

COMMISSION

COMMISSION DECISION

of 18 December 1996

on tax exemptions for biofuels in France

(Only the French text is authentic)

(Text with EEA relevance)

(97/542/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 93 (2) thereof,

Having regard to Council Regulation No 136/66/EEC of 22 September 1966 on the establishment of a common organization of the market in oils and fats⁽¹⁾, as last amended by Regulation (EC) No 3290/94⁽²⁾, and in particular Article 33 thereof,

Having regard to Council Regulation (EEC) No 1785/81 of 30 June 1981 on the common organization of the markets in the sugar sector⁽³⁾, as last amended by Regulation (EC) No 1101/95⁽⁴⁾, and in particular Article 44 thereof,

Having regard to Council Regulation (EEC) No 1765/92 of 30 June 1992 establishing a support system for producers of certain arable crops⁽⁵⁾, as last amended by Commission Regulation (EC) No 1664/95⁽⁶⁾,

Having regard to Council Regulation (EEC) No 1766/92 of 30 June 1992 on the common organization of the

market in cereals⁽⁷⁾, as last amended by Regulation (EC) No 3290/94⁽⁸⁾, and in particular Article 19 thereof,

Having given the interested parties notice, pursuant to Article 93 (2) of the Treaty, to submit their comments⁽⁹⁾, and having regard to those comments,

Whereas:

I

- (1) By letter of 19 March 1992, the French Permanent Representative to the European Communities notified the Commission of provisions relating to exemption from the domestic tax on petroleum products (*taxe intérieure sur les produits pétroliers*: TIPP) for biofuels of agricultural origin. The French authorities sent further information to the Commission in letters dated 19 November 1992 and 20 July 1993.

By letter dated 19 May 1994, the French Permanent Representative to the European Union notified the Commission of two 'technical progress' agreements for biofuels, linked to that exemption. The French authorities sent further information to the Commission in a letter dated 6 September 1994.

By letter of 12 December 1994, the Commission informed France of its decision to initiate the procedure provided for in Article 93 (2) of the Treaty in respect of the aid schemes, which seemed to be operating aid schemes not eligible for any of the exemptions under the State aid rules and thus incompatible with the common market.

⁽¹⁾ OJ No 172, 30. 9. 1966, p. 3025/66.

⁽²⁾ OJ No L 349, 31. 12. 1994, p. 105.

⁽³⁾ OJ No L 177, 1. 7. 1981, p. 4.

⁽⁴⁾ OJ No L 110, 17. 5. 1995, p. 1.

⁽⁵⁾ OJ No L 181, 1. 7. 1992, p. 12.

⁽⁶⁾ OJ No L 158, 8. 7. 1995, p. 13.

⁽⁷⁾ OJ No L 181, 1. 7. 1992, p. 21.

⁽⁸⁾ OJ No L 349, 31. 12. 1994, p. 105.

⁽⁹⁾ OJ No C 143, 9. 6. 1995, p. 8.

- (2) The measures consist, first, in exemption for products of agricultural origin from the domestic tax on petroleum products for use as fuels (TIPP) and secondly, of two 'technical progress' agreements, called the ETBE conventions, guaranteeing recipients that the rate of this exemption will remain at the level fixed by the 1993 amending Finance Act.
- (3) The tax exemption has direct effects as regards the alternative fuels and indirect effects as regards the agricultural raw materials from which these fuels are made.
- (4) The tax exemption applies directly to the fuels produced, namely esters of rapeseed oil and sunflower oil (both belonging to the 'diester' category), pure ethyl alcohol for incorporation into high-grade petrols, high-grade lead-free petrols and standard petrols, and pure ethyl alcohol as derivatives (including ethyl tert-butyl ether, or ETBE) incorporated into high-grade lead-free petrols and standard petrols (belonging to the 'bioethanol' category).

From 1 January 1994, it involves an exemption limited to FF 230 per hectolitre for esters of rapeseed and sunflower oil, an exemption limited to FF 329,50 per hectolitre for pure ethyl alcohol and derivatives, and an exemption of 100 % for certain products⁽¹⁾ of agricultural origin incorporated under customs control into oil products, when the mixture obtained is released for own use under tariff headings corresponding to indices 20, 22, 24 and 26 of Table B of Article 265 of the Customs Code.

The raw materials indirectly affected are rapeseed and sunflower seed for the diester category, and cereals, Jerusalem artichokes, potatoes and beet grown on set-aside land for the bioethanol category. The recipients are therefore certain industrial and agricultural producers. The tax exemption is granted under the following conditions:

First, under Article 30 of the 1993 amending Finance Act⁽²⁾, from 1994 the exemption is granted exclusively for products (diester and bioethanol) obtained from agricultural raw materials produced on land set aside for non-food use within the meaning of Commission Regulation (EEC) No 334/93 of 15 February 1993.

⁽¹⁾ Esters of rapeseed and sunflower oil used as a substitute for domestic fuel oil and diesel.

⁽²⁾ *Journal officiel de la République française*, 31 December 1993, p. 18 526.

Secondly, under Article 22 of the Decree of 27 March 1992⁽³⁾, the exemption from the domestic tax for ethyl alcohol, derivatives and esters of rapeseed and sunflower oil is subject to the production of certificates of production and exemption.

The certificate of production attesting the agricultural origin of the products is issued by the Ministry of Agriculture and Forests. In their letter of 19 November 1992, however, the French authorities said that certificates of production issued by the other Member States to producers operating within their borders could be acceptable equivalents.

The certificate of exemption defines the volume of fuel the holder may release for own use. Article 24 of the abovementioned Decree provides for a separate issuing procedure for each type of product: for ethyl alcohol, the exemption certificate is issued by Customs after denaturing, carried out in establishments under the supervision of the tax authorities, and approved by the Director General of Customs and Excise; for ETBE manufactured in a non-petroleum establishment, and transported for incorporation to a petroleum establishment under customs control, the certificate is issued by Customs upon entry of the ETBE into the establishment, for the volume of ethyl alcohol calculated on the basis of a processing coefficient. For esters, the exemption certificate is issued by Customs upon entry into the establishment under Customs control. In their letter of 19 November 1992, the French authorities said that the exemption certificate was issued, for all eligible ethyl alcohol originating in another Member State, in accordance with the above arrangements if the product arriving in an establishment under customs control was accompanied by a production certificate drawn up with the same guarantees as in France, ensuring in particular its agricultural origin. However, no equivalent commitment has been given for ETBE or esters.

Thirdly, the exempted products must also have been produced in production units considered experimental by the French authorities as part of an experimental project, within the meaning of the Decree of 27 March 1992.

That decree defines the 'experimental' unit as 'an establishment or group of establishments producing ethyl alcohol or derivatives from cereals, Jerusalem artichokes, potatoes or new beet crops, or producing esters of rapeseed oil or sunflower oil'. The establishment or group of establishments must be approved

⁽³⁾ *Journal officiel de la République française*, 28 March 1992, p. 4 323.

by the Ministry of Agriculture and the Ministry responsible for Customs, for establishments producing ethyl alcohol or esters, and by the Ministry responsible for hydrocarbon fuels for establishments producing derivatives of alcohol, such as ETBE. Approval of an experimental plant is subject to production of a specific contract between a supplier of raw materials and a manufacturer, and to prior verification of the production unit and the conditions of reception of the raw materials. In their letter of 19 November 1992, the French authorities said that the capacity of each unit producing ester or alcohol was not limited by the Decree, and could be up to 100 000 tonnes per year.

Article 4 of the Decree provides that the production and use of one of the exempt products constitutes an experimental project under the following conditions: the product must be supplied by an experimental unit, as defined above; a forward work programme must be lodged with the Ministries responsible; a half-yearly report on the monitoring of the distribution and use of the fuels containing ethyl alcohol, derivatives or esters of rapeseed oil or sunflower oil must be sent to the Ministries responsible.

Where the conditions for an experimental project, or the technical requirements on utilization, are not fulfilled, the Ministry responsible for Customs may refuse exemption within 30 days of the lodging of the experimental project for consideration.

- (5) The two 'technical progress' agreements provide for compensation from the State for each hectolitre of ethyl alcohol in the ETBE produced, to offset the gap recorded on the date of release for own use between the maximum exemption from the TIPP applicable to ethyl alcohol, on the one hand, and the amount guaranteed by the agreement on the other. This applies for ten years from the date of entry into service of the experimental unit, up to 31 December 2005 at the latest, if the rate of exemption is revised downwards. If the rate is revised upwards, an amount equal to the product of the difference between the two amounts and the number of hectolitres of ethyl alcohol for which the exemption has been granted during the period of overshoot, must be refunded to the State.

II

- (1) Under the abovementioned procedure, the Commission gave the French Government notice to submit its comments. The French Government's comments were notified to the Commission in a letter dated 31

March 1995, and at meetings between representatives of the French Government and the Commission on 7 March 1995, 2 February 1996 and 10 July 1996.

The Commission informed the Member States and other interested parties, by means of a communication published in the *Official Journal of the European Communities*⁽¹⁾, of its decision to initiate the procedure provided for in Article 93 (2) of the Treaty, and gave them notice to submit their comments. Comments were received from the United Kingdom in a letter of 7 July 1995, and from interested third parties in letters of 29 June and 4, 5 and 6 July 1995. Those observations were transmitted to France by letter of 3 August 1995.

- (2.1) The French authorities argue in the first place that the measures, in respect of which the Commission has initiated the Article 93 (2) procedure, are consonant with the Community policy of encouraging the use of renewable energy in general, and the development of biofuel in particular. In this context, they refer to Council Directive 92/81/EEC of 19 October 1992 on the structures of excise duties on mineral oils⁽²⁾, and in particular Article 8 (2) (d) thereof, and to the proposal for a Council Directive of 5 March 1992 on excise duties on motor fuels from agricultural sources⁽³⁾, and Council Decision 93/500/EEC concerning the promotion of renewable energy sources in the Community (Altener programme)⁽⁴⁾.

They argue that these are indeed experimental projects within the meaning of the Directive for two main reasons. First, although the rules do not set a limit on capacity, the important factor is not the rules but actual production capacity. Secondly, in reply to the Commission's remark that there is no provision for following up the results of research, the French authorities draw attention to Article 13 of the Decree of 27 March 1992, which provides for monitoring of the distribution and use of the fuels referred to in the instrument.

- (2.2) The French authorities also question the validity of the Commission's reasoning as to the legal arrangements applicable to some of the products concerned, which are included in Annex II of the Treaty, but not covered by a common organization of the market. Those products, namely ethyl alcohol and potatoes, should not be subject to the competition rules and to the checks carried out by the Commission by virtue of Articles 92 and 93 of the Treaty.

⁽¹⁾ OJ No C 143, 9. 6. 1995, p. 8.

⁽²⁾ OJ No L 316, 31. 10. 1992, p. 12.

⁽³⁾ COM(92) 36 final; OJ No C 73, 24. 3. 1992, p. 6.

⁽⁴⁾ OJ No L 235, 18. 9. 1993, p. 41.

- (2.3) The French authorities deny that the provisions of the Treaty and of Community legislation have been infringed, as is claimed in the decision initiating the Article 93 (2) procedure⁽¹⁾.

According to those authorities, Article 95 has not been infringed, since there is no reference to the place of establishment of the 'experimental units', nor to the nationality of the operators. They quote the example of approval granted to certain plants in Belgium and in Italy.

They also deny the charge of infringement of rules on common organization of markets, since the measure does not constitute indirect aid to certain basic products, because it serves a different purpose. Moreover, the quantities produced would not interfere with the market, and therefore would not affect prices, since by virtue of the contracts between manufacturers and producers, the raw materials are intended for the manufacture of esters or ETBE from the time when the plots of land are first cultivated. As to the limited list of basic products, they claim that it is justified by the fact that those products are the most suitable in view of the technical, economic and environmental constraints operating in the sectors. Even if the measure did constitute State aid within the meaning of Article 92 (1), the French authorities argue that it should be eligible for the derogation under Article 92 (3) (b) as a project of common European interest. In support of their argument, they mention the European economic interest grouping Eurobiodiesel, a grouping of undertakings from five Member States whose purpose is research to promote the use of biofuels.

- (3) Comments were received from interested third parties both for and against the French measures. The comments in support of the measures are based on the Commission's statements in favour of the development of biofuels, and the expectation of a Community framework. Comments in support of the Commission's position are based on the following reasons: most support the Commission's argument that the production units concerned ought not to be selected by virtue of the agricultural origin, on the one hand, and the national origin on the other, of the products used. Moreover, concern is expressed about the consequences of different treatment between Member States if the Union were to take new measures in the interest of the agreement on oilseeds with the United States.

An Italian company with a biofuels production plant in Belgium supplied information on the development of the European market in biofuels, and the

application, which it regards as discriminatory, of the tax exemption concerned. This company claims that the comparative figures it gives for the supply and demand of biofuels in Europe in 1994-95 clearly show that production is no longer at the experimental stage, and that France is well placed on the market.

This company was refused approval by the French Ministry for its Belgian factory as an 'experimental establishment' despite having supplied the information requested, and despite the fact that the Belgian authorities were prepared to carry out the inspections required by the French authorities. The reason given for the refusal was that the application related to an excessively large quantity, 'at all events, not less than 10 000 tonnes per year.' The factory had capacity to produce 45 000 tonnes per year of diesel of plant origin. At the same time, however, new capacity for the production of ester of rapeseed oil was authorized in France for up to 400 000 tonnes a year, including one factory with capacity for 170 000 tonnes, and another with capacity for 100 000 tonnes (see the *Bulletin de l'Industrie Pétrolière*, 10 November 1994). According to this company, the decision of the French authorities can be explained only by their wish to cordon off the French market, which would conflict with Article 95 of the EC Treaty.

III

- (1) Esters are industrial products, not included in Annex II of the EC Treaty, covered by the rules on competition, particularly those on State aid.
- (2) The other biofuel is ethyl alcohol, a product obtained from the raw materials mentioned above in point 4 of section I (cereals, Jerusalem artichokes, potatoes and new beets). This alcohol is then permanently incorporated into various high-grade fuels and petrols, and becomes an integral part of the final product. Ethyl alcohol is listed in Annex II to the Treaty, but is not covered by a common organization of the market (COM). Articles 92 and 93 do not therefore fully apply, and so the Commission can only make observations on aid in the sector pursuant to the first sentence of Article 93 (3) of the Treaty. However, where the conditions for the grant of aid contain restrictions either on the raw material from which such a product is obtained (such as cereals) or on the outlets for such a product (such as bio-ethanol), the Commission takes the view that the impact of the aid can no longer be considered to be limited to the product for which the aid is granted (in this case, ethyl alcohol). In the Commission's opinion, the aid, because it is only granted if the product is produced from a limited list of basic products covered by a common organization of the market and thus subject to all the rules laid down in

(1) OJ No C 143, 9. 6. 1995, p. 8.

Articles 92 and 93 of the Treaty, constitutes a scheme in which aid inevitably affects the said basic products. If aid to alcohol (not subject to competition rules) is granted on the strict condition that the alcohol has been manufactured on the basis of a product subject to the rules of competition (the raw materials⁽¹⁾), there is no need to treat that aid any differently from aid to raw materials granted on condition they are used to produce alcohol, since the practical effects of the two forms of aid produce the same impact on the markets for the products concerned. Application of the competition rules to these 'spill-over' effects is justified since aid to products not subject to the rules will inevitably have consequences in the markets for products subject to the rules. With respect to the application of the rules of competition to alcohol, the Commission adopts the same reasoning, *mutatis mutandis*, for bio-ethanol as an outlet for the alcohol necessarily used for that purpose. However, if the conditions for granting the aid left the recipient a free choice of raw materials and utilization of the products assisted, there would no longer be an inevitable effect on other products subject to competition rules, since the effects of granting aid for raw materials and markets of destination would result solely from economic and commercial choices by the recipients of the aid.

In the present case, for all the basic products concerned with the exception of potatoes and alcohol, all the rules on competition laid down in Articles 92 and 93 are applicable. If the aid had been granted with no legal constraint on the final use of the alcohol, the Commission would have considered that the measure could not be questioned under Articles 92 to 94 of the Treaty. However, given that aid for ethyl alcohol, in the case in point, necessarily produces effects solely on the market for fossil and plant-based fuels (to which the rules of competition apply), the Commission considers that the scheme may be examined in the full light of the Articles cited to the extent that they produce effects, albeit indirect effects, on certain other products which are

all subject to Articles 92 and 93 of the Treaty. Consequently, the aid does affect the conditions of competition of the other products.

- (3) Under Article 33 of Regulation No 136/66/EEC, Article 19 of Regulation (EEC) No 1766/92 and Article 44 of Regulation (EEC) No 1785/81, Articles 92, 93 and 94 of the Treaty are applicable to the production and trading of the products referred to in Article 1 of each of those Regulations, subject to any provisions in those Regulations to the contrary. The relevant products in the case in point are rapeseed and sunflower, cereals and Jerusalem artichokes and beets. Although potatoes are also listed in Annex II to the Treaty, they are not covered by a common organization of the market (COM). However, for the reasons given under point 2 above, the Commission considers that the arrangements can be examined in the light of the competition rules in Articles 92 and 93 of the Treaty.

IV

- (1) Under Article 92 (1) of the Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with the common market in so far as it affects trade between Member States.
- (2) The tax exemption for certain biofuels meets the criteria to be regarded as aid within the meaning of Article 92 (1) of the Treaty.
- (3) Biofuels are already subject to trade and competition between Member States, the main producers in the European Union being Belgium, France and Italy.

The value of trade in biofuels and basic products between France and the other Member States in 1995 was as follows⁽²⁾:

Product	Exports from France to other EC countries	Imports into France from other EC countries
I. Biofuels		
— esters	184 899,37	32 139,93
— ETBE	47 187,95	20 254,05
II. Basic products for the Diester sector		
— rapeseed	204 289,04	5 315,07
— sunflower	172 430,03	4 471,36

(¹) Except potatoes.

(²) Source: COMEXT 2.

Product	Exports from France to other EC countries	Imports into France from other EC countries
III. Basic products for the bioethanol sector		
— potatoes	156 396,19	104 128,44
— cereals	3 101 417,12	234 046,52
— Jerusalem artichokes	25,93	807,97
— beet	516,62	34,07

In view of the trade in products in the biofuels sector concerned, aid may affect trade between the Member States when it affords an advantage to national production over the production of other Member States.

Moreover, biofuels benefiting from this measure are also in direct competition, not only with biofuels of origins other than those provided for in the measure, but also with fuels based on chemicals such as methanol. The concerns of the competitors who submitted comments to the Commission show this problem to be pressing. France does not contest this point.

- (4) What the French authorities do contest, however, is that the measures lead to indirect aid for the small number of basic products concerned. However, the Commission can only confirm the analysis that first led it to take the decision to initiate the Article 93 (2) procedure.
- (5) The exclusion of certain basic products from the benefits of tax exemption is a strong argument for asserting that this measure constitutes aid within the meaning of Article 92 (1) of the Treaty, since it distorts competition by giving an advantage to certain agricultural products, and may, for the same reasons, affect trade between the Member States. Although the French authorities allege that the products chosen are those most suitable for the objective of developing the biofuels sector, no explanation has been given to justify the need to limit the measure to crops produced on set-aside land. On the contrary, as no technical constraint has been mentioned that could explain such severe restrictions on the origin of the products that can take advantage of the measure, it would seem that the real reason for the aid is principally to support the incomes of the farmers operating on set-aside land rather than to encourage biofuels.
- (6) Some of the comments presented to the Commission after the opening of the procedure also expressed anxiety about the influence of such a measure on intra-Community trade, in particular in the context of the obligations on the European Union as a result of international agreements to limit the use of

by-products of certain oilseed crops for the production of animal feed.

- (7) Consequently, direct aid to certain biofuels, and indirect aid to certain basic products constitute State aid within the meaning of Article 92 (1) of the Treaty and Article 61 (1) of the Agreement on the European Economic Area (EEA).
- (8) There are, however, exceptions to the principle of incompatibility between State aid and the common market.

V

- (1) The French authorities argue that this measure is eligible for the derogation in Article 8 (2) (d) of Directive 92/81/EEC, mentioned above.

The Commission cannot allow the derogation, for the following reasons. First, the provision refers solely to the mineral oils defined in Article 2 (1). Moreover, Article 2 (3) of the Directive lays down as a matter of principle that other products used as fuels (such as the vegetable oils considered here) should be taxed as mineral oils.

Only one derogation can be invoked for those other products. Article 8 (4) of the Directive provides that the Council, acting unanimously on a proposal from the Commission, may authorize any Member State to introduce further exemptions or reductions for specific policy considerations. However, no such action has been taken by the Council.

As to the definition of the measure as a 'pilot project' ⁽¹⁾, the French authorities have not provided any new information to change the position adopted by the Commission when the procedure was initiated. Considering in particular the manufacturing capacity of up to 100 000 tonnes per year, the Commission took the view that establishments operating on an industrial scale could take advantage of the reduction in excise duties. The French authorities' remarks confirm the Commission's argument

⁽¹⁾ Within the meaning of Council Directive 94/74/EC of 22 December 1994 amending Directive 92/12/EEC, Directive 92/81/EEC and Directive 92/82/EEC; OJ No L 365, 31. 12. 1994, p. 46.

that the real purpose and effect of the measure is not basic or even applied research, within the meaning of the aforementioned Directive, but the development on a commercial scale of non-food uses and the establishment of a larger volume of production of biofuels based on set-aside land.

- (2) The only derogations provided for in the Treaty which can be considered in this case are those of Article 92 (3) (b) and (c).

The derogation in Article 92 (3) (b) for aid to promote the execution of an important project of common European interest is not relevant here. Even if one of the aims of the measures was in line with Community policy to promote the development of fuels with lower pollution potential, the aid is still confined to a national scale, and further limited by the discrimination and infringements it involves.

- (3) The French authorities also present this measure as being consonant with the Community policy of encouraging the use of renewable energy in general, and the development of biofuels in particular.

This policy aim is not in doubt. The Commission stressed in its letter of 12 December 1994 to the French Government that 'this in no way calls into question the Community's interest in developing biofuels', but it has also pointed out repeatedly that the desirable development of alternative fuels cannot be achieved at the expense of other Community policies, and especially the rules in the Treaty and in Community regulations.

- (4) In its decision to initiate the procedure, the Commission clearly demonstrates that by taxing esters and ETBE imported from the other Member States and the European Economic Area more heavily than those produced in France, the measure constitutes an infringement of Article 95 of the Treaty.

As the tax exemption applied only to biofuels produced from certain basic products, the Commission takes the view that the measure discriminates against other biofuels made from other basic products (other types of product, or the same type grown on land other than set-aside land). Those other biofuels will be subject in France to the normal rate of excise. The aid measure, in the form of tax exemption, therefore constitutes an infringement of Article 95 of the Treaty since it is restricted to biofuels produced from a limited number of basic products (while excluding certain basic products that could be technically appropriate for the production of biofuels, but which are grown mainly outside France) and biofuels imported from other Member

States and produced from other basic products will be subject to a higher tax.

While it is true that the French Government has approved two establishments in Belgium and Italy, for very small quantities, that Government has also refused approval in other cases, such as that of the firm referred to in the second subparagraph of paragraph 3 of section II above.

As for imported products, the French authorities have not given any undertaking that esters and ETBE will be covered by the same arrangements for the issuing of exemption certificates as those applied to French products (see above, section I, paragraph 4).

The French authorities deny infringement of Article 95 of the Treaty, although without putting forward any argument that changes the Commission's view.

The aid measure in the form of a tax exemption is therefore an infringement of Article 95 of the Treaty, since it does not necessarily extend the same favourable treatment to biofuels imported from the other Member States.

- (5) Consequently, the Commission considers that the aid to biofuels is operating aid contravening Article 95 of the Treaty, and thus incompatible with the common market, whilst also being ineligible for any of the derogations provided for in Article 92 (3) of the EC Treaty.

VI

- (1) The French Government denies having infringed any of the rules for the common organization of the markets, as referred to in the decision initiating the Article 93 (2) procedure⁽¹⁾, for two reasons: first, the aims of the measures, which are different, and secondly, the fact that the measures do not affect the quantities produced on the markets concerned.

In the Commission's view, these arguments are irrelevant. According to the case law of the Court of Justice (see the judgment of 26 June 1979 in Case 177/78: *Pigs and Bacon Commission v. McCarren and Company Limited*⁽²⁾), the rules for the common organization of markets should be regarded as a complete and comprehensive system, for which the Community has sole competence, with Member States having no powers whatsoever to take any measures that derogate or detract from it.

⁽¹⁾ OJ No C 143, 9. 6. 1995, p. 8.

⁽²⁾ [1979] ECR 2161.

This measure is legally restricted to certain basic products grown on certain categories of land, which shows that its purpose is to support certain producers; it thus has an impact on the markets for the basic products concerned, by influencing output. The Commission would have taken a different view if the measure had applied to all the basic products that could be turned into biofuels, irrespective of whether or not they were produced on set-aside land.

- (2) The French authorities have put forward no new factors to justify the restricted list of basic products considered for aid.

In particular, they have not explained why the measure is legally restricted to products grown on set-aside land. For the sectors concerned, the provisions of Regulation (EEC) No 1765/92 involve integration of the common organizations of the corresponding markets. Article 13 of that Regulation provides that Community expenditure for the application of the arrangements should be deemed to be intervention intended to stabilize the agricultural markets within the meaning of Article 3 (1) of Regulation (EEC) No 729/70 of 21 April 1970 on the financing of the common agricultural policy⁽¹⁾. That Article provides that such intervention, undertaken to stabilize the markets according to the framework for the common organization of markets, is to be financed by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF). Therefore, any government aid in the field covered by Regulation (EEC) No 1765/92 would be equivalent to State interference in the complete and comprehensive system of the common organizations of markets.

This exemption, limited in certain cases, from 1994, to crops grown on set-aside land, thus constitutes an infringement of Regulation (EEC) No 1765/92.

- (3) Aid measures that involve infringements to Community provisions are not eligible for any of the derogations under Article 92 (3) of the Treaty. In particular, the derogation provided for in Article 92 (3) (b), which the French authorities invoke, is not applicable.
- (4) Consequently, indirect aid to the basic products contravenes the arrangements for common organization of markets under Regulation (EEC) No 1765/92 and Article 95 of the Treaty, and cannot therefore be eligible for any of the derogations provided for in Article 92 (3) of the EC Treaty.

VII

- (1) For the reasons given above, this aid fulfils the conditions laid down in Article 92 (1) of the Treaty and in Article 61 of the Agreement on the European Economic Area (EEA) without being eligible for any of the derogations provided for in paragraphs 2 and 3 of those Articles. The aid is therefore incompatible with the common market and with the operation of the EEA Agreement.

- (2) As this aid was not notified to the Commission, and was implemented without awaiting the Commission's final decision, it should be pointed out that the invalid measures cannot be regularized *ex post facto*, given the binding nature of the procedural rules laid down in Article 93 (3) of the Treaty; the Court recognized the direct effects of those rules in its judgments of 19 June 1973 (Case 77/72: *Carmine Capolongo v. Azienda Agricola Maya*)⁽²⁾, 11 December 1973 (Case 120/73: *Gebr. Lorenz GmbH v. Federal Republic of Germany*)⁽³⁾, 22 March 1977 (Case 78/76: *Steinike & Weinlig v. Federal Republic of Germany*)⁽⁴⁾ and 21 November 1991 (Case C-354/90: *Fédération nationale du commerce extérieur des produits alimentaires and others v. France*)⁽⁵⁾.

Moreover, where aid is incompatible with the common market, the Commission, in accordance with the case law of the Court of Justice, and in particular the judgment of 12 July 1973 (Case 70/72: *Commission v. Federal Republic of Germany*)⁽⁶⁾, confirmed by the judgments of 24 February 1987 (Case 310/85: *Deufil v. Commission*)⁽⁷⁾ and of 20 September 1990 (Case C-5/1989: *Commission v. Federal Republic of Germany*)⁽⁸⁾, may require the Member States to recover from the recipients any aid that was granted unlawfully.

- (3) France did not take account of the suspensory effect of Article 93 (3) of the Treaty, since it did not give the Commission time to reach a conclusion before granting the aid. Consequently, the aid was unlawful under Community law from the time it was first granted.

The Commission usually expects that unlawful and incompatible aid will be recovered. In this case, however, there is no reason to require recovery of the aid.

⁽²⁾ [1973] ECR 611.

⁽³⁾ [1973] ECR 1471.

⁽⁴⁾ [1977] ECR 595.

⁽⁵⁾ [1991] ECR I-5505.

⁽⁶⁾ [1973] ECR 813.

⁽⁷⁾ [1987] ECR 901.

⁽⁸⁾ [1990] ECR I-3437.

⁽¹⁾ OJ No L 94, 28. 4. 1970, p. 13.

It must be borne in mind that France has undertaken the development of a biofuels sector. In the first place, the use of biofuels could help to reduce pollution, thus contributing to conserving the environment; and in the second, the Commission wishes to support environment-friendly energy and farm policies.

Moreover, the advantage to the manufacturers of the direct aid was temporary, or at least marginal, although not quantifiable. While it did enable them to supply biofuels at a competitive price, the quantities concerned were generally not very large in relation to the market for fuels in general. Data from expert sources relating to the diester sector, which is preponderant, show that the aid to the plant-based fuels concerned did not in general overcompensate for the excess production costs. While it is true that the question of overcompensation in each case depends on individual circumstances and a variety of factors, in particular production capacity and continuity of output in each establishment producing biofuels, it can still be argued that even where there was some overcompensation, the effect would have been attenuated by higher indirect costs such as the distribution costs exceeding those in the sector of fossil fuels.

It should be observed, however, that on the basis of the above-mentioned data, the non-weighted average does not in general indicate compensation in excess of the extra cost of producing biofuels. Moreover, the Commission has no evidence such as would suggest that the real effect of the aid was to benefit manufacturers in terms of significantly higher sales or profits for the total amount of fuel produced. It would appear, indeed, that reducing the tax on biofuels to a level where those biofuels could be put on the market, and thus compete with fossil fuels, was not likely to lead to more than a marginal increase in the total output of fuels by those manufacturers, in view of the fact that the size of the market for those manufacturers is conditioned by factors other than the availability of agricultural raw materials for processing into fuel. However, the farmers, as indirect recipients of the aid, did benefit from considerably increased demand for the agricultural products concerned, grown on set-aside land. The real effect of the aid was thus to create a market for the said agricultural products where there had previously been no significant demand. Had the tax reduction not occurred, taking account of market prices for fossil fuels, there would have been little or no commercial point in farmers' producing the agricultural raw materials for the production of fuels of plant origin. This leads to the conclusion that from the point of view of the broad structure of the system, the

substantive effect of the aid bypassed the manufacturers, technically the direct recipients, and benefited the producers of the raw materials, who became the indirect recipients.

However, the infringements of Community law which the French arrangements entailed were not of themselves liable to increase output of raw materials, or to raise prices. On the contrary, the infringement is characterized by the discretionary choice of certain recipients: if the French authorities had given entitlement to the tax reduction to any raw material of any origin whatsoever, demand for the raw materials would have been likely to expand, which would in turn have increased output.

In view of the temporary nature of the advantage to the biofuel manufacturers and of the specific nature of the infringement at the level of farmers, who were the actual beneficiaries, it seems unnecessarily severe to require recovery of the amounts granted under this measure, which is basically in agreement with Community policy, and which (apart from the procedural aspects) is essentially unlawful only in terms of the excessively restrictive approach to the indirect recipients of aid.

Moreover, the economic justification for requiring recovery of illegal and incompatible aid is that it restores the *status quo*, in that it brings the economic situation of the recipients back to what it would have been before the grant of aid. In view of the very temporary nature of the advantage to the manufacturers, the recovery of the aid from the direct recipients would in this case produce an economic situation for those operators considerably worse than before the grant of aid. Indeed, as demonstrated above, there was in general no overcompensation of manufacturers as a consequence of the arrangements introduced by the French authorities. Recovery of the aid would not, therefore, restore the *status quo*.

However, for the farmers who benefited from the measure, two specific factors should be considered. First, the real (albeit indirect) advantage was the creation of a new market that had not previously existed. Sales of agricultural products, from the point of view of the farmers concerned, were effected under the conditions of that market.

On the other hand, the Commission cannot ignore a very special feature of the case in point: the farmers whose products were sold to manufacturers did not know and could not have known that the purchase was due to State aid. For those farmers, there was no

sign that the manufacturers were not operating under the normal commercial conditions of the market.

Consequently, a request for recovery of the aid would not be sustainable under law.

Nevertheless, this decision does not prejudice the conclusions the Commission may draw, if necessary, for the financing of the common agriculture policy by the European Agricultural Guidance and Guarantee Fund (EAGGF),

HAS ADOPTED THIS DECISION:

Article 1

The aid granted in France in the form of a tax exemption for biofuels of agricultural origin as provided for in Article 32 of the 1992 Finance Act, Article 89 of the 1993 Finance Act and Article 30 of the 1993 amending Finance Act, and in the two 'technical progress' agreements known as the ETBE Conventions, is illegal, having been granted in contravention of the procedural rules laid down in Article 93 (3) of the Treaty.

Article 2

This aid is incompatible with the common market within the meaning of Article 92 of the Treaty.

Article 3

France is required to discontinue the aid referred to in Article 2 within two months of notification of this Decision.

Article 4

France shall inform the Commission within two months of notification of this Decision of the measures it intends to take to comply herewith, and shall also inform the Commission within the time limit laid down in Article 3 of the measures that have been taken to comply therewith.

Article 5

This Decision is addressed to the French Republic.

Done at Brussels, 18 December 1996.

For the Commission

Franz FISCHLER

Member of the Commission