

Official Journal

of the European Union

L 274



English edition

Legislation

Volume 54

19 October 2011

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II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION

of 20 April 2011

on suspected aid to the company Trèves C 4/10 (ex NN 64/09) implemented by the French Republic*(notified under document C(2011) 2585)***(Only the French text is authentic)****(Text with EEA relevance)**

(2011/676/EU)

THE EUROPEAN COMMISSION,

8 January 2010. Following this meeting, the French authorities provided additional information by e-mail dated 15 January 2010.

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

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

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

Whereas:

I. PROCEDURE

(1) By means of various articles appearing in the press in spring 2009, it came to the Commission's attention that the company Trèves would appear to have benefited from an investment amounting to EUR 55 million by the Fonds de Modernisation des Equipementiers Automobiles (Fund for the Modernisation of Automobile Parts Manufacturers) (below: 'FMEA'). The Commission sent the French authorities requests for information on this subject by letters dated 5 May 2009, 11 June 2009, 10 July 2009 and 4 November 2009. The French authorities replied to these requests by letters (or e-mails) dated 5 June 2009, 23 June 2009, 18 August 2009, 18 November 2009 and 23 December 2009.

(2) Moreover, at the request of the French authorities, a meeting was held at the Commission's offices on

(3) By letter dated 29 January 2010, the Commission notified France of its decision to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (below: 'TFEU') concerning the FMEA investment and a plan to reschedule Trèves' tax and social security debts (also referred to as the 'debt settlement plan') authorised by the French administration. France communicated its comments concerning the initiation of the formal investigation procedure on 25 March 2010.

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

(5) The Commission received comments on this subject from the following interested parties: the Italian Republic, the company Trèves, the PSA Peugeot Citroën group, the Renault group, one of Trèves' competitors wishing to remain anonymous and the FMEA ⁽³⁾. The Commission forwarded these comments to France, giving it the opportunity to comment on them, and received its comments by letter dated 5 October 2010. A meeting was also held with the French authorities on 18 November 2010. Finally, additional information was forwarded to the Commission by e-mails dated 21 December 2010 and 22 February 2011.

⁽¹⁾ OJ C 133, 22.5.2010, p. 12.

⁽²⁾ See footnote 1.

⁽³⁾ The comments of interested parties are summarised in Section III.

II. DESCRIPTION OF THE MEASURES UNDER INVESTIGATION

- (6) Before describing the measures under investigation, it is appropriate to present the Fonds Stratégique d'Investissement (Strategic Investment Fund) (below: 'FSI'), the FMEA and CDC Entreprises (the FMEA management company) (point II.1 below) and the company Trèves and the measures taken in relation to it (point II.2 below). Finally, the reasons will be set out leading to the initiation of the formal investigation procedure regarding the FMEA investment and the tax and social security debt rescheduling plan (point II.3 below).

II.1. The FSI, the FMEA and CDC Entreprises

- (7) On account of the crisis which started in 2008, France established the Strategic Investment Fund (below: 'FSI') to bolster its economy. Shortly afterwards, the FSI, in partnership with the PSA Peugeot Citroën group (below: 'PSA') and the Renault group (below: 'Renault'), set up the FMEA. Whereas the object of the FSI is to intervene in any type of enterprise, whichever the economic sector concerned, the FMEA intervenes only in favour of automobile parts manufacturers.

FSI

- (8) The Strategic Investment Fund, with capital of EUR 20 billion, was set up by the French Government in December 2008 to meet the capital requirements of undertakings deemed to boost the growth and competitiveness of the French economy. According to its managers, the FSI invests only in undertakings which offer good prospects of growth and competitiveness for the French economy.
- (9) The FSI is 49 % owned by the French Government and 51 % by the Caisse des Dépôts et Consignations (below: 'CDC'). The CDC and its subsidiaries constitute a public group serving the general interest and economic development⁽⁴⁾ of France; its managers are appointed by decree.
- (10) The FSI Board of Directors is chaired by the Director-General of the CDC and, in addition to its Chairman, comprises six directors, of whom one represents the CDC, two represent the State (the Director-General for State Holdings and the Director-General for Enterprises) and three represent the interests of undertakings (the company directors of SCOR, Essilor and Artémis).

FMEA

- (11) The FMEA is a venture capital mutual fund, the object of which is to promote the emergence of competitive automobile parts manufacturers capable of offering their

customers research and development capacity and strong international support. It makes investments of up to a maximum of EUR 60 million, for the exclusive benefit of its subscribers, alone or together with other private investors or other funds.

- (12) The FMEA was established (on 25 March 2009) under the plan to support the motor vehicle industry, announced by the President of the French Republic on 4 December 2008. Its capital of EUR 600 million is funded by the FSI (EUR 200 million), PSA (EUR 200 million) and Renault (EUR 200 million).

- (13) The FMEA is managed by CDC Entreprises, a subsidiary of the CDC. Investment decisions are therefore taken by CDC Entreprises.

- (14) The FMEA has a selection committee and an investment committee, which are responsible for preparing files before investments are made by the management company CDC Entreprises. The three investors, PSA, Renault and the FSI, are represented equally on these committees.

- (15) According to the FMEA organisational rules, the selection committee must be consulted by the management company concerning the strategic nature of investment projects. Its advisory opinions are not binding on the management company. They are adopted by a two-thirds majority.

- (16) The investment committee must be consulted prior to each investment or divestment carried out or concerning any derogation from the investment policy criteria and rules. When pronouncing on an investment or divestment project, its opinions too are adopted by a two-thirds majority and are not binding on the management company. However, if one of the three investors votes against, the opinion given will be considered as a negative opinion. In this case, the investment or divestment project is returned to the selection committee.

CDC Entreprises

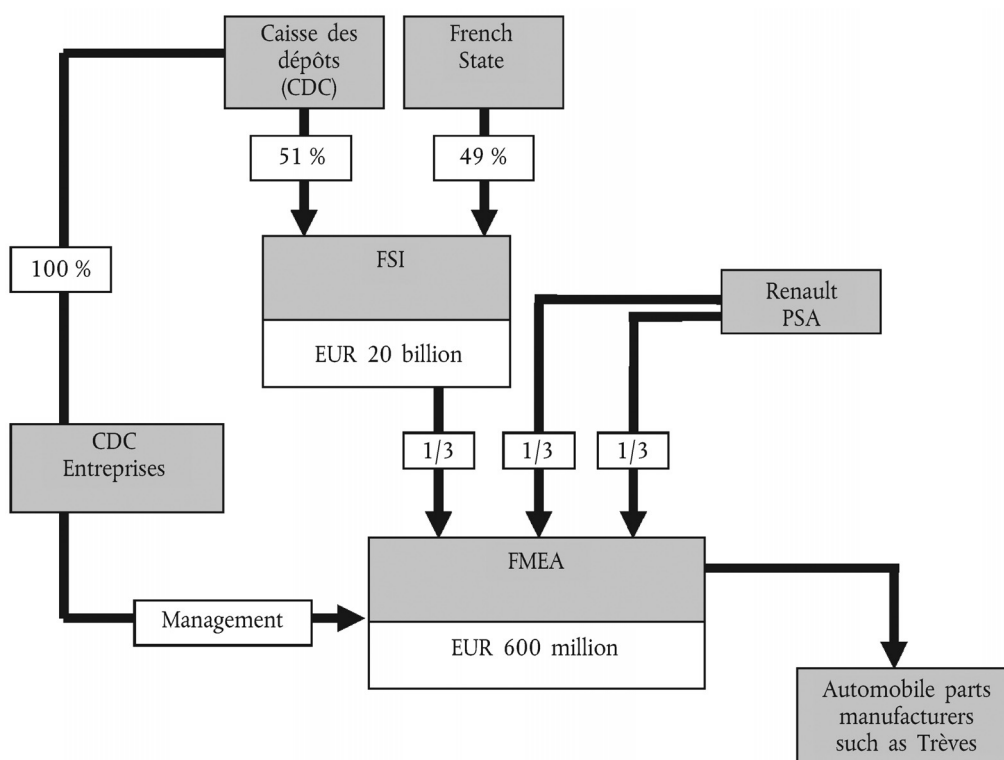
- (17) CDC Entreprises plays a key role in venture capital in France. It is required to comply with all the rules laid down by the Financial Markets Authority regarding third-party asset management and especially the rules relating to independence concerning choice of investments and prevention of conflicts of interests. CDC Entreprises' management activities include FSI's investments in unlisted SMEs and investments on behalf of the CDC and other investors.

⁽⁴⁾ Article L518-2 of the French Monetary and Financial Code.

- (18) CDC Entreprises is a full subsidiary of the CDC. The Chairman and Managing Director of CDC Entreprises are appointed by its Board of Directors, the members of which are appointed by the CDC.
- (19) CDC Entreprises has concluded an assistance and advice agreement with the FSI, under which a dedicated FSI team assists CDC Entreprises in preselection of investment projects (including feasibility and risk assessment studies, study and assistance in the implementation of these interventions) and monitoring the investments made.
- (20) The organisation and functioning of the FMEA committees mean that CDC Entreprises alone has the authority to commit the FMEA. The decisions taken by the committees are not binding on the management company (apart from derogations from the investment policy criteria and rules and the management of conflicts of interests, which are not relevant in the present case). The French authorities specified that, to date, CDC Entreprises has never deemed it appropriate to take investment decisions contrary to the opinion of the committees.
- (21) Figure 1 below summarises the links between the French State, the CDC, CDC Entreprises, the FSI, the FMEA, PSA and Renault.

Figure 1

Links between the French State, the CDC, CDC Entreprises, the FSI, the FMEA, PSA and Renault



II.2. The company Trèves and the measures taken in relation to it

- (22) Trèves is a company specialising in car interior components. Trèves employed about 6 500 persons before the current restructuring plan was implemented (the restructuring plan concerns 1 300 persons). It is structured around three areas of activity: noise insulation ⁽⁵⁾, seats and components, and textiles. The company owned 9 factories (2 have now been closed) and is established in 14 countries (including Spain, the United Kingdom, Portugal, Slovenia and the Czech Republic). 40 % of its turnover comes from France. Its main customers are Renault, Peugeot SA, Volkswagen, Nissan and Toyota.

⁽⁵⁾ Car Interiors and Acoustics, Carpets and Soundproofing (HAPP).

(23) Shortly before the outbreak of the crisis in 2008, Trèves was starting to reap the benefits of a first restructuring plan launched in 2005 aiming to reduce the workforce and rationalise production capacity. When the crisis arose, Trèves decided to modify and extend its restructuring plan and expressed the wish to conduct discussions with its lenders under a conciliation procedure ⁽⁶⁾.

(24) A conciliation protocol was therefore concluded on 25 May 2009 between the Trèves shareholder (the holding company 'Severt', the sole shareholder), the companies of the Trèves group, the lenders (i.e. the banks) and the FMEA. This protocol is based on the implementation of a restructuring plan (this plan is described in Section V.1.1).

(25) The financing of the restructuring plan was estimated at EUR [110-140] (*) million. Under this plan, the various parties entered into the commitments described in the protocol of 25 May 2009.

Contribution of the company, its banks and its customers

(26) Manufacturers Peugeot and Renault committed to contributing EUR 33,3 million under the financing [...].

(27) The Trèves group committed to doing its utmost to generate a sum during 2009 corresponding to [5-20] % of the cash resource requirements, i.e. EUR [5-30] million.

(28) The banks granted a new bank loan of EUR [10-30] million. The banks also granted a consolidation loan amounting to EUR [30-60] million to repay the existing short-term loans (EUR [0-20] million) and medium-term loans (EUR [30-40] million). The new loan and the consolidation loan must be repaid in full by [...] 2014.

FMEA contribution and public contribution

(29) The FMEA invested EUR 55 million in the company. Of this sum, EUR [40-50] million was in the form of debt securities providing access to capital (i.e. convertible bonds with adjustable parity), bearing a fixed coupon of [> 8] %. In parallel, EUR [5-15] million came from a

capital increase (subscription of new ordinary shares), thereby providing the FMEA with a [< 50] % holding in Trèves' capital.

(30) The public creditors authorised a tax and social security debt settlement plan amounting to EUR 18,4 million [...]. This plan consists in rescheduling the repayment of Trèves' tax and social security debts, together with the payment of penalties and interest on arrears.

II.3. Reasons for initiating the procedure

(31) The financing of Trèves' restructuring plan is based on the investment of new funds to a total of EUR [100-120] million (this amount does not include the consolidation loan). Of this amount, EUR 55 million is contributed by the FMEA. To this is added the tax and social security debt settlement plan amounting to EUR 18,4 million. In its decision to initiate the formal investigation procedure, the Commission expresses its doubts as to whether these latter two measures should not be categorised as State aid within the meaning of Article 107(1) TFEU.

(32) As regards the FMEA investment, the Commission points out that several factors seem to indicate that this investment is of state origin. At first sight, this investment appears to have been made from state resources and to be imputable to the State ⁽⁷⁾. The Commission's doubts are based in particular on observation of the functioning of the FSI, the FMEA and CDC Entreprises described above.

(33) The Commission then expresses its doubts about compliance with the criterion of the private investor operating in a market economy through this investment. In particular, the Commission was unable to establish with certainty, in the light of the situation in both the motor vehicle sector and the company which was experiencing certain financial difficulties ⁽⁸⁾, firstly, that the assumptions of the restructuring plan were credible, realistic and prudent, secondly, that the valuation of Trèves prior to the investment was prudent and, thirdly, that the prospect of an internal rate of return

⁽⁶⁾ The purpose of the conciliation procedure is to conclude an amicable agreement between a business manager and his creditors (public and private) with a view to establishing payment deadlines and/or debt remission (Article 611-7 of the French Commercial Code).

(*) Covered by business secrecy.

⁽⁷⁾ According to established case-law (see in particular the Court of Justice judgment in Case C-305/89 *Italy v Commission* [1991] ECR I-1603, paragraph 13), no distinction should be drawn between cases where aid is granted directly by the State and cases where it is granted by public or private bodies established or appointed by the State to administer the aid. European law cannot permit the rules on State aid to be circumvented merely through the creation of autonomous institutions charged with allocating aid. However, as the Court affirmed in its judgment of 16 May 2002 (C-482/99 *France v Commission*, known as 'Stardust Marine', [2002] ECR I-4397), for measures to be capable of being categorised as aid within the meaning of Article 107(1) TFEU, they must, first, be granted directly or indirectly through state resources and, second, be imputable to the State.

⁽⁸⁾ Trèves' financial difficulties at the end of 2008 were primarily a fall in turnover (EUR [650-700] million, i.e. [20-25] % compared with 2007) and a loss of EUR [40-50] million at the end of the financial year.

(below: 'IRR') of [$> 12\%$] ⁽⁹⁾ was to be considered sufficient in view of the risk assumed by the FMEA.

(34) As regards the tax and social security debt settlement plan, the Commission wonders whether the French authorities acted like a private creditor placed in the same conditions and seeking to recover sums due to it. The Commission was not in possession of all the information enabling it to conclude that the public creditors, by virtue of the conciliation protocol of 25 May 2009, were in a position at least as favourable as Trèves' private creditors (i.e. the banks) which also agreed to reschedule their claims by granting a consolidation loan. The Commission therefore expresses doubts about compliance with the principle of the private creditor operating in a market economy through the tax and social security debt settlement plan.

(35) Finally, if the two measures mentioned above were to be categorised as State aid, the Commission points out in its decision to initiate the procedure that their compatibility could be examined on the basis of the Commission guidelines on State aid for rescuing and restructuring firms in difficulty ⁽¹⁰⁾ (below: 'the guidelines'). However, the Commission asserts that, at this stage, it is unable to establish with certainty that all the conditions provided for by the guidelines are met.

III. COMMENTS FROM THIRD PARTIES

The Trèves group

(36) The Trèves group communicated its comments to the Commission by letter dated 2 July 2010. In its opinion, the terms and conditions of the FMEA investment in the Trèves group and the implementation of the tax and social security debt rescheduling plan are not covered by Article 107(1) TFEU.

(37) Firstly, the Trèves group points out that the argument of the imputability of the aid to the State is unfounded because, through the FMEA, the Trèves group opted for a commitment with two motor vehicle manufacturers of international dimension which account for [$> 50\%$] of its turnover. Furthermore, it contests the Commission's analysis that the company had to call on state resources as, on the one hand, the FMEA resources, in its view, come from private operators and, on the other hand, the participation of other private investors in the financing of the company (the banks), proves that it was capable of financing itself on the market.

⁽⁹⁾ In the decision to initiate the procedure, the IRR mentioned is [$> 15\%$]. This is explained as follows: the expected IRR from the FMEA investment is [$> 15\%$]. However, to be on the safe side, the FMEA applies a discount of [...] % to the EBITDA (see footnote 11) of the financial year 2011. After discount, the IRR is [$> 12\%$], which is used as reference rate of return in this decision. The IRR of [$> 15\%$] mentioned in the decision to initiate the procedure was an average rate: between the rate of [$> 15\%$] without discount and the rate of [$> 12\%$] with discount.

⁽¹⁰⁾ OJ C 244, 1.10.2004, p. 2.

(38) Secondly, the Trèves group categorically refutes the Commission's analysis of the economic situation of the company Trèves between 2005 and 2008. In its opinion, the Commission confuses the general crisis in the motor vehicle sector in 2008 with the individual situation of the company, which recorded an uninterrupted, substantial increase in its turnover between 1999 (EUR [500-700] million) and 2004 (EUR [900-1 100] million). This rise was in fact checked by the crisis which hit the motor vehicle sector in the second half of 2008. The object of the restructuring plans of 2005 and 2009 was not to remedy liquidity problems, but consisted in rationalising the company's production capacity in order to relaunch the company in a difficult economic climate and not to ensure its survival, as evidenced by the rising trend in Trèves' EBITDA ⁽¹¹⁾ between 2005 and 2007 and the recovery in its results from 2009.

(39) Furthermore, the Trèves group challenges the importance which the Commission attributes to the declarations by the French Minister for Industry that if the State had not intervened, Trèves would have filed a petition in bankruptcy. A subjective political declaration pronounced in a tense social climate has no relevance to the assessment of the real economic and financial situation of an undertaking.

(40) Consequently, the FMEA investment in the company Trèves was undeniably prudent, both financially and industrially. The company recalls that the FMEA was not the only investor, but that several other potential investors came forward and private partners entered into commitments alongside the FMEA. Contrary to what the Commission seems to assume, there is no contradiction between the financial logic and the industrial logic of the FMEA investment. According to the Trèves group, the fact that a manufacturer holds a participating interest in one of its suppliers for the purpose of strengthening their industrial ties and obtaining a financial benefit from its growth is current practice in the motor vehicle sector.

(41) Thirdly, the Trèves group pays particular attention to compliance with the principle of the prudent investor operating in a market economy. The terms of the investment are not only very strict, but also advantageous for the FMEA. Furthermore, in 2008-09, the company Trèves had key strengths at its disposal to ensure its rapid return to profitability (establishment and growth in emerging countries, diversification of its portfolio of manufacturer customers, marked focus on research and development). Taking account of these strengths, Trèves' industrial and financial restructuring plan was drawn up on the basis of prudent and reasonable forecasts after a detailed audit of the company's situation. Finally, the good results recorded by Trèves in 2009-10 demonstrate the prudent nature of the investment.

⁽¹¹⁾ Abbreviation for 'earnings before interest, taxes, depreciation, and amortisation'.

- (42) Finally, the Trèves group considers that, if the FMEA investment were to come under Article 107(1) TFEU, this aid would be compatible with the guidelines, as the company's long-term return to viability is ensured and the restructuring of Trèves does not give rise to any distortion of competition and is accompanied by compensatory measures already implemented in part ([...], reduction in production capacity, reduction in workforce and finally the share in funding the restructuring of Trèves allegedly of state origin remains confined to the strict minimum of the restructuring costs).
- (43) As regards the tax and social security debt rescheduling plan, the Trèves group considers firstly that it respects the principles of the private creditor operating in a market economy and that the Commission cannot presuppose that any categorisation as aid adopted would in fact preclude the possibility of a prudent rescheduling plan on the part of the financial authorities. The rescheduling plan provides for penalties and surcharges for late payment, an interest rate higher than the statutory rate which a private creditor could expect, first-ranking mortgages [...] and the co-existence of the intervention by the public authorities with that of private creditors.

The FMEA

- (44) The FMEA forwarded its comments to the Commission by letter dated 22 June 2010. The FMEA rejects the categorisation of its investment in the company Trèves as State aid, on account of its autonomy firstly in the choice of its investments and secondly in the approach adopted to achieve its objectives.
- (45) The FMEA emphasises the fact that its intervention decisions are entirely independent. This autonomy results not only from its status, but also from its governance. The FMEA, as a venture capital mutual fund, has a management company which in turn is subject to the rules of third-party asset management. The statutory independence of the management company in the choice of its investments, as it acts in accordance with the proprietary interest of the subscribers, contributes to ensuring the autonomy of the FMEA at the investment decision stage. As regards the FMEA advisory committees, the opinions of the selection committee and the investment committee can be adopted only with the approval of one of the two manufacturers. The management company, CDC Entreprises, has so far never departed from the opinions given by the committees. Consequently, the influence of the private investors, i.e. Renault and Peugeot, is predominant in the selection and definition of the investment projects.
- (46) Moreover, the FMEA investment in Trèves illustrates the FMEA investment policy, which gives preference to undertakings with strong innovative capacity and strong potential for growth and profitability in the automobile parts manufacturers sector. Trèves is a leading European parts manufacturer which for that matter was of interest to [...] other private funds. The distinct improvement in the company's results from 2010 shows the reality and relevance of the restructuring plan presented by Trèves. The temporary difficulties experienced by the company on account of the economic and financial crisis also enabled the FMEA to negotiate an investment on terms providing a very high level of protection.
- (47) The FMEA consequently considers that its investment cannot be categorised as State aid.

The Renault group

- (48) Renault forwarded its comments to the Commission by letter dated 6 July 2010. First of all, it challenges the Commission's assertions that its subscription to the FMEA is linked to the loan granted to it by the State in April 2009. The company recalls that when the Fund was set up on 20 January 2009⁽¹²⁾, it had no information about a possible future loan granted by the State to manufacturers. The object of the loan granted to it in April 2009 was to finance the general needs of the undertaking arising from the contraction in the financial markets during the fourth quarter of 2008 and the first quarter of 2009.
- (49) Furthermore, Renault's subscription to the FMEA was justified for economic, industrial and financial reasons: it is in fact strategically and financially essential for Renault to consolidate its supply on a permanent basis by relying on sound, competitive suppliers, while at the same time expecting a return on its financial investment. The FMEA in this way enables Renault to invest in undertakings which are absolutely essential for the sector, such as Trèves, which remains a key supplier for the European motor vehicle industry. Consequently, the FMEA interventions follow the same approach as that adopted by Renault, which is itself a prudent investor operating in a market economy.
- (50) Finally, Renault unreservedly endorses the FMEA's comments, presented in response to the Commission's decision to initiate the formal investigation procedure, on its role in the governance of the FMEA, how the FMEA operates, its autonomy and that of its management company in relation to the public authorities.

The Peugeot group

- (51) PSA forwarded its comments to the Commission by letter dated 6 July 2010. According to PSA, the FMEA investment in Trèves is not only profitable, but also in keeping with its economic and strategic interests.

⁽¹²⁾ It should be recalled here that the FMEA was legally established only on 25 March 2009, the date of signature of the rules governing the Fund by the subscribers and the date of the subscription of the first tranche by these investors. In fact, however, the Fund started work at the end of January while its establishment was still in progress.

(52) PSA's participation in the FMEA is part of the joint wish of the manufacturer and the Fund to invest in strategic undertakings with strong innovative capacity, capable of ensuring security of supply and optimum consolidation of the automobile parts manufacturers sector. Furthermore, PSA considers that the FMEA investment meets its profitability requirements in the light of the risk assumed.

(53) Finally, PSA emphasises the lack of conditionality between its decision to participate in the FMEA and the conclusion of a loan agreement for EUR 3 billion between the French State and the manufacturer in March 2009.

One of Trèves' competitors

(54) By letter dated 23 June 2010, one of Trèves' competitors, which wishes to remain anonymous, forwarded its comments to the Commission. This competitor endorses the Commission analyses described in the decision to initiate the procedure of 29 January 2010. It considers in fact that Trèves was experiencing economic difficulties before the start of the economic crisis and therefore is not eligible to benefit from measures under the temporary Community framework. Moreover, irrespective of Trèves' economic situation, the State aid from which it could benefit must be accompanied by substantial compensatory measures, on account of the very significant negative effects on competition. In fact aid with the sole aim of maintaining an undertaking artificially in existence in a sector experiencing long-term structural overcapacity is unjustified. It considers that Trèves should be obliged to limit its presence on the markets by selling subsidiaries or by reducing its activities drastically and contributing more from its own resources to its restructuring.

The Italian Republic

(55) The Italian Ministry of Economic Development forwarded its comments to the Commission by letter dated 15 June 2010. It endorses the Commission's 'arguments' ⁽¹³⁾ on two fundamental points: the FMEA investment is undoubtedly State aid on account of the decisive presence of public funds and this type of aid is intended to support undertakings which, before the second quarter of 2008, were encountering difficulties within the meaning of the guidelines.

IV. COMMENTS FROM FRANCE

(56) By letter dated 25 March 2010, the French authorities forwarded their comments to the Commission in response to the initiation of the formal investigation procedure on 29 January 2010.

(57) In their opinion, the terms and conditions of the FMEA investment in Trèves do not fall within the scope of Article 107(1) TFEU, as the investment was not financed by state resources, but by funds of predominantly private origin and not imputable to the State. Even if the FMEA resources were to be considered state resources or the investment decision were to be imputable to the State, the French authorities consider that this investment displays all the characteristics of a prudent investment in a market economy. Furthermore, they also consider that the rescheduling of the tax and social security debt authorised by the public creditors meets the criteria of the private creditor seeking to recover the sums due to it.

(58) The French authorities point out that the FMEA investment in no way involved the transfer of state resources within the meaning of the 'Stardust Marine' case-law ⁽¹⁴⁾. Concerning the share of the manufacturers PSA and Renault (2/3), the FMEA funds are purely private; concerning the share of the FSI (1/3), these funds, although public in origin, are not under the permanent control of the State. The FSI, created according to the private investment fund model, is constituted in the form of a joint stock company (*société anonyme*) in competition with other private investment funds. It makes long-term investments with profitability as their objective.

(59) Furthermore, on account of its status and operating procedures, the FMEA management company, CDC Entreprises, is not under the surveillance of the public authorities. On account of its status, it is legally independent of the CDC and invests for the exclusive benefit of its subscribers, in competition or together with private investors. CDC Entreprises therefore manages FMEA's funds entirely independently. As regards the investment in Trèves, it followed the FMEA selection and investment committee recommendations without any state intervention. Consequently, the French authorities conclude on the one hand that the resources invested are not state resources in so far as they are not constantly under public control and therefore available to the national authorities and, on the other hand, that the decision to invest is not imputable to the State as CDC Entreprises is acting only in the exclusive interest of the FMEA subscribers and totally independently.

(60) As regards the conformity of the FMEA investment with the principle of the prudent investor operating in a market economy, the French authorities recall that FMEA's investment policy gives preference to viable projects of strategic interest to the motor vehicle sector, with strong growth and strong innovative capacity. In the case of Trèves, the investment was made on the basis of a realistic, rigorous business plan, validated by several private analysts. In addition, the acquisition of the FMEA's participating interest in

⁽¹³⁾ It should be recalled here that, in its decision to initiate the procedure, the Commission confines itself to expressing doubts.

⁽¹⁴⁾ Court of Justice judgment in Case C-482/99 *French Republic v Commission* [2002] ECR I-4397.

Trèves' capital and the subscription to convertible bonds with adjustable parity occurred at the same time as other private investments and under the same conditions (*pari passu* investments). According to the French authorities, these factors are sufficient to establish that the investment is in conformity with market practices.

- (61) As regards the application of the principle of the private creditor operating in a market economy, the French authorities consider that authorisation of Trèves' tax and social security debt rescheduling plan is in keeping with the idea underlying the application of this criterion, i.e. that the public creditor, like the private creditor, must seek to recover the sums due to it by a debtor experiencing financial difficulties. The French authorities specify firstly that no remission of tax or social security debts was granted to the Trèves group. They consider that the two basic elements allowing the assessment of the private creditor principle, i.e. the presence of penalties and supplements for late payment and the interest rate charged, are observed in this case. In fact, the rescheduling plan provides for interest and penalties for late payment, defined prior to the agreement on the rescheduling plan and taken into account in the calculation of the monthly instalments payable by Trèves. Furthermore, this is in accordance with Article 1153 of the Civil Code, which provides that, in the absence of a contractual term, lateness in payment of a sum due to a private creditor gives rise to the imposition of the payment of interest on arrears at the statutory rate. This rate was 3,79 % in 2009, the year when the rescheduling plan was drawn up. The annual interest over the total duration of the rescheduling plan is approximately [5-10] %. In the alternative, the French authorities recall that, at the same time as the tax and social security debt rescheduling plan, the lending banks of the Trèves group granted a rescheduling of their own liabilities through a consolidation loan. Trèves' private creditors therefore also granted payment facilities to ensure the repayment of their claims.
- (62) The French authorities find firstly that the majority of the comments received confirm that the FMEA investment in Trèves cannot be categorised as State aid. Consequently, the French authorities will make no further comments on this subject.
- (63) On the other hand, concerning the comments presented by the Italian authorities and the anonymous company presenting itself as one of Trèves' competitors, the French authorities wish to communicate the following comments to the Commission.
- (64) The French authorities find that the Italian authorities confine themselves to asserting that the FMEA investment in Trèves must be categorised as State aid on account of the 'decisive role' played by public resources. This assertion is not substantiated by any demonstration or justification.

- (65) Still according to the French authorities, the company competing with Trèves also presumes, without proving it, the existence of State aid which would be incompatible with the guidelines and with the temporary framework adopted by the Commission in December 2008 in the context of the economic and financial crisis. The factors relied upon by this company are either entirely inaccurate or taken out of context and therefore interpreted in an erroneous and biased manner.

V. ASSESSMENT OF THE MEASURES UNDER INVESTIGATION

- (66) When the Commission investigates a national measure, it must first examine whether this measure can be categorised as State aid within the meaning of Article 107(1) TFEU. Once this categorisation has been established, the Commission can then assess the extent to which this measure can be considered compatible with the common market on the basis of the derogations permitted by the TFEU to the principle of prohibition of State aid. If the measure under investigation does not constitute State aid, the examination of the compatibility of the aid is not applicable.

V.1. Evaluation of the presence of State aid within the meaning of Article 107(1) TFEU

- (67) Article 107(1) of the TFEU provides that: 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.'
- (68) This provision mentions the criteria according to which a national measure can be categorised as State aid. As the Court of Justice recalls in its judgment of 15 June 2006, these criteria are 'the financing of that measure by the State or through State resources, the existence of a benefit for an undertaking, the selective nature of the said measure, and its effect on trade between Member States and the distortion of competition resulting therefrom' ⁽¹⁵⁾.
- (69) These criteria are cumulative and must therefore all be satisfied in order for it to be possible to categorise a measure as State aid. Consequently, as soon as the Commission establishes that one of these criteria is not satisfied, it can assert with certainty that the measure under investigation does not constitute State aid within the meaning of Article 107(1) TFEU.

⁽¹⁵⁾ Court of Justice judgment of 15 June 2006 in Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* [2006] ECR I-5293, paragraph 28.

V.1.1. The FMEA investment of EUR 55 million

- (70) As regards the FMEA investment in Trèves amounting to EUR 55 million, it should first be verified whether the criterion of benefit is met.

Benefit

- (71) According to settled case-law⁽¹⁶⁾, a contribution of funds to an undertaking does not constitute State aid if this contribution is made in circumstances which would be acceptable for a private investor operating in the normal conditions of a market economy ('criterion of private investor operating in a market economy').
- (72) In this respect, assuming that the FMEA will sell its participating interest in Trèves during 2012, the internal rate of return ('IRR') calculated by the FMEA on the basis of its investment is [$> 12\%$] per year. This rate represents the pre-tax rate of return on the entire FMEA investment, i.e. both the direct capital injection of EUR [5-15] million and the contribution in the form of debt securities giving access to capital (convertible bonds with adjustable parity) amounting to EUR [40-50] million.
- (73) Consequently, with a view to assessing whether the criterion of the private investor operating in a market economy is respected, the Commission must reach a decision on the following questions:
- (a) Is Trèves' restructuring plan, the basis for the FMEA's commitment, credible and realistic?
 - (b) Was the Trèves group valued appropriately before the FMEA capital injection of EUR [5-15] million?
 - (c) Were the assumptions of the restructuring plan underlying the IRR reasonable and realistic at the time of the FMEA investment?
 - (d) Is an expected IRR of [$> 12\%$] sufficient?

⁽¹⁶⁾ According to the General Court, 'it is necessary to determine whether, in similar circumstances, a private investor of a dimension comparable to that of the bodies managing the public sector could have been prevailed upon to make capital contributions of the same size, having regard in particular to the information available and foreseeable developments at the date of those contributions. In addition, although the conduct of a private investor with which the intervention of the public investor pursuing economic policy aims must be compared need not be the conduct of an ordinary investor laying out capital with a view to realising a profit in the relatively short term, it must at least be the conduct of a private holding company or a private group of undertakings pursuing a structural policy – whether general or sectoral – and guided by prospects of profitability in the longer term', General Court judgment of 21 May 2010 in Joined Cases T-425/04, T-444/04, T-450/04 and T-456/04 *France and others v Commission*, not yet reported paragraph 216. See also the following Commission communications: Application of Articles 87 and 88 of the EC Treaty to public authorities' holdings, *EC Bulletin* No 9-1984; Commission Communication to the Member States. Application of Articles 87 and 88 of the EC Treaty and Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector (OJ C 307, 13.11.1993, p. 3).

- (74) The Commission will add considerations relating to the structure of the FMEA investment and the sharing of the capital gain to the replies to questions b) and d) respectively.

- (75) The replies given to these questions will enable the Commission to determine whether the FMEA acted under similar conditions to those that a private investor would have required whose investment presents a risk arising from both the situation in the motor vehicle sector at the time of the investment and that of the undertaking which was experiencing certain financial difficulties.

Concerning the credible and realistic nature of the restructuring plan

- (76) As already indicated in recital 23, shortly before the outbreak of the financial and economic crisis of 2008, Trèves was starting to reap the benefits of a first restructuring plan, launched in 2005, aiming to cut the workforce and to rationalise production capacity⁽¹⁷⁾. When the crisis occurred, Trèves decided to modify and intensify its restructuring plan.
- (77) In this way, from the end of summer 2008, Trèves gave fresh impetus to its restructuring plan and at the end of December 2008, i.e. several months before the conciliation protocol of 25 May 2009, the following results could already be observed:
- a significant reduction in overhead costs: the measures taken in this respect allowed a reduction of [20-30] % in the total amount of Trèves' actual overhead costs in the last 4 months of 2008 compared with the 2008 budget forecast,
 - a hefty reduction in stocks: the cost of stocks fell by [30-40] % during the second half of 2008, from EUR [20-80] million in June to EUR [0-60] million in December,
 - control of tangible investments: these were reduced by [40-50] % in 2008 compared with the 2008 budget forecast,
 - a cut in the workforce: the group's workforce in France was cut by [10-20] % during 2008 alone ([...] employees in France in December 2008 compared with [...] employees in January 2008).

⁽¹⁷⁾ In fact, following a fall of [6-8] % between 2005 (EUR [900-950] million) and 2006 (EUR [800-850] million), Trèves' turnover recovered by [4-7] % from 2007 (EUR [850-900] million). Its profitability also recovered significantly since its EBITDA rose to EUR [50-60] million in 2007, or by [...] % compared with 2006 (EUR [30-40] million) and by [...] % compared with 2005 (EUR [40-50] million).

- (78) At the beginning of 2009, Trèves then drew up more formally a new version of the restructuring plan, with the assistance of the independent consultancy firm [...]. This firm in particular confirmed the amount of cash resource requirements considered necessary to finance the plan (EUR [110-140] million, see recitals 25 *et seq.*).
- (79) Firstly, it must be stressed that the forecasts for future turnover appearing in the restructuring plan seem to be credible and realistic. In fact, the estimate of orders from manufacturers on which these forecasts are based had been revised substantially downwards. For example, the volumes expected for 2009 are [15-25] % below their 2008 level. On the other hand, the forecasts are consistent with those drawn up at the same time by motor vehicle sector analysts (the company JD Power, for example) concerning the expected recovery of the sector and its configuration by the year 2011. Trèves therefore estimated its future turnover on the basis of a prudent, sound estimate of volumes. The plan remains prudent concerning the trend in the sector and counts on a level of activity in 2011 [...] than the sales recorded in 2008.
- (80) Secondly, the plan introduces a significant reduction in costs. This reduction is achieved, *inter alia*, by boosting the efficiency of the workforce and by cutting operating costs [...] ⁽¹⁸⁾ [...]. The reduction in costs is also based on a sizeable reduction in the workforce (the restructuring involves a total of 1 300 persons).
- (81) On the basis of these measures, the restructuring plan provides for:
- a return to breakeven from 2010, with a pre-tax result of EUR [0-10] million, a positive cash flow of EUR [0-10] million and an EBITDA of EUR [40-70] million,
 - a pre-tax result of EUR [10-30] million from 2011, with a cash flow of EUR [10-30] million and an EBITDA of EUR [50-80] million.
- (82) It should be noted that, before committing itself, the FMEA itself instructed the firm [...] to conduct a full audit, between mid-March and end-April 2009, of Trèves' situation (due diligence exercises). The FMEA teams themselves also analysed and confirmed the restructuring plan.
- (83) Moreover, in the context of its restructuring, Trèves undertakes to dispose of its [...] activity, taking into account the industrial and social balances relating to this operation and seeking to contribute to the competitiveness of the industrial plant and processes of the new Trèves group.
- (84) In the light of the factors above, the Commission concludes that the restructuring plan on which the FMEA based its investment in Trèves can be considered credible and realistic.
- Regarding the valuation of Trèves before the FMEA investment and the structure of this investment
- (85) Trèves' equity prior to the FMEA investment was valued at EUR [15-40] million. On this basis, the FMEA acquired [< 50] % of Trèves' equity through a capital increase of EUR [5-15] million. The Commission has to check that this valuation is appropriate and prudent in the light of the situation of the undertaking at the time.
- (86) Several methods exist for estimating the value of the equity of an undertaking ⁽¹⁹⁾. One method often used is that of the multiple of the EBITDA. It allows the value of the equity of an undertaking for year X to be assessed by multiplying the EBITDA of year X by a factor (the multiple) considered to be appropriate for the sector and subtracting the net debt from the result.
- (87) Another method is discounted cash flow analysis. The undertaking's nominal free cash flows for the coming years are discounted at the weighted average cost of capital, or WACC) and the net debt is subtracted from the value obtained.
- (88) A third method is that of the multiple of turnover. It allows the value of an undertaking's equity in year X to be assessed by multiplying the turnover of year X by a factor (the multiple) considered to be appropriate for the sector and subtracting the net debt from the result.
- (89) To value the company Trèves prior to its investment, the FMEA used the discounted cash flow analysis and the multiple of turnover methods. In fact, since Trèves did not have a positive EBITDA at the end of 2008, the first method mentioned, i.e. the multiple of the EBITDA, was not practicable.
- (90) On the other hand, the method of the discounted cash flow analysis was possible and allowed the prospects of return to profitability to be taken into account, which results in the integration in the valuation of the beneficial effects expected from the improvement in the performance of the undertaking. The multiple of turnover method was also used as a precaution and for confirmation.

⁽¹⁸⁾ [...].

⁽¹⁹⁾ By definition, the value of the equity of an undertaking is equal to the value of the undertaking minus the net debt.

- (91) As regards the method of the discounted cash flow analysis of the undertaking, the sectoral capital cost or WACC, integrating the specific sectoral risk, was estimated at 12 %. The FMEA then calculated a more prudent WACC of [> 12] % by integrating the additional specific risk premiums associated with the dimension of the undertaking and the non-liquid nature of the investment. It finally adopted a WACC of [> 12] % to take account of the additional risk associated with the turnaround (i.e. restructuring) of the undertaking. The long-term value of the undertaking (known as the terminal value) is calculated on the basis of the 2011 results. The FMEA therefore established the value of the equity of the Trèves group at EUR [15-40] million.
- (92) As regards the multiple of turnover method, the multiple adopted and applied to the end-2008 turnover was [0-1]. This multiple corresponds to the multiples observed on the market for comparable undertakings at the time of the transaction. It should be pointed out that in late 2008 and early 2009, these multiples reached historically low levels on account of the financial and economic crisis which greatly affected the motor vehicle manufacturing sector and the automobile parts manufacturers (in fact the long-term average of the multiple of turnover for the automobile parts manufacturers is set at 0,51). On the basis of a multiple of [0-1], the value of Trèves' equity stands at EUR [15-40] million.
- (93) Therefore, even though the multiple of [0-1] is a multiple which has to be considered to be historically weak, the FMEA adopted the value based on this multiple and not that resulting from an average long-term multiple or a multiple smoothed over several years. Likewise, the FMEA did not adopt the valuation resulting from the discounted cash flow analysis either. As a result of the above, the valuation of Trèves' equity before the FMEA made its investment is appropriate and prudent. It is in fact at the low end of the interval calculated according to the discounted cash flow analysis method and the stock market multiples. A valuation undertaken in this context is a favourable factor for the private investor, as it tends to strengthen the prospects of a capital gain in the perspective of valuation multiples returning to their average historical levels.
- (94) Furthermore, it should be recalled that the FMEA investment is not confined to a capital contribution of EUR [5-15] million providing it with [< 50] % of the Trèves group shares. The FMEA also contributed EUR [40-50] million in the form of debt securities giving access to capital (convertible bonds with adjustable parity), bearing interest of [> 8] % p.a. This is a sophisticated structure which a private investor would have demanded in a sector such as the motor vehicle subcontracting sector. In fact, the presence of a significant quantity of convertible bonds, with parity varying in accordance with the performance of the company, is one of the control mechanisms with the greatest possible incentive effect.
- (95) The mechanism put in place by the FMEA is the following. The convertible bonds can be redeemed through the issue of new Trèves company shares. The parity is determined in 2011 by attaining a gross operating surplus margin of [...] %. If this threshold is reached, the FMEA will obtain [...] % of the equity by redeeming bonds. If this threshold is not reached, redemption of the bonds would lead to the FMEA holding [...] % of equity. It is therefore in the interests of the Trèves managers to ensure that this gross operating surplus margin is achieved [...]. There is therefore strong convergence in the interests of the financial investor and those of the manager shareholders in maximising the value of the company on exit.
- Regarding the assumptions justifying an IRR of [> 12 %]
- (96) The approach generally adopted by a private investor consists in assessing the annual internal rate of return arising from the investment project under consideration. With a view to calculating the annual IRR of an investment in an undertaking, it is appropriate to determine the value of the equity of this undertaking at the time when the profitability is expected.
- (97) As has already been indicated in recitals 85 to 87, several methods are available for determining the value of an undertaking. To assess the value of the undertaking prevailing in 2012, the year when the FMEA could dispose of its participation⁽²⁰⁾, the FMEA used the method of the multiple of the EBITDA. This method is often used in the industrial sector with a view to providing for the exit terms for a capital or quasi-capital investor. Furthermore, by calculating the expected return on the basis of the EBITDA, the FMEA takes as a basis a pertinent measure for the recovery of the undertaking which must be achieved between its investment (25 May 2009) and the end of 2011. In addition, by adopting the EBITDA forecasted for 2011 and not the – higher – EBITDA forecasted for 2012, the FMEA adopts a prudent approach consisting of verifying that the undertaking is making a satisfactory recovery in a reasonably short period (just over 2½ years).
- (98) Consequently, in the case in point, the IRR calculated by the FMEA is based on three assumptions mentioned in the restructuring plan. Firstly, the Trèves group should achieve an EBITDA of EUR [50-80] million at the end of 2011. Secondly, the value of Trèves at the end of 2011 is determined on the basis of a multiple of the EBITDA of [1-6]. Thirdly, the net debt is estimated at EUR [50-150] million at the end of 2011. The Commission must in this way determine whether these three assumptions are to be considered as credible and realistic at the time when the FMEA investment was made.
- ⁽²⁰⁾ The potential disposal by the FMEA of its holding in 2012 is a working hypothesis with a view to assessing the return on the investment as it would stand in 2012, on the basis of the 2011 results. According to the shareholder agreement, the FMEA is totally free to retain or dispose of its holding in the first [...] years of its investment. [...] Furthermore, be that as it may, the sharing of the capital gain in the event of possible disposal of the company is favourable to the FMEA (see recitals 110 and 111 of this Decision).

- (99) Firstly, as regards the EBITDA value for 2011, it should be emphasised that this forecast is based on the implementation of the restructuring plan. As explained in recitals 76 *et seq.*, this plan can be considered to be credible and realistic. Therefore, it should be recalled that the reduction in costs is primarily implemented by boosting labour efficiency and cutting operating costs thanks, in particular, [...]. The reduction in costs is also based on a sizeable reduction in the workforce (the restructuring involves a total of 1 300 persons).
- (100) Secondly, the EBITDA multiple used ([1-6]) to determine the value of the undertaking corresponds to the average multiple for the sector calculated over the period 2000-09 ([1-6]), minus, as a precaution, the standard deviation associated with the context of the turnaround of the company. This multiple is slightly higher than the multiple of the sector at the time of the investment (about 4,2). Nevertheless, it is sufficiently prudent to take a figure of [1-6] as a basis for the valuation at the end of 2011, in view of the foreseeable recovery in the ratio, and for that matter this recovery already having made a good start at the time of the investment ([1-6] in December 2008 as opposed to [1-6] in May 2009). This multiple also seems to be particularly prudent in the light of the long-term forecasts for the sector indicating multiples of between [1-6] and [1-6].
- (101) Thirdly, the forecasts drawn up in April 2009 showed an improvement in the net debt, which was to fall from EUR [100-200] million at end-2008 to EUR [100-200] million at end-2010 (it had deteriorated previously, increasing from EUR [100-200] million at end-2005 to EUR [100-200] million at end-2008). In view of the aggregate level of the forecasted EBITDA for the period 2009-11, the absence of significant additional costs associated with tangible and intangible investments and the absence of additional provisions to cover the restructuring costs, the forecast of a reduction of EUR [0-30] million seems prudent.
- (102) In the light of the above, it is appropriate to conclude that the calculation of the IRR at the time of the investment is based on reasonable assumptions.
- Regarding the acceptability of an IRR of [$> 12\%$] and the sharing of the capital gain
- (103) As regards the question whether the IRR referred to of [$> 12\%$] is acceptable in the light of the risk entailed in the investment, the Commission makes the following comments.
- (104) Firstly, it should be recalled that the calculation made on the basis of the information set out in recitals 97 to 100 in reality results in an IRR of [$> 15\%$]. However, in the interests of safety and prudence, the FMEA applied a discount of [...] % to the EBITDA forecasted for 2011. Consequently, the IRR of [$> 12\%$] adopted for the purposes of the present analysis is an IRR resulting from a pessimistic scenario regarding the development of the undertaking. In fact, as has already been indicated, the base scenario results in an IRR of [$> 15\%$] whereas an optimistic scenario (EBITDA exceeded by [...] %) results in an IRR in the region of [$> 20\%$].
- (105) At present, it should be pointed out that, in view of the non-liquid nature of the transaction, it is not possible to refer to comparable quoted prices (for example for subordinated loans) at the time of the FMEA investment to assess whether the level of the forecasted IRR is appropriate. On the other hand, several factors presented below allow the 'minimum' IRR of [$> 12\%$] adopted by the FMEA in May 2009 to be assessed.
- (106) It should be pointed out firstly that the returns on investment observed in the automobile subcontracting sector are often low. In fact, in the 5 years before the crisis of the second half of 2008, the average IRR amounted to 8,5 % ⁽²¹⁾. Nevertheless, professional investors have often invested in this sector, aware of the potential gain linked to the low valuation of the undertakings in this sector [compared with other sectors]. In this way, in 2006, exceptional IRRs were to be found (exceeding 20 % per year over 3 years) for investors having invested during the market trough in 2003.
- (107) Consequently, in order to exceed the average returns observed, a professional investor must rely on in-depth knowledge of the market, which is the case for the FMEA, and provide for a participation structure enabling it to optimise its return, which is also the case for the FMEA investment (see the considerations concerning the structure of the investment in recitals 94 and 95 and the sharing of the capital gain in recitals 110 and 111).
- (108) Secondly, the French authorities invoke a study by the AFIC (French Venture Capital Association), which follows the performance trend of the venture capital sector in France. This study is based on data communicated by more than 120 structures managing more than 500 investment funds. The work of the AFIC shows a net performance of between 14,1 % for end- 2007 and 10,8 % for end-2008 (the closest date to the FMEA investment) for 'development capital'. Development capital is the relevant subdivision of venture capital from the point of view of the FMEA investment policy (acquisition of minority holding and injection of fresh capital). After taking account of the cost of remuneration of the management company, estimated at a maximum of [...], the target IRR to be attained to be able to produce a 'market' performance is between 12 % and 15 %.
- ⁽²¹⁾ This measure is undertaken on the basis of a significant stock market price index of the main automobile parts manufacturers. If the crisis is included, the average IRR for the 5 years preceding 1 December 2009 slumps to 4,7 %.

- (109) Finally, the parameters available at the time of the investment enable a weighted average capital cost ('WACC') to be determined on the basis of the CAPM⁽²²⁾ and adapted to the motor vehicle sector in France, integrating the additional specific risk premiums associated with the dimension of Trèves and the non-liquid nature of the investment. In view of these additional factors inherent in the risk premium, the corresponding WACC is estimated at [> 12] % at the time of the investment, raised to [> 12] % by the FMEA (see recital 91). It must be borne in mind that the WACC is the minimum rate of return required by the providers of capital of an undertaking (shareholders and creditors) to finance investment projects. The WACC calculated for Trèves therefore gives a significant indication regarding the acceptability of a 'minimum' IRR of [> 12] %⁽²³⁾.
- (110) Moreover, it should be emphasised that Trèves' capital gain will not be shared between the FMEA and the historical shareholder according to their respective share in Trèves' capital. In fact, assuming an exit in [...], the shareholder agreement specifies that the first EUR [...] million of the value of the company will be allocated in full to the FMEA (first tranche). Then, the proceeds from the sale amounting to between EUR [...] million and an amount equal to that of the FMEA investment capitalised at [...] % per year is shared between the FMEA ([...] %) and the historical shareholders ([...] %) (second tranche). Finally, the FMEA receives [...] % of the proceeds of the sale beyond this threshold and the historical shareholders [...] %.
- (111) This agreement on the sharing of the capital gain provides protection for the FMEA. In fact, the FMEA in this way receives a significant guarantee that an IRR of [> 12] % on its investment will rapidly be attained (this rate corresponds to the WACC of Trèves presented above). Secondly, this agreement is a strong incentive for the historical shareholder and the company managers to achieve, and even exceed, the objectives of the restructuring plan, with this plan resulting in an IRR of [> 12] %, [> 15] % or [> 20] % for the FMEA, depending on the scenario.
- (112) Consequently, it results from the findings above that the estimated IRR of [> 12] % was reasonable at the time of the investment and acceptable in the light of the risk it entails.

⁽²²⁾ Capital asset pricing model.

⁽²³⁾ The WACC calculated is based on the debt costing [0-10] % and equity [10-20] %. In view of the composite structure of the FMEA investment (capital contribution and convertible bond contribution), it is inappropriate to assess this investment by giving priority to either the cost of the debt or the cost of the equity. It is observed, for example, that the FMEA claim from the debt securities is preferential (preference of new money). In addition, in relation to the new credit facility amounting to EUR [10-30] million granted by the banks, the FMEA negotiated a '*pari passu*' position for a significant proportion of the debt securities, i.e. covering a tranche of EUR [10-20] million. The level of the WACC therefore seems the best indicator. Be that as it may, it should be pointed out that the cost of equity amounting to [10-20] %, which in any case cannot be adopted as such for the reasons mentioned above, is lower than the IRR of [> 15] % expected in the base scenario which constitutes the return required by the FMEA.

Conclusion concerning the criterion of benefit

- (113) Having analysed the Trèves restructuring plan, its valuation prior to the FMEA investment, the structure of this investment, the assumptions underlying an IRR of [> 12] % and the appropriateness of this IRR, especially in the light of the shareholder agreement provided for regarding the sharing of the capital gain, it should be pointed out that the FMEA operated under conditions similar to those that a private investor would have required in respect of an investment presenting a risk associated with both the situation of the motor vehicle industry at the time of the investment and that of the company, which was experiencing certain financial difficulties. In other words, the FMEA investment amounting to EUR 55 million respects the criterion of the private investor operating in a market economy. Therefore it does not confer any benefit on Trèves.

V.1.2. The tax and social security debt rescheduling plan

- (114) The French authorities authorised Trèves' tax and social security debt rescheduling plan for an amount of EUR 18,4 million. The Commission first wishes to examine the criterion of benefit in relation to this measure.

Benefit

- (115) According to the Commission's decision-making practice and case-law, a debt rescheduling agreement by a public creditor is not State aid if it has acted like a private creditor which 'seeks to recover sums due to it and which, to that end, concludes agreements with the debtor, under which the accumulated debts are to be rescheduled or paid by instalments in order to facilitate their repayment'⁽²⁴⁾.
- (116) For Trèves' public creditors, the debt rescheduling plan is a better solution than enforced recovery. In fact, in the case of forced recovery, the public creditors, in the light of the company's general level of debt, would have recovered only part of their non-preferential claims. On the other hand, by authorising the rescheduling, first-ranking mortgages [...] (Article [...] of the conciliation protocol of 25 May 2009) were established with a view to guaranteeing the tax and social security debts. These assets are identified in Annex 7 to the protocol. At 31 December 2008, their net accounting value was EUR [25-35] million. The volume of the collateral established in favour of the public creditors therefore covers over 140 % of the amount of their claim, which comprises the principal (EUR 18,4 million), penalties for late payment and interest on arrears (see recital 117).

⁽²⁴⁾ Court of Justice judgment of 29 April 1999 in Case C-342/96 *Spain v Commission*, known as 'Tubacex', [1999] ECR I-2459.

- (117) Moreover, Trèves' public creditors will receive interest. In fact, the amount of EUR 18,4 million was supplemented by penalties for late payment of EUR [1-2] million and interest on arrears of EUR [1-2] million, with the sum being repayable in full between [...] and [...] in monthly instalments of EUR [...]. The addition of penalties and interest on arrears amounts to EUR [2-4] million, i.e. [10-20] % of the principal, which represents annual interest of about [0-10] % over the weighted average duration of the rescheduling plan. This rate was from the start higher than the rates granted by the financial institutions for the loans granted to Trèves under the conciliation protocol of 25 May 2009, for both the new credit and the consolidation loan ⁽²⁵⁾.
- (118) In this respect, it should also be emphasised that the commitment of the public creditors occurred at the same time as a major commitment by the banks (consolidation loan of EUR [30-60] million and new credit facility of EUR [10-30] million). Moreover, the conciliation protocol explicitly indicates that the securities granted to the banks are second-ranking [...], which means that these creditors cannot call upon any security until the first-ranking public creditors have all been repaid in full.
- (119) In addition, no tax and social security debt remission was granted to the Trèves group.
- (120) Finally, the French authorities confirmed that the current rescheduling plan did not constitute an extension or modification of a previous plan.
- (121) Consequently, it results from the above that Trèves' tax and social security debt rescheduling plan was authorised by the French authorities on the basis of the assumptions, deemed to be credible, which underlie the restructuring plan (see Section V) and subject to terms and conditions which are acceptable to a private creditor operating in a market economy under the same circumstances.

V.2. Conclusion regarding the assessment of the presence of State aid within the meaning of Article 107(1) TFEU

- (122) In the light of the factors set out in Section V.1., it appears that neither the FMEA investment amounting to EUR 55 million or the tax and social security debt rescheduling plan amounting to EUR 18,4 million confer a benefit on the Trèves group. Consequently, these measures do not constitute State aid within the meaning of Article 107(1) TFEU.

VI. GENERAL CONCLUSION

- (123) After having carried out a detailed investigation of the measures in question, the Commission finds that they do not constitute State aid within the meaning of Article 107(1) TFEU,

HAS ADOPTED THIS DECISION:

Article 1

The two measures taken in relation to the company Trèves, consisting of an investment by the Fonds de Modernisation des Equipementiers Automobiles (Fund for the Modernisation of Automobile Parts Manufacturers) (FMEA) amounting to EUR 55 million and a tax and social security debt rescheduling plan amounting to EUR 18,4 million authorised by the French Republic, do not constitute aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 2

This Decision is addressed to the French Republic.

Done at Brussels, 20 April 2011.

For the Commission
Joaquín ALMUNIA
Vice-President

⁽²⁵⁾ However, these rates are established by adding a margin based on the EURIBOR rates, which are floating rates. Consequently, comparison with the fixed rate of [0-10] % is not entirely relevant, even though since 25 May 2009 the rates granted by the banks have never exceeded [0-10] %.

COMMISSION DECISION

of 13 July 2011

concerning State aid C 3/09 (ex NN 41 A-B/03) implemented by Portugal for the collection, transportation, treatment and destruction of slaughterhouse waste

*(notified under document C(2011) 4888)***(Only the Portuguese text is authentic)**

(2011/677/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union (TFEU), and in particular the first subparagraph of Article 108(2) thereof,

Whereas:

(6) Since no reply was received within the 4-week period allowed in the last letter mentioned above, on 19 December 2003 the Commission services sent the Portuguese authorities an official reminder, stipulating that, should the latter fail to reply, the Commission services reserved the right to propose that the Commission send an information injunction, pursuant to Article 10(3) 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 ⁽²⁾ (now Article 108 TFEU).

I. PROCEDURE

(1) Following a complaint, on 15 November 2002 the Commission asked the Portuguese authorities for information on the introduction of a parafiscal charge designed to finance the collection, transportation, treatment and destruction of mammalian meat and poultrymeat by-products, pursuant to Decree-Law No 197/2002 of 25 September 2002 ⁽¹⁾ (hereinafter referred to as 'Decree-Law No 197/2002'). The Portuguese authorities replied by letter of 20 January 2003.

(2) As the information provided indicated that this measure had been implemented without prior authorisation from the Commission, it was entered in the register of non-notified aid under number NN 41 A-B/03.

(3) By letters of 16 and 30 April 2003, the Commission services asked the Portuguese authorities for further information on the measure in question. The Portuguese authorities were given a period of 4 weeks in which to reply.

(4) By letters of 5 May and 6 June 2003, registered on 5 May and 10 June 2003 respectively, the Permanent Representation of Portugal to the European Union, on behalf of the Portuguese authorities, in view of the time needed to gather this information, asked for a further period in order to provide all the information requested.

(5) By letter of 25 July 2003, the Commission services granted an extension of 4 weeks.

(7) By letter of 5 February 2004 registered on the same date, the Permanent Representation of Portugal to the European Union sent the Commission the reply from the Portuguese authorities to the letters from the Commission services of 16 and 30 April 2003.

(8) By letter of 11 November 2004, the Commission services asked the Portuguese authorities for further information on the measure in question. The Portuguese authorities were given a period of 4 weeks in which to reply.

(9) By letter of 30 December 2004, registered on 5 January 2005, the Permanent Representation of Portugal to the European Union, on behalf of the Portuguese authorities, in view of the time needed to gather this information, asked for a further period of 1 month in order to provide all the information requested.

(10) By letter of 17 January 2005, the Commission services granted an extension for the second time, as requested.

(11) Since no reply was received to their questions within the further period allowed, on 12 April 2005 the Commission services sent the Portuguese authorities another official reminder, drawing the latter's attention once again to the fact that, should they fail to reply within the 4-week period allowed for this purpose, the Commission services reserved the right to propose that the Commission send an information injunction, pursuant to Article 10(3) of Regulation (EC) No 659/1999.

⁽¹⁾ *Diário da República*, I Series A — No 222 of 25 September 2002, p. 6535.

⁽²⁾ OJ L 83, 27.3.1999, p. 1.

- (12) The aforementioned period for a reply to be submitted expired in May 2005. Since no reply was received within that period, the Commission, by Decision of 21 February 2006 ⁽³⁾, called upon Portugal to provide all the information requested, stipulating that, should the Portuguese authorities fail to reply, it reserved the right to initiate the procedure laid down in Article 108(2) TFEU (see paragraph 80 of the information injunction).
- (13) As none of the requested information was provided, on 28 January 2009 the Commission decided to initiate the procedure laid down in Article 108(2) TFEU. This Decision was published in the *Official Journal of the European Union* ⁽⁴⁾. The Commission invited the other Member States and interested parties to submit their comments on the aid in question.
- (14) As no comments were received from Portugal within the prescribed period, on 18 March 2009 the Commission sent an official reminder to the Portuguese authorities. On 14 April 2009 Portugal sent its comments to the Commission and also provided a copy of Decree-Laws No 393-B/98 and No 244/2003. On 15 June 2009 comments were received from ETSA — Empresa de Transformação de Subprodutos Animais, SA.
- (15) On 1 July 2009 the Commission sent ETSA's comments to the Portuguese authorities. The Portuguese authorities did not send the Commission any observations on ETSA's comments.
- (16) Further to ETSA's comments, on 19 February 2010 the Commission services sent a letter to the Portuguese authorities requesting additional clarification. The Portuguese authorities replied by letter of 27 April 2010.
- (17) By letter of 1 February 2011, the Commission services requested clarification from the Portuguese authorities and called upon them to answer fully all the questions raised previously by those services.
- (18) By letter of 24 February 2011, the Portuguese authorities requested an extension of 30 days to the deadline for replying.
- (19) By letter of 28 February 2011, the Commission services granted the extension of 30 days to the deadline for

replying. The Portuguese authorities replied to the questions of the Commission services by letter of 1 April 2011.

- (20) By letter of 20 June 2011, the Commission services informed the Portuguese authorities that they were going to propose that the Commission take a conditional positive decision, and they set out the conditions to which that decision would be subject.

II. DESCRIPTION

- (21) According to the information provided by the Portuguese authorities, 66 cases of bovine spongiform encephalopathy (hereinafter referred to as 'BSE') were detected in Portugal between 1 January and 14 October 1998. In view of this risk to public and animal health, the Commission adopted Decision 98/653/EC of 18 November 1998 concerning emergency measures made necessary by the occurrence of bovine spongiform encephalopathy in Portugal ⁽⁵⁾, and imposed emergency measures as required by the BSE cases in Portugal, in particular prohibiting the dispatch of certain animals and animal by-products from Portugal to other Member States.
- (22) In order to mitigate the effects of the measures adopted to combat BSE, from 1999 the Portuguese State assumed the total cost of the collection, processing and destruction of mammalian meat and poultrymeat by-products. Through Decree-Law No 393-B/98 of 4 December 1998 ⁽⁶⁾ (hereinafter referred to as 'Decree-Law No 393-B/98'), the Portuguese State assumed responsibility for and the cost of the collection, processing and destruction of these by-products.
- (23) Article 4(3) of Decree-Law No 393-B/98 allowed charges to be imposed on slaughterhouses in order to finance the destruction of certain raw materials. According to the information received from the Portuguese authorities, this charge was not imposed on slaughterhouses.
- (24) The Portuguese authorities have explained that they did not have a sufficient number of specific facilities in order to adequately treat the waste and that they were therefore forced to contract these services — which are, by their nature, the State's responsibility — to the private sector.

⁽³⁾ Decision C(2006) 576, notified to Portugal by letter No SG(2006) D/200772 dated 21 February 2006.

⁽⁴⁾ OJ C 109, 13.5.2009, p. 9.

⁽⁵⁾ OJ L 311, 20.11.1998, p. 23.

⁽⁶⁾ *Diário da República*, I Series A — No 280 of 4 December 1998, p. 6708.

- (25) The Portuguese authorities have explained that this public interest mission was entrusted to the private sector in accordance with Decree-Law No 197/99 of 8 June 1999 ⁽⁷⁾, which transposed into national law European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively ⁽⁸⁾. The private undertakings entrusted with providing these services were selected based on their technical ability to correctly perform the public interest mission entrusted to them, having regard to the urgent need to treat these by-products safely, quickly and effectively. The Portuguese authorities have supplied a model service provision contract, which applied between 1 September 2004 and 31 December 2004.
- (26) According to the information provided by the Portuguese authorities, the parameters used to calculate the compensation for the services provided were established beforehand by Joint Order No 96/99 of 25 January 1999 ⁽⁹⁾. The contents of this Order were periodically checked, and were amended by Joint Order No 324/2001 of 6 April 2001 ⁽¹⁰⁾ and by Joint Order No 124/2002 of 19 February 2002 ⁽¹¹⁾.
- (27) Through Decision 2000/766/EC ⁽¹²⁾, the Council prohibited the use of animal by-products from almost all species in animal feed and imposed the destruction of these by-products in all Member States, including Portugal.
- (28) The Portuguese authorities have explained that, due to this Decision, the quantity of waste increased, thereby also increasing the cost of these operations.
- (29) Through Decision 2001/376/EC ⁽¹³⁾, the Commission decided to maintain Decision 98/653/EC, adopted in relation to Portugal.
- (30) Regulation (EC) No 1774/2002 of the European Parliament and of the Council of 3 October 2002 laying down health rules concerning animal by-products not intended for human consumption ⁽¹⁴⁾ lays down specific rules for the collection, processing and destruction of animal by-products, applicable to various categories of by-products.
- (31) The Portuguese authorities have explained that, in order to meet their obligations in this respect, they decided to pass on the cost of these operations to economic operators in the sector, in strict compliance with the polluter pays principle and without losing sight of the concerns about protecting public health, for which they are responsible and which must be ensured. Portugal therefore adopted the measure laid down in Decree-Law No 197/2002 of 25 September 2002.
- (32) Since October 2002, when Decree-Law No 197/2002 entered into force, the cost of the collection, transportation, processing and destruction of mammalian meat and poultrymeat by-products has been financed by revenue from a parafiscal charge imposed on slaughterhouses, importers of bone-in beef, veal and pigmeat, and intra-Community operators, i.e. bone-in beef, veal and pigmeat operators/receivers.
- (33) By letter of 20 January 2003, the Portuguese authorities indicated that the following operators were exempt from paying this charge:
- slaughterhouses collecting, processing and destroying all by-products generated either in the slaughterhouse itself or in cutting plants, with the exception of specified risk materials (hereinafter referred to as 'SRM'), given that these units were in a position to independently treat the respective by-products (see Annex 2, paragraph 2, of Decree-Law No 197/2002),
 - boned meat importers and intra-Community operators, as this operation does not generate by-products that must be treated under Community or domestic law.
- (34) With regard to the precise use of the revenue from this charge, the Portuguese authorities have stated that this was exclusively used to finance the operations inherent in the services of collecting, transporting, processing and destroying mammalian meat and poultrymeat by-products, including SRM.
- (35) The amount of the charge is set in Annex 1 to Decree-Law No 197/2002, as indicated below, in proportion to the weight and depending on the species in question:

⁽⁷⁾ *Diário da República*, I Series A — No 132 of 8 June 1999, p. 3171.

⁽⁸⁾ OJ L 328, 28.11.1997, p. 1.

⁽⁹⁾ *Diário da República*, II Series — No 20 of 25 January 1999, p. 935.

⁽¹⁰⁾ *Diário da República*, II Series — No 82 of 6 April 2001, p. 6270.

⁽¹¹⁾ *Diário da República*, II Series — No 42 of 19 February 2002, p. 3158.

⁽¹²⁾ OJ L 306, 7.12.2000, p. 32.

⁽¹³⁾ OJ L 132, 15.5.2001, p. 17.

⁽¹⁴⁾ OJ L 273, 10.10.2002, p. 1.

(EUR)

Species/Type	Beef and Veal	Pig	Sheep/Goat	Poultry	Other
Charge/kg of carcass	0,05	0,04	0,03	0,06	0,06

- (36) In order to finance the services of collecting, transporting, processing and destroying SRM, Article 2(2) of Decree-Law No 197/2002 provides that a fixed charge of EUR 0,30 per kilogram of SRM shall be specifically and solely imposed on slaughterhouses.
- (37) All the charges were paid to a public body, the Instituto Nacional de Intervenção e Garantia Agrícola (INGA), using a reverse charge procedure. The charges imposed on operators formed INGA's revenue and were paid directly to it.
- (38) As indicated in recitals 32 and 33 of this Decision, Article 4 of Decree-Law No 197/2002 provides that slaughterhouses may also arrange for the collection, processing and destruction of by-products, with the exception of SRM, either by contracting the services of third parties or on their own initiative, under the relevant legislation. Where slaughterhouses collect, process and destroy by-products generated in the slaughterhouse itself — with the exception of SRM — the charge to be paid is set in Annex 2 to Decree-Law No 197/2002 as follows:

(EUR)					
Species/Type	Beef and Veal	Pig	Sheep/Goat	Poultry	Other
Charge/kg of carcass	0,03	0,02	0,00	0,00	0,00

- (39) Where slaughterhouses collect, process and destroy all by-products generated either in the slaughterhouse itself or in cutting plants, with the exception of SRM, no charge is payable.
- (40) Under Article 5 of Decree-Law No 197/2002, INGA is responsible for checking that the charges are paid by slaughterhouses, which must therefore keep up-to-date registers of carcass numbers and weights. INGA is also responsible for checking that the charges payable on the import and receipt of products from the European Union are paid. The operators/receivers in question must keep up-to-date registers of all operations carried out.
- (41) If they opt for this alternative scheme, slaughterhouses must submit the respective plans in advance for assessment by INGA and must also submit to all the checks ordered by the competent authorities.
- (42) The Portuguese authorities have given assurances that this service was exclusively provided to entities generating by-products that had to be disposed of and that the charge did no more than pass on the cost of these operations to these entities.

- (43) With regard to the correspondence between the revenue from the charges and the cost of the services financed by these charges, the Portuguese authorities have stated that each charge set out in Annexes 1 and 2 to Decree-Law No 197/2002, as also the charge laid down in Article 2(2) on SRM, was calculated based on the actual cost of the services to be provided, bearing in mind the nature and importance of the by-products generated by each animal species.
- (44) According to the Portuguese authorities, this charge formed, in all respects, the compensation payable by users for the provision of a public service of general interest. The amounts paid by operators liable for the charge were directly proportional to the quantities of waste actually delivered to the public service and to the actual cost of disposing of this waste. In support of these assertions, the Portuguese authorities have provided documents containing figures for 1999 to 2005, proving the cost of the services, and, for 2003, a document containing figures for the revenue from the charge, with regard to the various types of by-product, regardless of whether these were imported or domestic products.
- (45) With regard to the question of whether imported products could effectively benefit from the scheme in the same way as domestic products, the Portuguese authorities have given assurances that, in the spirit of the polluter pays principle, the charges applicable to slaughterhouses, imports or intra-Community trade in bone-in meat reflected the costs associated with treating all the by-products generated in the system up to the final consumer.
- (46) According to the Portuguese authorities, the import of bone-in meat generates by-products and therefore benefited from the collection, transportation, processing and destruction service, which justified applying these charges.
- (47) The Portuguese authorities consider that the measures financed were in the public interest because, following the BSE crisis, it became clear that the disposal of slaughterhouse waste was a public service mission falling under the responsibility of the State because of its importance for the protection of human and animal health and the environment.
- (48) The scheme set up by Decree-Law No 197/2002 was repealed by Decree-Law No 244/2003 of 7 October 2003 ⁽¹⁵⁾ (hereinafter referred to as 'Decree-Law No 244/2003'), which entered into force on 22 October 2003 and which laid down a general scheme and a transitional scheme for animal by-products not appropriate for human consumption.

⁽¹⁵⁾ *Diário da República*, I Series A — No 232 of 7 October 2003, p. 6603.

- (49) Under the general scheme, slaughterhouses, cutting plants, hatcheries and egg production facilities must, either on their own initiative or by contracting the services of third parties, collect, transport, store, handle, process and destroy Category 1, 2 and 3 material generated within their own units, in accordance with Regulation (EC) No 1774/2002, by implementing a plan subject to prior approval by the Veterinary Directorate-General (DG V).
- (50) Slaughterhouses, cutting plants, hatcheries and egg production facilities must submit a plan for the destruction or use of Category 3 material, to be approved by DG V, within 90 days of the date of entry into force of Decree-Law No 244/2003 or the date of starting up. With regard to Category 3 material, until the plans are approved by DG V, INGA continues to provide services of collection, transportation, processing, temporary storage and destruction of by-products, in accordance with Decree-Law No 197/2002. Until the plan for Category 3 material is approved, owners of slaughterhouses, cutting plants, hatcheries and egg production facilities must pay the charges set in Annex 1 to Decree-Law No 197/2002, except for those entities benefiting from the alternative scheme provided for in that Decree-Law, which must pay the charges set in Annex 2 to the Decree-Law.
- (51) Under the transitional scheme, INGA also continued to provide these services for Category 1 and 2 material.
- (52) With regard to Category 1 and 2 material, slaughterhouses and cutting plants had to submit a destruction or use plan within 30 days of the end of the transitional scheme in November 2005. Until the plan was approved, they had to pay EUR 0,35 per kilogram of Category 1 or 2 material. Once the destruction or use plan was approved, they became exempt from paying the charge.
- (53) Once slaughterhouses and cutting plants had sent a plan to DG V, covering the operations needed to dispose of Category 1 and 2 material, they assumed responsibility for the cost of these operations and were subject to checks by that competent authority. Article 3(4) of Decree-Law No 244/2003 provided that this transitional scheme would expire 2 years after the Decree-Law entered into force.
- (54) The transitional scheme under Decree-Law No 244/2003 expired in November 2005. By letter of 1 April 2011, the Portuguese authorities stated that, after the expiry of the transitional scheme under Decree-Law No 244/2003, the cost of the operations to destroy the by-products of slaughterhouses and cutting plants was passed on to operators through waste recovery, conversion into biofuels, and export of meal.
- (55) In its decision to initiate the procedure, the Commission set out its concerns about the existence of aid in favour of the undertakings providing the services of collection, transportation, processing and destruction of the materials concerned, slaughterhouses and cutting plants, importers of bone-in beef, veal, pigmeat and poultrymeat, intra-Community operators and livestock farmers, and also about the compatibility of this aid.
- (56) The Commission in particular again asked the questions raised in the first information injunction. With regard to the aid in favour of the undertakings providing the services of collection, transportation, processing and destruction of the materials concerned, it expressed doubts about the public interest service nature that the Portuguese authorities were attributing to the activities in question, particularly in view of the *Altmark* judgment⁽¹⁶⁾. With regard to the aid in favour of slaughterhouses and cutting plants, importers of bone-in beef, veal, pigmeat and poultrymeat, and intra-Community operators in the sector, the Commission expressed doubts about whether the contribution paid by the sector through the charge corresponded to the actual financial cost of the collection service provided, and requested quantified information in this respect. Finally, with regard to the aid to livestock farmers, the Commission expressed doubts about the advantages that they could obtain from the scheme set up, given that they were not subject to the charge.
- (57) The Commission then examined, on a preliminary basis, the compatibility of the measures in question in light of the guidelines applicable since 1998 and concluded, on deciding to initiate the procedure, that it did not have sufficient information to draw any conclusions as to the compatibility of the measures in question.

III. COMMENTS SUBMITTED BY PORTUGAL

- (58) In its comments, Portugal first recalls the country's specific situation in 1998 due to BSE. The Portuguese authorities specifically refer to Decision 98/653/EC prohibiting the dispatch from Portugal to other Member States or to third countries of certain products, particularly meat-and-bone meal, as such or contained in other products. In this context, Portugal introduced a BSE monitoring, control and eradication plan, which was approved by the Commission's Standing Veterinary Committee. On 18 April 2001 the Commission decided to maintain the prohibition on Portugal, which was not repealed until 2004 by Commission Regulation (EC) No 1993/2004⁽¹⁷⁾.

⁽¹⁶⁾ Judgment in Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, and *Oberbundesanwalt beim Bundesverwaltungsgericht* [2003] ECR I-7747.

⁽¹⁷⁾ OJ L 344, 20.11.2004, p. 12.

- (59) Portugal therefore insists that, between 1998 and 2004, all the measures taken were aimed at dealing with an emergency situation that threatened public health. The Portuguese Government's objective was therefore to allow measures to be immediately introduced until operators could arrange to carry out these tasks themselves, while remaining under state control. Portugal takes the view that the protection of public health is a legal priority above all others, which justifies an exemption from State aid rules.
- (60) According to the Portuguese authorities, the adoption of Decision 98/653/EC and its successive extensions prevented the measures adopted by the Portuguese State to deal with the BSE crisis from producing any distortion in the market and therefore from hindering trade between Member States. Portugal points out that, as there was a ban on the dispatch of these products, there was no trade, which meant that there could be no distortion of competition.
- (61) First of all, Portugal indicates that no aid was granted in 1998, providing as evidence the date of entry into force of Decree-Law No 393-B/98, which was 4 December 1998. It was only at that point that the Portuguese State, on an exceptional and transitional basis, assumed responsibility for the collection, processing and destruction of these by-products.
- (62) Following the entry into force of Decree-Law No 393-B/98, the Portuguese State assumed the cost of the collection, processing and destruction of by-products until Decree-Law No 197/2002 entered into force. In this respect, according to the Portuguese authorities, it should be considered that the Portuguese State assumed responsibility for these measures in the short term, as the scheme was subsequently amended, and that the charge was introduced as a way of making the sector finance the collection, transportation, processing and destruction of mammalian meat and poultrymeat by-products, including specified risk materials (SRM).
- (63) With regard to the cost of these measures, the Portuguese authorities indicate that the parameters used to calculate the compensation were established beforehand by an order published in the *Diário da República*. The Portuguese authorities refer to three orders⁽¹⁸⁾, which indicate the prices of the services (collection, transportation, processing and bagging in big bags, per kilogram of product). The cost of these operations to be borne by animal by-product processing units not attached to slaughterhouses was taken into account. Overheads, such as energy, fuel, wage, insurance and other costs, were also taken into account. These parameters were the same for all service-providers. The Portuguese authorities indicate that the profits were between 30 % and 39,5 %, which, in their opinion, represents a margin that is fair or even slightly below the average for economic activities. The Portuguese authorities have provided examples showing how the parameters used to calculate the prices set in the orders were applied.
- (64) In conclusion, the Portuguese State considers that the aid granted can be declared compatible because a derogation from the polluter pays principle is applicable, because the aid corresponds to the cost of the services provided, and because the guidelines applicable at the time (*Community guidelines for State aid concerning TSE tests, fallen stock and slaughterhouse waste* ⁽¹⁹⁾) authorised aid of up to 100 % of the actual costs, as this was short term.
- (65) From October 2002, the legal basis for paying the charge became Decree-Law No 197/2002. The Portuguese authorities consider that the charges in question took into account the prices to be paid for the operations carried out by the by-product processing units. However, given that the crisis was still ongoing, the Portuguese authorities consider that the State's intervention as an intermediary was still justified.
- (66) In the simulations carried out at the time, the full costs borne by the undertakings and a reasonable profit were taken into account. The Portuguese authorities have provided the worked example based on the costs and charges for 2003, which, in their opinion, proves the balance between the revenue and charges resulting from the new legal rules, and sets the charges required to finance the services.
- (67) The Portuguese authorities also state that the services of collection, transportation, processing and destruction of poultrymeat by-products were not financed from the charges imposed on slaughterhouses and importers of bovine and pig carcasses, half-carcasses and other bone-in parts. The Portuguese authorities point out that the provisions of Article 2(1) of Decree-Law No 197/2002 must be interpreted in light of the provisions of Annex 1, to which they refer, with the result that the services of collection, transportation, processing and destruction of meat by-products were financed by three types of operator: beef, pig, sheep/goat, poultry and other slaughterhouses; importers of bovine and pig carcasses, half-carcasses and other bone-in parts; and intra-Community operators in the same products. Accordingly, Annex 1 contains a column indicating the charges to be imposed on poultry slaughterhouses not collecting, transporting, processing and destroying by-products generated during the slaughter of poultry, bearing in mind that most imported poultry carcasses do not generate by-products.

⁽¹⁸⁾ Joint Order No 96/99 of 25 January 1999; Joint Order No 324/2001 of 6 April 2001; and Joint Order No 124/2002 of 19 February 2002.

⁽¹⁹⁾ OJ C 324, 24.12.2002, p. 2.

- (68) The Portuguese authorities also state that the difference between the two charges set in Annex 2 to Decree-Law No 197/2002 was justified by the costs associated with the by-products generated in cutting plants.
- (69) The Portuguese authorities state that, in accordance with Decree-Laws No 197/2002 and No 244/2003, it was not intended that the charges should have an impact on livestock farmers, although the costs of the collection, transportation, processing and destruction operations did in fact impact on the whole meat sector. To that end, the Portuguese authorities have provided two service invoices dated 22 October 2002 and 28 October 2003, which, in their opinion, prove that the costs of the collection, transportation, processing and destruction operations were passed on by slaughterhouses to livestock farmers.
- (70) Finally, the Portuguese authorities give an assurance that no resources were diverted to any competing activities by the service-providers, given that the latter's sole activity was the collection, transportation, processing and destruction of animal by-products.
- (71) The Portuguese authorities also indicate that the transitional scheme set up by Decree-Law No 244/2003 expired in November 2005 and that, since then, entities generating by-products have fully assumed the responsibility that the State initially assumed on a temporary basis, in its place. Since November 2005, all costs have been borne by operators, which offset these through waste recovery, conversion into biofuels and export of meal.
- (72) In conclusion, the Portuguese authorities consider that the conditions laid down in the applicable guidelines were met, given that the operators generating by-products started to gradually pay for the operations associated with the destruction of these by-products through a charge.
- (74) As a preliminary point, ETSA notes the context of the BSE crisis, which forced the Portuguese State to adopt a number of preventive measures (specifically the collection, transportation, processing and destruction of Category 1, 2 and 3 animal by-products) to combat and reduce the risk of infection by BSE, so as to protect public health and the environment. These measures were largely adopted as a result of obligations laid down in Community legislation.
- (75) Between 1998 and 2005, INGA contracted ITS and SEBOL, through a direct award procedure, to provide services of collection, transportation, processing and destruction of waste. ETSA notes that all the undertakings capable of providing the required services were contracted under the same conditions. Up to 10 October 2002, INGA contracted undertakings licensed to provide this type of service and bore the resulting costs, as laid down in Article 6 of Decree-Law No 393-B/98. The parameters used to calculate the price to be paid for the service were established by Joint Order No 96/99. The price was set in proportion to the weight of raw material and could be revised in the light of changes to the service provision conditions. The price paid to SEBOL and ITS took account of the estimated costs of providing the service, particularly those associated with the weight and volume of waste to be collected and treated and with the operational establishment and management of the system for collecting fallen stock from holdings, which, for example, meant collection within a short period of time after notification of the animal's death.
- (76) ETSA points out that, although the service was not awarded through a public procurement procedure, the price paid for the service provided covered the respective costs, taking into account the relevant receipts, and only allowed a reasonable and legitimate profit to be made. It also notes that the level of remuneration for the service was always, in its opinion, in line with the principle of efficiency, as the price paid by INGA was within the European average of prices for equivalent services, and the prices paid until 2005 were actually, according to ETSA, lower than the prices subsequently applied in the contracts for the provision of the same services, concluded following public procurement procedures intended to help define the remuneration in line with market criteria.

IV. COMMENTS OF OTHER INTERESTED PARTIES

- (73) ETSA submitted its comments by letter of 15 June 2009. The ETSA group consists of the following undertakings: ITS — Indústria Transformadora de Subprodutos Animais, SA and SEBOL — Comércio e Indústria de Sebo, SA. These undertakings provide services of collection, transportation, processing and destruction of Category 1, 2 and 3 animal by-products in Portugal and are among the undertakings which the Portuguese State used to provide the services in question during the period concerned. Consequently, ETSA is regarded as a recipient of the state payments and may therefore be deemed an interested party in Case C 3/09.
- (77) From 2005 the service contracts were awarded through international public procurement procedures. Three public procurement procedures were organised: beef/equine at national level; sheep/goats (South) and sheep/goats (North). ITS took part in these public procurement procedures as part of a consortium which was awarded the contract. Three service provision contracts were concluded for the three lots mentioned. ETSA indicates that the conditions included the collection, transportation, processing and destruction of waste, as well as keeping a permanent and up-to-date register and archive on the operations. The Instituto de Financiamento da Agricultura e Pescas — IFAP I.P. was responsible for ensuring compliance with the obligations.

- (78) ETSA points out that the contracts concluded established the prices beforehand in an objective and transparent manner, according to the tonnage and species of animal in question. In its opinion, the prices were set according to market conditions and ensured adequate coverage of the costs incurred in order to comply with the public service obligations, as listed in the service provision contracts and relevant legislation.
- (79) ETSA concludes that, given the above, it did not benefit from any illegal aid and that all the funds received were simply legitimate consideration for the provision of a public service.

V. ASSESSMENT

1. EXISTENCE OF AID UNDER ARTICLE 107(1) TFEU

- (80) Under Article 107(1) TFEU, save as otherwise provided in the Treaties, 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 are, in so far as it affects trade between Member States, incompatible with the internal market.
- (81) Articles 107 to 109 TFEU apply to the pigmeat sector pursuant to Article 21 of Council Regulation (EEC) No 2759/75 of 29 October 1975 on the common organisation of the market in pigmeat⁽²⁰⁾, as last amended by Council Regulation (EC) No 1913/2005⁽²¹⁾. These articles apply to the beef and veal sectors pursuant to Article 40 of Council Regulation (EC) No 1254/1999 of 17 May 1999 on the common organisation of the market in beef and veal⁽²²⁾, as last amended by Council Regulation (EC) No 1152/2007⁽²³⁾. Before the latter was adopted, these articles applied to this sector pursuant to Article 24 of Council Regulation (EEC) No 805/68⁽²⁴⁾. They apply to the sheepmeat and goatmeat sectors pursuant to Article 22 of Council Regulation (EC) No 2467/98 of 3 November 1998 on the common organisation of the market in sheepmeat and goatmeat⁽²⁵⁾, as last amended by Regulation (EC) No 1913/2005. They apply to the poultrymeat sector pursuant to Article 19 of Council Regulation (EEC) No 2777/75 of 29 October 1975 on the common organisation of the market in poultrymeat⁽²⁶⁾, as last amended by Council Regulation (EC) No 679/2006⁽²⁷⁾. 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)⁽²⁸⁾ repealed these various regulations and provides, in Article 180 thereof, that the State aid rules apply to the aforementioned products.
- (82) The nature of the aid must be determined in light of all the beneficiaries of the services of collection, transportation, processing and destruction of slaughterhouse waste and their financing. The Commission has identified the following categories of potential beneficiaries of the scheme introduced in Portugal:
- undertakings providing the services of collection, transportation, processing and destruction of the material in question,
 - slaughterhouses and cutting plants, importers of bone-in beef, veal, pigmeat and poultrymeat, and intra-Community operators, i.e. bone-in beef, veal and pigmeat operators/receivers,
 - livestock farmers.
- (83) In order to assess the potential aid over time, the Commission identified four periods in its decision to initiate the procedure, taking into account the application of the various Community provisions relevant to the analysis of potential aid measures. The Commission identified: the period from 1998 to 31 December 1999, which was the period preceding the entry into force of the guidelines for State aid in the agriculture sector; the period from 1 January 2000 to 31 December 2002, which was the period preceding the entry into force of the Community guidelines for State aid concerning TSE tests, fallen stock and slaughterhouse waste; the period from 1 January 2003 to 31 December 2006, which was the period preceding the entry into force of the new Community guidelines for State aid in the agriculture and forestry sector 2007 to 2013⁽²⁹⁾; and the period from 1 January 2007 to the present.
- (84) Given the new information provided by the Portuguese authorities, particularly on the application of Decree-Law No 244/2003, as described above, and on the various methods of financing the potential aid, the Commission will slightly alter the division of these periods and will therefore take account of the following periods in its assessment of each group of potential beneficiaries:
- period between 9 December 1998 and 9 October 2002, during which Decree-Law No 393-B/98 was in force,

⁽²⁰⁾ OJ L 282, 1.11.1975, p. 1; Portuguese special edition: Chapter 03 Volume 9 p. 86.

⁽²¹⁾ OJ L 307, 25.11.2005, p. 2.

⁽²²⁾ OJ L 160, 26.6.1999, p. 21.

⁽²³⁾ OJ L 258, 4.10.2007, p. 3.

⁽²⁴⁾ OJ L 148, 28.6.1968, p. 24; Portuguese special edition: Chapter 03 Volume 2 p. 157; English special edition: Series I Chapter 1968(I) p. 187.

⁽²⁵⁾ OJ L 312, 20.11.1998, p. 1.

⁽²⁶⁾ OJ L 282, 1.11.1975, p. 77; Portuguese special edition: Chapter 03 Volume 9 p. 151.

⁽²⁷⁾ OJ L 119, 4.5.2006, p. 1.

⁽²⁸⁾ OJ L 299, 16.11.2007, p. 1.

⁽²⁹⁾ OJ C 319, 27.12.2006, p. 1.

- period between 10 October 2002 and 21 October 2003, during which Decree-Law No 197/2002 was in force, except for Annex 2, the application of which was extended under the transitional scheme laid down in Decree-Law No 244/2003,
- period between 22 October 2003 and November 2005, during which the transitional scheme laid down in Decree-Law No 244/2003 was in force.

1.1. EXISTENCE OF A SELECTIVE ADVANTAGE

- (85) According to settled case-law of the Court of Justice, measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions are regarded as aid ⁽³⁰⁾. In addition, measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect, are considered to constitute aid ⁽³¹⁾.

1.1.1. *Selective advantage for service-providers*

- (86) The Commission considers that the activity of collection, transportation, processing and destruction of the material in question is an economic activity, as it constitutes a service provision in return for remuneration and may be carried out by numerous economic operators on the Community market. This conclusion is based, in particular, on the information provided by ETSA, as summarised in recital 73 et seq. of this Decision.
- (87) With regard to this economic activity, the Portuguese authorities argue that the service-providers in question carried out a public service mission in the general interest, justified by reasons of public health and environmental protection. In this context, the Portuguese authorities stress the country's specific situation in relation to the BSE crisis. Portugal therefore insists that all the measures taken were aimed at dealing with an emergency situation that threatened public health. The Portuguese Government's objective was therefore to allow measures to be immediately introduced until operators could arrange to carry out these tasks themselves, while remaining under state control (see recitals 21 and 59 of this Decision).
- (88) In its comments, ETSA considers that it did not benefit from any illegal aid and that all the funds received were simply the legitimate consideration for the provision of a public service (see recital 79 of this Decision).

- (89) It is clear from the Court of Justice judgment in the *Altmark* case ⁽³²⁾ that public subsidies intended to allow the operation of public services do not fall within Article 107 TFEU, given that they must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations. However, the Court requires the following conditions to be satisfied:

- first, the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined,

- second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner,

- third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations,

- fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

- (90) Applying the judgment in *Altmark* to the present case leads the Commission to consider the following:

(a) **Genuine service of general economic interest, as defined in Article 106(2) TFEU**

- (91) To start with, it must be examined whether the present case involves a genuine service of general economic interest, as defined in Article 106(2) TFEU.
- (92) It is clear from the case-law of the Court of Justice that, with the exception of the sectors in which there are Community rules governing the matter, Member States have a wide margin of discretion regarding the nature of services that could be qualified as being services of general economic interest. Thus, the Commission's task is to ensure that this margin of discretion is applied without manifest error as regards the definition of services of general economic interest.

⁽³⁰⁾ *Altmark* judgment, paragraph 84.

⁽³¹⁾ Judgment in Case C-355/00 *Freskot AE v Elliniko Dimosio* [2003] ECR I-5263, paragraph 83.

⁽³²⁾ *Altmark* judgment, paragraph 88 et seq.

(93) Since the 1990s, the occurrence of various transmissible spongiform encephalopathies (TSEs) has been detected separately in humans and animals. Since 1996, evidence has been gathered pointing to the similarity between BSE agents and the new variant of Creutzfeldt-Jakob disease. Since 1990, the European Community has adopted a number of measures aimed at protecting public and animal health from the risk of BSE. These measures are based on the safeguard provisions of the directives on animal health and environmental measures. Pursuant to Decision 2000/766/EC, Member States had to ensure that animal waste, as defined by Directive 90/667/EEC ⁽³³⁾ was collected, transported, processed, stored or disposed of in accordance with that Directive, with Commission Decision 97/735/EC ⁽³⁴⁾ and with Council Decision 1999/534/EC ⁽³⁵⁾. In that respect, Regulation (EC) No 1774/2002 laid down health rules concerning animal by-products not intended for human consumption, and required Member States to ensure that adequate arrangements were in place and that a sufficient infrastructure existed to collect, transport and destroy animal by-products.

(94) Given that the Court of Justice has recognised that the management of particular waste may form the subject of a service of general economic interest ⁽³⁶⁾, and bearing in mind the specific situation of the BSE crisis as indicated above, the Commission has no objection to the Portuguese authorities attributing the nature of services of general economic interest to this activity of collecting and subsequently destroying carcasses and other animal waste unfit for consumption from 1999 to 2005, during which time the Portuguese State assumed full responsibility (from 1999 to 2003) and partial responsibility (from 2003 to 2005) for these operations. That decision was justified on grounds of public health and environmental protection, and is therefore covered by the concept of general economic interest, as defined in Article 106(2) TFEU.

(b) Discharge of the public service obligation

(95) The *Altmark* judgment requires a mandate in the form of one or more official acts with binding legal force under national law. With regard to the first condition imposed by the *Altmark* judgment, it is confirmed that Decree-Laws No 393-B/98 and No 244/2003 required the collection, transportation, processing and destruction of animal by-products unfit for human consumption. Article 6 of Decree-Law No 393-B/98 provided that INGA, which was responsible for the collection,

processing and destruction of animal by-products unfit for consumption, would select the undertakings to provide this service. Joint Order No 95/99 established beforehand the parameters used to calculate the remuneration for the public service, together with other obligations associated with the service provision, such as the obligation for the undertaking to collect all by-products generated in the national territory in accordance with the health and technical rules laid down by law.

(96) The Portuguese authorities maintain that the obligations of the service-providers were clearly defined in the service contracts. By way of example, they have provided the Commission with a service provision contract from 2003, concluded on the basis of Decree-Law No 393-B/98.

(97) The Commission notes that the obligations of the service-provider are clearly defined in the service provision contract submitted by the Portuguese authorities. In view of the provisions of Decree-Law No 393-B/98 and the Joint Order, as also the model service provision contract submitted, the Commission concludes that the first condition of the *Altmark* judgment is satisfied.

(c) Parameters established beforehand in an objective and transparent manner

(98) With regard to the second condition, the Commission considers — based on the available information — that the parameters used to calculate the compensation were established beforehand in an objective and transparent manner. The Joint Orders submitted by the Portuguese authorities define the calculation method and eligible expenditure (see recital 26 of this Decision). These figures were periodically checked based on previous years. From 2005, public procurement procedures were organised. Based on the available information, the Commission considers that the second condition of the *Altmark* judgment is satisfied.

(d) Compensation necessary to cover the service costs

(99) With regard to the third condition, the Portuguese authorities and the interested party state that the compensation did not exceed what was necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations.

⁽³³⁾ OJ L 363, 27.12.1990, p. 51.

⁽³⁴⁾ OJ L 294, 28.10.1997, p. 7.

⁽³⁵⁾ OJ L 204, 4.8.1999, p. 37.

⁽³⁶⁾ Judgment in Case C-209/98 *Entreprenørforeningens Affalds/Miljøsektion (FFAD) v Københavns Kommune* [2000] ECR I-3743, paragraph 75; see also the judgment in Case C-126/01 *Ministère de l'Economie, des Finances et de l'Industrie v GEMO SA* [2003] ECR I-13769, paragraph 21.

- (100) On several occasions, particularly when it initiated the examination procedure, the Commission asked the Portuguese authorities to provide information on the method used to calculate the actual economic cost of the services. The Portuguese authorities have provided documents showing the annual expenditure of the service-providers with regard to 1999 to 2005, and have compared these figures with what INGA paid providers for performing these services. The documents in question show that the compensation paid by INGA to the service-providers did not exceed what was necessary to cover all or part of the costs incurred in performing the service. The documents received show that the compensation also takes into account a profit of between 30 % and 39,5 %, depending on the year (see recital 62 of this Decision).
- (101) The Portuguese authorities have given an assurance that the resources could not have been diverted to competing activities in which the undertakings may have been engaged (cross-subsidies) because the service-providers chosen were not engaged in other activities.
- (102) However, based on the information provided by the Portuguese authorities, the Commission considers that it is unable to conclude that the profit taken into account was 'reasonable' as defined by the *Altmark* judgment.
- (103) In its comments, ETSA has confirmed that the remuneration received for the service provision adequately reflected the costs incurred, allowing a profit margin which did not result in any particular advantage, and that, in the period prior to 2005, the level of remuneration for providing the public service corresponded to the European average and was below the level of remuneration established in the public service contract awarded through the public procurement procedure.
- (104) With regard to this information, the Commission notes that neither the Portuguese authorities nor the interested party have provided supporting documents.
- (105) As a result, the Commission cannot conclude that the third condition of the *Altmark* judgment is satisfied in the present case.
- (107) The Commission is therefore obliged to conclude that not all (four) criteria in the *Altmark* judgment are satisfied in the present case, and that it cannot rule out the possibility that there was an advantage for the service-providers in the period between the entry into force of Decree-Law No 393-B/98 and the end of the transitional scheme introduced by Decree-Law No 244/2003, which expired in 2005.
- (108) The public payments were made to specific undertakings, i.e. to undertakings entrusted with the service. As a result, it can be considered that the measure in question is specific.
- (109) The Commission therefore concludes that it cannot rule out the possibility that there was a selective advantage for the service-providers in the period between 1998 and the end of the transitional scheme introduced by Decree-Law No 244/2003, which expired in 2005.
- 1.1.2. ***Selective advantage for slaughterhouses and cutting plants, importers of bone-in beef, veal, pigmeat and poultrymeat, and intra-Community operators, i.e. bone-in beef, veal and pigmeat operators/receivers***
- (110) According to the Court of Justice judgment in the *GEMO* case⁽³⁷⁾, the fact that the service for the collection and disposal of animal carcasses and waste available to farmers and slaughterhouses is carried out by private undertakings cannot call into question any classification as State aid as the organisation of that service originates with the public authorities.
- (111) In the present case, the rules governing the service and its financing originate from the Portuguese authorities, as laid down in Decree-Laws No 393-B/98, No 197/2002 and No 244/2003. In that respect, the Commission therefore concludes that the system in question can be imputed to the State.
- (112) In the *GEMO* judgment, the Court of Justice stated that the financial cost incurred in the disposal of animal carcasses and slaughterhouse waste must be considered to be an inherent cost of the economic activities of farmers and slaughterhouses⁽³⁸⁾. The Court therefore concluded that Article 107(1) TFEU must be interpreted as meaning that a system which provides farmers and slaughterhouses with the free collection and disposal of animal carcasses and slaughterhouse waste must be classified as State aid in favour of farmers and slaughterhouses.

(e) Analysis of the costs of a typical undertaking

- (106) Given that, prior to 2005, the service-providers were not selected through a public procurement procedure, the *Altmark* judgment requires a comparative analysis with the costs of a typical undertaking. The Portuguese authorities have not provided any evidence that the costs have been assessed based on an analysis of the costs of a typical undertaking.

⁽³⁷⁾ *GEMO* judgment, paragraph 26.

⁽³⁸⁾ *GEMO* judgment, paragraph 31.

Period between 9 December 1998 and 9 October 2002, prior to the entry into force of Decree-Law No 197/2002

- (113) In the present case, the disposal of animal carcasses and slaughterhouse waste can be considered as an inherent cost of the activity, not only for slaughterhouses and cutting plants, but also for importers of bone-in beef, veal, pigmeat and poultrymeat, and bone-in beef, veal and pigmeat operators/receivers. The Commission considers that this financing of the costs of collection, processing and destruction of mammalian meat and poultrymeat by-products through state budget appropriations prior to the entry into force of Decree-Law No 197/2002 resulted in the users of this service being exempt from a charge inherent in their activity.
- (114) The Commission concludes that there was an advantage in the period prior to the application of the parafiscal charge.

Period between 10 October 2002 and November 2005

- (115) With regard to the period after the entry into force of Decree-Law No 197/2002 and Decree-Law No 244/2003, the activities described above were financed through a parafiscal charge introduced by Decree-Law No 197/2002 and amended by Decree-Law No 244/2003. According to the rules of Decree-Law No 197/2002, the following were exempt from paying this charge: slaughterhouses collecting, transporting, processing and destroying all by-products generated either in the slaughterhouse itself or in cutting plants, with the exception of SRM, given that these units were in a position to independently treat their own by-products (see Annex 2, paragraph 2, to Decree-Law No 197/2002); and boned meat importers and intra-Community operators, given that they did not generate by-products subject to the compulsory treatment laid down in the Community and national legislation. Decree-Law No 244/2003 provided for the exemption of these operators through the approval of a destruction or use plan in accordance with the specific conditions required for the various categories of material.
- (116) In order to determine whether there was any advantage for slaughterhouses and cutting plants, importers of bone-in beef, veal, pigmeat and poultrymeat, and intra-Community operators, i.e. bone-in beef, veal and pigmeat operators/receivers liable for the charge, it must be determined to what extent the contribution by way of the charge corresponds to the actual economic cost of the services provided by the collection service.
- (117) The Commission notes that the Portuguese authorities state, in their letter of 20 January 2003, that the

charges set in Annexes 1 and 2 to Decree-Law No 197/2002, as also the charge laid down in Article 2(2) on SRM, were calculated based on the actual cost of the services to be provided, bearing in mind the nature and importance of the by-products generated by each animal species.

- (118) According to the Portuguese authorities, this charge formed, in all respects, the compensation payable by users for the provision of a public service of general interest. The amounts paid by operators liable for the charge were not fixed, but were directly proportional to the quantities of waste actually delivered to the public service and to the actual cost of disposing of this waste.
- (119) In support of these assertions, the Portuguese authorities have provided documents containing figures for 2003, in which the actual economic costs of the services provided are compared with the contributions resulting from the corresponding charge. The Portuguese authorities have not provided any documents containing figures for the revenue from the charge levied during the remainder of 2002, after the entry into force of Decree-Law No 197/2002 in October of that year.
- (120) With regard to 2004 and 2005, the Portuguese authorities have provided documents containing figures for the cost of the operations carried out, but not for the revenue from the charge imposed on those operators whose respective destruction and use plan had not been approved, and who for this reason had to continue paying the charge laid down by the transitional scheme introduced by Decree-Law No 244/2003.
- (121) With regard to 2002, 2004 and 2005, the Commission cannot, from the documents provided by the Portuguese authorities, conclude that the contributions from those liable for the charge were directly proportional to the quantities of waste actually delivered to the collection service and to the actual cost of destroying this waste.
- (122) With regard to 2003, the Commission concludes that there was no advantage, given that the contributions from those liable for the charge were directly proportional to the cost of the services received.
- (123) However, the Commission cannot rule out the possibility that there was some advantage for slaughterhouses and cutting plants, importers of bone-in beef, veal, pigmeat and poultrymeat, and intra-Community operators, i.e. bone-in beef, veal and pigmeat operators/receivers liable for the charge, from October 2002 until 1 January 2003 and also in 2004 and 2005.

1.1.3. *Selective advantage for livestock farmers*

Period between 9 December 1998 and 9 October 2002, prior to the entry into force of Decree-Law No 197/2002

- (124) In the present case, the disposal of animal carcasses and slaughterhouse waste can be considered as an inherent cost of the activity, not only for slaughterhouses and cutting plants, but also for livestock farmers who, under market laws, should bear at least part of the cost associated with these services. In accordance with the GEMO judgment, the Commission takes the view that this financing of the costs of collection, processing and destruction of mammalian meat and poultrymeat by-products through state budget appropriations prior to the entry into force of Decree-Law No 197/2002 resulted in the users of this service being exempt from a charge inherent in their activity.
- (125) The Commission concludes that there was an advantage in the period prior to the application of the parafiscal charge.

Period between 10 October 2002 and November 2005

- (126) As indicated, the measures adopted by the Portuguese authorities in order to collect, transport, process and destroy mammalian meat and poultrymeat by-products could have exempted livestock farmers from costs that, under normal circumstances, they should have partly borne. It is clear from Decree-Law No 197/2002 and from the transitional scheme introduced by Decree-Law No 244/2003 that livestock farmers are not liable for the charge in question. The Portuguese authorities state that, prior to the end of 2005, the collection costs were passed on to the whole sector. The Commission notes that the two invoices submitted by the Portuguese authorities do indicate that the charge based on Decree-Law No 197/2002 and Decree-Law No 244/2003 was passed on by one of the slaughterhouses in October 2002 and October 2003. The assertion by the Portuguese authorities that, in accordance with market laws, the costs were passed on to the whole sector, including livestock farmers, is corroborated by the documents submitted. The Commission therefore concludes that livestock farmers bore the costs corresponding to their activity and did not therefore benefit from any specific advantage.
- (127) The Commission considers that livestock farmers only benefited from an advantage in the period prior to the application of the charge.
- (128) Based on the above, the Commission concludes that there was an advantage, in respect of the collection, transportation, processing and destruction of animal by-products, in favour of slaughterhouses and importers during all the periods, except for 2003. In the case of livestock farmers, this advantage existed only during the period prior to the application of the charge.

1.2. ADVANTAGES FINANCED THROUGH STATE RESOURCES

- (129) Article 107(1) TFEU concerns aid granted by Member States or through State resources. In other words, the aid measure in question must be imputable to the State and be granted through State resources.
- (130) In the present case, the cost of the collection, processing and destruction of mammalian meat and poultrymeat by-products was financed through direct State revenue between 1999 and October 2002, and by revenue from a parafiscal charge imposed on slaughterhouses, importers of bone-in beef, veal and pigmeat, and intra-Community operators, i.e. bone-in beef, veal and pigmeat operators/receivers, from October 2002.
- (131) Payments to service-providers made from direct State revenue are advantages financed through State resources. The fact that, from 1999 until the application of the charge in 2002, this public service was financed through the State budget means that the undertakings providing the service benefited from public funds to cover the costs of this service.
- (132) The charges imposed between September 2002 and November 2005 are not covered by the scope of the TFEU provisions on State aid, unless they form the method of financing an aid measure and therefore form an integral part of this aid ⁽³⁹⁾.
- (133) The charges were paid to INGA using a reverse charge procedure. The charges imposed on operators formed INGA's revenue and were paid directly to it.
- (134) For a charge to be regarded as forming an integral part of an aid measure, it must be hypothecated to the aid measure under the relevant national rules, in the sense that the revenue from the charge is necessarily allocated for the financing of the aid ⁽⁴⁰⁾.
- (135) Given that the charges formed INGA's revenue and were paid directly to it, the Commission considers that they formed an integral part of the aid measure.

⁽³⁹⁾ Judgment in Joined Cases C-261/01 and C-262/01 *Belgische Staat v Eugène van Calster and Felix Cleeren and Openbaar Slachthuis NV* [2003] ECR I-12272, paragraph 51.

⁽⁴⁰⁾ Judgment of 13 January 2005 in Case C-174/02 *Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financiën* [2005] ECR I-85, paragraph 26.

(136) With regard to the issue of whether or not the revenue from the parafiscal charge in the present case can be regarded as State resources, it is worth noting that, in terms of State resources, there is no distinction between cases in which the aid is granted directly by the State and those in which it is granted through a public or private body designated or set up by that State. On 15 July 2004 the Court of Justice, in its judgment in *Pearle and Others* ⁽⁴¹⁾, found that compulsory contributions collected by an intermediary body from all undertakings in a given business sector are not regarded as State resources only if the following four conditions are satisfied:

- (a) the measure in question is implemented by the professional body representing undertakings and workers in a business sector and does not serve as an instrument for applying policies defined by the State;
- (b) the objectives of the measure in question are financed entirely by the contributions from undertakings in the sector;
- (c) the method of financing and the percentage/amount of the contributions are decided by the representatives of employers and employees within the professional body for the sector, without interference from the State;
- (d) the contributions must be used to fund the measure, without any possibility of intervention by the State.

(137) The available information indicates that the first condition of the judgment in *Pearle and Others* is not satisfied, as the measure was laid down by a decree-law in order to apply a policy defined by the State, which aims to combat BSE.

(138) In addition, the third and fourth conditions are not satisfied, given that the method of financing is regulated by the abovementioned decree-laws. As a result, the Portuguese authorities have the opportunity to intervene in determining the methods of financing the measure.

(139) As not all the conditions laid down in the judgment in *Pearle and Others* are satisfied and as the Portuguese State

has decisive control over the methods of financing the aid measure, the Commission considers that the revenue from the parafiscal charge does in fact constitute State resources imputable to the State.

1.3. DISTORTION OF COMPETITION AND EFFECT ON TRADE

(140) According to the case-law of the Court of Justice, strengthening the competitive position of an undertaking through the granting of State aid generally distorts competition with other competing undertakings not having benefited from this aid ⁽⁴²⁾.

(141) The measure may have an effect on Portugal's position in the meat sector ⁽⁴³⁾. As Portuguese undertakings operate in a highly competitive international market, the measure distorts or threatens to distort competition. The measure may also affect trade between Member States.

(142) The Portuguese authorities have argued that, due to the ban on the dispatch, in particular, of live cattle and meat-and-bone meal, as such or incorporated in other products, there was no trade, which means that there could not have been any distortion of competition.

(143) In this respect, it should be recalled that, in accordance with settled case-law ⁽⁴⁴⁾, an aid may be of such a kind as to affect trade between Member States and distort competition even if the recipient undertaking, which is in competition with producers in other Member States, does not itself export its products. Where a Member State grants aid to an undertaking, internal supply may thereby be maintained or increased, with the consequence that the opportunities for undertakings established in other Member States to offer their services to the market of that Member State are reduced.

(144) As a result, the Commission considers that the fact that the dispatch of the aforementioned products from Portugal to other Member States was prohibited does not alter the fact that the aid may be such as to distort competition or affect trade.

⁽⁴¹⁾ Judgment in Case C-345/02 *Pearle BV, Hans Pijls Optiek Franchise BV and Rinck Opticiëns BV v Hoofdbedrijfschap Ambachten* [2004] ECR I-7139, paragraph 41; see also the judgment in Case T-136/05 *EARL Salvat père & fils, Comité interprofessionnel des vins doux naturels et vins de liqueur à appellations contrôlées (CIVDN) and Comité national des interprofessions des vins à appellation d'origine (CNIV) v Commission of the European Communities* [2007] ECR II-4063, paragraph 161 et seq.

⁽⁴²⁾ Judgment in Case 730/79 *Philip Morris Holland BV v Commission of the European Communities* [1980] ECR 2671, paragraphs 11 and 12.

⁽⁴³⁾ Beef production figures in the EU-15 were 7 691 101 tonnes in 1999 and 7 466 476 tonnes in 2002, of which 95 765 tonnes in 1999 and 105 019 tonnes in 2002 were produced by Portugal. Pigmeat production figures in the EU-15 were 17 983 476 tonnes in 1999 and 17 729 855 tonnes in 2002, of which 344 209 tonnes in 1999 and 328 038 tonnes in 2002 were produced by Portugal (source: Eurostat).

⁽⁴⁴⁾ Judgment in Case T-55/99 *Confederación Española de Transporte de Mercancías (CETM) v Commission of the European Communities* [2000] ECR II-3207, paragraph 86; judgment in Case C-303/88 *Italian Republic v Commission of the European Communities* [1991] ECR I-1433, paragraph 27.

1.4. CONCLUSIONS

- (145) The Commission takes the view that the measure applied by Decree-Laws No 393-B/98, No 197/2002 and No 244/2003 with regard to the collection, transportation, processing and destruction of animal by-products constitutes State aid in favour of slaughterhouses and importers in the period during which Decree-Law No 393-B/98 was in force and until the application of the transitional scheme introduced by Decree-Law No 244/2003. However, the year 2003 is excluded, as the Portuguese authorities have been able to prove that there was no advantage.
- (146) With regard to livestock farmers, the Commission considers that, in the period prior to the application of the charge, the measure constitutes State aid under Article 107(1) TFEU.
- (147) With regard to the service-providers, the Commission concludes that it cannot rule out the possibility that State aid existed in the period between the entry into force of Decree-Law No 393-B/98 and the end of the transitional scheme introduced by Decree-Law No 244/2003, which expired in 2005.

2. UNLAWFULNESS OF THE AID

- (148) The Commission notes that Portugal did not notify, as required by Article 108(3) TFEU, the aid measures granted from 1999 nor the schemes introduced by Decree-Laws No 197/2002 and No 244/2003. Article 1(f) of Regulation (EC) No 659/1999 defines 'unlawful aid' as new aid put into effect in contravention of Article 93(3) of the Treaty.
- (149) As the measures implemented by Portugal contain elements of State aid, it is concluded that these are new aid, not notified to the Commission, and are therefore unlawful under the terms of the TFEU.
- (150) The compatibility of any aid must be examined in two stages: first, the Commission must examine the compatibility of the aid granted to service-providers; second, it must examine the compatibility of any aid granted to slaughterhouses and cutting plants, importers and intra-Community operators, and also livestock farmers.
- (151) This aid was financed from 2002 by a parafiscal charge and, where the financing is an integral part of the aid measure, the Commission must examine both the actions financed, i.e. the aid, and their financing. In fact, as found by the Court of Justice, where the method of financing aid through compulsory contributions in particular is an integral part of the aid measure, the Commission's examination of the latter must necessarily take into account

the method of financing the aid⁽⁴⁵⁾. As indicated in recital 135 of this Decision, the method of financing the aid must be regarded as an integral part of the aid measure.

3. EXAMINATION OF THE COMPATIBILITY OF THE AID

3.1. ANALYSIS IN LIGHT OF THE PROVISIONS APPLICABLE TO NON-NOTIFIED AID

3.1.1. *Aid to service-providers*(a) **Compatibility of the aid pursuant to Article 106(2) TFEU**

- (152) The prohibition laid down in Article 107(1) TFEU allows for exceptions.
- (153) It is clear from the case-law of the Court of Justice that compensation for public services does not constitute State aid, as defined in Article 107(1) TFEU, if certain conditions are satisfied (see recital 89 of this Decision). However, if the compensation for public services does not satisfy these conditions and if the general criteria for applying Article 107(1) TFEU are met, such compensation constitutes State aid. However, this may be found compatible with the TFEU, pursuant to Article 106(2) of the same Treaty, if it is necessary for the operation of services of general economic interest and does not affect the development of trade to such an extent as would be contrary to the interests of the Union. The Commission has clarified the conditions that must be satisfied to achieve this balance. In its 2001 *Communication on services of general interest in Europe*⁽⁴⁶⁾, the Commission clarified that it has to be ensured that any restrictions to the rules of the EC Treaty and, in particular, restrictions of competition and limitations of the freedoms of the internal market do not exceed what is necessary to guarantee effective fulfilment of the public service mission. This means, in particular, that the remuneration does not exceed the net extra costs of the particular tasks entrusted to the undertaking in question. The Commission subsequently further clarified these conditions, in the *Community framework for State aid in the form of public service compensation*⁽⁴⁷⁾ and in its Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty⁽⁴⁸⁾. With regard to calculating the compensation, the Commission clarified that the amount of this may not exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. The reasonable profit may include, in particular, all or some of the productivity gains achieved by the undertakings concerned during an agreed limited period without reducing the level of quality of the services entrusted to the undertaking by the State.

⁽⁴⁵⁾ *Van Calster and Others* judgment, paragraph 51.

⁽⁴⁶⁾ Communication from the Commission — Services of general interest in Europe (2001/C 17/04) (OJ C 17, 19.1.2001, p. 4).

⁽⁴⁷⁾ OJ C 297, 29.11.2005, p. 4.

⁽⁴⁸⁾ OJ L 312, 29.11.2005, p. 67.

- (154) Paragraph 18 of the *Community framework for State aid in the form of public service compensation* further clarifies that 'reasonable profit' should be taken to mean a rate of return on own capital that takes account of the risk, or absence of risk, incurred by the undertaking by virtue of the intervention by the Member State, particularly if the latter grants exclusive or special rights. This rate must normally not exceed the average rate for the sector concerned in recent years. In sectors where there is no undertaking comparable to the undertaking entrusted with the operation of the service of general economic interest, a comparison may be made with undertakings situated in other Member States, or if necessary, in other sectors, provided that the particular characteristics of each sector are taken into account. In determining what amounts to a reasonable profit, the Member State may introduce incentive criteria relating, among other things, to the quality of service provided and gains in productive efficiency.
- (155) As indicated in recital 99 et seq. of this Decision, the Commission cannot, from the information provided by the Portuguese authorities, conclude that the compensation was calculated taking into account a reasonable profit not exceeding the average rate for the sector. The Commission services have asked the Portuguese authorities on several occasions to provide the necessary information so that they can determine, in the present case, whether the conditions for the derogation laid down for State aid granted in the form of a service of general economic interest were satisfied. The information provided by the Portuguese authorities has never indicated whether any comparison with other undertakings has been made in order to determine the average rate for the sector in question.
- (156) The Commission cannot therefore conclude that the aid in favour of service-providers is compatible pursuant to Article 106(2) TFEU.
- (b) Compatibility of the aid pursuant to Article 107(3)(c) TFEU**
- (157) Pursuant to Article 107(3)(c) TFEU, aid intended to facilitate the development of certain economic activities or of certain economic areas may be regarded as compatible with the internal market, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. In order to benefit from the derogation laid down in this subparagraph, the aid must contribute to the development of the sector in question.
- (158) In the present case, the Portuguese authorities state that they assumed the total cost of the collection, processing and destruction of mammalian meat and poultrymeat by-products from 1999. Since October 2002, the cost of the collection, transportation, processing and destruction of mammalian meat and poultrymeat by-products has been financed by revenue from a charge imposed on slaughterhouses, importers of bone-in beef, veal and pigmeat, and intra-Community operators, i.e. bone-in beef, veal and pigmeat operators/receivers, where they do not carry out these operations themselves.
- (159) According to point 23.3 of the *Community Guidelines for State aid in the agriculture sector in the 2000-2006 period* (hereinafter referred to as 'the Guidelines')⁽⁴⁹⁾ and the *Commission notice on the determination of the applicable rules for the assessment of unlawful State aid*⁽⁵⁰⁾, any unlawful aid, as defined in Article 1(f) of Regulation (EC) No 659/1999, must be assessed in accordance with the rules and guidelines applicable at the time when the aid was granted. In 2002 the Commission adopted the *Community guidelines for State aid concerning TSE tests, fallen stock and slaughterhouse waste*. These guidelines applied between 1 January 2003 and 31 December 2006⁽⁵¹⁾. Point 44 of the latter guidelines establishes a derogation from the principle that unlawful aid must be assessed in accordance with the rules applicable at the time when it was granted, in particular for cases involving slaughterhouse waste. According to point 47 of those guidelines, the Commission will apply principles based on point 11.4 of the Guidelines to unlawful aid for slaughterhouse waste granted up to the end of 2002. As a result, point 47 of the TSE guidelines is the relevant legal basis for assessing the aid granted from 1999.
- (160) In accordance with point 194(c) of the *Community guidelines for State aid in the agriculture and forestry sector 2007 to 2013*, from the entry into force of these guidelines on 1 January 2007, the Commission ceased to apply the TSE guidelines, except for unlawful aid granted before 1 January 2007, as referred to in point 43 et seq. of those same guidelines. As a result, point 47 of the TSE guidelines continues to apply to unlawful aid for slaughterhouse waste from 1 January 2003.
- (161) Point 47 of the TSE guidelines lays down a number of provisions on slaughterhouse waste.
- (162) According to point 47 of the TSE guidelines, with regard to State aid for slaughterhouse waste, from January 2001 the Commission took a number of individual Decisions authorising State aid of up to 100 % for the cost of disposal of specified risk material, meat-and-bone meal, and animal feed containing such products, which had to be disposed of as a consequence of the new Community legislation on TSEs. These Decisions were in particular based on point 11.4 of the Guidelines, taking note of the short-term character of these aids, and of the need to respect the polluter pays principle in the long run. Exceptionally, the Commission has accepted that such State aid

⁽⁴⁹⁾ OJ C 28, 1.2.2000, p. 2.

⁽⁵⁰⁾ OJ C 119, 22.5.2002, p. 22.

⁽⁵¹⁾ See point 194(c) of the *Community guidelines for State aid in the agriculture and forestry sector 2007 to 2013* (OJ C 319, 27.12.2006, p. 1).

may also be granted to operators other than those active in the production of live animals, for example slaughterhouses. For unlawful aid granted before the end of 2002, for comparable costs in relation to the new Community legislation on TSEs, and without prejudice to compliance with other provisions of Community law, the Commission will apply the same principles.

(163) Point 47 of the TSE guidelines notes that, exceptionally, the Commission has accepted that such State aid may also be granted to operators other than those active in the production of live animals, for example slaughterhouses. In the past, the Commission has decided that this exception should also cover other undertakings carrying out tasks strictly linked with the production of live animals, such as undertakings processing animal by-products.

(164) Based on point 11.4 of the Guidelines, the Commission has authorised aid up to 100 % of actual costs incurred in respect of measures such as health checks, tests and other screening measures, purchase and administration of medicines and plant protection products, and cost of destruction of crops, provided that:

- there is an appropriate programme at Community, national or regional level for the prevention, control or eradication of the disease concerned,
- diseases are a matter of concern for the public authorities,
- the objective of the aid measures is preventative and/or compensatory,
- the aid is compatible with Community veterinary and phyto-sanitary legislation.

(165) These principles also apply under the terms of point 47 of the TSE guidelines.

(166) Bovine spongiform encephalopathy is a transmissible disease that poses a threat to public health. It is an animal disease, the outbreak of which must be notified directly to the Commission and other Member States⁽⁵²⁾. The objective of the aid measure was to ensure that the necessary prevention measures, involving collection, transportation, processing and destruction, were applied in accordance with the applicable veterinary legislation between 1999 and 2005 in the meat sector.

⁽⁵²⁾ Council Directive 82/894/EEC of 21 December 1982 on the notification of animal diseases within the Community (OJ L 378, 31.12.1982, p. 58).

(167) The Commission notes, in this respect, that Portugal has indicated that it assumed the total cost of the collection, processing and destruction of mammalian meat and poultrymeat by-products from 1999 until the end of 2002, in the context of the emergency measures approved by the Commission through Decision 98/653/EC, which prohibits the export of meat meal, bone meal and meat-and-bone meal of mammalian origin. It should also be noted that the measures prohibiting the dispatch of beef applied to Portugal were not repealed until the adoption of Regulation (EC) No 1993/2004.

(168) The Commission also points out that, in accordance with points 33 and 34 of the TSE guidelines, undertakings were chosen and remunerated according to market principles, in a non-discriminatory way (see recital 21 et seq. of this Decision). Bearing in mind the urgency of the measures to be taken, the Commission can, in the present case, accept that the Portuguese authorities chose service-providers in accordance with Decree-Law No 197/99 of 8 June 1999 — which, according to the information provided by those authorities, is the national instrument transposing Directive 97/52/EC — without recourse to a public procurement procedure (see recital 24 of this Decision).

(169) The Portuguese authorities indicate that Decree-Law No 197/2002 was laid down in order to meet Portugal's obligations in the context of Decision 2000/766/EC, in accordance with the polluter pays principle (see recitals 65 and 66 of this Decision). The Portuguese authorities have confirmed that the resources could not have been diverted to competing activities in which the service-providers may have been engaged as the only activities of the undertakings in question were in fact the collection, transportation, processing and destruction of animal by-products.

(170) The Commission also considers that responsibility for the service and its financing was passed on to the operators, following a transitional period, through the scheme introduced by Decree-Law No 244/2003.

(171) Given the special circumstances and the emergency situation created by the risk of the spread of BSE between 1999 and 2004, and due to the fact that the scheme introduced by Decree-Law No 244/2003 provides for the gradual transfer of responsibility for and financing of the services to operators in the sector, the Commission considers that the aid can be classified as short term and that it complies with the polluter pays principle in the long term.

(172) The Commission can therefore conclude that, based on the available information, the aid granted between 1999 and the end of 2002 can benefit from the derogation laid down in Article 107(3)(c) TFEU.

(173) With regard to the aid granted between 2003 and November 2005, the Commission considers that, given the emergency situation that arose at the end of 2004 and the fact that the scheme under the relevant Decree-Law provides for the gradual transfer of responsibility for and financing of the services, as indicated above, the aid can be classified as compatible and compliant with point 47 of the TSE guidelines, where this aid corresponds to the 'actual' costs of the services received.

(174) As indicated in recital 100 of this Decision, the Portuguese authorities have proven that the aid corresponded to the 'actual' cost of the services provided by the service-providers, with regard to the period between 1999 and 2005.

(175) Accordingly, the Commission concludes that, based on the available information, the aid granted between 2003 and November 2005 to service-providers can benefit from the derogation laid down in Article 107(3)(c) TFEU.

3.1.2. Aid granted to slaughterhouses and cutting plants, importers and intra-Community operators in the sector, and also livestock farmers

(176) As the Commission indicates in recital 166 of this Decision, between 1999 and 2004 the risk of BSE spreading in Portugal resulted in special circumstances and an emergency situation. Given this exceptional situation and bearing in mind the fact that the scheme introduced by Decree-Law No 244/2003 provides for the gradual transfer of responsibility for and financing of the services to operators in the sector, the Commission considers that the aid can be classified as short term and that it complies with the polluter pays principle in the long term. In line with its previous practice, it also considers that, in the present case, the aid under point 47 of the TSE guidelines could, exceptionally, be granted to other operators in the sector, namely slaughterhouses and cutting plants, and also to importers and intra-Community operators in the sector.

(177) As the Commission noted for service-providers, the aid was granted in accordance with the principles laid down in point 47 of the TSE guidelines.

(178) With regard to slaughterhouses and cutting plants, importers and intra-Community operators in the sector, the Commission can therefore conclude that the aid granted can benefit from the derogation laid down in Article 107(3)(c) TFEU.

(179) With regard to livestock farmers, the Commission also concludes that, bearing in mind the points made in

recital 160 et seq. of this Decision, the aid was granted in accordance with the principles laid down in point 47 of the TSE guidelines and can benefit from the derogation laid down in Article 107(3)(c) TFEU.

3.2. FINANCING OF THE AID

(180) Since October 2002, when Decree-Law No 197/2002 entered into force, the cost of the collection, transportation, processing and destruction of mammalian meat and poultrymeat by-products has been financed by revenue from a parafiscal charge imposed on slaughterhouses, importers of bone-in beef, veal and pigmeat, and intra-Community operators, i.e. bone-in beef, veal and pigmeat operators/receivers.

(181) In accordance with the case-law of the Court of Justice⁽⁵³⁾, the Commission normally considers that the financing of State aid through compulsory charges may affect the aid by having a protective effect which goes beyond aid properly speaking. The contributions in question are in fact compulsory charges. In view of the case-law, the Commission considers that aid cannot be financed through parafiscal charges which are also imposed on products imported from other Member States.

(182) In view of the case-law and of the fact that the aid was granted through State resources and therefore constitutes State aid, as defined in Article 107 TFEU, it should be examined whether this aid may be discriminatory, contrary to Article 110 TFEU, insofar as products from other Member States must also pay the charge.

(183) According to the Portuguese authorities, the imposition of charges on imported bone-in meat is justified by the fact that, insofar as bone-in meat generates by-products benefiting from the collection, transportation, processing and destruction services, these imported products may benefit from the system in the same way as domestic products.

(184) According to the information available to the Commission, the charges were imposed on slaughterhouses and importers of bovine and pig carcasses, half-carcasses and other bone-in parts (see Article 2(2) of Decree-Law No 197/2002), and were used to finance the services of collection, transportation, processing and destruction of mammalian meat and poultrymeat by-products (Article 1(1) of Decree-Law No 197/2002).

⁽⁵³⁾ Judgment in Case 47/69 *Government of the French Republic v Commission of the European Communities* [1970] ECR 487, paragraph 20.

- (185) This information made the Commission doubt that the charges imposed on those liable for the charge corresponded to the services from which they benefited. The Commission considered that it could not rule out the existence of a potentially discriminatory system in relation to products imported from other Member States, on which the charge was also imposed.
- (186) Subsequently, the Portuguese authorities gave an assurance that the services of collection, transportation, processing and destruction of poultrymeat by-products were not financed by charges imposed on slaughterhouses and importers of bovine and pig carcasses, half-carcasses and other bone-in parts, but, in accordance with Annex 1 to Decree-Law No 197/2002, by charges imposed on poultrymeat slaughterhouses which did not collect, transport, process and destroy all the by-products generated in the slaughter of poultry. Poultry carcass importers and operators were exempt from the charge, due to the fact that most imported poultry carcasses do not generate by-products.
- (187) However, with regard to importers and operators of bovine and pig carcasses, half-carcasses and other bone-in parts, the Portuguese authorities demonstrated that these imported bone-in parts did generate by-products.
- (188) In the information injunction and subsequently on initiating the procedure, the Commission asked the Portuguese authorities to give an assurance that imported products could benefit from the mechanism in the same way as domestic products and to prove, in a quantified manner, that, during a given reference period, the charges imposed on bone-in beef, veal and pigmeat products from other Member States were financially equivalent to the costs of the services from which these products exclusively benefited (see paragraph 37(h) of the Decision initiating the procedure).
- (189) The Portuguese authorities gave an assurance that imported bone-in parts did benefit in the same way from the meat by-product collection, transportation, processing and destruction services as domestic products, but they did not provide precise and supporting figures in this respect.
- (190) The information provided to the Commission does not therefore enable it to conclude that the charge introduced by Decree-Law No 197/2002, applied to imported products, was equivalent to the cost of the services from which the by-products generated by these imported products benefited and that, consequently, imported products could benefit from the services financed through the aid measure in the same way as domestic products.
- (191) Under Article 3(2) of Decree-Law No 244/2003, slaughterhouses, cutting plants, hatcheries and egg production facilities had to pay the charges set in Annex 1 to Decree-Law No 197/2002, except for those entities benefiting from the alternative scheme provided for in the Decree-Law, which, until the plan for the destruction of Category 3 material was approved, had to pay the charges set in Annex 2. With regard to Category 1 and 2 material, until a plan was approved, they had to pay EUR 0,35 per kilogram of material (Article 5(1) of Decree-Law No 244/2003).
- (192) With regard to the amendments made by Decree-Law No 244/2003 to the charging system, the Commission asked the Portuguese authorities to prove that imported products could benefit from these services in the same way as domestic products.
- (193) The Portuguese authorities confirmed that the charge introduced by Decree-Law No 244/2003 was based on the by-products actually generated and that imported products could benefit in the same way from the services in question. The Commission notes, however, that the Portuguese authorities have not provided any quantified data in support of these assertions.
- (194) In the absence of evidence, the Commission cannot therefore conclude that the charge introduced by Decree-Law No 244/2003 was equivalent to the cost of the services from which the by-products generated by these imported products benefited and that, consequently, imported products could benefit from the services financed through the aid measure in the same way as domestic products.
- (195) The Commission considers that the charging system applied based on Decree-Law No 197/2002 and on the transitional scheme introduced by Articles 3(2) and 5(2) of Decree-Law No 244/2003 does not comply with Article 110 TFEU, due to the existence of a potentially discriminatory system in relation to products imported from other Member States, on which the charge was also imposed.
- ## VI. CONCLUSIONS
- (196) The Commission regrets that Portugal should have unlawfully granted aid for the collection, transportation, processing and destruction of slaughterhouse waste, contrary to Article 108(3) TFEU.

- (197) The aid for the collection, transportation, processing and destruction of slaughterhouse waste complied with the applicable Community provisions in terms of the beneficiaries. However, the financing of this aid through the charging system applied based on Decree-Law No 197/2002 and on the transitional scheme introduced by Articles 3(2) and 5(2) of Decree-Law No 244/2003 is incompatible with the internal market, due to the potentially discriminatory effect in relation to products imported from other Member States, on which the charge was also imposed.
- (198) The Commission considers it appropriate in the present case to adopt a conditional decision using the possibility offered by Article 7(4) of Regulation (EC) No 659/1999, according to which the Commission may attach to a positive decision conditions subject to which an aid may be considered compatible with the common market and may lay down obligations to enable compliance with the decision to be monitored.
- (199) In order to make good the breach of Article 110 TFEU and thus retrospectively remove the potential discrimination, Portugal must repay part of the charge imposed on products from other Member States within a time limit and under conditions set by the Commission. Making good this breach will make the aid concerned compatible with the Treaty.
- (200) The conditions to be met for such repayment shall be laid down by the Commission. Portugal must thus repay to the persons who paid the charge that part of the charge imposed on products from other Member States between the date when the charge laid down in Decree-Law No 197/2002 was first imposed and the date when it was last imposed prior to the end of the transitional scheme introduced by Decree-Law No 244/2003. To that end, Portugal will ensure that the following conditions are met:
- If they can provide evidence that the charge was imposed on products imported from other Member States, the persons who paid the charge can claim the repayment of the proportion of the revenue from the charge intended to finance the part of the aid exclusively benefiting domestic products. These claims for repayment shall be made within a time limit set in accordance with national law and in no case less than 6 months from the publication of this Decision.
 - Portugal must establish the extent of any discrimination affecting imported products. To that end, Portugal must check, during a reference period, the financial equivalence between the amounts levied overall on domestic products by way of the charge concerned and the advantages from which these products exclusively benefit.
 - Repayment must be made within a maximum time limit of 6 months from the submission of the request.
 - The amounts repaid must include interest calculated as from the date on which they were levied up until the date of actual repayment. This interest shall be calculated on the basis of the Commission's reference rate laid down by the method for setting the reference and discount rates⁽⁵⁴⁾.
 - The Portuguese authorities shall accept any reasonable evidence from the payers of the charge paid in respect of products from other Member States.
 - The right to repayment cannot be made subject to other conditions, particularly that of the charge not having been passed on.
 - Where the charge has not yet been paid, the Portuguese authorities shall formally waive payment of the proportion of the charge imposed on products imported from other Member States and intended to finance the part of the aid exclusively benefiting domestic products. The Portuguese authorities shall also waive any interest on late payment of this part.
 - Where the Commission so requests, Portugal shall undertake to submit a full report proving the proper implementation of the repayment measure.
 - If a charge with similar objectives has been imposed in another Member State on the same products which have been made subject to the charge in Portugal, the Portuguese authorities shall undertake to repay those persons who have paid the charge for that part of it which affected products from that other Member State.
 - Portugal undertakes to make this Decision known to all potential payers of the charge.

⁽⁵⁴⁾ Commission notice on the method for setting the reference and discount rates (OJ C 273, 9.9.1997, p. 3).

HAS ADOPTED THIS DECISION:

Article 1

The State aid granted by Portugal based on Decree-Law No 393-B/98 of 4 December 1998 is compatible with the internal market.

Article 2

1. The State aid granted by Portugal based on Decree-Law No 197/2002 of 25 September 2002 and on the transitional scheme introduced by Article 3(2) of Decree-Law No 244/2003 of 7 October 2003 is compatible with the internal market, provided that Portugal repays those persons who have paid the charge for that part of it which affected products from other Member States between the date when the charge laid down in Decree-Law No 197/2002 was first imposed and the date when it was last imposed prior to the end of the transitional scheme introduced by Decree-Law No 244/2003.

2. To that end, Portugal will ensure that the following conditions are met:

- If they can provide evidence that the charge was imposed on products imported from other Member States, the persons who paid the charge can claim the repayment of the proportion of the revenue from the charge intended to finance the part of the aid exclusively benefiting domestic products. These claims for repayment shall be made within a time limit set in accordance with national law and in no case less than 6 months from the publication of this Decision.
- Portugal must establish the extent of any discrimination affecting imported products. To that end, Portugal must check, during a reference period, the financial equivalence between the amounts levied overall on domestic products by way of the charge concerned and the advantages from which these products exclusively benefit.
- Repayment must be made within a maximum time limit of 6 months from the submission of the request.
- The amounts repaid must include interest calculated as from the date on which they were levied up until the date of actual repayment. This interest shall be calculated on the basis of the Commission's reference rate laid down by the method for setting the reference and discount rates⁽⁵⁵⁾.

— The Portuguese authorities shall accept any reasonable evidence from the payers of the charge paid in respect of products from other Member States.

— The right to repayment cannot be subjected to other conditions, particularly that of the charge not having been passed on.

— Where the charge has not yet been paid, the Portuguese authorities shall formally waive payment of the proportion of the charge imposed on products imported from other Member States and intended to finance the part of the aid exclusively benefiting domestic products. The Portuguese authorities shall also waive any interest on late payment of this part.

— Where the Commission so requests, Portugal shall undertake to submit a full report proving the proper implementation of the repayment measure.

— If a charge with similar objectives has been imposed in another Member State on the same products which have been made subject to the charge in Portugal, the Portuguese authorities shall undertake to repay those persons who have paid the charge for that part of it which affected products from that other Member State.

— Portugal undertakes to make this Decision known to all potential payers of the charge.

Article 3

Portugal shall inform the Commission, within a time limit of 2 months from notification of this Decision, of the measures it has taken to comply with it.

Article 4

This Decision is addressed to the Portuguese Republic.

Done at Brussels, 13 July 2011.

For the Commission

Dacian CIOLOŞ

Member of the Commission

⁽⁵⁵⁾ See footnote 54.

COMMISSION DECISION

of 27 July 2011

concerning the State aid for financing screening of transmissible spongiform encephalopathies (TSE) in bovine animals implemented by Belgium (State aid C 44/08 (ex NN 45/04))

*(notified under document C(2011) 5457)***(Only the French and Dutch texts are authentic)**

(2011/678/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof ⁽¹⁾,

Having invited interested parties to submit their comments in accordance with that Article ⁽²⁾,

Whereas:

(6) Additional information was provided by the Belgian authorities by letters of 16 September 2004 and 22 February 2007, registered on 20 September 2004 and 22 February 2007 respectively.

(7) By letter of 26 November 2008 the Commission informed Belgium of its decision to initiate the procedure provided for in Article 108(2) of the TFEU in respect of that measure. The decision was published in the *Official Journal of the European Union* ⁽³⁾. The Commission invited interested parties to submit their comments on the measure in question.

1. PROCEDURE

(1) Following complaints received in January and February 2004, the Commission undertook a preliminary examination of the aid granted by Belgium to cover the costs of screening tests for BSE in bovine animals.

(2) Following those complaints, the Commission sent a letter to the Belgian authorities on 27 January 2004, asking for information on the measure in question. At the same time, an aid measure to finance screening for TSE in animals was notified by the Belgian authorities in accordance with Article 108(3) of the Treaty on the Functioning of the European Union (TFEU) (by letter of 23 January 2004, registered on 28 January 2004) and entered under the number N 54/04.

(3) The Belgian authorities provided written information to the Commission by letters of 6 February 2004 and 14 May 2004, registered on 11 February 2004 and 19 May 2004 respectively.

(4) By letter of 19 July 2004 the Commission informed Belgium that the measure had been transferred to the register of non-notified aid under the number NN 45/04, since it had become apparent that part of the funds had already been paid out.

(5) An informal meeting between the Belgian authorities and the Commission took place on 1 September 2004.

(8) By letter of 19 December 2008, registered on 26 December 2008, Belgium asked for an extension to the deadline for reply. That extension was granted by letter of 13 January 2009. Belgium provided comments by letter of 25 February 2009, registered on 6 March 2009.

(9) The Commission did not receive any comments from interested parties.

(10) By letter of 17 July 2009 the Commission asked Belgium additional questions relating to the comments submitted by Belgium. By letter of 4 September 2009, registered on 8 September 2009, Belgium asked for an extension to the deadline for reply. Belgium's reply reached the Commission by letter of 16 October 2009, registered on 20 October 2009.

(11) Two meetings took place between the Belgian authorities and the Commission, on 2 October 2009 and 30 October 2009.

(12) Following those meetings, additional information was sent by Belgium on 14 December 2009, registered on 16 December 2009. Following the simultaneous enquiry by the Belgian competition authorities concerning possible agreements between the laboratories, reply deadline extension requests were submitted by Belgium on 21 January 2010, 29 September 2010 and 17 January 2011. Those extensions were granted by the Commission.

⁽¹⁾ From 1 December 2009 Articles 87 and 88 of the EC Treaty have respectively become Articles 107 and 108 of the Treaty on the Functioning of the European Union (TFEU). In both cases the provisions are identical in substance. For the purposes of this Decision, references to Articles 107 and 108 TFEU shall be understood as being to Articles 87 and 88 of the EC Treaty.

⁽²⁾ OJ C 11, 16.1.2009, p. 8.

⁽³⁾ See footnote 2.

- (13) A last request for information was sent by the Commission on 22 February 2011, to which the Belgian authorities responded by letter of 6 April 2011. The Commission granted an additional extension to enable Belgium to answer the questions pending the outcome of the enquiry by the Belgian competition authorities.
- (14) The Belgian authorities replied by letter of 19 May 2011, registered on 25 May 2011.

2. DESCRIPTION

2.1. Background ⁽⁴⁾

- (15) In January 2004 the Commission received a complaint concerning a draft royal decree which would have introduced a parafiscal charge to finance BSE tests.
- (16) Following that complaint, the Commission asked the Belgian authorities for explanations. In response the Belgian authorities stated that, since 1 January 2001, BSE tests had been compulsory for bovine animals aged more than 30 months and for those aged more than 24 months undergoing emergency slaughter ⁽⁵⁾. They also notified a draft royal decree relating to the financing of screening for TSE in animals (hereinafter the TSE royal decree). That draft royal decree was registered under the number N 54/04. The Belgian authorities stated that this new draft royal decree was an amendment to the draft royal decree notified in 2001 by Belgium and approved by the Commission by Decision N 21/02 of 13 February 2002 ⁽⁶⁾, as well as to another draft discussed informally with the Commission in 2003. Neither of those two drafts had been implemented, however, and the decree notified in 2004 constituted their recasting.
- (17) It is clear from the information submitted by Belgium that the public purse had accepted, since 1 January 2001 ⁽⁷⁾, the costs of BSE tests (i.e. the costs of sampling and analysis). From 1 January 2002 onwards the costs of these tests have been prefinanced by the

Belgian Intervention and Refund Bureau (BIRB), pending a political decision on the system of financing to be chosen.

- (18) Following certain comments made by the Commission regarding the notified draft royal decree (N 54/04), in May 2004 the Belgian authorities submitted a new draft royal decree which attempted to respond to the comments made by the Commission and which provided for a system of fees of EUR 10,70 per bovine presented for slaughter from 1 January 2003 onwards and having to undergo a rapid BSE test. The Belgian authorities referred to the fact that the tests carried out and prefinanced during 2002 had been entirely financed by indirect State aid, i.e. by parafiscal charges. The Belgian authorities also stated that a maximum amount of EUR 40 per test had been financed from 1 January 2003 onwards through parafiscal charges. The Belgian authorities provided detailed tables showing the cost of the BSE tests from 2003 onwards and a forecast of financing those tests by parafiscal charges and fees. The Belgian authorities stated that the dates scheduled for implementing the financing scheme were 1 July 2004 for the fees and 1 January 2005 for the parafiscal charges.
- (19) As the notified draft royal decree states that aid had already been granted and taxes levied since 1 January 2002, the measure was registered as non-notified on 19 July 2004 under number NN 45/04. The notification registered under the number N 54/04 was withdrawn by Belgium.
- (20) It follows from the information submitted by Belgium in 2004 that the general intention was to prefinance the tests, the amount being refunded subsequently, the idea being to allocate part of the amount of the contributions to refunding the costs of the prefinanced tests.
- (21) In their letter of 16 September 2004 the Belgian authorities referred to a new draft royal decree in which the idea of a fee of EUR 10,70 per bovine tested was maintained for the future. The whole amount stated in that new draft royal decree would serve to finance BSE tests on bovine animals which would be slaughtered from the entry into force of that draft. The reimbursement of the amounts exceeding the EUR 40 authorised by the Community guidelines for State aid concerning TSE tests, fallen stock and slaughterhouse waste ⁽⁸⁾ of 24 December 2002 (the TSE guidelines), and which were prefinanced after 1 January 2003, would be the subject of another draft which would be submitted to the Commission and which would address the reimbursement of that prefinancing. That royal decree was adopted on 15 October 2004 ⁽⁹⁾ and entered into force on 1 December 2004.

⁽⁴⁾ Only the aspects relevant to the final decision will be included here — the other aspects are included in the decision initiating the formal investigation procedure.

⁽⁵⁾ Regarding the compulsory tests, the Belgian authorities refer to Regulation (EC) No 999/2001 of the European Parliament and of the Council of 22 May 2001 laying down rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies (OJ L 147, 31.5.2001, p. 1).

⁽⁶⁾ State aid No N 21/02 — Belgium — Acceptance of costs of compulsory BSE tests.

⁽⁷⁾ In accordance with Regulation (EC) No 999/2001, Belgium is undertaking rapid tests for BSE on all bovines over 30 months old presented for slaughter and on all bovines over 24 months old slaughtered by necessity. Since 1 July 2001 all carcasses of bovines over 24 months old have also been subject to a BSE test.

⁽⁸⁾ OJ C 324, 24.12.2002, p. 2.

⁽⁹⁾ Belgian Official Gazette of 8.11.2004, p. 75290.

- (22) According to the information provided by the Belgian authorities, the total amount of prefinanced costs beyond the maximum amount of EUR 40 for the period from 1 January 2003⁽¹⁰⁾ to 30 June 2004 comprises EUR 15 237 646. According to the Belgian authorities, from 30 June 2004 the maximum amount of EUR 40 has been complied with⁽¹¹⁾.
- (23) In the same letter of 16 September 2004 the Belgian authorities provided two information sheets in accordance with Article 19 of Commission Regulation (EC) No 1/2004 of 23 December 2003 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises active in the production, processing and marketing of agricultural products⁽¹²⁾.
- (24) These two measures were the subject of two exemptions, under numbers XA 53/04 and XA 54/04. As stated in points 19 et seq. of the decision initiating the formal investigation procedure, the measure exempted under number XA 53/04 covers the prefinancing of the BSE tests⁽¹³⁾ with a maximum aid intensity of EUR 40 per test, and was implemented on 1 January 2003. The legal basis for this measure is the Law of 27 December 2002 on the general budget of expenditure for 2003. The measure exempted under number XA 54/04 provides for a maximum aid intensity of EUR 33,38 per test, and was implemented on 15 October 2004. This aid measure is of indeterminate duration. Its legal basis is the Law of 27 December 2003 on the general budget of expenditure for 2004.
- (25) In the same letter of 16 September 2004, and in response to questions raised by the Commission, the Belgian authorities stated that the laboratories chosen to carry out the tests had to comply with very strict conditions in order to conduct the analyses in question.
- (26) Shortly after the letters of 14 May 2004 and 16 September 2004 the Belgian authorities notified two draft royal decrees concerning the financing of the activities of the Federal Agency for the Safety of the Food Chain (FASFC). The purpose of these measures was to introduce a contribution and a fee covering the activities of the FASFC. They were the subject of decision C(2005)4203 of 9 November 2005 on State aid N 9/05 and N 10/05 (the N 9/05 and N 10/05 decision) referred to in the decision initiating the formal investigation procedure. These measures were adopted by the Royal Decree of 10 November 2005 fixing the contributions referred to in Article 4 of the Law of 9 December 2004 on the financing of the FASFC⁽¹⁴⁾, and by the Royal Decree of 10 November 2005 on the fees referred to in Article 5 of the Law of 9 December 2004 on financing the FASFC⁽¹⁵⁾. Both these Royal Decrees entered into force on 1 January 2006. The Royal Decree on contributions provides for the repeal of the Royal Decree of 15 October 2004 referred to in recital 21.
- (27) More specifically, the Royal Decree on fees provides for slaughterhouses to have to pay a fee of EUR 10,70 for each bovine animal or soliped tested. The Royal Decree on contributions provides for financing part of the BSE tests and is charged to different sectors. The total cost of the BSE test is EUR 44,08, comprising EUR 12 for sampling (financed at EUR 10,70 by the slaughterhouse under the Royal Decree on fees, and EUR 1,30 by the contribution), and EUR 32,08 financed by the contribution, and is paid directly to the laboratories by the FASFC. In the N 9/05 and N 10/05 decision the Commission concluded that the financing of the FASFC by fees did not constitute State aid, that the financing of overall random controls by flat-rate contributions did not constitute State aid, that financing part of the costs of the BSE tests by contributions was compatible State aid, and that the financing of the costs of other tests/controls relating to production/marketing was compatible State aid.
- (28) In December 2006 the Commission sent Belgium new questions concerning case NN 45/04. Those questions related in particular to the reimbursement of the amounts paid under prefinancing since 1 January 2003.
- (29) In their reply, dated 22 February 2007, the Belgian authorities stated that they wished to effect an overall reimbursement of all the expenditure related to the BSE analyses over a period of 15 years. In practice, a solidarity-based recovery system was introduced through the new system of financing the FASFC. Since 1 January 2006 each operator pays a contribution to the FASFC and part of that contribution goes to recovering past costs related to the prefinancing of the BSE tests. All active operators who kept bovine animals during the period in question contribute equally to this system.
- 2.2. Content of the complaints lodged against the draft royal decree on TSE**
- (30) According to the complaints concerning the draft royal decree on TSE, the contribution is applied to all types of animal slaughtered in Belgian slaughterhouses, including imported products. One complainant asserted that a

⁽¹⁰⁾ In accordance with the TSE guidelines, total public aid must not exceed EUR 40 from 1 January 2003.

⁽¹¹⁾ See table at recital 25 of the Decision to initiate the formal investigation procedure.

⁽¹²⁾ OJ L 1, 3.1.2004, p. 1.

⁽¹³⁾ OJ C 105, 30.4.2005, p. 3.

⁽¹⁴⁾ Belgian Official Gazette, 21.11.2005 p. 49941.

⁽¹⁵⁾ Belgian Official Gazette, 21.11.2005 p. 49918.

substantial percentage of animals slaughtered in Belgian slaughterhouses came from other Member States. According to the complainants, the contribution was discriminatory with regard to imported animals since the revenue from it was used to recover the costs of BSE tests carried out on Belgian bovine animals.

2.3. Doubts raised by the Commission within the framework of initiating the formal investigation procedure

(31) Firstly, it must be pointed out that the initiation of the formal investigation procedure concerns the aid for financing TSE screening for animals in Belgium since 1 January 2001 and the mechanisms for financing that aid, with the exception of the aid approved by Commission decision because of its compatibility with the internal market. Specifically, this means that the aid approved by decisions N 9/05 and N 10/05 (which relate to the contributions and fees financing the FASFC) will not be assessed as regards compatibility with the rules on State aid applicable when the aid was granted. This decision therefore relates solely to the aid financing the BSE tests for the period 2001-06 and to their system of financing given that the aid for the BSE tests during that period was prefinanced and that that prefinancing is the subject of reimbursement spread over several years.

(32) In the interests of clarity it is necessary to bear in mind the terminological distinction between a fee and a contribution: on the one hand there are duties or fees which cover the costs of a service provided. In the case at issue, these come to EUR 10,70 and have been levied since 1 December 2004 on the basis of the Royal Decree on TSE and subsequently on the basis of the Royal Decree on fees financing the FASFC. On the other hand there are levies or contributions which are levied on the basis of the Royal Decree of 10 November 2005, are charged by the FASFC, due by entities on Belgian territory and broken down among 7 sectors (see recital 29 of decision N 9/05 and N 10/05).

(33) The Commission noted, in its decision initiating the formal investigation procedure, that the aid measures for financing BSE tests are and were financed in Belgium by subsidies and a system of parafiscal charges comprising both fees and contributions. Part of the revenue from those fees and contributions reimbursed the prefinancing of the tests.

(34) The Commission had raised several problems and stated that it lacked information for reaching a final assessment of the measures in question: firstly, questions arose as to the existence of an advantage for beneficiaries of the services. It was not clear whether the fees for the BSE tests covered the part of the cost of the tests which was

not covered by compatible State aid. The exact cost of the tests was not known, nor was the source of additional financing in the event that the fees were not sufficient to cover the total costs of the BSE tests. Nor had it been established whether the conditions under which the FASFC provided the services corresponded to market prices, in particular because the Belgian authorities had not stated clearly that the choice of laboratories had been made by means of an open and transparent procedure.

(35) Secondly, the mechanism of levies was not clear: in particular, the beneficiaries and the contributors were not clearly established and the mechanism for reimbursement of the prefinancing of the costs of the BSE tests was not clear. There were also questions about the conditions which the parafiscal charges had to meet in order to be considered as complying with the rules on State aid, in particular as regards the exclusion of imported products from the parafiscal charges, as regards whether exported products profited from the aid measure financed by the charges, and whether the charges influenced the price of the final products given that this was determined by changes in supply and demand on the free market.

3. COMMENTS BY BELGIUM

(36) On 27 February 2009 Belgium commented in reply to the Commission's doubts expressed in its decision to initiate the formal investigation procedure. These comments can be summarised as follows:

3.1. Classification of the financing of ESB tests as State aid

(37) By definition, Belgium contests the Commission's classification of the financing of BSE tests as State aid due to the obligatory nature of these tests. Belgium claims that the obligation to carry out the BSE tests is imposed by Regulation (EC) No 999/2001 of the European Parliament and of the Council of 22 May 2001 laying down rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies⁽¹⁶⁾ to protect public health. In support of its claim Belgium quotes two judgments⁽¹⁷⁾ in which the Court of Justice held that the costs of controls carried out to protect public health cannot be considered as compensation for a service and that the authority itself must bear these costs. While Belgium recognises that the judgments in question involve the free circulation of goods rather than State aid, it feels that this rationale can be applied to State aid.

⁽¹⁶⁾ OJ L 147, 31.5.2001, p. 1.

⁽¹⁷⁾ Judgments of the Court of 5 February 1976, Case 87-75, *Bresciani v Amministrazione Italiana delle Finanze* [1976] p. 129 point 10, and of 15 December 1993, Joined cases C-277-91, C-318/91 and C-319/91, *Ligur Carni Srl e.a. v Unita Sanitaria Locale n. XV di Genova e.a.* [1993] I-06621 points 29-31.

(38) Moreover, Belgium states that as Regulation (EC) No 999/2001 does not oblige enterprises to bear the costs of controls, a Member State may decide to use the 'normal' system of financing BSE tests. Therefore, according to Belgium, the selectivity criterion for State aid must be seen in relation to this normal system⁽¹⁸⁾. This could only be State aid in that certain sectors or enterprises might enjoy special treatment compared to the normal Belgian system. Belgium states that the Commission appears to think that normally the costs had to be borne by the farmers; this does not, however, fall under the applicable texts. If different systems of financing BSE tests can lead to distortions of competition this problem can in Belgium's view be solved through harmonisation of legislation⁽¹⁹⁾; this is in no way a State aid issue. Belgium also quotes the GEMO judgment⁽²⁰⁾, but does not consider that this changes its line in this particular case. In its letter of 16 October 2009 Belgium reiterates that it does not agree with the Commission's classification of the financing as State aid in its decision to initiate the formal investigation procedure. Nonetheless, in a spirit of cooperation, Belgium applied the Commission's arguments in order to clarify the issues raised in that decision.

3.2. Classification of the fee

- (39) In Belgium's view the fee of EUR 10,70 per tested bovine animal cannot be considered as State aid.
- (40) According to Belgium State aid can only be present if an advantage is given to one or several enterprises. As a result, a received fee can only represent an advantage if it is greater than the amount paid. If part of the BSE tests is financed by the authorities, the final advantage to the farmer corresponds to the cost of the test minus the fee paid.
- (41) Belgium takes this argument further by stating that, if the costs were recovered, this would mean demanding a higher global payment from the farmer. In other words, if the total cost of the test has to be repaid, this would mean that in the end this cost is added to the fee already paid.

(42) Belgium stresses that in the Court's judgments State aid is present only when the revenue from fees is used to favour a specific group and does not equally benefit all those who paid a fee⁽²¹⁾. In this case the fee of EUR 10,70 per tested bovine animal is paid to economic actors in the bovine meat production sector. The EUR 10,70 used for the test does not represent any economic advantage to these actors and therefore cannot be considered as State aid within the meaning of Article 107 of the TFEU.

(43) According to Belgium the Commission used a similar argument in decision N 9/05 and N 10/05. Belgium states that in this decision the fee of EUR 10,70 was not qualified as State aid (see recital 98 of the decision). A similar rationale was used in decision N 21/02, where part of the costs of BSE tests partially financed out of fees paid by the sector was not considered to be State aid.

(44) In its letter of 16 October 2009 Belgium indicates that the fee was charged to the farmer and that it concerned part of the economic costs of the BSE tests. Replying to the Commission's question, i.e. whether the fee corresponded to the true economic cost of the laboratories' services, Belgium states that the fee only related to part of the costs of the BSE tests, as indicated in decision N 9/05 and N 10/05. The Commission's reasoning in recitals 61-66 of that decision, that the costs of the services and the amount of the fees were equal, related to services other than the BSE tests. Belgium reiterates that, regarding the BSE tests, decision N 9/05 and N 10/05 concluded that while the service in the form of BSE tests was State aid, the amount of the fee (EUR 10,70) was not aid and should be subtracted from the cost of the tests.

3.3. Absence of overcompensation and test prices' conformity with market prices

(45) Belgium refers to point 132 of the Community guidelines for State aid in the agriculture and forestry sector 2007 to 2013⁽²²⁾ (agriculture guidelines 2007-13) which states that EUR 40 per test is 'the best price currently available in the Community'. Since July 2005 the FASFC's proposed prices have been less than EUR 40.

⁽¹⁸⁾ General Court judgment of 18 December 2008, *Government of Gibraltar (T-211/04) and United Kingdom of Great Britain and Northern Ireland (T-215/04) v Commission of the European Communities* [2008] II-3745, points 143-146.

⁽¹⁹⁾ To illustrate this Belgium quotes Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules, where Article 27 and Annexes IV and V oblige Member States to organise the collection of fees to finance certain controls.

⁽²⁰⁾ Court judgment of 20 November 2003 Case C-126/01 *Ministère de l'Économie, des Finances et de l'Industrie v GEMO SA* [2003] I-13769.

⁽²¹⁾ Court judgments of 11 March 1992, Joined Cases C-78/90, C-79/90, C-80/90, C-81/90, C-82/90 and C-83/90 *Compagnie commerciale de l'Ouest e.a. v Receveur principal des douanes de La Pallice Port* [1992] I-1847, point 35; of 2 August 1993, Case C-266/91 *Celulose Beira Industrial SA v Fazenda Pública* [1993] I-4337, point 21; of 11 June 1992, Joined Cases C-149/91 and C-150/91 *Sanders Adour e.a. v Directeur des services fiscaux des Pyrénées-Atlantiques* [1992] I-3899, point 27, and of 16 December 1992, Case C-17/91 *Lornoy v État belge* [1992] I-6523, point 32.

⁽²²⁾ OJ C 319, 27.12.2006, p. 1.

In the opinion of the Belgian authorities this shows that the prices charged in Belgium are in line with market prices. In decision N 9/05 and N 10/05 the Commission recognised that the laboratories were selected using open, transparent and non-discriminatory procedures, and that the service providers (i.e. the laboratories) could not be seen as receiving State aid. The situation has not changed in the meantime. In addition, the Belgian competition authorities are currently carrying out a survey of price-fixing between the laboratories regarding BSE tests. This clearly shows, according to Belgium, that there was no wish whatsoever to pay a supplementary price to the laboratories. In its letter of 16 October 2009 Belgium stated that the investigation of possible price-fixing between the laboratories would be carried out and should in principle be completed during the first quarter of 2010.

3.4. Levy on imports and exports

- (46) The Belgian authorities state that the contributions and fee were never applied to imports and exports. Only enterprises based in Belgium have to pay a contribution and only bovine animals slaughtered in Belgium and over 30 months old are subject to a fee of EUR 10,70.
- (47) Belgium stresses that the Commission already looked at these measures in decision N 9/05 and N 10/05 and concluded that the contributions were not discriminatory towards imported or exported products and were not contrary to the provisions of the Treaty.

3.5. Absence of a mechanism through which the slaughterhouses pass on the fee to producers or other market actors

- (48) The Belgian authorities indicate that the slaughterhouses pass on the cost of fees to their clients just as any normal enterprise passes on costs incurred to its clients. Normal market mechanisms therefore apply to this passing on of costs. Moreover, itemising the cost of fees separately on the invoices submitted to producers is normal practice. In this connection Belgium quotes recitals 93 and 95 of decision N 9/05 and N 10/05, where the criteria in point 25 of the TSE guidelines are considered to be met.

3.6. Classification of the beneficiaries as small and medium-sized enterprises (SME)

- (49) Belgium states that all Belgian farmers are SMEs, based on the following criteria: they employ less than 250 people, their annual turnover does not exceed EUR 40 million or their annual balance sheet total is less than EUR 27 million, and 25 % or more of the enterprise is not owned by another company or companies which are not SMEs.

3.7. Comments on the compatibility of aid during the three periods identified in the decision to initiate the formal investigation procedure (2001-2003; 2003-2007; after 2007)

- (50) Belgium has no particular comment to make regarding the period from 1 January 2001 to 1 January 2003, given that the Commission itself assumes, in recital 80 of the decision to initiate the formal investigation procedure, that the aid was probably compatible. Belgium does, however, state that the aid was not more than 100 % of the costs incurred and that it agrees to provide further information in this regard if necessary.
- (51) However, Belgium insists that this information is only given in passing, since its initial point of view is that State aid is not an issue in this case, because it is up to Belgium to choose how it finances BSE tests.
- (52) During the period 1 January 2003 to 1 January 2007, Belgium indicates that no aid in excess of 100 % of the test costs was paid. It refers to decision N 9/05 and N 10/05 which already dealt with this issue.
- (53) Regarding the period from 1 January 2007, Belgium never granted aid exceeding EUR 40, as the cost of the tests was less than that amount.
- (54) Belgium, as an enclosure to its comments, submits a detailed sequence of the measures taken with regard to the financing of BSE tests. As this information is largely repeated in the descriptive part of this decision, the sequence in this section is not exhaustive. Some elements are, however, repeated below.
- (55) The sequence of BSE test financing is as follows:
- 1 January 2001 to 31 December 2001: tests entirely financed by the Exchequer,
 - 1 January 2002 to 30 June 2004: tests prefinanced by the BIRB. The total amount prefinanced is EUR 67 156 527,65,
 - 1 July 2004 to 30 November 2004: tests prefinanced by FASFC,
 - 1 December 2004 to 31 December 2005: a fee of EUR 10,70 for each bovine animal tested pursuant to the Royal Decree of 15 October 2004, as well as financing by the FASFC out of its reserves and the reimbursable advance provided by the Exchequer,

— from 1 January 2006: financing via a fee of EUR 10,70 for each bovine animal tested and from contributions imposed on seven different sectors ⁽²³⁾. These contributions are also designed to reimburse the costs of the BSE tests prefinanced since 1 January 2002. The fee was then indexed at EUR 11,07 from 1 January 2008.

(56) The prices of the BSE tests are as follows:

(EUR)		
Period	Total cost of tests (*)	Amount of fee
01.01.2001-31.01.2001	111,81	/
01.02.2001-31.03.2001	89,50	/
01.04.2001-31.12.2001	64,71	/
01.01.2002-15.03.2002	64,74	/
16.03.2002-31.12.2003	63,45	/
01.01.2004-15.01.2004	63,42	/
16.01.2004-30.06.2004	53,88	/
01.07.2004-30.11.2004	43,44	/
01.12.2004-31.12.2004	43,44	10,70
01.01.2005-30.06.2005	43,47	10,70
01.07.2005-31.12.2005	38,62	10,70
01.01.2006-30.09.2006	40,35	10,70
01.10.2006-31.12.2006	39,32	10,70
01.01.2007-31.12.2007	39,35	10,70
01.01.2008-31.12.2008	39,38	11,07

(*) These costs include laboratory costs, the costs of veterinarians carrying out the analyses on behalf of the public authority, and the sampling kits.

3.8. Replies to additional questions asked by the Commission

(57) In its letter of 16 October 2009 Belgium makes several clarifications in reply to the questions asked by the Commission on 24 July 2009 after receiving Belgium's comments. Belgium begins by reiterating its position that a Member State is not obliged to make economic actors bear the costs of the BSE tests. Since these are linked to public health protection, the costs of controls imposed by public authorities cannot be seen as compensation for

a service and passed on to the economic actors. However, in a spirit of cooperation, Belgium has decided to reply to the Commission's questions by using the logic expressed in the decision to initiate the formal investigation procedure.

(58) Concerning the share of Community funding, Belgium confirms that this had been included in the previously communicated figures.

(59) Belgium then indicated that, with regard to funding during the period from 30 June 2004 to 31 December 2005, this had been carried out by FASFC based on sources of funding available to it and taken from the former bodies from which it had been created. No para-fiscal charges had been levied during this period.

(60) The Commission had asked about the link between the amount of EUR 15 237 646 and that of EUR 67 156 527,65 mentioned in Belgium's comments (see recital 55). Belgium replied that the first sum was an integral part of the second amount. The Belgian authorities also indicated their willingness to perform calculations to verify the correctness of the amount mentioned.

(61) Regarding fees, Belgium states that these were borne by the farmers and therefore could not be State aid. Here Belgium refers to decision N 9/05 and N 10/05 which indicated that only EUR 33,38 of the EUR 44,08 total cost represented State aid. The other EUR 10,70 was not State aid and was therefore subtracted from the price of the test during the evaluation of its conformity with the maximum aid intensity of EUR 40 per test.

(62) For reference, Belgium states that the only difference between its system and that approved by the Commission in decision N 9/05 and N 10/05 was the indexation of the fee which increased from EUR 10,70 to EUR 11,07.

(63) In its letter of 1 December 2009, Belgium corrects its previous figures regarding the number of tests carried out. It indicated that these figures replaced those previously given in the letters preceding and following the decision to initiate the formal investigation procedure.

(64) These changes were due to the fact that the number of samples taken into consideration before was incorrect. The original calculations had been based on a theoretical rate of 3 samples per hour, while in reality 12 samples had been taken per hour on the ground. This increase in the number of tests meant a lower price for each sample, also affecting the total price per test, as the cost of the tests included a cost per hour, which decreased due to the larger number of samples taken per hour. In addition, the number of animals slaughtered in 2003 and 2004 was revised downwards compared to the previous figures. The figures mentioned in the Belgian letter of 1 December 2009 are those for bovine animals slaughtered for human consumption, reported to the Commission for 2003 and 2004.

⁽²³⁾ These contributions and fees were approved by decision N 9/05 and N 10/05.

(EUR)

2003	Laboratory costs	Hourly fee: veterinary surgeon	Cost of sampling	Cost of test kit	Total cost	Intervention > EUR 40 per test
January	52,06	32,02	2,67	0,69	55,42	15,42
February	52,06	32,02	2,67	0,69	55,42	15,42
March	52,06	32,02	2,67	0,69	55,42	15,42
April	52,06	32,02	2,67	0,69	55,42	15,42
May	52,06	32,02	2,67	0,69	55,42	15,42
June	52,06	32,02	2,67	0,69	55,42	15,42
July	52,06	32,02	2,67	0,69	55,42	15,42
August	52,06	32,02	2,67	0,69	55,42	15,42
September	52,06	32,02	2,67	0,69	55,42	15,42
October	52,06	32,02	2,67	0,69	55,42	15,42
November	52,06	32,02	2,67	0,69	55,42	15,42
December	52,06	32,02	2,67	0,69	55,42	15,42

(EUR)

2004	Laboratory costs	Hourly fee: veterinary surgeon	Cost of sampling	Cost of test kit	Total cost	Intervention > EUR 40 per test
1-15 January	52,06	32,02	2,67	0,69	55,42	15,42
16-31 January	42	32,02	2,67	0,69	45,36	5,36
February	42	32,02	2,67	0,69	45,36	5,36
March	42	32,02	2,67	0,69	45,36	5,36
April	42	32,02	2,67	0,69	45,36	5,36
May	42	32,02	2,67	0,69	45,36	5,36
June	42	32,02	2,67	0,69	45,36	5,36
July	31,90	32,02	2,67	0,69	35,26	- 4,74
August	31,90	32,02	2,67	0,69	35,26	- 4,74
September	31,90	32,02	2,67	0,69	35,26	- 4,74
October	31,90	32,02	2,67	0,69	35,26	- 4,74
November	31,90	32,02	2,67	0,69	35,26	- 4,74
December	31,90	32,02	2,67	0,69	35,26	- 4,74

(65) Based on the table in recital 64, Belgium concludes that the total cost of BSE tests has been less than EUR 40 since 1 July 2004.

(66) On this basis the Belgian authorities also correct the table provided prior to the initiation of the formal investigation procedure and mentioned in recital 25 of the decision to initiate that procedure. These latest figures are real rather than estimates as previously provided. It can be derived from this data that the total prefinanced amount was not EUR 15 237 789,90 as previously estimated but EUR 6 619 810,74.

Period		Test price (EUR)	Number of tests	Total (EUR)
1.1.2003 15.1.2004	Indirect State aid	40,00	373 550	14 942 015,90
	Cost of test > EUR 40	31,08	373 550	5 759 524,54
	Total	71,08	373 550	20 701 540,44
16.1.2004 30.6.2004	Indirect State aid	40,00	160 551	6 422 043,10
	Duty	22,02	160 551	860 286,19
	Total	62,02	160 551	7 282 329,29
1.1.2003 30.6.2004	Total pre-financed budget above maximum of EUR 40			6 619 810,74

- (67) Belgium also states that, if the competition authority's inquiry reveals that the prices for laboratory BSE tests were increased due to possible illegal price fixing, it would do all it could to recover the surplus, if necessary by taking the laboratories to court.
- (68) In their letter of 6 April 2011 the Belgian authorities confirm that the fee of EUR 10,70 was solely for the payment of the BSE test by the beneficiary at that moment, rather than as reimbursement of the pre-financing of previous BSE tests.
- (69) In that same letter Belgium indicates that the total amount prefinanced by the BIRB was EUR 67 156 527,65. FASFC reimbursed part of that amount as follows:

Reimbursed by FASFC	
2005	EUR 4 477 102
2006	EUR 4 477 102
2007	No reimbursement (a request for extension was made and granted subject to the payment of interest)
2008	EUR 194 901 (interest on the reported reimbursement)
From 2008	No more reimbursements to the BIRB — programme act of 22 December 2008
Still to be reimbursed	EUR 58 202 323

- (70) Belgium states that the government had decided to suspend the prefinancing reimbursement to the BIRB,

and that the recovered amounts would therefore be included in FASFC's positive balance. This surplus must be seen as the reimbursement of the BSE tests.

- (71) Concerning the payment of the cost of BSE tests by the producer, Belgium reiterates that there was no specific system obliging the slaughterhouses to bill the fee for the BSE test to the producer, but this took place in a spontaneous way. Belgium submitted several invoices clearly showing that the fee was billed as a separate item. One is the slaughterhouse's bill to the producer, where the fee is deducted from the total amount payable by the slaughterhouse to the producer for the animal. In Belgium's opinion this is evidence that the producer is the person finally liable for payment of the BSE test to FASFC.
- (72) In its final letter of 25 May 2011 Belgium states that the aid amounts could be the subject of a cumulative application for *de minimis* aid pursuant to Commission Regulation (EC) No 1860/2004 of 6 October 2004 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid in the agriculture and fisheries sectors⁽²⁴⁾ and of the EUR 40 of compatible aid per test, for the Regulation's period of application.

4. THIRD-PARTY COMMENTS

- (73) During this procedure the Commission did not receive any comments from interested third parties.

5. ASSESSMENT

5.1. Evaluation of whether there is aid

- (74) First of all, Belgium indicated in its comments on the decision initiating the formal investigation procedure that it considered that the costs of the BSE tests were financed by the Member States because of their compulsory nature and that no Community rules required enterprises to bear the costs of controls. The agricultural guidelines for 2007-13 and the Commission's practice clearly indicate that the different levels of test costs may distort competition, and that most States grant aid to cover the costs of these tests, whence the need to regulate its intensity in order to limit the distortions of competition caused by this aid. In particular, the TSE guidelines clearly state that the aid awarded by the States risks distorting competition. Point 24 of the TSE guidelines, for example, states that 'from 1 January 2003, as far as compulsory BSE testing of bovine animals slaughtered for human consumption is concerned, direct and indirect State aid, including Community payments, may not be more than EUR 40 per test. The obligation for testing may be based on

⁽²⁴⁾ OJ L 325, 28.10.2004, p. 4.

national or Community legislation.' These guidelines were presented to the Member States, who were asked to take the appropriate measures and bring their schemes into line with these guidelines. Likewise, as far as the agricultural guidelines for 2007-13 are concerned, what qualifies as State aid with regard to the BSE tests is set out in points 132(f) and subsequent. Furthermore, it is important to emphasise that Decision N 9/05 and N 10/05, where a part of the financing of the BSE tests was classified as aid, was not the subject of an appeal by the Belgian authorities, which implicitly means that the Belgian authorities accepted this classification of the aid for financing BSE tests as State aid.

- (75) From these elements, we can deduce that Belgium's calling into question of the classification of the aid for financing BSE tests as State aid by virtue of the obligatory nature of these tests has no basis given the texts that apply and that have applied for many years.
- (76) Consequently, the Commission is examining the measures in question on the basis of Article 107 of the TFEU. Article 107(1) of the TFEU provides: 'Save as otherwise provided in this 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 enterprises or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.
- (77) For a measure to be covered by Article 107(1) of the TFEU, each of the following four conditions must be cumulatively met: 1) the measure must be financed by the State or through State resources and be attributable to the State; 2) it must selectively concern certain enterprises or sectors of production; 3) it must involve an economic advantage for the recipient enterprises; 4) it must affect trade within the EU and distort or threaten to distort competition.
- (78) In the following recitals, these four criteria will be applied to the measures which may constitute State aid.
- (79) As indicated in recital 55, several financing systems were used to finance the costs of the BSE tests. As part of the examination of the criterion of the presence of State resources, this Decision makes a distinction between the different means of financing the BSE tests.

5.1.1. Presence of State resources

5.1.1.1. From 1 January 2001 to 31 December 2001

- (80) During the period from 1 January 2001 to 31 December 2001, the BSE tests were financed entirely by the national exchequer. There is no doubt that this was a case of financing through State resources.

5.1.1.2. From 1 January 2002 to 30 June 2004

- (81) During the following period, that is from 1 January 2002 to 30 June 2004, the tests were pre-financed by the BIRB, pending a structural solution for financing the tests. The BIRB is a federal public institution with a legal personality, resulting from the merger of the former *Office Belge de l'Économie et de l'Agriculture* (OBEA) and the agriculture division of the former *Office Central des Contingents et Licences* (OCCL). It is a category B para-state organisation reporting to the Minister for agriculture, SMEs and the self-employed. The BIRB is an accredited paying agency in the context of the Common Agricultural Policy, and financed by the EAGGF⁽²⁵⁾. It may also be entrusted with tasks arising from the federal or regional governments' agricultural policy. To balance its administrative budget, the BIRB has a government endowment entered in the budget for its supervisory role at federal level (the Federal Public Service Economy) and some revenue of its own (revenue from some fees and limited assets). In view of the above, financing through the BIRB constitutes financing through State resources.

5.1.1.3. From 1 July 2004 to 30 November 2004

- (82) From 1 July 2004 to 30 November 2004, the tests were prepaid by the FASFC (Federal Agency for the Safety of the Food Chain). The legislation in force at the time (that is, chiefly the Law of 4 February 2000 on the creation of the FASFC⁽²⁶⁾) indicated that the FASFC was financed mainly by revenue sources such as the product of duties, charges and fees, the products of administrative fines, occasional revenue, gifts and legacies, etc.⁽²⁷⁾. The FASFC is a public institution with legal status, classed as Category A under the Law of 16 March 1954 on the supervision of certain bodies of public interest⁽²⁸⁾. Consequently, it follows from these considerations that the funds provided by the FASFC constitute State resources and that their allocation is decided by public authority, the FASFC being subject to the hierarchical authority of the Minister responsible for public health.

5.1.1.4. From 1 December 2004 to 31 December 2005

- (83) As far as the period between 1 December 2004 (date on which Royal Decree of 15 October 2004 entered into force) and 31 December 2005 (date on which the Royal Decrees of 10 November 2005 entered into force) is concerned, the BSE tests were financed by a fee of EUR 10,70 per bovine tested in addition to financing by the FASFC from its reserves and from the repayable advance made available to it by the national exchequer.
- (84) The partial financing from the FASFC provided from its own funds constitutes a State resource (see recital 82).

⁽²⁵⁾ Source: www.birb.be

⁽²⁶⁾ MB of 18.2.2000, p. 5053.

⁽²⁷⁾ See Article 10 of the Law of 4 February 2000.

⁽²⁸⁾ MB of 24.3.1954, p. 2210.

- (85) With regard to the question of whether the fees constitute State resources, they may be State resources if they do not cover the real full costs of the services they are intended to pay for. Indeed, if the fee and the cost of the service provided are not the same, the surplus constitutes a State resource at the disposal of the State body to whom the fee is paid. This is why it is important to verify whether the fees paid to the FASFC for the BSE tests represent payments for the FASFC's services effectively provided to the enterprises and whether or not they were based on market prices (see recital 54 of the decision initiating the formal investigation procedure). This question is dealt with below, during the examination of the concept of advantage.

5.1.1.5. From 1 January 2006 on

- (86) As far as the period following the entry into force of the Royal Decrees of 10 November 2005, i.e. the period starting on 1 January 2006, is concerned, it is necessary to examine whether the fees and the contributions set by these Decrees constitute State resources. This question was already examined in the context of Decision N 9/05 and N 10/05. In recital 44 there was a general indication that the contributions constituted State resources and that the fees could constitute State resources if those fees did not cover the real full costs of the services they were intended to pay for. The BSE tests were part-financed by the fees and part-financed by the contributions. Decision N 9/05 and N 10/05 concluded that the part-financing of the costs of the BSE tests by the fees did not constitute State aid and that the financing by the contributions was a compatible form of State aid. As indicated in recital 34 of the decision initiating the formal investigation procedure, the aid approved by Commission Decision is not the subject of this decision and will not be re-examined here.
- (87) However, in light of the information provided by Belgium following the initiation of the formal investigation procedure, it emerged that the revenue from the contributions was used in part in 2005 and 2006 to reimburse the pre-financing of the BSE tests exceeding EUR 40 during the period from 1 January 2003 to 1 December 2004. However, this had not been mentioned in Decision N 9/05 and N 10/05. Consequently, a part of the contributions was used to finance the BSE tests conducted during the period between 1 January 2003 and 1 December 2004, the aim being to recover from the farmers in a non-individual fashion the pre-financed costs of the compulsory BSE tests that exceeded the maximum amount of EUR 40.
- (88) Allocating part of the receipts of these contributions to the reimbursement of the pre-financing of the tests does not in any way change the classification as State resources as per Decision N 9/05 and N 10/05.

5.1.2. Selective advantage for an enterprise

- (89) In examining the existence of an advantage, it is necessary to distinguish, on the one hand, the measures financed by State resources, including contributions, and the measures financed by fees.
- (90) With regard to the measures financed through State resources, including the contributions, the Commission has constantly held the opinion⁽²⁹⁾ that if the State finances the costs of the obligatory controls that concern the production or the marketing of products, this has to be considered as a selective advantage for the enterprises⁽³⁰⁾. Indeed, the State reduced the charges that are normally included in the budget of an enterprise. It can be deduced from the above that the farmers, the slaughterhouses and other entities which process, handle, sell or market products from bovine animals for whom BSE tests are obligatory by virtue of the legislation in force during the period in question, are conducting an economic activity and have benefited from State aid for the financing of the BSE tests by the State, and this since 1 January 2001.
- (91) The arguments put forward by Belgium (see recitals 37 et seq.) according to which the financing of the BSE tests was compulsory with a view to protecting public health and that it is up to the Member State to decide on the normal system of financing BSE tests may not be accepted for the reasons set out in recital 74. In the more specific context of the selectivity assessment, Belgium argued that one could not speak of selectivity except where certain sectors or enterprises would benefit from preferential treatment in comparison with the normal system. The fact of there being differences between the various Member States as regards the financing of the BSE tests and that this could lead to distortions of competition is not, in Belgium's view, a question of State aid but of harmonisation of legislations.
- (92) However, this argument cannot be accepted. As indicated in Decision N 9/05 and N 10/05, the selectivity criterion is met when the advantage is reserved for some enterprises or one sector. In this case, at national level, the financing of the BSE tests by the State only benefited one given sector, namely the sector involved in breeding animals subject to BSE tests. At Community level, the fact that the BSE tests were financed by the State or through State resources favoured Belgian enterprises and gave those enterprises an advantage over their

⁽²⁹⁾ See in particular recital 73 of Decision N 9/05 and N 10/2005 which states that 'the Commission has always considered that the financing by the State of the costs of the obligatory controls directly linked to production or to the placing on the market of a product constitutes a selective advantage benefiting those enterprises'.

⁽³⁰⁾ See the TSE guidelines, e.g. points 7 and 12.

foreign competitors for whom the mandatory BSE tests were not financed by the State or through State resources. In the preamble to the TSE guidelines (points 8 and 9), it was clearly indicated that the ongoing harmonisation obliging the sector to support the costs was slow, and that the Commission had thus decided to clarify and modify its policy on State aids with regard to the costs generated by the BSE tests. Point 24 of the TSE guidelines, for its part, indicates that the examination requirement could be based on Community or national legislation. This point clearly indicates that there is no Community harmonisation with regard to the obligation to perform the tests, which implies that this could also lead to an aid selectively benefiting the enterprises of a given Member State. In conclusion, the measures financed through State resources, including the contributions, give a selective advantage to farmers, slaughterhouses and other entities that process, handle, sell or trade in bovine animal products that are subject to compulsory BSE testing under the applicable legislation, by reducing the costs they must pay. These advantages are not conferred by direct payments, but by the public authorities covering the costs of the BSE tests by directly paying the laboratories which perform the tests on request from the slaughterhouses and invoice the costs to the FASFC.

(93) As far as the aid measures financed by the fees are concerned, whether an advantage is conferred through these fees must be verified. As indicated in the decision to initiate the formal investigation procedure (in recitals 61 and 62), there would be no question of an advantage if those fees were less than the real costs to the economic operators of the services effectively provided by the FASFC. Whether the charges represent payments for the FASFC services effectively provided to the enterprises must be verified. More specifically, the question arises of whether an advantage was conferred on the slaughterhouses and producers who paid the fee of EUR 10,70 per bovine tested during the period between 1 December 2004 and 31 December 2005, and whether they effectively benefited from the services provided by the FASFC.

(94) The Belgian authorities indicated in the response to the decision to initiate the formal investigation procedure that the fee of EUR 10,70 per bovine tested was the only source of financing for the FASFC to support the costs of the BSE tests, with the exception of the FASFC reserves and the recoverable advances from the national exchequer. The fee was paid by the slaughterhouses. The Belgian authorities mentioned that there was no legal obligation for the slaughterhouses to invoice the amount of the fee to their clients, but that the slaughterhouses' practice was to separately invoice the cost of the fee to the producers. This was proved by Belgium by means of the invoices provided by way of example, where it is clearly visible that the slaughterhouses separately invoice the cost of the fee to the producers. Belgium considers that there is no need to formally regulate the way in which the slaughterhouses repay the fee to the producers or other potential beneficiaries

of the services, given that this cost is invoiced to producers in a similar way to the other costs incurred during slaughtering and invoiced to producers.

(95) Consequently, from the above we can deduce that the doubt expressed during the opening of the formal investigation procedure, in recital 44, which indicates that the charge for the slaughterhouses was a lot higher than for other beneficiaries of the service, had arisen from the information Belgium submitted on how the amount of this fee was invoiced to the producers.

(96) As for whether the price for the BSE tests was the market price, Belgium firstly indicated to the Commission that since July 2005 the prices proposed by the FASFC were less than EUR 40, while the agricultural guidelines for 2007-13 cite EUR 40 as the lowest price available in the Community at that time. This is an indication that the prices were in line with prices elsewhere in Europe during the period in question. Secondly, Belgium responded to the decision to initiate the formal investigation procedure by saying that the situation was identical to the one examined in Decision N 9/05 and N 10/05, which concluded that the service providers were designated in accordance with open and non-discriminatory procedures (see recital 82 of Decision N 9/05 and N 10/05). Thirdly, the Commission noted the commitment made by Belgium to take all possible legal measures to recover payments made in excess of the price of the tests, in the event of the Belgium competition authority's enquiries concluding that there was an illegal agreement between the laboratories, the effect of which was to increase the price of the tests. On the basis of these considerations, the Commission concludes that the fees may not be considered as State resources, in that these fees paid to the FASFC for the BSE tests represent payments for the FASFC services effectively provided to the enterprises and were based on market prices.

(97) It can be concluded, in accordance with Decision N 9/05 and N 10/05, that this fee did not give any advantage to the slaughterhouses or the producers, because the fee covers a payment for a service from which the person who paid the fee benefited, and that the test price was based on the market price. This conclusion also permits the conclusion that there was no financing through State resources, given that the test price was in line with the market price.

5.1.3. Distortion of competition and effect on trade within the EU

(98) As far as the other conditions governing the application of Article 107(1) of the TFEU are concerned, the measure may have an effect on Belgium's position in this

sector⁽³¹⁾. As the Belgian undertakings are active in a highly competitive international market, the measure distorts or threatens to distort competition⁽³²⁾ and affects trade between Member States.

5.1.4. *Conclusions on the nature of aid within the meaning of Article 107(1) of the TFEU*

- (99) In light of the above, the Commission considers that the financing of the BSE tests through contributions and other State resources as indicated above is an advantage, financed through State resources. This advantage distorts or threatens to distort competition by favouring certain enterprises and certain productions and is thereby likely to affect trade between Member States. The advantage is conferred to farmers, slaughterhouses and other entities which process, handle, sell or market products from bovine animals subject to a mandatory BSE test by virtue of the applicable legislation. Consequently, the Commission concludes that these measures fall within the scope of Article 107(1) of the TFEU. However, the part of the BSE tests that is financed by the fees does not constitute aid, given that those who pay the fee benefit from the services provided at the market price.

5.2. Unlawfulness of the aid

- (100) Since 1 January 2001 the Belgian authorities have not notified the Commission, within the meaning of Article 108(3) of the TFEU, of the aid measures involved in the financing of the BSE tests. Aid measures that fall under Regulation (EC) No 1/2004 are exempt from the reporting obligation, provided that they meet the conditions set out in that Regulation. Consequently, they are unlawful if they do not meet those conditions.

5.3. Financing the aid

- (101) With regard to State aid part-financed by a para-fiscal tax, i.e. the contribution, the measures financed by the aid and the financing of the aid itself must be assessed by the Commission. Indeed, the possible incompatibility of the financing of a State aid measure with the internal market would also make the aid itself incompatible, even where the awarding of the aid had respected the relevant competition rules.

- (102) According to established case-law, taxes do not fall within the scope of the provisions of the TFEU

concerning State aid unless they constitute the means of financing an aid measure, such that they form an integral part of that measure⁽³³⁾. For a tax or part of a tax to be considered as forming an integral part of an aid measure, it must be hypothecated to the aid measure under the relevant national rules, in the sense that the revenue from the tax must be allocated for the financing of the aid measure⁽³⁴⁾. If such a hypothecation exists, the revenue from the tax directly influences the amount of the aid⁽³⁵⁾ and, consequently, the assessment of the compatibility of this aid with the internal market.⁽³⁶⁾

- (103) Therefore, consideration has to be given to whether the contribution levied since 1 July 2004 meets the criteria set out in recital 102, and distinctions must be made by the legal instruments applicable during the different periods. The aid financed was the subject of an exemption, but this exemption does not cover the system for financing the aid, so consequently the lawfulness of the financing system throughout the entire period in question must be examined.

5.3.1. *From 1 July 2004 to 31 December 2005*

- (104) During this period the aid was pre-financed by the FASFC and by the fees in virtue of the Royal Decree of 15 October 2004 (although the latter are not covered by this section, given that they are not considered as aid — see recital 97). It is necessary to determine whether the financing system is an integral part of the aid measure. The legislation in force does not suggest that the means of financing of the FASFC be hypothecated to the financing of the BSE tests, nor that the revenue from the tax must be allocated to financing the aid. In fact, the Law of 4 February 2000 creating the FASFC provides for different sources of financing for the FASFC (see recital 82). Furthermore, it cannot be concluded that the revenue from the tax directly influences the amount of the aid, given that the tests are financed by both fees and by the FASFC for the remainder. Consequently, the amount of aid paid by the FASFC varies on the basis of the price of the tests and not on the basis of the contributions paid to the FASFC. In conclusion, there is no hypothecation between the revenue from the contributions and the reimbursement of the pre-financing.

⁽³¹⁾ Belgium has a share of 2,1 % in agricultural production in EU in 2004 (source: Agriculture in the EU — Statistical and economic information 2005).

⁽³²⁾ According to the case law of the Court of Justice, improvement in the competitive position of an undertaking resulting from a State aid generally points to a distortion of competition compared with other competing undertakings not receiving such assistance, (Judgment of the Court of 17 September 1980, *Philip Morris Holland BV/Commission* (Case C-730/79, ECR 1980, p. 2671, paragraphs 11 and 12).

⁽³³⁾ Judgment of the Court of 13 January 2005, *Streekgewest Westelijk Noord-Brabant/Staatssecretaris van Financiën* (C-174/02, ECR 2005, p. I 85), paragraph 25.

⁽³⁴⁾ *Streekgewest* Judgment, cited above in the footnote on page 36, paragraph 26, Judgment of the Court of 27 October 2005, *Nazairdis SAS e.a./Caisse nationale de l'organisation autonome d'assurance vieillesse des travailleurs non salariés des professions industrielles et commerciales (Organic)* (Joined Cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04, ECR 2005, p. I-9481), paragraphs 46 to 49.

⁽³⁵⁾ Judgments of the Court of 15 June 2006, *Air Liquide/Ville de Seraing et Province de Liège* (Joined Cases C-393/04 and C 41/05, ECR. 2006, p. I-5293), paragraph 46, and *Streekgewest*, cited above in the footnote on page 36, paragraph 28.

⁽³⁶⁾ Judgment of the Court of 25 June 1970, *France v Commission* (47/69, ECR 1970, p. 487), paragraph 17, 20 and 21.

5.3.2. From 1 January 2006 on

- (105) Since that date, the question of the contributions is regulated by the Royal Decree on the contributions for financing the FASFC. Decision N 9/05 and N 10/05 examined the system of financing through contributions and concluded that the part-financing of the costs connected with the BSE tests did not involve discrimination against imported or exported products and was not contrary to the provisions of the Treaty⁽³⁷⁾. As indicated in recital 31, this Decision does not have any bearing on previously approved measures. However, given that Belgium indicated that a part of the contributions were used, from 1 January 2006, to reimburse the pre-financing of earlier BSE tests, the Commission is entitled to examine the financing system with regard to the contributions financing the reimbursement of the pre-financing of the BSE tests.
- (106) Belgium has indicated that the financing system was unchanged, apart from the indexation of the fee. The only element that was changed is the use of revenue from the contributions to reimburse the pre-financing of the BSE costs in 2006.
- (107) As for the question of whether this financing is an integral part of the aid measure, the answer is no. The allocation of the contributions after 2006 for reimbursing the pre-financing of the tests did not affect the amount of aid awarded. Furthermore, the Belgian authorities indicated that the recovery system was a solidarity-based recovery system whereby each operator paid a contribution to the FSCA and a part of that contribution went to recovering past costs linked to pre-financing the BSE tests. All active operators that had bovine animals in the period in question contributed equally to that system, but they were not the only contributors. Consequently, the Commission concludes that the financing of the aid was not an integral part of the aid measure in question.

5.4. Appraisal of the compatibility of the aid measures

- (108) Where the aid constitutes State aid and falls under Article 107(1) of the TFEU, it is necessary to examine whether it can be considered compatible with the internal market by virtue of Article 107(2) and (3) of the TFEU.
- (109) In the light of the measure in question, only Article 107(3)(c) of the TFEU, which stipulates that aid to facilitate the development of certain economic activities or of certain economic areas may be considered to be compatible with the internal market where such aid does not adversely affect trading conditions to an extent contrary to the common interest, could apply.

- (110) Pursuant to point 23.3 of the Community Guidelines for State aid in the agricultural sector⁽³⁸⁾ for the period 2000-06 (hereinafter 'the 2000-06 agricultural guidelines') and the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid⁽³⁹⁾, all unlawful aid within the meaning of Article 1(f) 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⁽⁴⁰⁾ must be assessed in accordance with the rules and guidelines in force at the time the aid was granted. In 2002, the Commission adopted the TSE guidelines. They applied between 1 January 2003 and 31 December 2006⁽⁴¹⁾. Point 44 of the TSE guidelines provides that, except for cases relating in particular to BSE tests, unlawful aid within the meaning of Article 1(f) of Regulation (EC) No 659/1999 is to be examined in accordance with the rules and guidelines applicable at the time the aid was granted. Given that the aid was granted between 1 January 2001 and 31 December 2005, the TSE guidelines are the appropriate framework for examining this aid.

- (111) In accordance with point 194(c) of the 2007-13 agricultural guidelines, the Commission will cease to apply the TSE guidelines from 1 January 2007, except for unlawful aid as set out in point 43 et seq. of those guidelines.

- (112) Two periods can be distinguished on the basis of the different legal provisions that apply.

5.4.1. Period from 1 January 2001 to 31 December 2002: application of point 11.4 of the 2000-06 agricultural guidelines as referred to in point 45 of the TSE guidelines

- (113) Point 45 of the TSE guidelines provides that, as regards unlawful State aid towards the costs of BSE tests granted before the date of application of the TSE guidelines (i.e. 1 January 2003), the Commission is to evaluate the compatibility of such aid in line with point 11.4 of the 2000-06 agriculture guidelines and its practice since 2001 of accepting such aid of up to 100 %.
- (114) In order to be considered compatible, in accordance with point 11.4 of the 2000-06 agricultural guidelines:
- the measure must be part of an appropriate programme at Community, national or regional level for the prevention, control or eradication of the disease concerned (point 11.4.2),
 - the objective of the measure should be either preventive or compensatory, or a combination of the two (point 11.4.3),

⁽³⁸⁾ OJ C 28, 1.2.2000, p. 2.

⁽³⁹⁾ OJ C 119, 22.5.2002, p. 22.

⁽⁴⁰⁾ OJ L 83, 27.3.1999, p. 1.

⁽⁴¹⁾ See point 194(c) of the 2007-13 agricultural guidelines.

⁽³⁷⁾ See recitals 100 et seq. of Decision N 9/05 and N 10/05.

- the measure should be compatible both with the objectives and the specific provisions laid down in Community veterinary and phytosanitary legislation (point 11.4.4),
- the aid intensity should not exceed 100 % of the eligible costs (point 11.4.5).

If the aid is provided under Community and/or national and/or regional aid schemes, the Commission is to require evidence that there is no possibility of overcompensation through the cumulation of measures under different schemes. Where Community aid has been approved, the date and references of the relevant Commission decision should be provided.

(115) As regards the first three conditions, the decision initiating the formal investigation procedure already concluded that they had been met (see recital 80 of that decision). Furthermore, the Belgian authorities confirmed this approach in their comments on the decision initiating the formal investigation procedure. BSE is a transmissible disease and poses a threat to human health. It is an animal disease of which a primary outbreak must be notified directly to the Commission and other Member States⁽⁴²⁾. The objective of the aid measure is to control BSE by testing slaughtered animals and fallen stock. Compensating the costs of farmers should ensure that the measures are actually implemented. All the measures arise under, or are recommended by, Community law⁽⁴³⁾.

(116) As regards the fourth condition, the information provided by Belgium refers to financing of BSE tests with a cost varying between EUR 111,81 and EUR 63,45 during this period (see recital 56). This covers the cost of the laboratory analysis, the cost of having a sample taken by a vet and the cost of the test kit. The Commission is of the opinion that these costs are in line with those mentioned in point 11.4.5 of the 2000-06 agricultural guidelines, which include health checks, tests and other screening measures among the actual costs incurred.

(117) In conclusion, the aid granted in the period from 1 January 2001 to 31 December 2002 is compatible.

5.4.2. Period from 1 January 2003 to 31 December 2005: application of point 21 et seq. of the TSE guidelines

(118) In accordance with point 23 of the TSE guidelines, the Commission decided to continue to approve aid of up to 100 % of the costs of BSE tests meeting the principles set out in point 11.4 of the 2000-06 agriculture guidelines (see recital 114).

(119) In addition, the following conditions must also be met in line with the TSE guidelines:

- from 1 January 2003, as far as compulsory BSE testing of bovine animals slaughtered for human consumption is concerned, support, including Community payments, may not be more than EUR 40 per test (see point 24 of the TSE guidelines),

- State aid towards the costs of BSE tests must be paid to the operator where the samples for the tests have to be taken. If the aid is paid to laboratories, it must be demonstrated that the full amount of State aid paid is passed on to the operator (point 25 of the TSE guidelines).

(120) As indicated in recitals 115 and 116, the four conditions set in the 2000-06 agricultural guidelines have been met.

(121) As regards the condition concerning the maximum amount of EUR 40 per test, the Commission notes that this limit was exceeded between 1 January 2003 and 30 June 2004. According to the information provided by Belgium, the total amount of the excess payments during this period was EUR 6 619 810,74. From 1 July 2004, the total cost of the test was below EUR 40 (see recital 64). The Belgian authorities have indicated that these amounts covered both national and Community payments (see recital 58).

(122) As regards the requirement that the aid must be paid to the operator where the samples for the test are taken or that, if the aid is paid to laboratories, it must be demonstrated that the full amount of State aid is passed on to the operator (point 25 of the TSE guidelines), the Commission concludes that this requirement has been met.

(123) As indicated in the decision initiating the formal investigation procedure, the Belgian authorities stated that the costs of BSE tests are paid directly to the laboratories. Operators do not have to pay any laboratory costs for BSE tests on bovine animals. This appraisal is in line with what was decided for the similar system in recital 95 of decision N 9/05 and N 10/05. As already stated, the only cost passed on to producers is the fee (see recital 93 et seq.), but this part of the financing of the BSE test does not constitute aid. Consequently, the full amount of the aid is passed on to the operator.

5.4.3. From 1 January 2006

(124) For the period after 1 January 2006, the Commission refers to decision N 9/05 and N 10/05, as it is not the purpose of this Decision to go back over the aid approved there.

⁽⁴²⁾ Council Directive 82/894/EEC of 21 December 1982 on the notification of animal diseases within the Community (OJ L 378, 31.12.1982, p. 58).

⁽⁴³⁾ See Regulation (EC) No 999/2001.

5.4.4. Conclusion

- (125) To conclude, the aid granted to finance BSE tests in excess of EUR 40 per test during the period from 1 January 2003 to 30 June 2004, which amounts to EUR 6 619 810,74 in total, is incompatible with the internal market.

5.5. Repayment of prefunded budget

- (126) As mentioned above, the tests were financed from State resources over and above the limit of EUR 40 per test during the period from 1 January 2003 to 30 June 2004.
- (127) Belgium decided to start repaying this excess from the contributions levied to finance the FASFC from 1 January 2006, initially spread over a period of 15 years, but this was subsequently abandoned. According to the Belgian authorities, the reason for this global approach is that, in practice, it was difficult to enforce recovery on an individual basis, as some operators had died or ceased operating.
- (128) In a subsequent letter dated 6 April 2011, the Belgian authorities indicated that the FASFC had started repayment using FASFC resources in 2005-06.
- (129) However, the recovery system proposed does not meet the requirements for the recovery of unlawful and incompatible aid. Under case law, the purpose of recovery is to re-establish the situation that existed on the market prior to the granting of the aid. The objective of re-establishing the previously existing situation is achieved once the unlawful and incompatible aid is repaid by the recipient, who thereby forfeits the advantage which he enjoyed over his competitors in the market, and the situation as it existed prior to the granting of the aid is restored⁽⁴⁴⁾. The aid to be recovered includes interest, at an appropriate rate fixed by the Commission, from the date on which the unlawful aid was placed at the disposal of the beneficiary until the date of its recovery⁽⁴⁵⁾. Under Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty⁽⁴⁶⁾, interest must be calculated on a compound basis, which is not the case here. Furthermore, Article 14 of Regulation (EC) No 659/1999 stipulates that Member States must take all necessary measures to ensure the immediate and effective execution of the Commission's decision. Recovery as proposed and partially implemented by Belgium does

not meet the above requirements and cannot be considered recovery as provided for in Article 14 of Regulation (EC) No 659/1999.

6. CONCLUSIONS

- (130) The Commission concludes that financing BSE tests through fees does not constitute aid.
- (131) The Commission concludes that financing BSE tests from State resources constitutes aid for farmers, slaughterhouses and other entities that process, handle, sell or trade in bovine animal products that are subject to compulsory BSE testing under the applicable legislation. This aid is compatible for the period from 1 January 2001 to 31 December 2002 and from 1 July 2004 to 31 December 2005. It is incompatible for the period from 1 January 2003 to 30 June 2004. The incompatible portion of the aid consists of the amount in excess of EUR 40 per test and has been assessed by Belgium as EUR 6 619 810,74.
- (132) The Commission notes that Belgium unlawfully implemented aid to finance BSE tests in breach of Article 108(3) of the TFEU during the period from 1 January 2001 to 30 June 2004. From 1 January 2003, the aid was covered by an exemption regulation, but as the conditions of the exemption regulation were not complied with, the aid is unlawful.
- (133) The unlawful and incompatible aid exceeding the maximum amount of EUR 40 per test must be recovered, with the exception of aid granted to specific projects which, at the time the aid was granted, met all the conditions set in the applicable *de minimis* Regulation,

HAS ADOPTED THIS DECISION:

Article 1

1. The measures financed through fees do not constitute aid.
2. For the period from 1 January 2001 to 31 December 2002 and for the period from 1 July 2004 to 31 December 2005, financing of BSE tests from State resources constitutes aid compatible with the internal market for farmers, slaughterhouses and other entities that process, handle, sell or trade in bovine animal products that are subject to compulsory BSE testing.

⁽⁴⁴⁾ Judgment of the Court of 4 April 1995 in Case C-348/93 *Commission v Italy* [1995] ECR I-673, paragraph 27.

⁽⁴⁵⁾ Article 14 of Regulation (EC) No 659/1999.

⁽⁴⁶⁾ OJ L 140, 30.4.2004, p. 1.

3. For the period from 1 January 2003 to 30 June 2004, financing of BSE tests from State resources constitutes aid compatible with the internal market for farmers, slaughterhouses and other entities that process, handle, sell or trade in bovine animal products that are subject to compulsory BSE testing for amounts of up to EUR 40 per test. Amounts in excess of EUR 40 per test are incompatible with the internal market and must be recovered, with the exception of aid granted to specific projects which, at the time the aid was granted, met all the conditions set in the applicable *de minimis* Regulation.

4. Belgium unlawfully implemented aid to finance BSE tests in breach of Article 108(3) of the TFEU during the period from 1 January 2001 to 30 June 2004.

Article 2

1. Belgium shall take all necessary measures to recover the unlawful and incompatible aid referred to in Article 1(3) and (4) from its beneficiaries.

2. The aid to be recovered shall include interest calculated from the date on which it was placed at the disposal of the beneficiaries until the date of its recovery.

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

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

Article 3

Recovery of the aid referred to in Article 1(3) and (4) shall be immediate and effective.

Belgium shall ensure that this Decision is implemented within 4 months of the date of its notification.

Article 4

1. Within 2 months of notification of this Decision, Belgium shall submit the following information to the Commission:

- (a) a list of beneficiaries who received the aid referred to in Article 1(3) and (4) and the total amount of aid received by each one;
- (b) the total amount (principal and recovery interest) to be recovered from the beneficiaries;
- (c) a detailed description of the measures already taken or planned to comply with this Decision;
- (d) documents demonstrating that orders to return the aid have been sent to the beneficiaries.

2. Belgium 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(3) and (4) has been completed.

3. After the 2-month period referred to in paragraph 1, Belgium shall submit, at the Commission's request, a report on the measures already taken and those planned to comply with this Decision. That report shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.

Article 5

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 27 July 2011.

For the Commission

Dacian CIOLOȘ

Member of the Commission

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