

II

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

DECISIONS

COMMISSION

COMMISSION DECISION

of 18 February 2004

on State aid C27/2001 (ex NN 2/2001) concerning the implementation in France of a programme to control pollution of agricultural origin (PMPOA) during the period 1994 to 2000

(notified under document number C(2004) 415)

(Only the French text is authentic)

(2007/51/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

by the Commission by letter dated 11 July 2000. The French authorities replied by letter dated 26 December 2000.

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

Having asked interested parties to submit their observations in accordance with that Article ⁽¹⁾ and having regard to those observations,

Whereas:

I. PROCEDURE

(1) Following information received by the Commission on the existence in France of a programme to control pollution of agricultural origin ('Programme de maîtrise des pollutions d'origine agricole' — hereafter called PMPOA or the programme) the Commission sent a letter to the French authorities on 24 February 2000 requesting information on the application of that programme since 1994. By letter dated 31 May 2000 France confirmed that the PMPOA had existed since 1994. Additional information was requested

(2) On 13 February 1991 France notified a State aid relating to aid for investments in individual pig farms in favour of the environment. The Commission authorised the aid by letter of 11 December 1991 ⁽²⁾. In addition, on 20 April 1993, as part of a part-financed structural programme and in accordance with Article 29(4) of Council Regulation (EEC) No 2328/91 of on improving the efficiency of agricultural structures ⁽³⁾, France forwarded DEPSE/SDEE circulars No 93-7005 of 2 March 1993 and No 7027 of 5 November 1992 on investment aid in the beef and veal sector. In accordance with Regulation (EEC) No 2328/91 on 29 July 1993 the Commission adopted a Decision authorising a Community financial contribution to that joint measure ⁽⁴⁾. However, the national aid was not notified to the Commission within the meaning of Article 88(3) of the Treaty ⁽⁵⁾. The French authorities declared that those provisions, which predated the entry into force of the PMPOA, had been integrated into it by DEPSE circular

⁽¹⁾ OJ C 179, 23.6.2001, p. 18.

⁽²⁾ State aid N 136/91.

⁽³⁾ OJ L 218, 6.8.1991, p. 1.

⁽⁴⁾ C(93) 1888.

⁽⁵⁾ Cf. ruling of the Court of First Instance of the European Communities of 15 September 1998 in Joined Cases T-126/96 and T-127/96, *Breda Fucine Meridionali SpA and others v the Commission*, ECR [1998] II-3437. The Court accepted the Commission's argument that a communication from a Member State could not be accepted as a valid notification if it did not explicitly mention Article 93(3) of the Treaty and was not presented to the Secretariat-General. The measures in question had therefore to be considered as non-notified.

No 7016 of 22 April 1994. They therefore form the beef and pig sector components of the PMPOA. That circular was also not notified to the Commission within the meaning of Article 88(3) of the Treaty.

- (3) By letter of 13 June 1994 France notified a State aid for investments to protect the environment in the poultry sector. That scheme, later integrated into the PMPOA as its poultry sector component, was authorised by the Commission by letter of 26 April 1995 ⁽⁶⁾.
- (4) France did not notify within the meaning of Article 88(3) of the Treaty the agreement of 8 October 1993 creating the programme, nor any other document describing the characteristics of the PMPOA relating in particular to the programme's financing key ⁽⁷⁾. The Commission, in particular, was not informed of the participation of water supply agencies in financing the programme.
- (5) Moreover, in respect of the beef and veal sector, France did not notify the Commission of the planned investment aids.
- (6) No notification regarding young farmers was submitted to the Commission.
- (7) By letter of 11 April 2001 the Commission informed France of its decision to initiate proceedings as provided for in Article 88(2) of the Treaty against the PMPOA. The present Decision concerns only the application of the PMPOA in the period 1994-2000.
- (8) The Commission decision to initiate proceedings was published in the *Official Journal of the European Communities* ⁽⁸⁾. The Commission invited the other Member States and interested parties to submit their comments on the aids in question. The Commission received no comments from third parties. France submitted its comments by letter of 21 June 2001.
- (9) Extension of the PMPOA from 2001 was authorised by the Commission by letter of 30 October 2001 ⁽⁹⁾.

II. DESCRIPTION

1. The aid measure

- (10) The PMPOA is the result of an agreement between the French state and French agricultural trade organisations

dated 8 October 1993 which entered into force on 1 January 1994. The purpose of the programme was to enable farmers to adapt their equipment and working practices with a view to better environmental protection in general and water protection in particular. The pollution identified as the subject of the programme was water pollution by plant health products and by mineral and organic fertilisers.

- (11) The PMPOA particularly sought compliance with Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources ⁽¹⁰⁾ (hereafter called the nitrates Directive) and the national provisions to introduce a code of good farming practice. It related to all production methods: livestock and crops.

- (12) In order to satisfy the legal requirements and to avoid polluting water resources with animal waste it was deemed necessary to improve animal housing and to manage liquid waste. The cost of the work on housing alone was indicatively estimated at that time at approximately EUR1 billion up to 2002. An investment programme was launched; its overall financing plan was: livestock rearers: one-third of the cost; the State (Ministry of Agriculture and Fisheries) and local authorities, one-sixth each; water supply agencies: one-third ⁽¹¹⁾. In return, livestock farmers likely to qualify for aid had to pay the pollution charge levied by the water supply agencies.

⁽¹⁰⁾ OJ L 375, 31.12.1991, p. 1.

⁽¹¹⁾ According to information available to the Commission — part of it taken from the water supply agencies' website (<http://www.eaufrance.tm>) — the agencies are public bodies created in 1964 enjoying legal personality and financial independence. They operate under the supervision of the Ministers of the Environment and of the Economy and Finance and are managed by an administrative council representing the various water users. The agencies are split up over six major water regions covering the entire territory of mainland France: Adour-Garonne, Artois-Picardie, Loire-Bretagne, Rhin-Meuse, Rhône-Méditerranée-Corse and Seine-Normandie. These have identical structures: a regional committee, a water supply agency and its administrative council. Their policies are defined by the regional committee and are based on four major components: management of water resources, pollution control, conservation of aquatic environments and monitoring the quality of inland and coastal waters.

Between 1997 and 2001 the agencies planned aid to finance works estimated at some €16 billion to conserve water resources and control pollution. They provide technical advice to local government, economic operators and farmers and provide them with funding so that they can undertake the works needed to prevent water pollution and protect water resources. The agencies are financed by means of proportional charges imposed on water polluters, users and consumers. Those charges are then redistributed in the form of aid (subsidies and loans) to local authorities, industry and agriculture (and, more generally, to works contractors) to carry out works such as water treatment plants, sanitation networks, drinking water plants, river facilities, studies and measuring networks.

⁽⁶⁾ State aid N 342/94.

⁽⁷⁾ Cf. footnote 5.

⁽⁸⁾ Cf. footnote 1.

⁽⁹⁾ State aid N 355/2000.

- (13) By memorandum of 24 February 1994 to the relevant administrative bodies the French ministries of agriculture and of the environment defined the procedures adopted by the national monitoring committee responsible for implementing the programme: timetable, financing keys, application by rearers.
- (14) As regards the programme's link to the classified installations, the French authorities stated in the memorandum that it was in the interests of the rearers to comply with the provisions relating to protection of water resources in the ministerial decrees of 29 February 1992 on livestock farms when work under pollution control contracts was being carried out.
- (15) Implementation of the PMPOA followed a sectoral approach and was by means of circulars containing the aid rules from the Ministry of Agriculture and Fisheries to the regional and departmental prefects. At the request of the Commission the French authorities sent copies of the following circulars:
- DEPSE/SDEEA circular No 7016 of 22 April 1994, 'Aides à la mise en conformité des élevages bovins et porcins' [aid for standardising cattle and pig farms];
 - DEPSE/SDEEA circular No 7021 of 18 April 1995, 'Aides à la mise en conformité des élevages avicoles' [aid for standardising poultry farms];
 - DEPSE/SDEEA circular No 7028 of 19 June 1995, 'Aides à la mise en conformité des élevages' [aid for standardising livestock farms];
 - DEPSE/SDEEA circular No 7001 of 15 January 1996, 'Aide à la mise en conformité des élevages. Cas des jeunes agriculteurs qui s'installent à compter du 1er janvier 1996' [aid for standardising livestock farms, where young farmers set up from 1 January 1996].
- (16) Aid beneficiaries were managers or owners of property for farming use in the beef and veal, pig and poultry sectors. The aim of the investments was to redevelop existing housing so as to increase storage capacity for animal waste and improve storage equipment to bring it in line with the requirements of the nitrates Directive ⁽¹²⁾.
- (17) Financing consisted of a State contribution of 35 % of the costs in the form of a capital subsidy covering 30 % of the costs to which could be added a low-interest loan, the subsidy equivalent of which corresponded to 5 % of the costs. Participation by the water supply agencies to the extent of one-third of the costs was not mentioned in the circulars referred to in recital 15.
- (18) With regard to the beef and veal and pig sectors, aid was also planned for farmers implementing their projects under a material improvement plan (MIP) in less-favoured areas in the form of capital aid of 30 % and a loan with a subsidy equivalent of 15 %. The rates were increased in the case of young farmers (43,75 % in lowland areas and 56,25 % in less-favoured areas). For young farmers in the poultry sector an increase of 5 % via a soft loan was provided for.
- (19) DEPSE/SDEEA circular No 7001 of 15 January 1996 amended the aid rates in favour of young farmers setting up from 1 January 1996. The capital subsidy rate was increased from 30 % to 35 % in less-favoured areas and priority rural development areas. No soft loan was provided for. In other areas the capital subsidy rate was increased from 30 % to 32,5 %. A supplementary loan having a subsidy-equivalent effect of 2,5 % was permitted.
- (20) To qualify for the aid, farmers had to submit a preliminary study performed on their behalf by approved experts and resulting in the drawing up of the farmer's investment project. Analyses were used as the basis for the pollution control contract (see recital 21) and, therefore, for the definition of the eligible amount for each of the parties participating in the public financing of the work. The studies amounted to 2 % of the cost of the investments and were subsidised at the rate of 50 % by the State and 50 % by the water supply agencies up to a ceiling of FRF 6 000 before taxes (equivalent to EUR 914).
- (21) The pollution control contract was the factor which guaranteed the farmer that the aid provided for in the PMPOA would be applied and that any charge by the water supply agencies would be offset. It was a contract of confidence which of necessity highlighted the existence of environmental problems on a farm but the purpose of which was to help resolve them. It was signed by all the financial partners, including the farmer.

2. The reasons given by the Commission for initiating the examination procedure

- (22) Firstly, the Commission felt that the involvement of the water supply agencies in the PMPOA was a State aid within the meaning of Article 87(1) of the Treaty. The water supply agencies were responsible for one-third of the funding of the PMPOA's investment costs. The Commission only became aware of their involvement after dissemination of a report evaluating the management and progress of the PMPOA drawn up by the Inspectorate-General of Finances, the standing committee for the coordination of inspections of the Ministry of Agriculture and Fisheries and the *Conseil Général* for agricultural engineering, water resources and forests ⁽¹³⁾.

⁽¹²⁾ Details on the subsidised investments can be consulted in the decision to initiate the procedure.

⁽¹³⁾ Report dated 26 July 1999 published in 2000 on the website of the French Ministry of Agriculture: <http://www.agriculture.gouv.fr>.

- (23) The Commission noted the fact that Article 2 of French decree No 66-700 of 14 September 1966 on water supply agencies stipulated that the agencies were public State bodies enjoying legal personality and financial independence and that French legislation made it clear that the agencies were public in nature.
- (24) In its decision to initiate the procedure the Commission concluded that, in the light of the legislation adopted in France on the water supply agencies and their operating methods, and the decisions of the Court of Justice of the European Communities and the Court of First Instance ⁽¹⁴⁾, the water supply agencies were to be regarded as extensions of the State and that their funding of investments on agricultural holdings therefore constituted State aid ⁽¹⁵⁾.
- (25) The Commission considered that the amounts allocated to cattle, pig and poultry farmers, including those provided by the water supply agencies, conferred on those farmers an advantage from which other forms of production could not benefit. This was therefore State aid granted by France which, by distorting or being likely to distort competition by favouring certain undertakings or production sectors, was likely to affect trade between the Member States. Consequently the measure fell under Article 87(1) of the Treaty.
- (26) The Commission also concluded that the State aid put into effect by France constituted new aid not notified to the Commission which could by dint of that be considered unlawful aid within the meaning of the Treaty. The Commission based its arguments on Article 1(f) of Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽¹⁶⁾, which defines unlawful aid as new aid put into effect in contravention of the former Article 93(3) (now Article 88(3)) of the Treaty. The term new aid covers all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid.
- (27) The Commission noted that any aid scheme authorised by the Commission into which major changes were later introduced — in this case, relating to the participation of a public body in the financing of an aid notified to the Commission, thus significantly altering the financing key and, consequently, the aid rate — constituted a new aid which had to be notified to the Commission within the meaning of Article 88 of the Treaty and authorised by it. The notification obligation was established by Article 1(c) of Regulation (EC) No 659/1999. The Commission stated that varying the aid rate appeared *per se* to constitute an element modifying the substance of the aid which made notification within the meaning of Article 88(2) of the Treaty obligatory.
- (28) The Commission then carried out an assessment of the aids in question in the light of paragraph 23.3 of the Community guidelines on State aid in the agriculture sector ⁽¹⁷⁾ (hereafter 'the agriculture guidelines'), which states that any unlawful aid within the meaning of Article 1(f) of Regulation (EC) No 659/1999 is to be assessed in accordance with the rules and guidelines in force at the time the aid is granted.
- (29) With regard to the subsidised investments and the form of aid, the Commission considered that, where the pigmeat sector was concerned, the type of investment had actually been continued in the PMPOA and that the investments corresponded in the main to those notified to and authorised by the Commission. With regard to the beef and veal sector, the Commission, even though it had not examined the aid from the point of view of the Community's competition rules at the time, noted its compatibility with those rules when it initiated the procedure. With regard to the poultry sector the Commission noted that the PMPOA included exactly what it had previously authorised. Lastly, with regard to the scheme in favour of young farmers setting up from 1 January 1996, the Commission concluded that the scheme did not engender any changes in the scheme as regards the section on eligible investments, but was restricted to a change in the form of that part of the aid financed by the State.
- (30) The Commission was therefore able to conclude on the nature of the investments and the forms of aid provided for by the French authorities that the aids, while tainted with illegality, had been put into effect in compliance with the Community competition rules applicable at the time. The Commission did not therefore object to that aspect of the aid as applied.
- (31) Where the financing key for the aid was concerned, the Commission noted that, according to the rules applicable at the time the programme was launched, the ceiling for investment aid to protect the environment was 35 % of the eligible costs (45 % in less-favoured areas). The fifth indent of Article 12(5) of Regulation (EEC) No 2328/91, which provides for scrutiny of national aids in the light of former Articles 92 and 93 (now Articles 87 and 88) of the Treaty and Article 6 of that Regulation, authorised investment aid to protect the environment provided it did not give rise to

⁽¹⁴⁾ Cf. in particular: Court of First Instance judgment of 12 December 1996 in Case T-358/94, *Compagnie nationale Air France v the Commission*, ECR [1996] II-2109; Court of Justice judgment of 22 March 1977 in Case 78/76, *Steinike & Weinlig v FRG*, ECR [1977] 595; Court of First Instance judgment of 31 January 2001 in Joined Cases T-197/97 and T-198/97, *Weyl Beef Products BV and others v the Commission*, ECR [2001] II-303; Court of Justice judgment of 30 January 1985 in Case 290/83, *Commission v France*, ECR [1985] 439; Commission communication of 26 March 1997 on environmental duties, taxes and charges in the single market (COM (97) 9 final).

⁽¹⁵⁾ Cf. detailed reasoning by the Commission on the public nature of the water supply agencies in the decision to initiate the procedure.

⁽¹⁶⁾ OJ L 83, 27.3.1999, p. 1.

⁽¹⁷⁾ OJ C 28, 1.2.2000, p. 2 and corrigendum, OJ C 232, 12.8.2000, p. 17.

an increase in production. In its decision on State aid N 136/91, the Commission took account of the fact that it normally considered as compatible with the common market an aid rate of 35 % of eligible costs for that type of aid (45 % in less-favoured areas within the meaning of Council Directive 75/268/EEC of 28 April 1975 on mountain and hill farming and farming in certain less-favoured areas⁽¹⁸⁾). Those aid rates were confirmed in paragraph 3.2.3 of the Community guidelines on State aid for environmental protection⁽¹⁹⁾ shortly after entry into force of the programme.

- (32) In addition, the French authorities explained the existence and nature of those ceilings in the sectoral circulars applying the PMPOA as referred to in recital 15. They wrote that the European Union had authorised a derogating rate of 35 % for public aid to this type of investment linked to improvement of the environment.
- (33) Given that the programme's financing key provided for a contribution to investment costs of one-third by the State and local authorities (equal shares, i.e. one-sixth each), one-third by the water supply agencies and one-third by the farmers, and that the contribution by the water supply agencies constituted a State aid, the Commission concluded in its decision to initiate the procedure that the aid ceilings authorised for that type of investment appeared not to have been respected, for the result of the funding of the PMPOA by the water supply agencies would have been to increase the rate of public financing to two-thirds of the investment costs, i.e. some 66,6 % of the costs incurred. According to the Commission that was some 31,6 % (21,6 % in less-favoured areas) more than the permitted rate. A similarly excessive rate applied to the scheme in favour of young farmers setting up on or after 1 January 1996 since the amendments to the scheme related only to the form of the aid in the part financed by the State and therefore did not result in an overall increase in the assistance rate in favour of them.
- (34) However, the Commission also considered the fact since 1 January 2000, the date of application of the agriculture guidelines, it had been authorising, on the basis of paragraph 4.1.1.2 of those guidelines, aid rates for that type of investment of 40 % of costs incurred (50 % in less-favoured areas). For young farmers the accepted rate was 45 % (55 % in less-favoured areas). That meant that, applying these favourable conditions, the excess aid rates granted in 2000 would have been only 26,6 % (16,6 % in less-favoured areas) and, for young farmers, 21,6 % (11,6 % in less-favoured areas), for investments implemented from 1 January 2000 and meeting the conditions set out in the agriculture guidelines.

- (35) Since the aid authorised by the Commission for investments was based on a permitted maximum rate of public financing of 35 % of their costs (45 % in less-favoured areas), or 40 % to 55 %, depending on circumstances, from 1 January 2000, the Commission had to conclude in its decision to initiate the examination procedure that the level of aids granted under the PMPOA did not appear to tally with the aid rate it authorised and so all public funding granted above the authorised ceilings constituted a State aid incompatible with the Treaty.
- (36) Having examined the information provided by the French authorities, the Commission had doubts as to the compatibility with the common market of the aid for investments financed under the PMPOA during the period 1994-2000, in particular in respect of the aid amounts which had been granted in excess of the authorised aid rates of 35 % or 45 %. For that reason the Commission initiated the procedure provided for in Article 88(2) of the Treaty.
- (37) The Commission also concluded that the aid rate used by the French authorities for arranging for the holding analyses was in compliance with the applicable competition rules.

III. COMMENTS SUBMITTED BY FRANCE

- (38) By letter of 21 June 2001 the French authorities submitted their comments on the Commission's decision to initiate the Article 88(2) procedure against the notified aid.
- (39) The French authorities noted the Commission's legal opinion on the public nature of the aid from the water supply agencies. The authorities stated that the French government was planning to revise Act No 64/1245 of 16 December 1964 on water resources and their distribution and controlling their pollution, which defined the underlying principles of the operation of the water supply agencies for the purpose of in future submitting to Parliamentary vote the rules for calculating water charges and the guidelines for financial assistance programmes by the agencies.
- (40) Nevertheless the French authorities believed that the provisions of Article 12(5) of Regulation (EEC) No 2328/91, subsequently Article 12(3)(d) of Council Regulation (EC) No 950/97 on improving the efficiency of agricultural structures⁽²⁰⁾ could have been used to exceed the intensities of 35 % and 45 %. They stated that those provisions allowed for the prohibition of the aids and the limitations on exceeding the rates to be waived in the case of certain investments, including those for environmental protection purposes.

⁽¹⁸⁾ OJ L 128, 19.5.1975, p. 1.

⁽¹⁹⁾ OJ C 72, 10.3.1994, p. 3.

⁽²⁰⁾ OJ L 142, 2.6.1997, p. 1.

- (41) With regard to the impact on competition of the involvement of the water supply agencies in the PMPOA, the French authorities believed that the agencies were not unjustifiably favouring a specific national sector for the following reasons: The investments were non-productive so, even at high aid rates, they were a burden on the finances of the farms and placed the farmers concerned in a disadvantageous position compared to those not carrying out such investments. The latter were by far the more numerous in France. It was the French authorities' opinion that the distortion of competition would therefore generally be to the detriment of the farmers concerned and not to their benefit.
- (42) The French authorities stated that if there were a distortion of competition with in the light of Article 87 of the Treaty it could only by comparison with farmers in other Member States who had carried out similar work, but with financial aid limited to 35 %, or 45 % in less-favoured areas. They stated that the existence of such a distortion could really only be assessed on a case-by-case basis.
- (43) The French authorities pursued their argument by claiming that the actual aid rates applied to such work varied substantially from one farmer to the next depending on the precise rules for applying the programme. They explained that the rates were very generally much lower than 60 % if they were calculated using the value of the aid expressed as a percentage of the amount of the investment, in accordance with Article 7(2) of Regulation (EEC) No 2328/91 and Article 7(2) of Regulation (EC) No 950/97.
- (44) According to the French authorities, the rules for applying the aid granted by the State as communicated to the Commission define the general framework for applying the programme. The water supply agencies decided to adopt the same list of eligible works but the aid ceilings were not always the same. For instance, technical limits (in m² of covered exercise area, for example) were added locally, both for the aid from the agencies and for that from the State or local authorities, and those limits often reduced the financeable portion of the eligible works. Lastly, certain water supply agencies applied an overall ceiling on the aid by amount of nitrogen per livestock unit (UGBN).
- (45) Thus, as a result of the different ceilings the actual aid rate granted, relative to the expenditure agreed by the farmer for the eligible works, is, according to the French authorities, always in practice lower than the maximum rates permitted under the programme.
- (46) The French authorities explained that during work on improving environmental effectiveness some farmers carried out modernisation work. The latter was not eligible and did not therefore receive aid under the PMPOA.
- (47) In the cattle rearing sector, which represented 80 % of the total number of farms eligible under the PMPOA, the actual average aid rate was quite low, often between 35 % and 50 %, and also varied greatly according to production method. That was the result of a large variety of effluent — liquid, solid and most often mixed — and therefore of effluent storage in terms of both its nature (slurry or dung pits) and its capacity, and because of that investments in storage, land concreted-over and coverage for exercise areas were subject to technical limits or particularly low financial ceilings.
- (48) In intensive pig and poultry farms waste storage capacity was usually adequate to cope with periods when spreading was banned. In that case works consisted in re-sealing the pits or existing concrete surfaces or in installing bi-phase supply systems, reducing pollution at source in pig farms and improving the management of droppings in poultry farms. The actual aid rate could in that case be increased to up to 60 % of the cost of eligible works, as Table 1 shows. However, the cost of the works was usually much lower than for the beef and veal sector.
- (49) According to the French authorities, a study covering 20 000 dossiers in the Loire-Bretagne water supply region showed that the average aid rate was 40 %.
- (50) Some of those dossiers related to new structures built under the programme in cases where for various reasons it was felt inappropriate to carry out the recommended works on existing buildings. The French authorities felt that those cases had to be dealt with separately because in that case the aid no longer fell under aid for environmental protection, but instead under modernisation aid as provided for in Article 7(2)(b) of Regulation (EEC) No 2328/91 and Article 12(4)(c) of Regulation (EC) No 950/97. The amount of aid could therefore not exceed 35 % or 26,25 % (45 % or 38,75 % respectively in less-favoured areas) of the cost of the works, depending on whether the farmer could or could not obtain a material improvement plan. In such cases the actual aid rate was, in the examples shown in Table 2, always well below those rates — column (a) indicating what the cost of the environmental works would have been had the buildings been preserved.
- (51) Work on existing buildings and new structures could also be carried out on the same farm.

- (52) Lastly, if it was necessary to make the comparison on a case-by-case basis, the French authorities felt that farmers paying an annual charge to a water supply agency should under all circumstances be excluded from the scope of the comparison.

Table 1

Examples of actual aid rates for upgrading work under the PMPOA

(in FRF ⁽¹⁾)

Farm type	Improvements needed	Total amount for works (a)	Eligible amount for works (b)	Amount approved: State (c)	Amount approved: water agency (d)	Total aid (e)	Actual rate (e/b)
Mixed farm: 52 dairy cows, 20 sucklers plus replacements, or 120 UGBN	Sealing and covering exercise area. Increasing manure capacity. Construction of slurry pit.	334 154	257 372	236 550	236 550	141 930	55,1 %
60 dairy cows and replacements, or 80 UGBN	Sealing existing pit. Construction of open pit. Sealing exercise area.	328 178	328 178	272 038	272 038	163 222	49,7 %
90 dairy cows and replacements, or 120 UGBN	Creation of slurry. Increase in capacity of pit. Rainwater separation. Spreading plan.	1 220 700	671 020	495 800	495 800	252 780	36,7 %
Mixed farm: 450 fatstock pigs, 84 fatstock and dairy cattle, or 115 UGBN	Increase to 9 months in waste storage capacity. Coverage of exercise area. Water fountain for pigs.	196 380	188 330	177 225	177 225	115 195	57,5 %
147 sows, 27 boars, 1 840 fatstock pigs, or 223 UGBN	Separate water network. Covering of runs.	93 180	305 510	16 163	16 163	10 505	34,4 %
210 sows, 1 318 fatstock pigs, or 167 UGBN.	Sealing slurry pit. Drainage network. Multi-phase supply.	100 293	55 375	55 375	55 375	33 225	60 %
242 000 laying poultry, or 1 128 UGBN	Droppings removal and drying installation.	1 575 200	547 700	310 930	310 930	186 558	34,6 %

⁽¹⁾ 1 FRF = EUR 0,15

Table 2

Examples of actual aid rates in the case of the construction of new buildings

(in FRF)

Type of farm	Improvements needed	Estimated cost of old buildings (a)	Total amount for works (b)	Amount approved: State (c)	Amount approved: water agency (d)	Total aid (e)	Actual rate (e/b)
80 dairy cows and replacements, or 123 UGBN	Construction of straw pens for all animals. Installation of gutters.	380 120	468 502	328 640	90 880	118 592	25,3 %
75 sucklers and replacements, or 116 UGBN	Construction of open-run housing. Increase in slurry and dung storage.	280 634	741 807	212 436	111 211	97 094	13,1 %
82 sucklers and replacements, or 134 UGBN	Construction of open-run housing. Sealing of concrete areas. Increase in slurry and dung storage.	605 565	1 197 152	437 153	196 951	190 231	15,9 %
70 sucklers and renewals, or 110 UGBN	Construction of open-run housing. Sealing of concrete areas. Construction of slurry pit.	160 940	565 612	88 550	6 000	26 565	4,7 %
34 650 laying hens, or 214 UGBN	Construction of coops. Droppings storage area. Installation of droppings drier.	368 454	2 309 993	368 454	176 454	163 472	7,1 %

IV. ASSESSMENT

1.1. Existence of a selective advantage financed by State funds

1. Introduction: Article 87(1) of the Treaty

(53) Article 87(1) of the Treaty states: '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 undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.'

(54) Articles 87 to 89 of the Treaty were made applicable to the pigmeat sector by Article 21 of Council Regulation (EEC) No 2759/75 on the common organisation of the market in pigmeat ⁽²¹⁾. In the beef and veal sector they were made applicable by Article 40 of Council Regulation (EC) No 1254/1999 on the common organisation of the market in beef and veal ⁽²²⁾. Prior to the adoption of the latter, they were made applicable in that sector by Council Regulation (EEC) No 805/68 on the common organisation of the market in beef and veal ⁽²³⁾. In the poultrymeat sector they were made applicable by Article 19 of Council Regulation (EEC) No 2777/75 on the common organisation of the market in poultrymeat ⁽²⁴⁾.

(55) The nature of the aid must be established for each agricultural holding having carried out investments under the PMPOA. The Commission believes that the funding of the PMPOA has conferred a selective advantage on French farmers.

(56) The Commission believes that, contrary to the claims of the French authorities in their comments, the non-productive nature of the investments does not cancel out the impact of the advantage of the aid in purely financial terms, since it takes over a cost normally incurred by the beneficiary, thus placing the latter at an advantage vis-à-vis competitors who do not receive such aid.

(57) Moreover, even assuming that such non-productive investment could initially be a financial burden on the farms by, according to the French authorities, placing the farmers in question at a disadvantage by comparison with those not carrying out such investments, it is no less true that those

⁽²¹⁾ OJ L 282, 1.11.1975, p. 1.

⁽²²⁾ OJ L 160, 26.6.1999, p. 21.

⁽²³⁾ OJ L 148, 28.6.1968, p. 24.

⁽²⁴⁾ OJ L 282, 1.11.1975, p. 77.

investments comply with a precise legal obligation and that, in the end, all the farmers concerned must carry out such an investment in order to avoid committing an infringement.

1.2. *Impact on trade*

- (58) In order to establish whether the aid which is the subject of this Decision falls within the scope of Article 87(1) of the Treaty we must firstly establish whether it is likely to affect trade between the Member States.
- (59) The Court of Justice has ruled that when an advantage granted by a Member State strengthens the position of an undertaking compared with undertakings competing in intra-Community trade the latter must be regarded as affected by that advantage ⁽²⁵⁾.
- (60) It appears that the aid which is the subject of this Decision is likely to affect trade between Member States in so far as it favours national production to the detriment of production in other Member States. The sectors in question are particularly open to competition at a Community level and therefore highly sensitive to any measure in favour of production in one or other Member State.
- (61) Table 3 shows trade between France and the other Member States in the products concerned during the first year after the PMPOA entered into force.

Table 3

France/EU 11	Beef and veal	Pigmeat	Poultry
<i>Imports — 1994</i>			
Tonnes	525 000	463 000	85 000
ECU million	1 664	860	170
<i>Exports — 1994</i>			
Tonnes	796 000	361 000	389 000
ECU million	2 368	669	863

1.3. *Conclusions on the nature of the aid within the meaning of Article 87(1) of the Treaty*

- (62) The measures examined in this Decision constitute State aid within the meaning of the Treaty because they provide beneficiaries with a financial advantage from which other sectors cannot benefit. Consequently, the Commission concludes that the measures fall within the scope of Article 87(1) of the Treaty.

⁽²⁵⁾ Court of Justice judgment of 17 September 1980 in Case 730/79, *Philip Morris Holland BV v Commission*, ECR [1980] 2671, paragraph 11.

2. **The illegality of the aids in question**

- (63) Article 1(f) of Regulation (EC) No 659/1999 defines unlawful aid as new aid put into effect in contravention of Article 88(3) of the Treaty. In accordance with Article 1 (c) of that Regulation the term new aid covers all aid, that is to say aid schemes and individual aid, which is not existing aid, including alterations to existing aid.
- (64) Any aid scheme authorised by the Commission to which major modifications are subsequently made — in this case, relating to the involvement of a public body in the financing of the aid notified to the Commission significantly altering the financing key and, therefore, the aid rate — constitutes a new aid which must be notified to, and authorised by, the Commission within the meaning of Article 88 of the Treaty.
- (65) The Court of Justice has held that the obligation to inform the Commission of plans to grant or alter aid as provided for in the first sentence of Article 88(3) of the Treaty does not apply solely to the initial plan but also covers subsequent alterations to that plan; such information may be supplied to the Commission in the course of the consultations which take place following the initial notification ⁽²⁶⁾.
- (66) The notification obligation is established by Article 1(c) of Regulation (EC) No 659/1999.
- (67) It must be noted that inclusion of an information sheet in the list of aids drawn up by the French Ministry of Agriculture merely has an informative value and cannot be described as a notification for the purpose of the Treaty. Moreover, the information in it makes no reference to the involvement of the water supply agencies in the programme but states that the State's contribution is 35 % of the cost of the investments.
- (68) The Commission has not been able to assess the involvement of the water supply agencies in the programme or the impact that their involvement could have had on public assistance to the investments concerned. More specifically, it was not able to examine the possible impact that the involvement of a public body in financing the aid was likely to have in terms of the aid rate. Consequently, the aids actually granted by the French authorities did not necessarily comply with the conditions authorised by the Commission for State aids N 136/91 and N 342/94.

⁽²⁶⁾ Court of Justice judgment of 9 October 1984 in joined cases 91 and 127/83, *Heineken Brouwerijen BV v Inspecteur der Vennootschapsbelasting, Amsterdam and Utrecht*, ECR [1984] 3435.

(69) Variation of the aid rate constituted *per se* a factor altering the substance of the aid which made notification within the meaning of Article 88(2) of the Treaty obligatory.

(70) With regard to the beef and veal sector, the French authorities had not notified the Commission of the investment aid. They claimed, however, that once the Commission deemed the scheme eligible for a Community financial contribution they were justified in deducing that it was compatible with Community rules. Article 12(5) of Regulation (EEC) No 2328/91, which applied at that time, stipulated that aid for investment in the protection and improvement of the environment was authorised provided that it did not entail an increase in production and that it complied with Articles 92 to 94 (now 87 to 89) of the Treaty. That included the obligation to notify all State aid schemes within the meaning of the former Article 93(3) of the Treaty, all the more so as the conditions applied to the aids in 1994 were not the same as those communicated to the Commission in 1991.

(71) It is clear from the above that the State aids put into effect by France were new aids not notified to the Commission and hence unlawful within the meaning of the Treaty.

3. Examination of the compatibility of the aid

(72) Article 87 of the Treaty does, however, provide for exceptions, even though some of them are clearly not applicable, particularly those provided for in paragraph 2 of the Article. They were not invoked by the French authorities.

(73) With regard to the derogations provided for in Article 87(3) of the Treaty, these must be interpreted strictly during the examination of any regional or sectoral aid programme or of any individual case of the application of general aid schemes. They may be granted only if the Commission can establish that the aid is necessary for the realisation of one of the objectives in question. Allowing such derogations to apply to aids which do not involve such a *quid pro quo* would be tantamount to permitting interference with trade between Member States and distortion of competition that has no justification in the light of Community interest and, by the same token, undue advantages to operators in certain Member States.

(74) The Commission is of the opinion that the aids in question are not intended to promote the economic development of a region in which the standard of living is abnormally low or in which there is serious underemployment within the meaning of Article 87(3)(a) of the Treaty. Nor are they intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State within the meaning of Article 87(3)(b), or to promote either culture or

heritage conservation within the meaning of Article 87(3)(d).

(75) Article 87(3)(c) of the Treaty stipulates that aid to facilitate the development of certain economic activities or of certain economic areas may be considered to be compatible with the common market, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. To be entitled to that derogation, the aid must contribute to the development of the sector in question.

(76) Turning to the investments subsidised and the form of the aid, the Commission concluded when initiating the procedure that the aid, while tainted with illegality, had been put into effect in compliance with the Community competition rules applicable at the time. The Commission has no cause to call into question that part of the aid as applied.

(77) Therefore, the resultant examination of the compatibility of the aid only concerned the aid rates applied by the French authorities.

(78) The Commission noted when initiating the examination procedure that under the rules applicable at the time the programme entered into force the ceiling for aid for environmental protection investments was 35 % of costs incurred (45 % in less-favoured areas).

(79) Nevertheless, the French authorities believe that Article 12(5) of Regulation (EEC) No 2328/91, later Article 12(3)(d) of Regulation (EC) No 950/97, could have been used to exceed the rates of 35 % and 45 %. According to the French authorities those rules permit derogations from the aid prohibitions and restrictions on exceeding those intensities in the case of certain investments, including those intended to protect the environment.

(80) The Commission initially noted that the fifth indent of Article 12(5) of Regulation (EEC) No 2328/91, which provides for national aid to be examined for compliance with Articles 92 and 93 (now 87 and 88) of the Treaty, and with Article 6 of the same Regulation, authorised aid for investments intended to protect the environment provided they did not result in an increase in production. The Commission believes it is proven that the investments targeted by the aid in question did not bring about an increase in production since they were exclusively intended for the protection of the rural environment (in particular, the storage and treatment of waste).

(81) With regard more specifically to the permitted aid rate, the Commission, in its decision addressed to France on State aid N 136/91, noted that it normally considered as

compatible with the common market a rate of 35 % of eligible costs for that type of aid (45 % in less-favoured areas).

a maximum of 40 %, or 50 % in less-favoured areas. However, in the case of investments made by young farmers within five years after setting-up, the maximum rate of aid was increased to 45 %, or 55 % in less-favoured areas.

- (82) Those aid rates were confirmed by the Community guidelines on State aid for environmental protection shortly after the PMPOA was put into effect. Paragraph 3.2.3 of those Guidelines stated that as a general rule aid for environmental investment could be authorised up to specific levels. The second paragraph of footnote 14 explained that 'for investments covered by Article 12(1) and (5) of Council Regulation (EEC) No 2328/91 [...] the maximum aid level is 35 %, or 45 % in [...] less-favoured areas [...]. These maximum aid levels apply irrespective of the size of the enterprise. Consequently, the maxima may not be increased for SMEs as provided for below in this section. For investments in Objectives 1 and 5(b) regions, the Commission reserves the right, on a case-by-case basis, to accept higher aid levels than the above, where the Member State demonstrates to the satisfaction of the Commission that this is justified.'
- (83) Regulation (EEC) No 2328/91 was repealed by Regulation (EC) No 950/97. Article 12(2)(e) of the latter stipulated that Member States could grant aid to investments intended for 'the protection and improvement of the environment, provided that such investments do not entail an increase in production capacity'. Article 12(3) stipulated that 'in the case of individual or associated holdings which satisfy the conditions of eligibility laid down in Articles 5 and 9, aids for investments which exceed the amounts laid down in Article 7(2) and (3) and 11, are prohibited'. However, pursuant to point (d) of the second subparagraph of Article 12(3) that prohibition applied only to aid intended for 'the protection and improvement of this environment'.
- (84) Article 12(2) and (3) of Regulation (EC) No 950/97 stipulated that Articles 92 to 94 (now 87 to 89) of the Treaty applied to those aids. That is tantamount to a reversion to the competition rules applicable at the time, i.e. Community practice as already cited in the decision on State aid N 137/91, and to the conditions contained in the Community guidelines for environmental protection.
- (85) The Commission, on the basis of the provisions applicable in 1994-1999 as described in this Decision, can only conclude that the maximum aid intensity applicable to the aid in question was 35 % of costs incurred (45 % in less-favoured areas) and that, therefore, aid granted in excess of those intensities was not in compliance with those provisions.
- (86) However, where the year 2000 and aid for investments in agricultural holdings are concerned, paragraph 4.1.1.2 of the agriculture Guidelines, which applied from 1 January 2000, stipulated that the maximum rate of public support, expressed as a volume of eligible investment, was limited to
- (87) Paragraph 4.1.2.4 of the agriculture Guidelines stipulated, as an exception, that where investments resulted in extra costs relating to the protection and improvement of the environment, the improvement of hygiene conditions of livestock enterprises or the welfare of farm animals, the maximum aid rates of 40 % and 50 % referred to in point 4.1.1.2 could be increased by 20 or 25 percentage points respectively. Thus, the increase could be granted for investments aimed at ensuring compliance with the recently introduced minimum standards, subject to the conditions in Article 2 of Commission Regulation (EC) No 1750/1999 of 23 July 1999 laying down detailed rules for the application of Council Regulation (EC) No 1257/1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) ⁽²⁷⁾. It had to be strictly contained within the limits of the additional eligible expenditure needed to realise the aim in question and must not concern investments having the effect of increasing production capacity.
- (88) The entry into force on 23 January 2004 of Commission Regulation (EC) No 1/2004 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 ⁽²⁸⁾ changed the legal situation on the case in question. The Regulation authorises, under certain conditions, aid to small and medium-sized agricultural holdings while exempting them from the notification obligation under Article 88(3) of the Treaty.
- (89) The French authorities explained that the beneficiaries of the investment aid under the PMPOA during the period 1994-2000 were small and medium-sized enterprises within the meaning of Article 2(4) of Regulation (EC) No 1/2004.
- (90) Article 20(2) of Regulation (EC) No 1/2004 stipulates that individual aid and aid schemes implemented before the date of entry into force of this Regulation and aid granted under those schemes in the absence of a Commission authorisation and in breach of the notification requirement of Article 88(3) of the Treaty are to be compatible with the common market within the meaning of Article 87(3)(c) of the Treaty
- ⁽²⁷⁾ OJ L 214, 13.8.1999, p. 31. The second paragraph of Article 2 stipulates that where investments are made in order to comply with newly introduced minimum standards regarding the environment, [...] support may be granted in order to reach these new standards. In this case, a time period may be provided for the fulfilment of these minimum standards, where such a period is necessary to solve the specific problems in reaching such standards and where this period is in accordance with the specific legislation concerned.
- ⁽²⁸⁾ OJ L 1, 3.1.2004, p. 1.

and be exempt if they fulfil the conditions laid down in Article 3 of that Regulation, except the requirements in paragraph 1 and paragraph 2(b) and (c) of that Article.

- (91) Article 3(3) of Regulation (EC) No 1/2004 stipulates that aid granted under the schemes referred to in paragraph 2 of that Article is to be compatible with the common market within the meaning of Article 87(3)(c) of the Treaty and exempt from the notification requirement of Article 88(3) of the Treaty provided that the aid fulfils all the conditions of the Regulation.
- (92) Article 4 of Regulation (EC) No 1/2004 contains the conditions which have to be respected in the case in question, i.e. in the case of an unnotified investment aid scheme in favour of small and medium-sized enterprises.
- (93) Thus, under Article 4(1) of Regulation (EC) No 1/2004, aid for investments in agricultural holdings in favour of the production of agricultural products is compatible with the common market and exempt from the notification obligation if the gross aid intensity does not exceed 50 % of eligible investments in less-favoured areas and 40 % in other areas.
- (94) However, if the investments result in extra costs linked to the protection and improvement of the environment the maximum aid intensities of 50 % and 40 % may be increased by 25 and 20 percentage points respectively. This increase may only be granted for investments which go beyond the minimum Community requirements in force, or for investments made to comply with newly introduced minimum standards. The increase must be limited to the extra eligible costs necessary and must not apply in the case of investments which result in an increase in production capacity.
- (95) In the case in question it is clear that the investments are aimed at protecting and improving the environment and the applicable environmental legislation is the nitrates Directive. This was adopted in 1991 and could not therefore be described as new legislation in 2000.
- (96) The Commission has already expressed its opinion on that problem as part of State aid N 355/2000, in authorising the continuation of the PMPOA from 2001 to 2006. In line with the arguments invoked at the time, the Commission today insists that it cannot ignore the fact that the initial French action programme implementing the nitrates Directive was only adopted in 1997 and that the actual initial obligations imposed on livestock rearers on the spot, transposing that programme, are subsequent to that date. Even if it seems clear that France did not exercise due diligence in transposing the Directive and that it should have adopted the necessary provisions within time limits long since passed ⁽²⁹⁾, it cannot be denied that the initial obligations of which the livestock rearers were aware were much more recent.
- (97) Moreover, unlike some other Community rules, the Nitrates Directive contains no precise obligations to which economic operators had to agree without the prior intervention of the Member State. Neither does the Directive contain time limits within which installations have to be adapted.
- (98) For that reason, the Commission maintains its opinion that, in the light of the particular circumstances surrounding the nitrates Directive, the obligations on the rearers could be deemed to be new rules within the meaning of Regulation (EC) No 1/2004. Any other interpretation would have the effect of penalising rearers because of France's omission to take legal action.
- (99) It is the Commission's opinion that investments in non-vulnerable areas within the meaning of the nitrates Directive, where the conditions required by the Directive do not apply, could in any case benefit from the higher rates because less exacting rules than those envisaged in that Directive apply and the planned work goes beyond the minimum requirements existing in those regions.
- (100) Turning to investments to be realised in vulnerable areas, the Commission, while remaining consistent to its reasoning already expressed on the new nature of the rules imposed on the rearers, must conclude that an increase in the aid rates could be applied in the case in question. The rates could therefore be set at 60 % of investment costs, or 75 % in less-favoured areas.
- (101) Given that the figures provided by the French authorities show that the level of the aid never in practice exceeded 60 % of incurred costs the Commission believes that the aid granted during the period 1994-1999 under the PMPOA can be authorised.
- (102) In the light of the reasons given, the Commission considers the notified measure to be compatible with Community rules, in particular with Article 87(3)(c) of the Treaty.
- ⁽²⁹⁾ It should be noted that as the result of infringement proceedings brought against France the Commission took France to the Court of Justice for incorrect application of the nitrates Directive. The Court held against France for failure to take the appropriate steps to identify waters affected by pollution and consequently to designate the corresponding vulnerable zones (Court of Justice judgment in Case C-258/00, *Commission v France*, ECR [2002] I-05959).

V. **CONCLUSION**

(103) The measure consisting in the grant of aid to investments in favour of farmers under the programme to control pollution of agricultural origin (PMPOA) during the period 1994-2000 may benefit from the derogation provided for in Article 87(3)(c) of the Treaty,

is compatible with the common market under Article 87(3)(c) of the Treaty.

Article 2

This Decision is addressed to the French Republic.

HAS ADOPTED THIS DECISION:

Done at Brussels, 18 February 2004

Article 1

The State aid scheme put into effect by France to finance investments by farmers under the programme to control pollution of agricultural origin (PMPOA) from 1994 to 2000

For the Commission

Franz FISCHLER

Member of the Commission