

COMMISSION DECISION

of 13 July 2011

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

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

(2011/677/EU)

THE EUROPEAN COMMISSION,

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

Whereas:

(6) Since no reply was received within the 4-week period allowed in the last letter mentioned above, on 19 December 2003 the Commission services sent the Portuguese authorities an official reminder, stipulating that, should the latter fail to reply, the Commission services reserved the right to propose that the Commission send an information injunction, pursuant to Article 10(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽²⁾ (now Article 108 TFEU).

I. PROCEDURE

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

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

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

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

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

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

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

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

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

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

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

⁽²⁾ OJ L 83, 27.3.1999, p. 1.

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

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

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

II. DESCRIPTION

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

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

⁽⁴⁾ OJ C 109, 13.5.2009, p. 9.

⁽⁵⁾ OJ L 311, 20.11.1998, p. 23.

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

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

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

⁽⁸⁾ OJ L 328, 28.11.1997, p. 1.

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

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

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

⁽¹²⁾ OJ L 306, 7.12.2000, p. 32.

⁽¹³⁾ OJ L 132, 15.5.2001, p. 17.

⁽¹⁴⁾ OJ L 273, 10.10.2002, p. 1.

(EUR)

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

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

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

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

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

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

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

III. COMMENTS SUBMITTED BY PORTUGAL

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

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

⁽¹⁷⁾ OJ L 344, 20.11.2004, p. 12.

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

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

⁽¹⁹⁾ OJ C 324, 24.12.2002, p. 2.

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

IV. COMMENTS OF OTHER INTERESTED PARTIES

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

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

V. ASSESSMENT

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

- (80) Under Article 107(1) TFEU, save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods are, in so far as it affects trade between Member States, incompatible with the internal market.
- (81) Articles 107 to 109 TFEU apply to the pigmeat sector pursuant to Article 21 of Council Regulation (EEC) No 2759/75 of 29 October 1975 on the common organisation of the market in pigmeat⁽²⁰⁾, as last amended by Council Regulation (EC) No 1913/2005⁽²¹⁾. These articles apply to the beef and veal sectors pursuant to Article 40 of Council Regulation (EC) No 1254/1999 of 17 May 1999 on the common organisation of the market in beef and veal⁽²²⁾, as last amended by Council Regulation (EC) No 1152/2007⁽²³⁾. Before the latter was adopted, these articles applied to this sector pursuant to Article 24 of Council Regulation (EEC) No 805/68⁽²⁴⁾. They apply to the sheepmeat and goatmeat sectors pursuant to Article 22 of Council Regulation (EC) No 2467/98 of 3 November 1998 on the common organisation of the market in sheepmeat and goatmeat⁽²⁵⁾, as last amended by Regulation (EC) No 1913/2005. They apply to the poultrymeat sector pursuant to Article 19 of Council Regulation (EEC) No 2777/75 of 29 October 1975 on the common organisation of the market in poultrymeat⁽²⁶⁾, as last amended by Council Regulation (EC) No 679/2006⁽²⁷⁾. Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation)⁽²⁸⁾ repealed these various regulations and provides, in Article 180 thereof, that the State aid rules apply to the aforementioned products.
- (82) The nature of the aid must be determined in light of all the beneficiaries of the services of collection, transportation, processing and destruction of slaughterhouse waste and their financing. The Commission has identified the following categories of potential beneficiaries of the scheme introduced in Portugal:
- undertakings providing the services of collection, transportation, processing and destruction of the material in question,
 - slaughterhouses and cutting plants, importers of bone-in beef, veal, pigmeat and poultrymeat, and intra-Community operators, i.e. bone-in beef, veal and pigmeat operators/receivers,
 - livestock farmers.
- (83) In order to assess the potential aid over time, the Commission identified four periods in its decision to initiate the procedure, taking into account the application of the various Community provisions relevant to the analysis of potential aid measures. The Commission identified: the period from 1998 to 31 December 1999, which was the period preceding the entry into force of the guidelines for State aid in the agriculture sector; the period from 1 January 2000 to 31 December 2002, which was the period preceding the entry into force of the Community guidelines for State aid concerning TSE tests, fallen stock and slaughterhouse waste; the period from 1 January 2003 to 31 December 2006, which was the period preceding the entry into force of the new Community guidelines for State aid in the agriculture and forestry sector 2007 to 2013⁽²⁹⁾; and the period from 1 January 2007 to the present.
- (84) Given the new information provided by the Portuguese authorities, particularly on the application of Decree-Law No 244/2003, as described above, and on the various methods of financing the potential aid, the Commission will slightly alter the division of these periods and will therefore take account of the following periods in its assessment of each group of potential beneficiaries:
- period between 9 December 1998 and 9 October 2002, during which Decree-Law No 393-B/98 was in force,

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

⁽²¹⁾ OJ L 307, 25.11.2005, p. 2.

⁽²²⁾ OJ L 160, 26.6.1999, p. 21.

⁽²³⁾ OJ L 258, 4.10.2007, p. 3.

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

⁽²⁵⁾ OJ L 312, 20.11.1998, p. 1.

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

⁽²⁷⁾ OJ L 119, 4.5.2006, p. 1.

⁽²⁸⁾ OJ L 299, 16.11.2007, p. 1.

⁽²⁹⁾ OJ C 319, 27.12.2006, p. 1.

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

1.1. EXISTENCE OF A SELECTIVE ADVANTAGE

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

1.1.1. *Selective advantage for service-providers*

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

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

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

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

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

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

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

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

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

⁽³⁰⁾ *Altmark* judgment, paragraph 84.

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

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

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

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

(b) Discharge of the public service obligation

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

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

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

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

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

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

(d) Compensation necessary to cover the service costs

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

⁽³³⁾ OJ L 363, 27.12.1990, p. 51.

⁽³⁴⁾ OJ L 294, 28.10.1997, p. 7.

⁽³⁵⁾ OJ L 204, 4.8.1999, p. 37.

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

- (100) On several occasions, particularly when it initiated the examination procedure, the Commission asked the Portuguese authorities to provide information on the method used to calculate the actual economic cost of the services. The Portuguese authorities have provided documents showing the annual expenditure of the service-providers with regard to 1999 to 2005, and have compared these figures with what INGA paid providers for performing these services. The documents in question show that the compensation paid by INGA to the service-providers did not exceed what was necessary to cover all or part of the costs incurred in performing the service. The documents received show that the compensation also takes into account a profit of between 30 % and 39,5 %, depending on the year (see recital 62 of this Decision).
- (101) The Portuguese authorities have given an assurance that the resources could not have been diverted to competing activities in which the undertakings may have been engaged (cross-subsidies) because the service-providers chosen were not engaged in other activities.
- (102) However, based on the information provided by the Portuguese authorities, the Commission considers that it is unable to conclude that the profit taken into account was 'reasonable' as defined by the *Altmark* judgment.
- (103) In its comments, ETSA has confirmed that the remuneration received for the service provision adequately reflected the costs incurred, allowing a profit margin which did not result in any particular advantage, and that, in the period prior to 2005, the level of remuneration for providing the public service corresponded to the European average and was below the level of remuneration established in the public service contract awarded through the public procurement procedure.
- (104) With regard to this information, the Commission notes that neither the Portuguese authorities nor the interested party have provided supporting documents.
- (105) As a result, the Commission cannot conclude that the third condition of the *Altmark* judgment is satisfied in the present case.
- (107) The Commission is therefore obliged to conclude that not all (four) criteria in the *Altmark* judgment are satisfied in the present case, and that it cannot rule out the possibility that there was an advantage for the service-providers in the period between the entry into force of Decree-Law No 393-B/98 and the end of the transitional scheme introduced by Decree-Law No 244/2003, which expired in 2005.
- (108) The public payments were made to specific undertakings, i.e. to undertakings entrusted with the service. As a result, it can be considered that the measure in question is specific.
- (109) The Commission therefore concludes that it cannot rule out the possibility that there was a selective advantage for the service-providers in the period between 1998 and the end of the transitional scheme introduced by Decree-Law No 244/2003, which expired in 2005.

1.1.2. *Selective advantage for slaughterhouses and cutting plants, importers of bone-in beef, veal, pigmeat and poultrymeat, and intra-Community operators, i.e. bone-in beef, veal and pigmeat operators/receivers*

- (110) According to the Court of Justice judgment in the *GEMO* case⁽³⁷⁾, the fact that the service for the collection and disposal of animal carcasses and waste available to farmers and slaughterhouses is carried out by private undertakings cannot call into question any classification as State aid as the organisation of that service originates with the public authorities.
- (111) In the present case, the rules governing the service and its financing originate from the Portuguese authorities, as laid down in Decree-Laws No 393-B/98, No 197/2002 and No 244/2003. In that respect, the Commission therefore concludes that the system in question can be imputed to the State.
- (112) In the *GEMO* judgment, the Court of Justice stated that the financial cost incurred in the disposal of animal carcasses and slaughterhouse waste must be considered to be an inherent cost of the economic activities of farmers and slaughterhouses⁽³⁸⁾. The Court therefore concluded that Article 107(1) TFEU must be interpreted as meaning that a system which provides farmers and slaughterhouses with the free collection and disposal of animal carcasses and slaughterhouse waste must be classified as State aid in favour of farmers and slaughterhouses.

(e) Analysis of the costs of a typical undertaking

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

⁽³⁷⁾ *GEMO* judgment, paragraph 26.

⁽³⁸⁾ *GEMO* judgment, paragraph 31.

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

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

Period between 10 October 2002 and November 2005

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

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

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

1.1.3. *Selective advantage for livestock farmers*

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

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

Period between 10 October 2002 and November 2005

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

1.2. ADVANTAGES FINANCED THROUGH STATE RESOURCES

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

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

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

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

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

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

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

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

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

1.3. DISTORTION OF COMPETITION AND EFFECT ON TRADE

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

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

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

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

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

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

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

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

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

1.4. CONCLUSIONS

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

2. UNLAWFULNESS OF THE AID

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

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

3. EXAMINATION OF THE COMPATIBILITY OF THE AID

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

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

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

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

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

⁽⁴⁷⁾ OJ C 297, 29.11.2005, p. 4.

⁽⁴⁸⁾ OJ L 312, 29.11.2005, p. 67.

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

⁽⁴⁹⁾ OJ C 28, 1.2.2000, p. 2.

⁽⁵⁰⁾ OJ C 119, 22.5.2002, p. 22.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.2. FINANCING OF THE AID

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

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

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

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

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

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

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

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

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

HAS ADOPTED THIS DECISION:

Article 1

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

Article 2

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

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

— If they can provide evidence that the charge was imposed on products imported from other Member States, the persons who paid the charge can claim the repayment of the proportion of the revenue from the charge intended to finance the part of the aid exclusively benefiting domestic products. These claims for repayment shall be made within a time limit set in accordance with national law and in no case less than 6 months from the publication of this Decision.

— Portugal must establish the extent of any discrimination affecting imported products. To that end, Portugal must check, during a reference period, the financial equivalence between the amounts levied overall on domestic products by way of the charge concerned and the advantages from which these products exclusively benefit.

— Repayment must be made within a maximum time limit of 6 months from the submission of the request.

— The amounts repaid must include interest calculated as from the date on which they were levied up until the date of actual repayment. This interest shall be calculated on the basis of the Commission's reference rate laid down by the method for setting the reference and discount rates⁽⁵⁵⁾.

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

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

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

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

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

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

Article 3

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

Article 4

This Decision is addressed to the Portuguese Republic.

Done at Brussels, 13 July 2011.

For the Commission

Dacian CIOLOŞ

Member of the Commission

⁽⁵⁵⁾ See footnote 54.