

COMMISSION

COMMISSION DECISION

of 28 January 2009

**on the ‘contingency plans’ in the fruit and vegetable sector implemented by France
(C 29/05 (ex NN 57/05))**

(notified under document number C(2009) 203)

(Only the French text is authentic)

(2009/402/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Having given notice to the parties concerned to submit their comments, in accordance with the first subparagraph of Article 88(2) of the Treaty, and having regard to those comments,

Whereas:

25 July 2003, France submitted information on the nature of measures financed and tables showing the breakdown of public funding for different holdings for the 1998-2002 period.

(5) The measure was subsequently entered in the register of unnotified aid under number NN 57/05.

(6) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽¹⁾. The Commission called on the other Member States and interested third parties to submit their comments on the aid in question.

I. PROCEDURE

(1) In response to a complaint, on 31 July 2002 the Commission wrote to the French authorities requesting information on unnotified aid in the fruit and vegetable sector that it was claimed France had been paying for several years under schemes known as contingency plans, strategic plans or annual plans (hereinafter referred to as contingency plans).

(2) A meeting took place between the French authorities and the Commission on 21 October 2002.

(3) By letter of 26 December 2002, registered on 2 January 2003, France provided information confirming that such aid had been paid up until the year 2002.

(4) By letter of 16 April 2003, the Commission asked France to provide it with a complete inventory of aid paid under ‘contingency plans’, broken down by measure and by holding, including the amount of aid paid for each measure and the precise duration of the schemes. By letter of 30 April 2003, France requested an extension of the deadline for replying to the Commission’s request for information. By letter of 22 July 2003, registered on

(7) France requested an extension of the deadline for replying, by letter dated 5 August 2005, received on 9 August 2005. France submitted its comments by letter dated 4 October 2005, received on 6 October 2005.

(8) By letter of 22 October 2005, registered on 24 October 2005, the Commission received comments from a third party with an interest, the Federation of Economic Agricultural Committees connected with the fruit and vegetable production sector [*Fédération des Comités Economiques Agricoles rattachés à la filière de production des fruits et légumes*] (hereinafter referred to as FEDECOM), which is a federation of agri-economic committees and specialist fruit and vegetable federations. These comments were forwarded to the French authorities by letter dated 1 December 2005. The French authorities replied by letter dated 28 December 2005, in which they gave their permission for the letters dated 26 December 2002 and 22 July 2003 to be forwarded to FEDECOM. In the same letter, the French authorities sent a correction to the financial tables previously supplied. The letters concerned were forwarded to FEDECOM by letter dated 18 January 2006.

⁽¹⁾ OJ C 233, 22.9.2005, p. 21.

II. DESCRIPTION

- (9) Following an anonymous complaint, the Commission came into possession of a number of documents showing that State aid had been paid to the fruit and vegetable sector in France. Public funds from the National Interbranch Office for Fruit, Vegetables and Horticulture [*Office National Interprofessionnel des Fruits, des Légumes et de l'Horticulture*], (hereinafter referred to as ONIFLHOR) had apparently been paid to producers through the economic agricultural committees for undertaking measures to support the fruit and vegetable market.

1. Measures to support the fruit and vegetable market

1.1. The economic agricultural committees — composition, task and financing arrangements

- (10) The economic agricultural committees bring together the agricultural producer groups of a given sector. They are established by French law ⁽¹⁾ and are governed by the provisions of Article 552-1 *et seq.* of the Rural Code.
- (11) The task of the economic committees is to lay down common rules for their members to harmonise the production, distribution, prices and placing on the market of their products ⁽²⁾.
- (12) Although set up in company forms governed by private law, the committees must be approved by the Ministry of Agriculture and are closely monitored by the public authorities. In particular, the Prefect of the region where the committee has its seat attends all the decision-making meetings of the bodies and follows all their deliberations.
- (13) To cover their operating costs, the economic committees receive a registration fee from the producer organisations and contributions based on the value of their marketed production ⁽³⁾. These contributions are compulsory for the parties involved exclusively by virtue of the contract between the members and the committee (*contractual contributions*).
- (14) Furthermore, the approved economic agricultural committees may draw up special rules for production

and placing products on the market, which they may require to be extended to all the producers in their territorial area. This extension is done by a decree from the Ministry of Agriculture. The decision to extend the rules creates an obligation for the remaining independent producers to pay contributions to the committees, known as *contributions for the extension of the rules*.

1.2. The 'contingency plans'

- (15) Eight economic agricultural committees (Rhône-Méditerranée, Grand Sud-Ouest, Corse, Val de Loire, Nord, Nord-Est, Bretagne and Normandie) received public funding for many years, provided mainly by ONIFLHOR, and used to finance aid known as 'contingency plans', comprising measures both inside and outside the EU aimed at facilitating the marketing of agricultural products harvested in France, particularly in periods of crisis.
- (16) According to the complainants, these provisions were introduced before the 1996 reform of the CMO in fruit and vegetables. France has assured us that no further measures have been financed under these provisions since 1 January 2003.
- (17) As far as the exact nature of the measures was concerned, in their letter of 26 December 2002, the French authorities explained that they were aiming to prevent or, in the event of crises, to mitigate the effects of supply temporarily exceeding demand by acting on three levels: external markets, the internal market and processing.
- (18) On the external markets, the aim was to maintain the market shares of the French products by allowing exporters to position themselves on strategic markets and compete on prices.
- (19) On the internal market, the measures financed were aimed at relieving the market either by offering more attractive prices, or by destroying part of the surplus harvest or encouraging its processing. The French authorities also refer to measures for the temporary storage of products in the event of market saturation and measures to allow processing companies to improve the market conditions for fresh produce.

⁽¹⁾ Notably the law of 6 October 1982 and the law No 2001-6 of 4 January 2001.

⁽²⁾ Law No 99-574 of 9 July 1999, Article 59 III, IV (French Official Journal of 10.7.1999).

⁽³⁾ Decree No 90-879 of 28 September 1990, Article 4 (French Official Journal of 30.9.1990).

- (20) The French authorities' letter of 22 July 2003 included tables of figures indicating the amounts of public aid paid for measures concerning 'processing', 'market relief', 'quality', 'contracting', 'external markets' and 'storage'.
- (21) The documents and information available to the Commission contain more precise figures, albeit limited to certain products, on the type of measures likely to have been financed under the 'contingency plans'.
- (22) For example, with regard to apple production, a letter received by the Commission in April 2002 refers to aid for export outside the Community which was allegedly paid under cover of aid for marketing. In reality, the measure consisted of offering discounts to the buyer, paid for by the French authorities per box of apples bought. Moreover, according to other documents, in 2000 the fruit and vegetable economic committee for the Bassin Rhône Méditerranée (BRM) apparently financed items such as 'production costs', 'sales prices', 'processing policy', 'structural export', 'export development', 'export during a production peak', 'emerging markets', and 'internal market development'. In the peach and nectarine sectors, this aid appears to have been granted on the basis of quantities produced.
- (23) Certain documents in the Commission's possession indicate that the French authorities were informed of the dubious nature of these actions with regard to Community law. They themselves regarded these actions as 'largely anti-Community' and drew attention to the 'threat of an obligation to have the producers reimburse sums unduly paid' ⁽¹⁾. A report from the BRM also recalls the 'confidential nature of the strategic plans and the need for discretion, given their anti-Community element' ⁽²⁾.
- (25) FEDECOM explained the funding mechanism for the 'contingency plans' in detail, along with the role of the committees. France has not contested these explanations.
- (26) According to FEDECOM, the measures to apply were determined exclusively by ONIFLHOR and the economic committees were obliged to apply them. At the time of each contingency plan and for each type of plant, ONIFLHOR took a decision on which measures to take and entrusted the relevant national section with implementing them. ONIFLHOR also decided the sums allocated to the plans in question, as well as the amount of contributions that had to be paid by the economic committees.
- (27) The measures were financed from an operational fund managed by the economic committees. This fund worked on the basis of the same principles as those governing Community aid provided for by Article 15 of Council Regulation (EC) No 2200/96 of 28 October 1996 on the common organisation of the market in fruit and vegetables ⁽³⁾, in that part of the money came from public funds and part from financial contributions from the member producers (known as *sectoral contributions*), based on the quantity or value of the fruit and vegetables sold. The sectoral contributions were not made up of contributions for the extension of the rules. Thus they were not compulsory by virtue of a ministerial decree.
- (28) The sectoral contributions were demanded by the economic agriculture committees and ONIFLHOR paid them from government aid. However, the producer organisations had the option not to take part in the initiative. The non-payment of sectoral contributions equated to a rejection of ONIFLHOR aid. In this case, government aid was blocked at economic committee level and ONIFLHOR asked for ex-post reimbursement. In fact, certain producer organisations, such as Roussillon Méditerranée, Rambertfruits and Vallée de l'Eyrieux, refused to pay the sectoral contributions and therefore did not benefit from aid under the 'contingency plans'.

1.4. Amount of aid

1.3. Financing mechanism

- (24) In its letter of 26 December 2002, France explained that 30-50 % of the funding of these measures was covered by the sectors concerned, with the remainder coming from public funds.

- (29) The following table gives an overview of the amounts paid, in euro, by ONIFLHOR under the 'contingency plans' from 1992 to 2002 ⁽⁴⁾. These sums are broken down by year and by measure. However, for 1992 and 1993, the table only shows the overall amount of aid paid. France has explained that the ONIFLHOR archives do not allow for a more detailed breakdown for these two years.

⁽¹⁾ Minutes of the Fruit and Vegetables meeting of 11 April 2001, notes from the Ministry of Agriculture, Annex No 19.

⁽²⁾ Minutes of the General Assembly of the Fisheries OP of 31 August 2000 in Nîmes, Annex No 20.

⁽³⁾ OJ L 297, 21.11.1996, p. 1.

⁽⁴⁾ This table takes account of the correction sent by the French authorities by letter of 28 December 2005.

(in EUR)

	Processing	Market relief	Quality	Contractualisation	External markets	Storage	Total
1992							29 081 983,81
1993							18 639 480,39
1994	3 476 338,03	7 476 623,78	7 344 395,76	141 027,37	7 681 356,49	370 770,47	26 490 511,90
1995	6 355 889,01	10 693 311,73	3 359 858,02	109 049,43	15 738 316,68	745 034,23	37 001 459,10
1996	6 806 740,88	16 777 570,17	5 808 577,08	297 302,41	16 024 793,42	467 681,24	46 182 665,21
1997	5 727 385,57	9 219 002,49	4 197 657,27	210 767,17	12 928 391,98	348 239,42	32 631 443,91
1998	5 108 432,83	10 714 426,52	3 225 588,91	235 250,96	8 060 847,76	221 905,32	27 566 452,29
1999	13 025 113,13	11 885 479,12	5 496 144,68	193 162,59	18 580 942,06	1 211 975,20	50 392 816,78
2000	9 472 914,30	8 748 331,16	5 601 928,08	648 258,44	11 496 657,37	787 112,53	36 755 201,88
2001	7 661 016,28	0	735 689,69	1 121 848,94	2 891 108,02	287 509,69	18 763 119,48
2002	6 568 162,59	0	3 686 121,77	37 869,61	3 623 285,33	783 323,81	14 698 762,81

2. Points raised by the Commission in the context of initiating an investigation procedure

- (30) The Commission initiated the investigation procedure provided for by Article 88(2) of the Treaty as it had serious doubts as to the compatibility of this aid with the common market and considered that it should initially be categorised as simple operating aid. Furthermore, such measures appeared to seriously interfere with the mechanisms of the common organisation of the market in the fruit and vegetable sector.

III. COMMENTS BY THIRD PARTIES

- (31) The complainant did not make any comments in the context of the formal investigation procedure.
- (32) FEDECOM submitted a document describing the composition and arrangements for financing of these committees, along with the role played by the latter in the context of the 'contingency plans'.
- (33) France has not contested the accuracy of these descriptions.
- (34) On the basis of the information provided (set out in sections 1 and 3 of the document referred to in paragraph 32), FEDECOM claims that:
- (35) The economic agricultural committees were not beneficiaries of sums allocated under the 'contingency plans'.

The committees limited themselves to taking receipt of the funds and subsequently redistributing them to the end recipients (the producer organisations and, though them, the producers belonging to the organisations).

- (36) The payment of the 'sectoral contribution' was voluntary on the part of the producer organisations, the principle of which was subject to approval by the national sections concerned and decided on in accordance with a democratic process. There was no text that obliged the producer organisations to ask to benefit from Community aid. Consequently, according to FEDECOM, the sectoral contributions cannot be considered as constituting State resources, given their private and voluntary nature.

- (37) According to FEDECOM, the measures taken under the 'contingency plans' do not constitute State aid within the meaning of Article 87(1) of the Treaty, given that the criterion of financing the aid granted through State resources is not met in this case.

IV. COMMENTS BY FRANCE

- (38) By letter of 4 October 2005, France submitted its comments concerning the Commission's decision to initiate the procedure provided for in Article 88(2) of the Treaty in respect of the unnotified aid.
- (39) France did not clarify the exact nature of the measures funded under its 'contingency plans', nor did it contest the Commission's preliminary analysis on the incompatibility of this aid with the common market with regard to Community legislation.

(40) However, with regard to the nature of the sectoral contributions paid for financing the 'contingency plans', France indicated that these contributions constituted the contribution of the sectors concerned for measures financed under the 'contingency plans' and did not benefit from the extension of rules as provided for by Article 18 of Regulation (EC) No 2200/96 on the common organisation of the market in fruit and vegetables. According to the French authorities, these were voluntary contributions not laid down by the public authorities and which were freely available to the economic committees. They were not obligatory in nature. France concluded that these contributions could not be equated to State resources within the meaning of Article 87(1) of the EC Treaty.

(41) France supplied a table with the amounts of appropriations for the 'contingency plans' taken from the ONIFLHOR budget for the years from 1994 to 2002, broken down by production and by measure (see above). These amounts do not include the 'sectoral contributions' paid by the sector. A correction of this table for the year 2002 was sent to the Commission by letter of 28 December 2005.

V. ASSESSMENT

(42) The Commission finds that Articles 92, 93 and 94 of the Treaty (which have become Articles 87, 88 and 89) were applicable to the production of and trade in fruit and vegetables, by virtue of Article 31 of Regulation (EEC) No 1035/72 of 18 May 1972 on the common organisation of the market in fruit and vegetables⁽¹⁾, and of Article 43 of Regulation (EC) No 2200/96, which were applicable at the time the aid was granted.

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

(43) Article 87(1) of the Treaty provides: 'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market'.

(44) For a measure to be within the scope of Article 87(1) of the Treaty, each of the following four conditions must be

cumulatively met: 1) the measure must be financed by the State or through State resources and be attributable to the State; 2) it must selectively concern certain undertakings or sectors of production; 3) it must involve an economic advantage for the recipient undertakings; 4) it must affect intra-Community trade and distort or threaten to distort competition.

(45) Firstly, the measures undertaken in the context of the 'contingency plans' benefited exclusively (selectively) the fruit and vegetable producers of the French departments concerned.

(46) As far as the definition of the beneficiaries is concerned, the effect of the aid suffices to determine its beneficiaries. The beneficiaries of the aid are those who actually benefited⁽²⁾ from it and who saw their competitive situation improve after payment of the aid.

(47) In this case, it is clear from the very nature of the actions undertaken in the context of the 'contingency plans' (see paragraphs 17 and following of this Decision) that they were intended to facilitate the sale of French produce, by making it possible for producers to benefit from a sales price (or sales-related payment) higher than the actual cost paid by the buyer of the goods. Thus, it appears that the producers were the final beneficiaries of this aid.

(48) However, the explanations given by FEDECOM and not contested by the French authorities make it clear that the economic agricultural committees initially distributed the funds made available under the contingency plans between the producer organisations, which had been part of the contingency plan initiative and paid the sectoral contributions, the benefit of this aid then being passed on to the producers by the professional organisations.

(49) However, the Commission notes that Article L 551-1 of the Rural Code allows for producer organisations to exist under different legal forms, equating to close business links, to a greater or lesser extent, between the members of these organisations. Also, it cannot be ruled out that, in certain exceptional cases, the benefit of the aid is not transferred by the producer organisation to its members, meaning that, in these very particular cases, the final beneficiary of the aid will be the producer organisation.

⁽¹⁾ OJ L 118, 20.5.1972, p. 1.

⁽²⁾ Judgment of the Court of 21 March 1991, Italy v Commission (Case C-303/88, ECR 1991, p. I-1433), paragraph 57.

- (50) Secondly, the producers in question benefited from an economic advantage in the form of the financing of different market support measures. This advantage improved their competitive position. According to the established case-law of the Court of Justice, the improvement of the competitive position of an undertaking resulting from State aid, indicates, as a general rule, a distortion of competition compared with other undertakings not receiving the same aid ⁽¹⁾.
- (51) Thirdly, at the time of payment of the aid, the fruit and vegetable sector was fully open to competition and characterised by intense intra-Community trade ⁽²⁾. The existence of a common market organisation in the sector is further proof of the importance of intra-Community trade in fruit and vegetables and of the desire to ensure undistorted conditions of competition on the common market. The measures in question, which sought to manipulate the prices and quantities placed on the market, were thus of a nature to affect trade and distort competition. With regard to the measures aimed at non-EU markets, the case law of the Court indicates that, given the interdependence of the markets on which Community producers are operating, the possibility that aid could distort intra-Community competition by strengthening the competitive position of operators, even if the aid benefits products for export outside the Community, cannot be ruled out ⁽³⁾. Thus, the criteria concerning the effect on trade and the distortion of competition are fully met.
- (52) Fourthly, with regard to the criterion of financing by the State through State resources, an in-depth study should be conducted, inter alia, examining the arguments of the French State and of FEDECOM on the character of State resources of the sectoral contributions.
- (53) In accordance with the case-law of the Court, for a benefit to qualify as State aid, it must first be awarded directly or indirectly through State resources and, secondly, it must be attributable to the State ⁽⁴⁾.
- (54) The Commission notes that ONIFLHOR is a public body. Consequently, financial support from ONIFLHOR for the 'contingency plans' clearly constitutes State resources. The measures undertaken as part of these plans are moreover attributable to the State, because for each contingency it was ONIFLHOR that decided on the measures to take, entrusted the implementation of these measures to the relevant national section, decided the sums allocated and the amount of the sectoral contributions.
- (55) In the light of the case-law of the Court ⁽⁵⁾, the Commission considers the fact that a measure attributable to the State was partially financed by contributions from the undertakings concerned does not divest it of its character of State aid, given that this depends on the arrangements under and effects of the system. The mandatory or voluntary nature of these contributions does not play any part in the application of this principle. Consequently, FEDECOM's allegation that the measures implemented under the 'contingency plans' do not constitute aid due to the private nature of the sectoral contributions must be rejected.
- (56) The Commission is therefore able to find that the measures undertaken under the 'contingency plans' were financed by the State or through State resources and were attributable to the State.
- (57) The Commission nevertheless wished to verify that the possible applicability of the recent case-law of the Court with regard to State resources to this case did not call this reasoning into question. To this end, the main considerations of the Court in the *Pearle* ⁽⁶⁾ case should briefly be recalled. In its judgment, the Court stated that the revenue from a compulsory levy on all the companies in a sector of activity, collected by an intermediate association governed by public law, could be considered as a State resource only if each of the following four conditions were cumulatively met: (a) the measures financed by the mandatory contributions were determined by the sector concerned; (b) 100 % of the financing came from the contributions of the companies in the sector; (c) the contributions were compulsorily earmarked for the funding of the measure, with no possibility for the State to intervene by determining or modifying the use of these resources; (d) the parties who paid the contributions were also the beneficiaries of the measure.
- ⁽¹⁾ Judgment of the Court of 17 September 1980, Philip Morris/Commission, (Case 730/79, ECR 1980, p. 2671), paragraphs 11 and 12.
- ⁽²⁾ For example, in 2000 intra-Community trade in vegetables amounted to 6 727 000 tonnes and trade in fruit to 5 609 000 tonnes. France has always been one of the EU's biggest producers of fruit and vegetables, producing 3 681 000 tonnes of fruit and 7 989 000 tonnes of vegetables in 2000.
- ⁽³⁾ Judgment of the Court of 21 March 1990, Belgium v Commission (Cases C-142/87, ECR 1987, p. 2589), paragraph 35, ECR 1987, p. 2589.
- ⁽⁴⁾ Judgment of the Court of 21 March 1991, Italy v Commission (C-303/88, ECR I-1433), paragraph 11. Judgment of the Court of 16 May 2002, France v Commission (C-482/99, ECR 2002, p. I-4397), paragraph 24. Judgment of the Court of 20 November 2003, GEMO (C-126/01, ECR 2003, p. I-13769), paragraph 24.
- ⁽⁵⁾ Judgment of the Court of 22 March 1977, Steinike & Weinlig (78/76, ECR 1977, p. 595) and judgment of the Court of 11 November 1987 (259/85, France/Commission, ECR 1987, p. 4393), paragraph 23.
- ⁽⁶⁾ Judgment of the Court of 15 July 2004, Pearle e.a. (Case C-345/02, ECR 2004, p. I-7139). The disputed measure was a publicity campaign for the optical sector, financed entirely by a 'compulsory contribution' levied on the companies in the sector. This charge was imposed by a trade association governed by public law. This association never had the power to freely dispose of contributions gathered in this manner.

(58) In this case, less than 100 % of the financing came from the contributions of the companies in the sector. Evidently, this does not meet the *Pearle* criteria. It must, however, be noted that in the *Pearle* judgment, the Court ruled on a different situation and for a different purpose. The Court wanted notably to identify the criteria that would allow the establishment of the circumstances in which the role played by the State in creating a measure entirely financed by the beneficiary sector is so marginal that the measure in question is not considered to meet all the criteria of Article 87(1) of the Treaty.

(59) In the case in question, the State's role was clearly central at all stages of the implementation of the plans (from the choice of measures to their co-financing). The two situations (this case and the case in the *Pearle* judgment) are thus difficult to compare.

(60) Furthermore, the Court of First Instance recently ruled on the infamous role that the French State played in another aid scheme in the agricultural sector, which had led the Court to consider that the sectoral contributions were State resources, *inter alia*, from the fact that they had required the adoption of an act by a public authority for their impact to be felt ⁽¹⁾.

(61) In this case, the main choice given to the producer organisations was whether or not to take part in the State's initiative. Again, if they decided not to take part, the producers affected would lose the benefit of the funds allocated to the contingency plans by ONIFLHOR, which constituted a strong incentive to participate in this initiative.

(62) In view of the considerations set out above, the Commission confirms that an analysis in the light of the four criteria set out in Article 87(1) of the Treaty allows the nature of the measures connected with the 'contingency plans' to be conclusively established as State aid.

2. Unlawfulness of the aid

(63) The Commission notes that the French authorities did not notify it of the measures introducing the aid in question, as required by Article 88(3) of the Treaty. The measures thus constitute unlawful aid within the meaning of Article 1(f) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽²⁾.

(64) It must be noted that the Commission's examination here only covers the period between 31 July 1992 to the current date, by virtue of Article 15 of Regulation (EC) No 659/1999, which states that the powers of the Commission to recover aid shall be subject to a limitation period of 10 years. If the Commission concludes that the unlawful aid in question here is incompatible with the common market organisation, it may only order its recovery for the period prescribed. The prescription period may be interrupted by any measure taken by the Commission with regard to the unlawful aid. In the case in question, the prescription period was interrupted by a letter from the Commission to France on 31 July 2002. Consequently, the period preceding 31 July 1992 may not be taken into account by the Commission.

3. Assessment of the compatibility of the aid

(65) Article 87 of the Treaty admits some exceptions to the general principle of the incompatibility of State aid with the Treaty.

(66) Firstly, the Commission notes that the French authorities have not put forward any argument to show that the aid examined is compatible with the common market.

(67) Secondly, some of the exceptions provided for by the Treaty are clearly not applicable here, notably those provided for in Article 87(2), which covers aid having a social character, aid to make good the damage caused by natural disasters, and aid relating to German reunification. The same applies to the exemptions provided for in Article 87(3)(a), (b) and (d) of the Treaty, given that the aid in question was neither intended for the promotion of the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, nor was it intended for projects of common European interest or to remedy a serious disturbance of the economy of a Member State, nor for the promotion of culture and heritage conservation.

(68) The only derogation which may apply in the case in point is that provided for in Article 87(3)(c) of the Treaty, which provides 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. In order to be covered by this derogation, aid must comply with the Community rules governing State aid.

⁽¹⁾ Judgment of the Court of 20 September 2007, *Salvat Père & Fils* e.a./Commission (T-136/05, ECR p. II-4063).

⁽²⁾ OJ L 83, 27.3.1999, p. 1.

3.1. Identifying the guidelines applicable to the unlawful aid

- (69) In accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid ⁽¹⁾, all unlawful aid under Article 1(f) of Regulation (EC) No 659/1999 must be examined in accordance with the texts in force at the time when the aid was granted.
- (70) Thus, the aid paid between 1 January 2000 and 31 December 2002 (date on which the aid payments ceased) must be examined in the light of the rules set out in the guidelines for State aid in the agriculture sector ⁽²⁾. However, any aid granted before this date must be assessed in the light of the measures and practice applicable before 1 January 2000.

3.2. Incompatibility of the aid

- (71) According to the information available to the Commission, the 'contingency plans' provided for measures intended to deal with crises caused by a surplus of French products on the Community market, in particular by subsidising selling prices and providing subsidies for the storage or destruction of part of the harvest and financial incentives to process fresh products. On markets outside the European Union, export subsidies would also have helped to dispose of surplus French products and could have strengthened the operators' competitive position. This aid seems to have been provided on the basis of prices and the quantity produced.
- (72) This aid is neither provided for by the abovementioned guidelines nor by any other Community rules on the subject. It clearly constitutes operating aid which was aimed at facilitating the sales of French products by manipulating the sales price or the quantities available on the markets. Interventions of this nature are strictly forbidden by Community legislation on State aid.
- (73) It should be recalled that, as the Court of Justice and the Court of First Instance have ruled, operating aid, i.e. aid aimed at relieving undertakings of costs that they would normally incur in the ordinary management of their activities, in principle distorted competition to the extent that, for one part, it did not facilitate the 'development' of any economic sector and, for the other part, it gave the beneficiary artificial financial support causing an ongoing distortion of competition and affecting trade in a manner contrary to the common interest ⁽³⁾.

- (74) In particular, the agriculture markets in the European Union are thoroughly regulated through common market organisations (CMO). One of the CMO's tasks is to ensure fair competition between the operators of the sector concerned within the European Union. Market support measures such as those introduced and financed by France, based on the prices and quantities produced, are contrary to the aims of the fruit and vegetable CMO, and likely to seriously disturb its operation. In the case in the question, the CMO concerned was the fruit and vegetables CMO, based, for the 1992-2002 period, respectively on Regulations (EEC) No 1035/72 and (EC) No 2200/96.

- (75) As the Court of Justice has repeatedly pointed out ⁽⁴⁾, any intervention by a Member State in the market mechanisms, excluding those specifically provided for by a Community regulation, risks interfering with the operation of the common market organisations and giving unfair advantages to certain economic groups in the Community. In particular, in its most recent ruling ⁽⁵⁾, the Court again pointed out that in a sector covered by a common organisation, *a fortiori* where that organisation is based on a common pricing system, Member States can no longer take action, through national provisions taken unilaterally, affecting the machinery of price formation at the production and marketing stages established under the common organisation.

- (76) It should be noted that the national mechanisms for aid for prices such as those in question in this case compromise the common pricing system and more generally the finality of mechanisms established by Community regulations on the common organisation of markets, even if their aim was to facilitate the sales of national products on the markets of non-EU countries. In fact, these regulations also affect the sales of Community products on the markets of non-EU countries and thus harmonise conditions of competition between Community producers.

- (77) In light of the considerations set out above, the Commission concludes that the aid measures described cannot benefit from any derogation provided for by the Treaty, in that they distort competition and are not justified with regard to the common interest.

⁽¹⁾ OJ C 119, 22.5.2002, p. 22.

⁽²⁾ OJ C 28, 1.2.2000, p. 2.

⁽³⁾ See judgment of the Court of 8 June 1995, *Siemens v Commission* (Case T-459/93, ECR II-1675), paragraphs 48 and 77.

⁽⁴⁾ See, for example, the judgment of the Court of 29 November 1978, *Redmond* (known as the 'Pigs Marketing Board' judgment) (83/78, ECR 1978, p. 2347), paragraph 60.

⁽⁵⁾ Judgment of the Court of 26 May 2005, *Kuipers* (C-283/03, ECR 2005, p. I-3761), paragraphs 42, 49 and 53.

VI. CONCLUSION

- (78) The State aid provided by France in the form of 'contingency plans' for French fruit and vegetable producers between 1992 and 2002 is incompatible with the common market.
- (79) The Commission regrets that France operated the above aid measures in contravention of Article 88(3) of the Treaty.
- (80) Where unlawful aid is incompatible with the common market, Article 14(1) of Regulation (EC) No 659/1999 provides that the Commission must decide that the Member State concerned take all necessary measures to recover the aid from the beneficiary. Such reimbursement is necessary to re-establish the situation applying previously, and involves cancelling all the financial advantages from which beneficiaries of the unlawfully granted aid have unduly benefited since the date the aid was granted.

VII. RECOVERY PROCEDURE

- (81) As indicated in Article 15(64) of the Procedural Regulation (EC) No 659/1999, the powers of the Commission to recover aid shall be subject to a limitation period of 10 years (the so-called 'prescription period'). The limitation period shall begin on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme. However, any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid shall interrupt the limitation period. Each interruption shall start time running afresh. Given that the Commission took its first action on 31 July 2002, in the case in question the Commission may not recover any aid which predates 31 July 1992.
- (82) The interest rates applicable for recovering the aid deemed incompatible and the rules governing these rates are set out in Chapter V of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty⁽¹⁾, as amended by Commission Regulation (EC) No 271/2008⁽²⁾.
- (83) The aid shall be recovered in accordance with the procedures under French law, provided these allow the immediate and effective implementation of this Decision.

- (84) The aid shall be recovered from the beneficiaries of the aid. As mentioned above, the final beneficiaries of the aid are, in principle, the producers belonging to professional organisations who participated in the contingency plans. However, in exceptional cases, it may be possible that the aid had not been transferred to them by the producer organisations. Thus, the aid should be recovered from the producers, unless the Member State can show that the aid was not transferred by the producer organisation, in which case the aid shall be recovered from the producer organisation.
- (85) As regards the quantification of the aid, it follows from the case-law that the Commission is not obliged to quantify the exact amount of aid to be recovered⁽³⁾. In this case, it is clear from the very nature of the actions undertaken in the context of the 'contingency plans' (see in particular paragraphs 17 and following of this Decision) that in essence they consisted of allowing producers to benefit from a sales price (or sales-related payment) higher than the actual cost paid by the buyer of the goods. The amount of the reduction shall thus be the difference between those two amounts. In the case of aid for destroying a part of the harvest, the amount to be covered shall be all the sums paid in exchange for this destruction. In certain cases, in particular in the specific cases of measures for the temporary storage of products, the measures taken could also have consisted of relieving the beneficiaries of costs which they would normally have incurred (notably storage costs). The amount of aid thus corresponds to the costs of which the beneficiaries of the aid were relieved.
- (86) It is for France, pursuant to its Community obligations, to proceed to recover the sums in question. In the event that France encounters unforeseen difficulties in this recovery, it may submit these problems for consideration by the Commission. In such a case, the Commission and the Member State must, in accordance with the duty of genuine cooperation, as expressed, *inter alia*, in Article 10 EC, work together in good faith with a view to overcoming the difficulties whilst fully observing the Treaty provisions, in particular the provisions on aid,

HAS ADOPTED THIS DECISION:

Article 1

The State aid paid under the 'contingency plans' for French fruit and vegetable producers which France unlawfully put into effect between 1992 and 2002 in breach of Article 83(3) of the Treaty is incompatible with the common market.

⁽¹⁾ OJ L 140, 30.4.2004, p. 1.

⁽²⁾ OJ L 82, 25.3.2008, p. 1.

⁽³⁾ Judgment of 27 October 2007, *France v Commission* (Case C-441/06, not yet reported), paragraph 29.

Article 2

1. France shall take all necessary measures to recover the incompatible aid referred to in Article 1 from its beneficiaries.
2. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiaries until the date of its recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.
4. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of this Decision.

Article 3

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.
2. France shall ensure that this Decision is implemented within four months of its notification.

Article 4

1. Within two months from notification of this Decision, France shall submit the following information to the Commission:
 - (a) the list of beneficiaries that have received aid under the scheme referred to in Article 1 and the total amount received by each of them;

- (b) the total amount (principal and recovery interest) to be recovered from the beneficiaries;
 - (c) a detailed description of the measures already taken and planned to comply with this Decision;
 - (d) documents demonstrating that the beneficiaries have been ordered to repay the aid.
2. France shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed.
3. After the two-month period provided for in paragraph 1, France shall submit, on request from the Commission, a report on the measures already taken and planned to comply with this Decision. This report shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.

Article 5

This Decision is addressed to the French Republic.

Done at Brussels, 28 January 2009.

For the Commission

Mariann FISCHER BOEL

Member of the Commission
