitute State aid and in those cases have to be notified pursuant to Article 88(3) of the EC Treaty. That Article expressly states that information provided to the Commission on the basis of the Directive does not release Member States from the notification obligation pursuant to Article 88(3) of the EC Treaty.
- (47) The same applies for the Directive 92/81/EEC, which states in its recitals (sixth recital) that Member States may apply on an optional basis certain (...) exemptions (...) where this does not give rise to distortions of competition. Its Article 8(2) states that the Member States may 'without prejudice to other Community provisions' apply total or partial tax exemptions or reductions. The Commission recalls, at this occasion, its competence on State aid issues originating directly from the EC Treaty. Any Community legislation can not possibly impair the Commission's competence in this field.
- (48) Germany asserts that the tax refund is an implementation of a power granted to Member States by the above-mentioned Directives, to which the Commission responds that this is possible only subject to the above-mentioned conditions. Germany also argues that it is contradictory for the Commission, which after all proposed those Directives, to assert to Germany that there is a resultant danger to the common market. Firstly, Germany did not argue that according to the Commission's interpretation there was no possibility of actually applying the said Directives. The Commission does not, of course, rule out the possibility of there being cases which have been conceived on the basis of the Directives, but which at the same time satisfy the requirements of fair competition. The Commission would point out that the Directives only allow for favourable tax treatment at this stage of the approximation of the fiscal legislation. They do not prescribe it.

⁽¹²⁾ OJ C 232, 12.8.2000, p. 17.

⁽¹³⁾ Commission notice on the determination of the rules applicable for the assessment of unlawful State aid – OJ C 119, 22.5.2002, p. 22.

- (49) Germany disputes that the competition-law aspects of the Directives in question take priority. However, it follows from the above-mentioned considerations that in any case — i.e. even if competition-law considerations do not take priority — aid such as the present tax refund must be examined on the basis of the relevant competition rules under the EC Treaty. The question of whether or not there is priority is, therefore, without significance ⁽¹⁴⁾.
- (50) The scope for assessment and discretion accorded to the Commission by the EC Treaty as regards the application of the exemptions under Article 87(3) was not and could not be restricted by the Directives in question in any way.
- (51) Point 3.5 of the Community guidelines reflects the principles of State aid policy and the Common Agricultural Policy. It states that unilateral State aid measures which are simply intended to improve the financial situation of producers but which in no way contribute to the development of the sector, and in particular aid which is granted solely on the basis of price, quantity, unit of production or unit of the means of production is considered to constitute operating aid which is incompatible with the common market.
- (52) As already stated, the aid in question is not linked to investment likely to modernise the sector (e.g. through better heat insulation or investment to increase energy utilisation). On the contrary, necessary adjustments (such as the above-mentioned) are likely to be delayed by such subsidies. The sector therefore remains dependent on this aid. Development either does not occur at all or takes place only after a corresponding delay. Contrary to what some interested third parties argue, not only is there no incentive effect to undertake the necessary investment, but the existing incentive of high energy prices is reduced by the subsidies. The aid in question is therefore to be classified as operating aid in the sense referred to above.
- (53) The new Community guidelines for State aid in the agriculture and forestry sector 2007-2013 ⁽¹⁵⁾ did not enter into force until 1 January 2007. Point 172 provides for retroactive applicability in respect of unlawful tax refunds granted under Directive 2003/96/EC, but only if the conditions of that Directive have been met and there has been no differentiation within the agricultural sector. The same would apply for unlawful tax refunds granted under Directive 92/81/EEC. Since the measure in question applies only in favour of certain agricultural undertakings, however, point 172 does not therefore constitute a basis which would allow the Commission to regard the present tax refunds as compatible with the common market.
- (54) Germany intends to justify the compatibility of the aid under the environmental guidelines. The Commission has also considered the application of points 23 and 51 *et seq.* of the Community guidelines on State aid for environmental protection which in certain circumstances permit the granting of operating aid. The agriculture guidelines of 2000 refer in point 5.6.2 to these environmental guidelines.
- (55) Point 23 of the environmental guidelines states that exemptions from or reductions in taxes the effects of which are conducive to environmental protection to the benefit of firms in particular categories in order to avoid placing them in a difficult competitive situation could be acceptable, provided that such exemptions are *necessary* to ensure the adoption or continued application of taxes to all products.
- (56) The Commission reminds that following point 50 of the environmental guidelines the tax measures in question should make, in general, a significant contribution to protecting the environment. Care should be taken to ensure that the exemptions do not, by their very nature, undermine the general objectives pursued.
- (57) On the basis of the documents (the study) it submitted subsequently, Germany demonstrated that, notwithstanding the increase in energy taxes, energy consumption had decreased continuously and energy efficiency had increased in both vegetable and flower cultivation in greenhouses.
- (58) Consequently, the Commission assumes that the undertakings in question have recognised the need to take measures to bring about some improvement in respect of environmental protection.
- (59) The environmental guidelines distinguish between, on the one hand, new taxes (point 51.1) and, on the other, existing taxes (points 51.2 and 52).
- (60) The Mineral Oil Tax Law had been in force when it was amended on 16 August 2001 by the Law Amending the Mineral Oil Tax Law, which granted the tax refunds. Therefore, it is to be deemed to have 'existed' in the sense of point 51.2 or 52 of the environmental guidelines at the time of the introduction of the amending Law.

⁽¹⁴⁾ Case T184/97 BP Chemicals v Commission, [2000] ECR II-3145, paragraph 59 *et seq.*

⁽¹⁵⁾ OJ C 319, 27.12.2006, p. 1.

- (61) Point 51.2 provides for the application of the provisions in point 51.1 if the following two conditions are satisfied at the same time: (a) the tax in question must have an appreciable positive impact in terms of environmental protection, and (b) the derogations for the firms concerned must have been decided on when the tax was adopted or have become necessary as a result of a significant change in economic conditions that placed the firms in a particularly difficult competitive situation. In the latter instance, the amount of the reduction may not exceed the increase in costs resulting from the change in economic conditions. Once there is no longer any increase in costs, the reduction must no longer apply.
- (62) The conditions mentioned under (a) and (b) must be cumulatively fulfilled in order to apply point 51.1 of the environmental guidelines. As regards the conditions under (b) first alternative, which requires that the derogations for the firms concerned must have been decided on when the tax was adopted, the Commission observes that all the tax reductions have been granted after the adoption of the tax law and not at the time of the adoption. Therefore, the first alternative is not fulfilled. The second alternative requires not only the proof of a significant change in economic conditions of the firms concerned, on the one hand, but also the proof that the amount of reduction does not exceed the increase in costs resulting from the change in economic conditions, on the other. Germany has not provided evidence which would allow the Commission to consider these conditions fulfilled. Therefore, also the second alternative of (b) is not fulfilled. Consequently, point 51.2 can not be applied.
- (63) The Commission has examined whether point 52 could be applied. Point 52 lays down that where an existing tax is increased significantly and where the Member State concerned takes the view that derogations are needed for certain firms, the conditions set out in point 51.1 as regards new taxes are applicable by analogy. Therefore it must be examined whether the taxes were increased significantly and if the conditions of point 51.1 of the environmental guidelines are fulfilled.
- (64) The existing taxes were all increased by more than 20 % (see Annex I). The Commission considers this increase to be significant within the meaning of point 52 of the environmental guidelines. The Commission notes that, according to Germany, the tax reductions in question are necessary for the continued existence of the greenhouse undertakings which benefit from them.
- (65) However, point 52 can be applied only to the granted tax reductions that do not exceed the increase in the original tax, that is to say the new part of the existing tax. Point 52 refers to the rules applicable to new taxes. As a consequence the increase of the tax is assessed by analogy in the same way as the introduction of a new tax. This analogy can only be applied for the new part, meaning the increased part of the tax. Only this reasoning ensures that the additional criteria which have to be applied in the assessment of existing taxes are not ignored in the case of the assessment of a tax increase. Based on this assumption the Commission has established the following facts:
- (66) Regarding heating oil, the original tax had been increased from EUR 40,90/1 000 l to EUR 61,35/1 000 l. The Commission considers therefore that any reduction of the tax going beyond the original level (namely EUR 40,90/1 000 l), cannot be justified under the environmental guidelines and is therefore incompatible with the common market.
- (67) Regarding natural gas, the original tax had been increased from EUR 1,87/MWh to EUR 3,476/MWh (as of 1 April 1999), and EUR 5,50/MWh (as of 2003). The Commission considers therefore that any reduction of the tax going beyond the original level (namely EUR 1,87/1 000 l), cannot be justified under the environmental guidelines and is therefore incompatible with the common market.
- (68) Regarding the liquid gas, the original tax had been increased from EUR 25,56/1 000 kg to EUR 38,34/1 000 kg (as of 1 April 1999) and EUR 60,60/1 000 kg (as of 2003). The Commission considers therefore that any reduction of the tax going beyond the original level (namely EUR 25,56/1 000 kg), cannot be justified under the environmental guidelines and is therefore incompatible with the common market.

- (69) With respect to the part of the aid which has not gone beyond the increase of the tax in 1999, the Commission has also determined whether the conditions of point 51.1(b) (applicable by analogy in accordance with point 52 of the guidelines) were respected.
- (70) Point 51.1(b) states that exemption decisions covering a 10-year period with no degressivity may be justified in two cases and specifies two further conditions which must be met: (a) where the reduction concerns a Community tax, the amount effectively paid by the firms after the reduction must remain higher than the Community minimum in order to provide the firms with an incentive to improve environmental protection; (b) where the reduction concerns a domestic tax imposed in the absence of a Community tax, the firms eligible for the reduction must nevertheless pay a *significant* proportion of the national tax. Alternatively the environmental guidelines require that alternative measures (e.g. voluntary agreements) are in place, which is not the case here.
- (71) With regard to the three products concerned, namely heating oil, natural gas and liquid gas, the original level of taxation applied before the increase of the tax in 1999 exceeded the Community minima:

For heating oil, the Community minimum tax rate was EUR 18,00/1 000 l⁽¹⁶⁾ for the years 2001-2003 and EUR 21,00/1 000 l⁽¹⁷⁾ for the years 2004-2006 and was therefore below the original level of taxation of EUR 40,90/1 000 l.

For natural gas, the Community minimum tax rate was EUR 0,54/MWh for the years 2004-2006 and was therefore below the original level of taxation of EUR 1,87/MWh.

For liquid gas, the Community minimum tax rate was EUR 0/1 000 kg and was therefore below the original level of taxation of EUR 25,56/1 000 kg.

- (72) With regard to the (word missing) heating fuels which were *not* subject to a Community minimum during the

years 2001-2003, point 51.1(b), second indent, of the 2001 Guidelines on State aid for environmental protection requires benefiting companies to pay a significant proportion of the national tax. The reason for that is to leave them with an incentive to improve their environmental performance. In the practice of the Commission, it has become clear that, in general 20 %, or the Community minimum that applies to energy uses that do fall within the scope of respective Directives can be regarded as a significant proportion.

- (73) Even if one takes into account the highest national tax rate applicable in the period in question, namely EUR 5,5/MWh, in the year 2003, the 20 % threshold only amounts to EUR 1,1/MWh, and therefore remains under the original level of taxation, namely EUR 1,87/MWh.

- (74) For these reasons, the Commission concludes that, as far as the tax reductions do not go beyond the original levels of taxation before the increase in 1999, the conditions set out in point 51.1 b are fulfilled.

- (75) Regarding heating oil, the Commission considers therefore that the part of the reduction of the tax which goes beyond the original rate (namely EUR 40,90/1 000 l) is incompatible, and that the part of the reduction above the original rate (the reduction from EUR 61,35/1 000 l to EUR 40,90/1 000 l) is compatible with the common market.

- (76) Regarding natural gas, the Commission considers therefore that the part of the reduction of the tax, which goes beyond the original rate (namely EUR 1,87/MWh) is incompatible, and that the part of the reduction above the original rate (the reduction from EUR 3,476/MWh for the years 2001 and 2002 and EUR 5,5/MWh for the years 2003 to 2006 to EUR 1,87/MWh) is compatible with the common market.

- (77) Regarding liquid gas, the Commission considers therefore that the part of the reduction of the tax which goes beyond the original rate (namely EUR 25,56/1 000 kg) is incompatible, and that the part of the reduction above the original rate (the reduction from EUR 38,34/1 000 kg for the years 2001 and 2002 and EUR 60,60/1 000 kg for the years 2003 to 2006 to EUR) is compatible with the common market.

⁽¹⁶⁾ Minimum rate of taxation referred to in Article 5(3) of Council Directive 92/82/EEC of 19 October 1992 on the approximation on the rates of excise duties on mineral oils.

⁽¹⁷⁾ Minimum rate of taxation referred to in Article 4(1) in conjunction with Annex I Table C of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity.

- (78) The Commission notes that the aid granted in the years 2001-2004 was granted in breach of Article 93(2) of the EC Treaty (now Article 88(2)) without registering it in time with the Commission and without awaiting the Commission's Decision.
- (79) Germany argues that the Commission knew about the aid as early as 29 August 2001, but that the Commission had not initiated proceedings under Article 88(2) of the EC Treaty until 22 October 2005. In Germany's opinion this decision is too late and with reference to Article 10(1) of Regulation (EC) No 659/1999 cannot be reconciled with the principles of proper administration. Germany therefore argues that the Commission is no longer authorised to establish the aid's incompatibility with the common market.
- (80) Unlawful aid is not eligible for the short examination periods specified in Article 4 of Regulation (EC) No 659/1999. The principles of proper administration remain applicable, however. The Commission underlines nevertheless that it reserved its right to examine the aid under scrutiny in its Decision C(2002) 441 final of 13 February 2002 addressed to Germany.
- (81) From the date cited by Germany (29 August 2001) until the opening of the formal investigation procedure (20 October 2005) the Commission addressed at least three requests for information to Germany and held a meeting with representatives from Germany. Also, it was not until during this period that the Commission learnt of the two extensions of the tax refund, by two years in each case. During the same period Germany addressed no less than five communications with additional information to the Commission. The mere fact that during the period in question Germany sent five communications to the Commission proves that it was also Germany's view that the information had not been sufficiently complete to allow the Commission to take a decision on this case. Citing the RSV judgment does not alter that fact. The case underlying that judgment is different. In that case, the Commission not only already had detailed knowledge of the aid (which is not so in the present case), but had even already taken a decision on the basic measure. Even taking into account the relevant ECJ case law, there is therefore no question of the Commission having failed to take action. Article 10(1) of Regulation (EC) No 659/1999 has not been infringed.
- (82) Regarding the notified part of the aid (ex number N 189/2005) neither Germany nor interested third parties argued that there had been specific infringements of the examination periods as referred to in Article 4(5) of Regulation (EC) No 659/1999. Furthermore, Germany did not apply the procedure provided for under Article 5(3) of that Regulation.
- (83) Therefore, the arguments of Germany concerning the concrete application of the Regulation (EC) No 659/1999 must be discarded.
- (84) The Commission points out that, pursuant to Article 14(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 [now Article 88] of the EC Treaty ⁽¹⁸⁾, any unlawful aid found to be incompatible with the common market granted under the scheme at issue must be recovered.
- (85) Article 14(1) provides as follows: 'The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law.' The Commission is required to take into consideration on its own initiative exceptional circumstances that provide such justification ⁽¹⁹⁾.
- (86) It should be examined whether, in this case, any general principle of Community law, such as the principle of legitimate expectations or of legal certainty, could be applied in order to preclude recovery from the beneficiaries of the unlawful and incompatible aid.
- (87) The protection of legitimate expectations is a general principle protected under Community law. For legitimate expectations to arise, previous assurances provided by the Commission administration regarding the legality of a certain measure are required. Therefore, there must be an act or conduct on the part of the Community administration capable of having given rise to such an expectation ⁽²⁰⁾.
- (18) OJ L 83, 27.3.1999, p. 1.
- (19) Case 223/85 *Rijn-Schelde-Verolme (RSV) Machinefabrieken en Scheepswerven NV v. Commission*, [1987] ECR 4617.
- (20) Case C-265/85 *Van den Bergh en Jurgens v Commission*, [1987] ECR 1155, paragraph 44; case C-152/88 *Sofrimport v Commission*, [1990] ECR I-2477, paragraph 26; case T-290/97 *Mehibas Dordtselaan v Commission*, [2000] ECR II-15, paragraph 59; case T-223/00 *Kyowa Hakko Kogyo v. Commission*, [2003] ECR II-2553, paragraph 51.

- (88) According to the case-law, the principle of legal certainty is breached when the circumstances of uncertainty and lack of clarity led to the creation of an equivocal situation which the Commission should have clarified before it could take any action to order recovery ⁽²¹⁾.
- (89) Germany has not specifically demonstrated why recovery in itself should not be compatible with proper administration. Under Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999, aid deemed to be unlawful and incompatible with the common market must be recovered as a matter of principle.
- (90) The only exception to that are cases in which recovery would infringe general principles of Community law. No such infringement is apparent. Furthermore, and in particular, any legitimate expectation on the part of Germany was neither well founded nor worthy of protection. It was not well founded because the aid had not been notified. Germany could not therefore have legitimate expectations in the existence of that aid. This applies all the more so because by the above-mentioned letter of 13 February 2002 the Commission drew Germany's attention to the possibility that the aid might be checked. According to established ECJ case law, a prudent businessman could and should have asked the German authorities whether the aid had been notified and could have therefore found out that there was a risk of possible demand for recovery ⁽²²⁾. If he deliberately or as a result of negligence failed to ask this, his legitimate expectations are not worthy of protection.
- (91) In response to Germany's objection that, as a result of verbal statements by Commission officials, Germany gained the impression that the aid was compatible with the common market, the Commission points out that it alone, under the responsibility of the College, is authorised to take such decisions. It also notes that there is no Commission document from which it could be concluded that the aid in question is compatible with the common market.
- (92) In response to the objection that in the event of possible recovery a large number of undertakings would be threatened with insolvency, the Commission reiterates that recovery of part of the aid is necessary in order to enable restoration of the status quo ante, i.e. a situation without distorted competition. If this means that individual undertakings are not viable, then that is only a result of competition taking place under market-economy conditions.
- (93) From the considerations formulated in this decision it is clear that the recovery of the subsidies in question can not possibly be waived on grounds of legal certainty.
- (94) The tax refunds granted must, in principle, be recovered in full where they have been deemed to constitute aid which is incompatible with the common market.
- (95) The decision concerns the tax refund in question and must, including recovery, be effected without delay in accordance with Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty.
- (96) Under Article 14(1) of Council Regulation (EC) No 659/1999, where negative decisions are taken in cases of unlawful aid, the Commission is to decide that the Member State concerned must take all necessary measures to recover the aid from the beneficiary. Germany must therefore take all necessary measures to recover from the beneficiaries the incompatible aid granted. Germany must call upon the beneficiaries concerned to pay back the aid within two months following publication of this decision. The aid to be recovered includes interest, calculated in accordance with Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999.
- (97) Nevertheless, any individual aid granted under this scheme which satisfies, at the time of grant, the conditions laid down by the Commission Regulations adopted on the basis of Council Regulation (EC) No 994/98 or by any other approved aid scheme is compatible with the common market to the amount of the admissible intensities.
- (98) Furthermore, the Commission's experience has shown that very small amounts of aid granted subject to certain conditions do not fall under Article 87(1) of the Treaty.
- ⁽²¹⁾ Case T-308/00 *Salzgitter AG v Commission*, not yet reported in the ECR, paragraph 180.
- ⁽²²⁾ *Deufil GmbH & Co. KG v Commission* [1987] ECR 901.

(99) Under Regulation (EC) No 1860/2004⁽²³⁾, aid not exceeding EUR 3 000 per beneficiary over three years (this amount including the '*de minimis*' aid granted to any one enterprise) does not affect trade between Member States and does not distort or threaten to distort competition and therefore does not fall under Article 87(1) of the Treaty.

(100) Under Article 5 of Regulation (EC) No 1860/2004 the same applies to aid granted before its entry into force, provided that the requirements of Articles 1 and 3 thereof are fulfilled.

(101) On 1 January 2008, Regulation (EC) No 1860/2004 has been replaced by Regulation (EC) No 1535/2007 of 20 December 2007 on the application of Articles 87 and 88 of the EC Treaty to the *de minimis* aid in the sector of agricultural production⁽²⁴⁾, which increases the amount of *de minimis* aid to EUR 7 500 per beneficiary over any period of three fiscal years, irrespective of the form of the aid or the objective pursued, within the limits of a maximum amount per Member State corresponding to 0,6 % of the value of the annual production.

(102) Article 6(1) of that Regulation states that 'this Regulation shall apply to aid granted before 1 January 2008 to undertakings in the sector of agricultural production, provided that such aid fulfils all the conditions laid down in Articles 1 to 4, except for the reference requirement clearly set out in this Regulation in the first subparagraph of Article 4(1)'.

(103) Article 6(2) of the same Regulation states that 'any *de minimis* aid granted between 1 January 2005 and six months after entry into force of this Regulation, which fulfils the conditions of Regulation (EC) No 1860/2004 applicable to the sector of agricultural production until the date of entry into force of this Regulation, shall be deemed not to meet all the criteria of Article 87(1) of the Treaty and shall therefore be exempt from the notification requirement of Article 88(3) of the Treaty'.

(104) Against this background, the Commission considers that a tax reduction up to a maximum amount of EUR 3 000

would not constitute State aid if it complied with the provisions of Regulation (EC) No 1860/2004 at the time it was granted, and that a tax reduction up to the maximum amount of EUR 7 500 would not constitute State aid if it complied with the provisions of Regulation (EC) No 1535/2007 at the time it was granted.

VI. CONCLUSIONS

(105) The State aid granted to agricultural and forestry undertakings for heating greenhouses or covered areas for crop production under the *Law amending the Mineral Oil Tax Law* and the *Law on the further development of the ecological tax reform*, unlawfully put into effect by the Federal Republic of Germany in breach of Article 88(3) of the Treaty, or which it intends to grant to them under the Guidelines Implementation Law, is hereby deemed to be incompatible with the common market to the extent mentioned in points 75 to 77 of the present decision, and must be recovered for the relevant period, where granted.

(106) In all other respects, the State aid which the Federal Republic of Germany has granted to agricultural and forestry undertakings for heating greenhouses or covered areas for crop production under the *Law amending the Mineral Oil Tax Law* and the *Law on the further development of the ecological tax reform* or which it intends to grant to them under the Guidelines Implementation Law, is hereby deemed to be compatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The State aid scheme applied or intended to be applied by Germany to agricultural and forestry undertakings for heating greenhouses or covered areas for crop production under the *Law amending the Mineral Oil Tax Law*, the *Law on the further development of the ecological tax reform* and the *Guidelines Implementation Law* is incompatible with the common market with respect to the part of the reduction of the tax, which goes beyond the original rate of EUR 40,90/1 000 l for heating fuel, of EUR 1,87/MWh for natural gas, and of EUR 25,56/1 000 kg for liquid fuel.

⁽²³⁾ OJ L 325, 28.10.2004, p. 4.

⁽²⁴⁾ OJ L 337, 21.12.2007, p. 35.

Article 2

The State aid scheme applied or intended to be applied by Germany to agricultural and forestry undertakings for heating greenhouses or covered areas for crop production under the *Law amending the Mineral Oil Tax Law*, the *Law on the further development of the ecological tax reform* and the *Guidelines Implementation Law* is compatible with the common market in all other respects.

Article 3

Germany shall withdraw the part of the scheme referred to in Article 1.

Article 4

1. Germany shall take all necessary measures to recover from the beneficiaries the aid referred to in Article 1.

2. The aid to be recovered shall include interest from the date on which the aid became available to the beneficiaries until the date on which it is actually recovered.

Interest shall be calculated in accordance with Chapter V of Commission Regulation (EC) No 794/2004.

3. Germany shall cancel all payment of outstanding aid referred to in Article 1 with effect from the date of the present decision.

4. Recovery shall be effected without delay and in accordance with the procedures of national law, provided these allow the immediate and effective execution of this Decision.

5. Germany shall ensure that this Decision is implemented within four months of the date of its notification.

Article 5

1. Germany shall keep the Commission informed of the progress of the national proceedings to implement this Decision until those proceedings have been completed.

2. Within two months from notification of this Decision, Germany shall submit the following information:

(a) the list of beneficiaries that have received aid under the scheme referred to in Article 1 and the total amount of aid received by each of them under the scheme;

(b) the total amount (principal and recovery interest) to be recovered from each beneficiary;

(c) a detailed description of the measures already taken and planned to comply with this Decision;

(d) documents demonstrating that the beneficiaries have been ordered to repay the aid.

3. Within two months following notification of this Decision, Germany shall at the request of the Commission submit a report detailing the measures taken or planned to comply with this Decision. That report shall also provide detailed information on the amounts of aid and recovery interest already repaid by each beneficiary.

Article 6

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 11 March 2008.

For the Commission

Mariann FISCHER BOEL

Member of the Commission

ANNEX I

ENERGY TAXATION

Heating oil

Year	Standard rate of taxation	Reduction pursuant to s. 25(3a) first sentence, No 1,2 in conjunction with s. 25(4) of the Mineral Oil Tax Law since 1 August 2006: s. 54(2)(1) in conjunction with s. 54(3) of the Energy Taxation Law	Reduction pursuant to s. 25(3a) first sentence, No 1,4 of the Mineral Oil Tax Law since 1 August 2006: s. 58(2)(1) of the Energy Taxation Law C 39/2005	Net taxation	EU minimum tax
	in EUR/1 000 l				
until 31.3.1999	40,90 ⁽¹⁾				
as of 1.4.1999	61,35 ⁽²⁾				
2000	61,35 ⁽²⁾				
2001	61,35 ⁽²⁾	16,36	40,90	4,09 ⁽³⁾	18,00 ⁽⁵⁾
2002	61,35	16,36	40,90	4,09 ⁽³⁾	18,00 ⁽⁵⁾
2003	61,35	8,18	40,90	12,27 ⁽⁴⁾	18,00 ⁽⁵⁾
2004	61,35	8,18	40,90	12,27 ⁽⁴⁾	21,00 ⁽⁶⁾
2005	61,35	8,18	40,90	12,27 ⁽⁴⁾	21,00 ⁽⁶⁾
2006	61,35	8,18	40,90	12,27 ⁽⁴⁾	21,00 ⁽⁶⁾

⁽¹⁾ Until 31 March 1999, the standard rate of taxation on heating oil (HEL) was DM 80,00/1 000 litres. Figures have been provided in euro to facilitate comparison (exchange rate: EUR 1 = DM 1,95583).

⁽²⁾ As of 1 April 1999, the standard rate of taxation on heating oil (HEL) was DM 120,00/1 000 litres. Figures have been provided in euro to facilitate comparison (exchange rate: EUR 1 = DM 1,95583).

⁽³⁾ For the sake of simplicity, the net taxation figure does not take account of the tax 'floor' (deductible) of EUR 409 provided for by s. 25(4) of the Mineral Oil Tax Law. The actual net taxation figure depends on the amount consumed.

⁽⁴⁾ For the sake of simplicity, the net taxation figure does not take account of the tax 'floor' (deductible) of EUR 205 provided for by s. 25(4) of the Mineral Oil Tax Law (as of 1 August 2006: s. 54(3) of the Energy Tax Law). The actual net taxation figure depends on the amount consumed.

⁽⁵⁾ Minimum rate of taxation referred to in Article 5(3) of Council Directive 92/82/EEC of 19 October 1992 on the approximation of the rates of excise duties on mineral oils.

⁽⁶⁾ Minimum rate of taxation referred to in Article 4(1) in conjunction with Annex I Table C of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity.

Natural gas

Year	Standard rate of taxation	Reduction pursuant to s. 25(3a) first sentence, No 3,2 in conjunction with s. 25(4) of the Mineral Oil Tax Law since 1 August 2006: s. 54(2)(2) in conjunction with s. 54(3) of the Energy Taxation Law	Reduction pursuant to s. 25(3a) first sentence, No 3,4 of the Mineral Oil Tax Law since 1 August 2006: s. 58(2)(2) of the Energy Taxation Law C 39/2005	Net taxation	EU minimum tax
	in EUR/MWh				
until 31.3.1999	1,87 ⁽¹⁾				
as of 1.4.1999	3,476 ⁽²⁾				
2000	3,476 ⁽²⁾				
2001	3,476 ⁽²⁾	1,308	1,84 ⁽³⁾	0,328 ⁽⁴⁾	not harmonised
2002	3,476	1,308	1,84 ⁽³⁾	0,328 ⁽⁴⁾	not harmonised
2003	5,50	1,464	3,00	1,036 ⁽⁵⁾	not harmonised
2004	5,50	1,464	3,00	1,036 ⁽⁵⁾	0,54 ⁽⁶⁾ ⁽⁷⁾
2005	5,50	1,464	3,00	1,036 ⁽⁵⁾	0,54 ⁽⁶⁾ ⁽⁷⁾
2006	5,50	1,464	3,00	1,036 ⁽⁵⁾	0,54 ⁽⁶⁾ ⁽⁷⁾

⁽¹⁾ Until 31 March 1999, the standard rate of taxation on natural gas was DM 3,60/MWh. Figures have been provided in euro to facilitate comparison (exchange rate: EUR 1 = DM 1,95583).

⁽²⁾ From 1 April 1999 until 31 December 2001, the standard rate of taxation on natural gas was DM 6,80/MWh. Figures have been provided in euro to facilitate comparison (exchange rate: EUR 1 = DM 1,95583).

⁽³⁾ Amount of tax reduction pursuant to s. 25(3a)(3.4) of the Mineral Oil Tax Law of 1 August 2002 (Federal Law Gazette Part I, p. 2778).

⁽⁴⁾ For the sake of simplicity, the net taxation figure does not take account of the tax 'floor' (deductible) of EUR 409 provided for by s. 25(4) of the Mineral Oil Tax Law. The actual net taxation figure depends on the amount consumed.

⁽⁵⁾ For the sake of simplicity, the net taxation figure does not take account of the tax 'floor' (deductible) of EUR 205 provided for by s. 25(4) of the Mineral Oil Tax Law. The actual net taxation figure depends on the amount consumed.

⁽⁶⁾ Minimum rate of taxation referred to in Article 4(1) in conjunction with Annex I Table C of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity.

⁽⁷⁾ Converted into MWh (Table C: 0,15/0,30 euro/gigajoule based on gross calorific value).

Liquid gas

Year	Standard rate of taxation	Reduction pursuant to s. 25(3a) first sentence, No 4,2 in conjunction with s. 25(4) of the Mineral Oil Tax Law since 1 August 2006: s. 54(2)(3) in conjunction with s. 54(3) of the Energy Taxation Law	Reduction pursuant to s. 25(3a) first sentence, No 4,4 of the Mineral Oil Tax Law since 1 August 2006: s. 58(2)(3) of the Energy Taxation Law C 39/2005	Net taxation	EU minimum tax
	in EUR/1 000 kg				
until 31.3.1999	25,56 ⁽¹⁾				
as of 1.4.1999	38,34 ⁽²⁾				
2000	38,34 ⁽²⁾				
2001	38,34 ⁽²⁾	10,22	25,56	2,56 ⁽³⁾	0,00 ⁽⁵⁾
2002	38,34	10,22	25,56	2,56 ⁽³⁾	0,00 ⁽⁵⁾
2003	60,60	14,02	38,90	7,68 ⁽⁴⁾	0,00 ⁽⁵⁾
2004	60,60	14,02	38,90	7,68 ⁽⁴⁾	0,00 ⁽⁶⁾
2005	60,60	14,02	38,90	7,68 ⁽⁴⁾	0,00 ⁽⁶⁾
2006	60,60	14,02	38,90	7,68 ⁽⁴⁾	0,00 ⁽⁶⁾

⁽¹⁾ Until 31 March 1999, the standard rate of taxation on liquid gas was DM 50,00/1 000 kg. Figures have been provided in euro to facilitate comparison (exchange rate: EUR 1 = DM 1,95583).

⁽²⁾ From 1 April 1999 until 31 December 2001, the standard rate of taxation on liquid gas was DM 75,00/1 000 kg. Figures have been provided in euro to facilitate comparison (exchange rate: EUR 1 = DM 1,95583).

⁽³⁾ For the sake of simplicity, the net taxation figure does not take account of the tax 'floor' (deductible) of EUR 409 provided for by s. 25(4) of the Mineral Oil Tax Law. The actual net taxation figure depends on the amount consumed.

⁽⁴⁾ For the sake of simplicity, the net taxation figure does not take account of the tax 'floor' (deductible) of EUR 205 provided for by s. 25(4) of the Mineral Oil Tax Law. The actual net taxation figure depends on the amount consumed.

⁽⁵⁾ Minimum rate of taxation referred to in Article 6(3) of Council Directive 92/82/EEC of 19 October 1992 on the approximation of the rates of excise duties on mineral oils.

⁽⁶⁾ Minimum rate of taxation referred to in Article 4(1) in conjunction with Annex I Table C of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity.

ANNEX II

Information about the amounts of aid received, to be recovered and already recovered

Identity of the beneficiary	Total amount of aid received under the scheme (°)	Total amount of aid to be recovered (°) (principal)	Total amount of aid already recovered (°)	
			Principal	Recovery interest

(°) National currency in millions.

COMMISSION DECISION

of 2 April 2008

on State aid C 38/07 (ex NN 45/07) implemented by France for Arbel Fauvet Rail SA

(notified under document number C(2008) 1089)

(Only the French version is authentic)

(Text with EEA relevance)

(2008/716/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

(3) France submitted comments in communications dated 12 October and 18 and 19 December 2007.

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

(4) The Commission Decision to initiate the formal investigation procedure was published in the *Official Journal of the European Union* ⁽²⁾. The Commission called on interested parties to submit their comments.

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽¹⁾,

2. AID DESCRIPTION

2.1. Beneficiary

Whereas:

(6) AFR is a manufacturer of railway equipment specialising in goods wagons and tank containers. It is one of the leading manufacturers of railway rolling stock on the European market. The company is located in Douai (Nord) and currently employs around 265 people.

1. PROCEDURE

(1) The Commission received a complaint informing it of certain support measures implemented by France for Arbel Fauvet Rail (hereinafter AFR). In communications dated 28 January 2006, 25 October 2006, 30 January 2007 and 6 June 2007, France submitted additional information.

(7) In 2005 AFR was wholly owned by Arbel SA ⁽³⁾ and employed around 330 people.

(2) By letter dated 12 September 2007, the Commission informed France that it had decided to initiate the formal investigation procedure laid down in Article 88(2) of the Treaty in respect of the measure.

(8) AFR's business has been running at a loss for several years. The company's economic difficulties worsened from 2001 onwards. This trend gathered momentum between 2002 and 2005. The following table shows some of AFR's key performance indicators for the period before the aid was granted.

(in EUR)

	At 31.12.2004	At 31.12.2003	At 31.12.2002	At 31.12.2001
Turnover	22 700 000	42 700 000	42 000 000	70 000 000
Net result	- 11 589 620	- 14 270 634	- 2 083 746	- 10 500 000
Capital and reserves	- 21 090 000	- 23 000 000	- 8 700 000	- 6 600 000

⁽²⁾ See footnote 1.

⁽³⁾ On 29 June 2007 AFR was taken over by IGF Industries. Its business name changed to 'IGF Industries — Arbel Fauvet Rail'.

⁽¹⁾ OJ C 249, 24.10.2007, p. 17.

2.2. Support measures

- (9) On 4 July 2005 the Nord-Pas-de-Calais regional authorities and the Communauté d'agglomération du Douaisis jointly granted AFR a repayable advance of EUR 1 million each, making a total of EUR 2 million.
- (10) According to the information provided by the French authorities, the terms of the advances were as follows:
- the repayable advance from the regional authorities was granted at an annual interest rate of 4,08 % (equivalent to the Community reference rate applicable at the time), subject to the completion of a financing plan that AFR was drawing up. It was to be repaid in six-monthly instalments over a three-year period starting on 1 January 2006. As far as the Commission is aware, these advances have not yet been repaid in full,
 - the advance from the Communauté d'agglomération du Douaisis was granted at an annual interest rate of 4,08 % (equivalent to the Community reference rate applicable at the time), subject to payment of the advance from the regional authorities, repayable under the same terms, and to supply of proof of the irrevocable merger between AFR and Lormafer, another company controlled by Arbel SA. This advance was also to be repaid in six-monthly instalments over a three-year period starting on 1 January 2006.

3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (11) In its Decision to initiate the procedure, the Commission took the view that the repayable advances constituted State aid within the meaning of Article 87(1) of the Treaty. In this connection, it noted that the measures conferred an advantage on AFR in that the firm, given its financial situation, could not have raised funds on such favourable terms on the financial market.
- (12) The Commission also took the view that AFR was a firm in difficulty within the meaning of the Community Guidelines on State aid for rescuing and restructuring firms in difficulty ('the Guidelines')⁽⁴⁾ and that the compatibility of the State aid it had received needed, therefore, to be assessed in the light of the Guidelines. The Commission was doubtful whether, in the light of the Guidelines, the aid in question was compatible with the common market.

4. COMMENTS FROM FRANCE

- (13) The French authorities claimed that, although AFR was going through a difficult period at the time the repayable advances were granted and then paid (i.e. July and the second half of 2005), it had maintained the confidence of its customers and bankers.
- (14) To support their claims, the French authorities mentioned the following points, which they described as 'signs of confidence' in AFR on the part of customers and banks:
- [...] (*) bank had increased the overdraft facility on AFR's current account by EUR 2 million (guaranteed by [...]),
 - AFR had received EUR 7 million in advance payments from its customers (guaranteed by [...]) (*), to which a further EUR 4 million in new advance payments was added in January 2006,
 - at the same time, the firm held supplier guarantees worth EUR 4 million with [...] (*).
- (15) The French authorities backed up their comments with documents which show the following:
- the overdraft interest rate was 4,4199 % as 1 July 2005,
 - the outstanding amount of the various guarantees (suppliers, contract guarantees, financial guarantees) provided by [...] (*) to AFR was EUR 29 million of at 6 May 2005.

5. ASSESSMENT OF THE AID IN THE LIGHT OF ARTICLE 87 OF THE TREATY

5.1. Existence of State aid

5.1.1. State resources

- (16) Article 87(1) of the Treaty stipulates that, save as where otherwise provided for in the Treaty, aid granted by a Member State or through State resource which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade among Member States, incompatible with the common market.
- (17) With regard to the repayable advances, the Commission notes the following.

⁽⁴⁾ OJ C 244, 1.10.2004, p. 2.

(*) Confidential information.

- (18) Article 87 of the Treaty does not apply only to aid granted by the national governments of Member States, but also to aid from local and regional authorities such as the Nord-Pas-de-Calais region or the municipalities in the Communauté d'agglomération du Douaisis. The funds of such authorities constitute state resources, and their decisions to grant the advances in question to AFR are attributable to the State.

5.1.2. Aid favouring certain undertakings

- (19) The advances were granted at a time when AFR was in a difficult financial situation. In its decision to initiate the procedure, the Commission was of the opinion that, given its financial situation as described in point 8, AFR was a firm in difficulty within the meaning of the Guidelines when the aid was granted. It also noted that the advances were granted without any guarantee being lodged for their repayment, whereas the interest rates applied are supposed to reflect the interest rate applicable to loans 'backed by normal security' ⁽⁵⁾. It therefore considers that there is no way that AFR, given its financial situation, would have been able to obtain funding on such favourable terms on the credit market. The advances in question therefore confer an advantage on AFR.

- (20) In this connection, it is worth noting that, basing themselves on the examples given in paragraph 14, the French authorities stated that AFR still had the confidence of its bankers and customers at the time the aid was granted. The Commission takes these comments to mean that France disputes the idea that AFR was unable to obtain funds on similar terms on the credit market (which amounts to disputing that the repayable advances conferred an advantage on AFR) and *a fortiori* that AFR was a firm in difficulty within the meaning of the Guidelines at the time the repayable advances were granted.

- (21) However, France's comments did not alter the analysis made in the decision to initiate the procedure, for the following reasons.

- (22) The examples of credit quoted by the French authorities (such as the current account overdraft facility and the advance payments from customers) are not comparable to the repayable advances in question. A current account overdraft is a very short-term credit facility, unlike the repayable advances, which have a maturity of three years. These different types of credit are not, therefore, subject

to the same risk analyses by creditors, and the fact that a debtor can obtain short-term credit is not sufficient to assess whether it could obtain a longer-term loan, the repayment of which depends on the debtor's ability to survive.

- (23) Concerning the advance payments from customers, the Commission notes that they were counter-guaranteed by [...] ^(*), an independent institution, which means that customers and suppliers were not incurring any risks in connection with AFR's financial situation and therefore had no reason to subject the payment of these advances to an analysis of the financial soundness of the firm along the lines of that which would have been carried out by a creditor considering the possibility of providing an unsecured loan.

- (24) In conclusion, France's comments do not lead to the conclusion that AFR would have been able to obtain funds on similar terms on the credit market.

5.1.3. Firm in difficulty

- (25) With regard to AFR's status as a firm in difficulty within the meaning of the Guidelines, the Commission makes the following observations.

- (26) Point 10(a) of the Guidelines states that a firm is in difficulty where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months. This provision reflects the assumption that a company experiencing a massive loss in its registered capital will be unable to stem losses that will almost certainly condemn it to go out of business in the short or medium term. The Commission considers that this assumption logically applies *a fortiori* to a company that has lost all its registered capital and has negative capital and reserves.

- (27) As shown by the financial data set out in paragraph 8 (and not disputed by France during the formal investigation procedure), AFR had had negative capital and reserves since 2001 and had not, at the time the aid was granted, been able to reverse this trend and move back into a positive situation as regards capital and reserves. Under the circumstances, the Commission considers that AFR was a firm in difficulty within the meaning of point 10 of the Guidelines at the time the aid was granted.

⁽⁵⁾ See the Commission notice on the method for setting the reference and discount rates (OJ C 273, 9.9.1997, p. 3).

- (28) In the alternative, the Commission notes that, at the time the aid was granted, AFR also fitted the definition of a firm in difficulty given in point 11 of the Guidelines, which states that, even when none of the circumstances set out in point 10 are present, a firm may still be considered to be in difficulty, in particular where the usual signs of a firm being in difficulty are present, such as increasing losses and diminishing turnover. However, point 11 does stipulate that a firm in difficulty is eligible only where, demonstrably, it cannot recover through its own resources or with the funds it obtains from its owners/shareholders or from market sources. This provision is therefore a reminder that the status of a firm in difficulty must be determined in the light of all the relevant indicators, but with significant weight being given to the firm's ability to recover without State intervention.
- (29) In this regard, the Commission notes (as is clear from the table in paragraph 8) that, since 2001, AFR's turnover has fallen steadily while losses have persisted. These are signs of a firm in difficulty within the meaning of point 11 of the Guidelines. In its decision to initiate the formal investigation procedure, the Commission had already noted these signs in support of its preliminary conclusion that AFR was a firm in difficulty. Moreover, the negative trend in AFR's financial situation is clear from the fact that, from January 2004 onwards, the firm was unable to pay by the due date taxes and social security contributions totalling EUR 4,3 million and therefore needed to ask the competent authorities for a moratorium and an arrangement to clear the debt.
- (30) The only facts cited by France that might constitute signs to the contrary are the loans granted to AFR (current account overdraft and advance payments) and the fact that AFR had received certain guarantees from [...] (*). The Commission considers that these signs should be taken into account in the assessment, required by point 11 of the Guidelines, of the firm's ability to recover with the funds it obtains from market sources. In this respect, the Commission notes that:
- the fact that AFR had negative capital and reserves suggests that it was unable to overcome its difficulties with its *own resources*,
 - the French authorities indicated that AFR's *shareholder*, Arbel SA, despite the support it provided to AFR, was unable on its own to ensure the recovery of its subsidiary,
 - lastly, with regard to financial market sources, the loans and guarantees cited by France mean at the most that AFR still had some ability to obtain limited amounts of short-term credit. However, given the extent of AFR's difficulties, particularly its need for capital and reserves, the loans cited are not sufficient to conclude that AFR could have resolved its difficulties with funds from *market sources*.
- (31) Accordingly, it must be concluded that, at the time the aid was granted, AFR was in serious financial difficulties that threatened its survival in the short or medium term and that it was not in a position to address those difficulties without help from the public authorities.
- (32) The Commission therefore takes the view, in the light of the above observations and, in particular, of the financial results shown in paragraph 8, that AFR was a firm in difficulty within the meaning of point 10 and, in the alternative, of point 11 of the Guidelines at the time the repayable advances were granted. Given the difficulties being experienced by AFR, the Commission considers that AFR would not have been able to obtain funds on such advantageous terms on the credit market. The advances in question thus conferred an advantage on AFR by providing it with finance on more favourable terms than it would have been able to obtain on the credit market.
- #### 5.1.4. Effect on trade and competition
- (33) The repayable advances confer an advantage on AFR in relation to other firms in a similar situation in that they are available only to AFR.
- (34) The railway rolling stock manufacturing sector is characterised by the presence of several European operators and by intra-Community trade. Consequently, the advantage conferred on AFR is likely to distort competition and trade between Member States.
- #### 5.1.5. Conclusion
- (35) In the light of the above observations, the Commission considers that the repayable advances granted to AFR constitute state aid within the meaning of Article 87(1) of the Treaty.
- ### 5.2. Amount of the aid
- (36) In the case of aid granted in the form of loans to firms in difficulty, the aid element is made up of the difference between the interest rate actually applied and the interest rate at which the beneficiary company could have obtained the same loan on the open market ⁽⁶⁾.
- ⁽⁶⁾ See the Commission Decision of 2 March 2005 in *Chemische Werke Piesteritz* (OJ L 296, 12.11.2005, p. 19, points 107 and 108) and the Commission Decision of 24 January 2007 in Case C 38/2005 *Biria* (OJ L 183, 13.7.2007, points 27 and 83 *et seq.*).

- (37) In its notice on the method for setting the reference and discount rates⁽⁵⁾, the Commission states that the reference rate is a floor rate which may be increased in situations involving a particular risk (for example, an undertaking in difficulty or where the security normally required by banks is not provided) and states that, in such cases, the premium may amount to 400 basis points or more.
- (38) Thus, in *Chemische Werke Piesteritz*⁽⁶⁾, the Commission considered that a loan to a company in difficulty justified an interest premium of 400 basis points. It confirmed this view in *Biria*⁽⁷⁾, stating that the risk constituted by the lack of security justified an additional premium of 400 basis points, i.e. a total increase of 800 basis points. The Commission considers that the circumstances of this case are broadly similar to those of the above-mentioned cases, in particular in relation to the absence of security and the extent of the difficulties encountered. Consequently, the risks associated with the repayable advances granted to AFR may be subject to the same assessment.
- (39) Thus, the State aid constituted by the repayable advances is made up of the difference between the interest actually due under the terms of the repayable advances and the interest that would be due if the reference rate in force at the time the aid was granted, increased by 800 basis points, had been applied.
- 5.3. Compatibility of the aid with the common market**
- (40) Given AFR's economic situation at the time the aid was granted, as described in paragraph 8 (running at a loss for several years, negative capital and reserves, falling turnover), the Commission considers that AFR was a firm in difficulty within the meaning of the Guidelines at the time the repayable advances were granted. For the reasons set out in paragraphs 22 and 23, France's comments do not alter this analysis.
- (41) It is true that in 2005 AFR was part of a group controlled by the holding company Arbel SA. Aside from its railways division (made up of AFR and Lormafer), the group included a construction division made up of firms specialising in the manufacture of windows for the construction industry. However, it is clear from the information supplied by the French authorities in the correspondence exchanged before the initiation of the formal investigation procedure that the difficulties encountered by AFR were specific to it within the group as its activity had no connection with the construction division. Moreover, the Commission notes that AFR's difficulties seem to have been too great for the group to overcome, given its mediocre results. It therefore considers that point 13 of the Guidelines is no obstacle to AFR being considered eligible for rescuing and restructuring aid, despite its being part of a group.
- (42) The compatibility of the aid must therefore be assessed in the light of the Guidelines.
- (43) The Commission observes that the compatibility conditions for restructuring aid laid down in the Guidelines are not fulfilled. Accordingly, it notes that:
- the French authorities did not present it with a restructuring plan consistent with points 34 to 37 of the Guidelines,
 - the Commission was not aware of any compensatory measures designed to prevent any excessive distortion of competition that may be caused by the aid (points 38 to 42 of the Guidelines).
- (44) Nor does the aid appear to fulfil the compatibility conditions for rescue aid provided for by the Guidelines, given that the repayable advances were granted for a period of more than six months (see point 25 of the Guidelines).
- (45) These points suffice for it to be concluded that the aid is not compatible with the common market.

6. CONCLUSION

The Commission finds that France has unlawfully implemented the aid in question in breach of Article 88(3) of the Treaty. As the aid is incompatible with the common market, France must bring it to an end and recover from the beneficiary the amounts already paid,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which France has implemented for Arebel Fauvet Rail SA is incompatible with the common market.

Article 2

1. France shall take all necessary measures to recover from the beneficiary the aid referred to in Article 1 and unlawfully made available to the beneficiary.

⁽⁷⁾ Case C 38/05, cited in footnote 6 (see points 83 to 86).

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision. The aid to be recovered shall include interest from the day on which it was at the disposal of the beneficiary until the date of its recovery.

3. Interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ⁽⁸⁾.

4. France shall cancel all outstanding payments of the aid referred to in Article 1 with effect from the date of notification of this decision.

Article 3

1. France shall ensure that this decision is implemented within four months following the date of its notification.

2. France shall inform the Commission, within two months of the date of notification of this decision, of the measures taken to comply with it, and in particular the following:

- (a) the total amount (principal and interest) to be recovered from the beneficiary;

- (b) a detailed description of the measures already taken and planned to comply with this Decision;

- (c) the documents demonstrating that the beneficiary has been ordered to repay the aid.

3. France shall keep the Commission informed of the progress of the national measures taken to implement this decision until recovery of the aid referred to in Article 1 has been completed. It shall immediately forward to the Commission, at the latter's request, any information on the measures already taken and planned to comply with this decision, as well as detailed information concerning the amounts of aid and interest already recovered from the beneficiary.

Article 4

This Decision is addressed to the French Republic.

Done at Brussels, 2 April 2008.

For the Commission

Neelie KROES

Member of the Commission

⁽⁸⁾ OJ L 140, 30.4.2004, p. 1.

NOTE TO THE READER

The institutions have decided no longer to quote in their texts the last amendment to cited acts.

Unless otherwise indicated, references to acts in the texts published here are to the version of those acts currently in force.