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EN

Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

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## II

(Non-legislative acts)

## DECISIONS

## COMMISSION DECISION

of 15 December 2009

**on support measures implemented by Spain in the agricultural sector following the increase in fuel prices**

(notified under document C(2009) 9971)

(Only the Spanish text is authentic)

(2010/473/EU)

THE EUROPEAN COMMISSION,

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

Having invited interested parties to submit comments in accordance with the above Article, and taking account of such comments,

Whereas:

## I. PROCEDURE

- (1) By letter of 29 September 2000, the Spanish authorities notified the European Commission, in accordance with Article 108(3) of the TFEU, of aid measures implemented by Spain to support the agricultural sector following the increase in fuel prices. By fax of 20 November 2000, the Commission asked for further information. That information was supplied by letters of 9 January and 13 March 2001.
- (2) Most of the measures covered by the notification were transferred to the register of non-notified aid measures (Aid NN 19/2001). Others were entered in the register of notified aid (N 681/A/2000).
- (3) By letter of 11 April 2001, served on 25 April 2001, the Commission notified Spain of its decision to initiate the procedure laid down in Article 108(2) of the TFEU concerning some of the measures, and to consider that others did not meet the requirements to fall within the scope of Article 107 of the TFEU.

<sup>(1)</sup> With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are in substance identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty.

- (4) The Commission's Decision to initiate the procedure was published in the *Official Journal of the European Union* <sup>(2)</sup>. The Commission invited interested parties to submit their comments on the measures concerned.

- (5) By letters of 6 June and 20 December 2001, Spain sent a series of comments. The Commission also received comments from interested parties. It passed on these comments to Spain, giving it the opportunity to comment on them, and received its comments by letters of 1 and 30 October 2001.

- (6) The Commission adopted a final partially negative Decision on 11 December 2002, under Number 2003/293/EC <sup>(3)</sup>.

- (7) On 15 April 2003, the Association of Service Station Managers of Madrid (*Asociación de Empresarios de Estaciones de Servicio de la Comunidad de Madrid*) and the Catalan Federation of Service Stations (*Federación Catalana de Estaciones de Servicio*) brought an action against the European Commission before the Court of First Instance <sup>(4)</sup>. The complainant requested the partial annulment of the Commission Decision.

- (8) In its judgment of 12 December 2006 <sup>(5)</sup>, the Court of First Instance annulled Article 1 of Commission Decision 2003/293/EC, which states that the measures to support agricultural cooperatives laid down by Royal Decree-Law No 10/2000 of 6 October 2000 on emergency support for agriculture, fisheries and transport <sup>(6)</sup> do not constitute State aid within the meaning of Article 107(1) of the TFEU.

<sup>(2)</sup> OJ C 172, 16.6.2001, p. 2.

<sup>(3)</sup> OJ L 111, 6.5.2003, p. 24.

<sup>(4)</sup> OJ C 171, 19.7.2003, p. 34.

<sup>(5)</sup> Case T-146/03 *Asociación de Estaciones de Servicio de Madrid, Federación Catalana de Estaciones de Servicio v Commission of the European Communities* [2003] ECR II-98.

<sup>(6)</sup> *Boletín Oficial del Estado* (Spanish Official Gazette – BOE) 241, 7.10.2000, p. 34614.

- (9) Following the partial annulment of the Decision, the Commission must adopt a new decision concerning the measures referred to in Article 1 of Commission Decision 2003/293/EC as annulled by the Court of First Instance, which it will do by means of this Decision.
- (10) With regard to the measures referred to in Article 1 of Commission Decision 2003/293/EC that were not annulled by the Court of First Instance<sup>(7)</sup> and which therefore remain in full force, they are not affected by this Decision. Consequently, no further reference will be made to these measures.
- (11) The measures referred to in Article 2 of Commission Decision 2003/293/EC<sup>(8)</sup>, as well as in Articles 3, 4 and 5 that follow therefrom, are not affected by this Decision either, and remain in full force. Consequently, no further reference will be made to these measures.
- (14) On the other hand, Law No 34/1998 of 7 October 1998 on hydrocarbons<sup>(12)</sup> has also been amended to waive the requirement that agricultural cooperatives must set up a legal entity to which the general tax arrangements apply if they carry out deliveries of B diesel to non-member third parties.
- (15) The principal objective of these measures was, according to the Spanish authorities, to offset the increase in fuel prices which had hit the agricultural sector hard at the time the measures were adopted. Thus, in the statement of reasons of Royal Decree-Law No 10/2000, it is stated that 'diesel used for agriculture, fisheries and transport, like fuels for other uses, is experiencing price increases following the rise in the price of oil and the marked appreciation of the dollar against the euro'. The Spanish Government, 'aware of the real significance of this crisis caused by external factors, analysed the scale of the economic impact in the agricultural and fisheries sector with organisations that best represented these sectors, and obtained overwhelming consensus on the adoption of a package of measures designed to offset the negative effect of the increase in oil prices and to increase the liberalisation of the sectors'.

## II. DESCRIPTION

### 1. Measures to support agricultural cooperatives

- (12) The notified measures to support agricultural cooperatives are provided for in Article 1 of Royal Decree-Law No 10/2000 on emergency support for agriculture, fisheries and transport<sup>(9)</sup>, which amends Law No 27/1999 of 16 July 1999 on cooperatives<sup>(10)</sup> and Law No 20/1990 of 19 December 1990 on the tax arrangements applying to cooperatives<sup>(11)</sup>.
- (13) On the one hand, it abolishes the maximum limit of 50 % of turnover imposed on cooperatives for their transactions with non-member third parties without losing their preferential tax treatment as granted by Law No 20/1990 (Article 13(10)) for deliveries of B diesel by agricultural cooperatives to non-member third parties.
- (16) With regard to the scope of the Laws amended by the notified measure, a more detailed description is necessary.
- (17) Law No 27/1999 on cooperatives is the instrument which governs cooperative activity in Spain. It defines the concept of a cooperative society, classifies the types of cooperative society and regulates their formation. Its aims also include the promotion and development of cooperative societies and it describes their forms of association, whilst facilitating the creation of such groups, with the aim of stimulating the cooperative movement. Article 93 of the Law is devoted to agricultural cooperatives, and in particular their purpose and the activities that they may engage in.
- (18) Articles 16(5), 18(2), 33 and 34 of Law No 20/1990 establish rules concerning the taxable amount and the tax arrangements for Spanish cooperatives, including agricultural cooperatives. The Law makes a distinction between 'protected cooperatives' and 'specially protected cooperatives'. 'Protected cooperatives' are cooperatives which comply with the principles and provisions arising from the general law on cooperatives or the laws of Autonomous Communities. Workers cooperatives, agricultural cooperatives, community land cooperatives, fishing cooperatives and consumer and user cooperatives are 'specially protected cooperatives'. The Law states that the reason why specially protected cooperatives are afforded the highest level of protection is due to the nature of the sectors concerned, the economic capacity of their members and their closer alignment with the principle of mutuality.
- <sup>(7)</sup> This concerns measures relating to the amendment to Law No 37/1992 pursuant to Royal Decree-Law No 10/2000, as well as tax measures provided for by the Order of 29 November 2000 issued by the Ministry of Finance on the application of a corrective index to feed purchased from third parties in the case of certain livestock farming activities covered by the scheme for objective assessment of personal income tax. These measures also include a reduction in the net yield under the scheme for the objective assessment of personal income tax for agricultural activities, a reduction of the percentage for calculating quarterly VAT payments under the simplified arrangements for certain agricultural activities and a tax measure to increase the percentage of expenditure which is difficult to substantiate in the context of personal income tax. In its Decision, the Commission had considered that these measures did not constitute State aid.
- <sup>(8)</sup> These measures consisted in State aid granted by Spain to farmers in the form of subsidies on loans and guarantees provided for in a Ministry of Agriculture Decision of 15 November 2000 publishing a Council of Ministers Agreement of 10 November 2000, and the measure extending, for 2000 and 2001, tax benefits applicable to personal income on transfer of certain agricultural land and holdings provided for in the seventh transitional provision of Law No 14/2000. In its Decision, the Commission declared these measures incompatible with the TFEU.
- <sup>(9)</sup> BOE 241, 7.10.2000, p. 34614.
- <sup>(10)</sup> BOE 170, 17.7.1999, p. 27027.
- <sup>(11)</sup> BOE 304, 20.12.1990, p. 37970.
- <sup>(12)</sup> BOE 241, 8.10.1998, p. 33517.

(19) For the purposes of establishing the taxable amount for cooperatives, the results of cooperative activities (transactions with members) and the results of extra-cooperative activities (transactions with non-members) are assessed separately and are not taxed in the same manner. Therefore, cooperatives should keep separate accounts for the two types of activity.

(20) The tax regime for agricultural cooperatives as 'specially protected cooperatives' is identical to that of protected cooperatives, except in the cases mentioned below:

— *Company tax*: the purpose of this tax is to raise a charge on profits made by companies and other legal entities. The taxable amount for cooperative results (transactions with members) attracts a reduced rate of 20 %, while the taxable amount for extra-cooperative results (transactions with non-members or third parties) is subject to the general rate of 35 % (Article 33(2)). Moreover, there is a 50 % rebate on financing the mandatory reserve (Article 16(5)) <sup>(13)</sup> and a 100 % deduction on allocations to the apprenticeship and training reserve (Article 18(2)) <sup>(14)</sup>. With regard solely to specially protected cooperatives, they are also entitled to a 50 % rebate on their tax bill, defined as the algebraic sum of the amounts resulting from applying the corresponding tax rates to the cooperative and extra-cooperative taxable amounts, whether positive or negative, that sum being the amount payable when positive (Article 34(2)). Finally, they are also free to decide on the depreciation of their new physical assets acquired during the three years following the date of their registration in the Register of Cooperatives.

— *Tax on capital transfers and documented legal acts*: this indirect form of taxation is designed to be charged on different legal acts such as taxable capital transfers, documented legal acts or certain company transactions (for example, corporate financing such as increasing share capital). Provision is made for an exemption from this tax on incorporation, capital increases, fusions and divisions, taking out and cancelling loans (including long-term bonds), the acquisition of goods and rights under their apprenticeship and training reserves for the fulfilment of their purpose, and exclusively for specially protected cooperatives, an exemption on the acquisition of goods and rights

directly intended for the fulfilment of their social and statutory aims (Articles 33(1) and 34(1)).

— *Tax on economic activities*: this local tax is charged directly on any type of entrepreneurial, professional or artistic economic activity performed by natural or legal persons on Spanish territory. There is a 95 % rebate on this tax (Article 33(4)(a)).

— *Tax on immovable property*: this is a local tax charged on the rights of ownership and other property rights attached to a building. There is provision for a 95 % allowance on this local tax in respect of rural property belonging to agricultural cooperatives and community land cooperatives (Article 33(4)(b)).

(21) Finally, Article 13 of the Law provides that any cooperative, regardless of its classification, whose transactions with non-member third parties exceed 50 % of its total transactions will lose its preferential tax status as a cooperative.

(22) The budget for the measures in favour of agricultural cooperatives remains unknown due to the nature of the measures. The duration of these measures is unspecified.

## 2. Arguments raised by the Commission for the purposes of initiating the examination procedure

(23) The Commission based the decision to initiate the procedure on the following arguments.

(24) As set out in the decision to initiate the procedure, Royal Decree-Law No 10/2000 granted tax advantages to agricultural cooperatives which they did not enjoy previously.

(25) The first advantage is the waiving of the requirement to set up a legal entity to which the general tax arrangements apply (i.e. lower tax rates) through which to sell B diesel to non-member third parties, whereby cooperatives pay less tax than before on their sales of diesel to non-members. In other words, before Law No 27/1999 was amended, in order to sell B diesel to non-members, agricultural cooperatives had to set up a legal entity. Since the Law was changed, they are no longer required to set up a legal entity and so those transactions are subject to a lower rate of tax.

<sup>(13)</sup> The obligation for cooperatives to constitute these reserves is laid down in Article 55 of Law No 27/1999. In the first instance, reserves are constituted using cooperative income and extra-cooperative profits. A similar obligation applies to companies with share capital, which by virtue of Article 214 of Spanish Law No 1564/1989 on public limited companies must allocate a sum amounting to 10 % of profit for the financial year to a legal reserve until the reserve amounts to at least 20 % of the company's registered capital (BOE of 27.12.1989).

<sup>(14)</sup> The obligation for cooperatives to constitute this reserve is provided for in Article 56 of Law No 27/1999.

- (26) The second advantage is that agricultural cooperatives are no longer subject to the 50 % limit when selling B diesel to non-member third parties, above which they lost their preferential tax treatment. In other words, before Law No 27/1999 was amended, agricultural cooperatives had to restrict their sales to non-members to 50 % of their turnover if they did not want to lose their preferential tax treatment. Since the Law was changed, they can exceed that limit without losing their preferential tax treatment.
- (27) This would seem to be a specific measure applying only to agricultural cooperatives which confers a tax advantage granted in the context of the increase in fuel prices whereby they now pay less tax than they did before Law No 27/1999 was amended.
- (28) According to the information available at the time, the Commission considered that these measures conferred an advantage on agricultural cooperatives which relieved them of charges that were normally borne from their budgets. A loss of tax revenue is equivalent to consumption of State resources in the form of fiscal expenditure (point 10 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation<sup>(15)</sup>). Accordingly, the measure should be considered a selective tax measure affecting the resources of the State.
- (29) When initiating the procedure, the Commission took the view, according to the information available to it at the time, that these measures were to be considered tax measures attributable to the State and affecting the resources of the State; they conferred a selective advantage and did not appear justified by the nature or general scheme of the tax system, and therefore constituted selective aid granted by the State.
- (30) The information supplied by the Spanish authorities, according to which the price of fuel rose by 47 % between 1999 and 2000, provoking public disturbances, strikes and energy and food shortages, was not sufficient to allow the Commission to conclude, at that stage in the procedure, that the increase in fuel prices was an exceptional occurrence within the meaning of Article 107(2)(b) of the TFEU.
- (31) Again, according to the information available at that time, the measures to support agricultural cooperatives appeared to constitute State aid, intended to improve their financial situation without contributing to the development of the sector. Consequently, it appeared that this aid was to be regarded as operating aid incompatible with the internal market.

- (32) In view of the above, the Commission considered that the measures in question, in so far as they were State aid, did not appear to be eligible for any of the exceptions provided for in Article 107(2) and (3) of the TFEU and consequently decided to initiate the procedure laid down in Article 108(2) of the TFEU.

### III. COMMENTS FROM INTERESTED THIRD PARTIES

#### 1. Comments from the Association of Service Station Managers

- (33) This association considers that Royal Decree-Law No 10/2000 grants tax advantages to agricultural cooperatives.
- (34) Firstly, waiving the requirement to set up a legal entity to which the general tax arrangements apply in order to distribute B diesel to non-member third parties confers a tax advantage enabling cooperatives to pay less tax than before when selling B diesel to non-members, in that it subjects those transactions to a lower rate of tax.
- (35) The second tax advantage lies in the fact that agricultural cooperatives are no longer subject, when selling B diesel to non-member third parties, to the maximum limit of 50 % beyond which they lose their preferential tax treatment.
- (36) The association argues that Royal Decree-Law No 10/2000 encourages the creation outside the market of a parallel network for cooperatives, as 'State-assisted bodies', which are also exempt from fulfilling the legal requirements imposed on their competitors. The purpose of all this is to enable cooperatives to offer prices lower than those produced by normal market mechanisms, without providing any compensation for holders of facilities selling to the general public (retail distributors), many of whom will be eliminated from the market.
- #### 2. Comments from the Association of Service Station Managers of Madrid, the Catalan Federation of Service Stations and the Spanish Confederation of Service Stations
- (37) These associations, which represent practically all service stations in Spain, take the view that Royal Decree-Law No 10/2000 contains measures designed to relieve agricultural cooperatives of various tax charges on their sales of B diesel to non-member third parties by bringing that activity within a specially protected tax system.

<sup>(15)</sup> OJ C 384, 10.12.1998, p. 3.

- (38) These associations argue that since Royal Decree-Law No 10/2000 came into force, agricultural cooperatives have obtained the tax advantages referred to below on their sales of B diesel to third parties.
- (39) Tax on capital transfers and documented legal acts; cooperatives will not be required to pay tax on their instruments of incorporation, capital increases, fusions and divisions, taking out and cancelling loans (including long-term bonds), the acquisition of goods and rights under their apprenticeship and training reserves for the fulfilment of their purpose and transactions to acquire goods and rights directly intended for the fulfilment of their social and statutory purposes.
- (40) Company tax: given that Royal Decree-Law No 10/2000 treats the sale of B diesel to non-member third parties as the economic result of cooperative activity, it will be taxed at the rate of 20 %; moreover, cooperatives are completely free to decide on the depreciation of their new physical assets acquired during the three years following the date of their registration in the Register of Cooperatives, and what is more, they receive a 50 % rebate on their entire company tax bill.
- (41) Cooperatives receive a 95 % rebate on their economic activities tax.
- (42) Cooperatives receive a 95 % rebate on their immovable property tax.
- 3. Comments from Agri-food Cooperatives Spain (formerly the Spanish Confederation of Agricultural Cooperatives)**
- (43) Most of Spain's agricultural cooperatives belong to this Confederation.
- (44) Agricultural cooperatives began selling petroleum products following an Order of 31 July 1986<sup>(16)</sup> of the Ministry of Economy and Finance amending the Regulation on the supply and sale of fuel and liquid fuel subject to the petroleum monopoly<sup>(17)</sup>. Law No 34/1992 of 22 December 1992 regulating the petroleum sector<sup>(18)</sup> introduced a new system for the distribution of petroleum products.
- (45) The previous system had suddenly ceased to apply to agricultural cooperatives with the publication of Law No 34/1998 and, specifically, the fifteenth additional provision thereof, prohibiting cooperatives from selling petroleum products (both diesel and petrol) to third parties unless they set up a legal entity for that purpose, to which the general tax arrangements would apply.
- (46) The Confederation argues that Royal Decree-Law No 10/2000 merely removed – and then only partially – the restriction on free competition imposed by the prohibition introduced by the fifteenth additional provision of Law No 34/1998.
- (47) The tax advantages enjoyed by cooperative societies must be examined in the light of the technical adjustment standards and the obligations which these impose on cooperatives.
- (48) For the purposes of determining the taxable amount for the purposes of company tax, cooperatives must make a clear distinction between the two types of transactions they engage in: transactions with members and transactions with non-members or third parties. Under the technical adjustment standard provided for in Article 16 of Law No 20/1990, for the purposes of determining the taxable amount, the cooperative results of transactions with members are to be considered separately from the extra-cooperative results of transactions between the cooperative and non-members or third parties.
- (49) Article 33 of Law No 20/1990 stipulates that the rate of company tax on cooperatives is differentiated, so that a rate of 20 % applies to the taxable amount for cooperative results, and the general rate of 35 % is applied to the taxable amount for extra-cooperative results, including, inter alia, the results of transactions between agricultural cooperatives and third parties. Therefore, there is no rebate on the amounts earned by agricultural cooperatives in their transactions with non-member third parties.
- (50) Article 23 of Law No 20/1990 defines the amount of company tax payable by cooperatives as the algebraic sum of the amounts resulting from applying the corresponding tax rates to the taxable amounts, whether positive or negative, that amount being the amount payable (*cuota íntegra*) when positive. Here, according to Article 34 of the aforementioned Law on specially protected cooperatives, which in principle covers agricultural cooperatives, the tax advantage consists in a 50 % rebate on the full tax payable as defined by Article 23 as mentioned above.

<sup>(16)</sup> BOE 188, 7.8.1986, p. 27907.

<sup>(17)</sup> BOE 58, 9.3.1970, p. 3820.

<sup>(18)</sup> BOE 308, 24.12.1992, p. 43867.

- (51) This tax advantage cannot be considered in isolation from the tax paid by cooperative members on their share of their cooperative's profits when they pay their personal income tax. The profits made by a cooperative are distributed among its members on the basis of the cooperative business each carries out during the financial year, not according to the capital each contributed; this is known as 'cooperative income' and is completely different from the dividends paid out by companies with share capital.
- (52) Taking account of these special features, the 50 % rebate on the amount of company tax payable by specially protected cooperatives must be seen in the light of the fact that dividends/cooperative income are taxed twice, first through company tax and then through personal income tax. The alleviation of double taxation in the case of companies with share capital and their shareholders (dividends) has no counterpart in the case of cooperatives and their members (cooperative income), with the result that cooperative income is more heavily taxed than dividends.
- (53) This situation is reflected in Article 23 of Law No 40/1998 of 9 December 1998 on personal income tax and other tax rules<sup>(19)</sup>, which confirms the unequal treatment of dividends (specific to capital companies subject to the general tax system) in relation to cooperative income (specific to cooperatives subject to special tax arrangements).
- (54) Moreover, under Article 66 of Law No 40/1998, personal income tax rebates also vary depending on the type of company involved; in the case of dividends, the rebate will be 40 % of the tax payable, while in the case of cooperative income, Article 32 of Law No 20/1990 applies, according to which the rebate for double taxation is 10 % for protected cooperatives and 5 % for specially protected cooperatives.
- (55) In addition, cooperatives are subject to some specific financial obligations introduced by Law No 27/1999 which do not affect companies subject to the general tax regime but which tie up the resources of cooperatives and prevent their distribution among members, as in the case of the mandatory social reserves.
- (56) Firstly, the mandatory reserve, as provided for in Article 55 of Law No 27/1999, is specifically intended for the consolidation, development and guarantee of cooperatives and may not be distributed among the members. This reserve is part of the undistributable net assets and, should the cooperative be dissolved, would be transferred to the State Treasury and used to set up a cooperative promotion fund. Under Law No 27/1999, at least 20 % of the cooperative's results and 50 % of extra-cooperative profits (such as income from its transactions with non-members) are paid into the mandatory reserve, as are membership dues and the amounts deducted from the compulsory share subscriptions when members leave the cooperative. This means that part of what each member contributes to the cooperative will never be recovered and that part of the cooperative's surplus is tied up.
- (57) Secondly, the apprenticeship and training reserve, governed by Article 56 of Law No 27/1999, is intended for the training and education of the cooperative's members and workers, dissemination of information about the cooperative movement and promotion of intercooperative relations and the cultural, professional and social welfare of the local community or society in general. According to Law No 27/1999, at least 5 % of the cooperative's results are to be paid into this reserve. Like the mandatory reserve, the apprenticeship and training reserve may not be distributed among the members, even if the cooperative is wound up.
- (58) Consequently, the maximum distributable surplus which can be distributed to cooperative members is lower than what other companies with share capital can distribute to their shareholders because the latter are under no obligation to use the year's profits to fund the mandatory reserves.
- (59) The tax advantage that a cooperative might enjoy as a result of the company tax rebate is offset by the double taxation on personal income imposed on cooperative members and the increase in their tax burden in this way.
- (60) A general overview of the cooperative tax regime, showing both the advantages and the obligations, can be seen in the following practical examples.
- (61) The first example analyses the net availability of funds received by a cooperative member as compared with a company shareholder subject to the general tax regime in Spain, starting from the same initial results, namely 150 monetary units (mu).

<sup>(19)</sup> BOE 295, 10.12.1998, p. 40730.

*Hypothesis: Cooperative results (50 %) and extra-cooperative results (50 %), applying Law No 27/1999 and assuming that the entire available profit goes to the members. Marginal rate of personal income tax: 48 %*

|                                           | Cooperative                                                                                                                                                                                                        | Company with share capital                                                                                                                                                     |
|-------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Results                                   | Cooperative result (CR): 75 (50 %)<br>Extra-cooperative result (ER): 75 (50 %)<br>Total: 150                                                                                                                       | 150                                                                                                                                                                            |
| Financing the social reserves             | Apprenticeship & training reserve: 5 % CR = 3,75<br>Mandatory reserves: 20 % CR = 15<br>50 % ER = 37,5<br>Total: 56,25                                                                                             | 0                                                                                                                                                                              |
| Results after reserves have been financed | CR: 56,25<br>ER: 37,5<br>Total: 93,75                                                                                                                                                                              | 150                                                                                                                                                                            |
| Company tax                               | CR: $(75 - 11,25) \times 20 \% = 12,75$<br>ER: $(75 - 18,75) \times 35 \% = 19,687$<br>Total: 32,437                                                                                                               | $150 \times 35 \% = 52,5$                                                                                                                                                      |
| Available profit                          | $93,75 - 32,437 = 61,313$                                                                                                                                                                                          | $150 - 52,5 = 97,5$                                                                                                                                                            |
| Personal income tax                       | Taxable amount (TA): $61,313 \times 100 \% = 61,313$<br>Tax payable (marginal rate):<br>$61,313 \times 48 \% = 29,430$<br><br>Rebate: $61,313 \times 10 \% = 6,131$<br>Amount payable:<br>$9,430 - 6,131 = 23,299$ | TA = $97,5 \times 140 \% = 136,5$<br>Tax payable (marg. rate):<br>$136,5 \times 48 \% = 65,52$<br><br>Rebate: $97,5 \times 40 \% = 39$<br>Amount payable: $65,52 - 39 = 26,52$ |
| Net amount received                       | $61,313 - 23,299 = 38,014$                                                                                                                                                                                         | $97,5 - 26,52 = 70,98$                                                                                                                                                         |

- (62) Taking a marginal personal income tax rate, for an identical initial result of 150 monetary units, a cooperative member would receive a net amount of 38 units, while a company shareholder subject to the general tax regime would receive 71 units. Moreover, as mentioned above, it should be noted that double taxation through company tax and personal income tax cancels out the initial effect of the rebate on the full amount of company tax payable.
- (63) The second example, in which different rates are applied to the cooperative's transactions with members and with non-member third parties (i.e. cooperative and extra-cooperative results), shows how the higher the ratio of extra-cooperative to cooperative results, the larger the amount to be paid into the mandatory reserves, the higher the income tax and the smaller the percentage of available profit, so that the higher the extra-cooperative results, the lower the net amount received by each member.

*Analysis of different breakdowns between cooperative and extra-cooperative results*

|                                          | Protected cooperative |                            |                      |                      | Company with share capital |
|------------------------------------------|-----------------------|----------------------------|----------------------|----------------------|----------------------------|
| Hypothesis                               | CR: 75 %<br>ER: 25 %  | CR: 66,66 %<br>ER: 33,33 % | CR: 50 %<br>ER: 50 % | CR: 25 %<br>ER: 75 % |                            |
| Results                                  | 150                   | 150                        | 150                  | 150                  | 150                        |
| Financing the social reserves            | 46,875                | 50                         | 56,25                | 65,625               | 0                          |
| Income after reserves have been financed | 103,125               | 100                        | 93,75                | 84,375               | 150                        |
| Company tax                              | 28,97                 | 30,125                     | 32,437               | 35,906               | 52,5                       |

|                     | Protected cooperative |        |        |        | Company with share capital |
|---------------------|-----------------------|--------|--------|--------|----------------------------|
| Available profit    | 74,155                | 69,875 | 61,313 | 48,469 | 97,5                       |
| Personal income tax | 28,179                | 26,55  | 23,299 | 18,418 | 26,52                      |
| Net amount received | 45,976                | 43,325 | 38,014 | 30,051 | 70,98                      |

- (64) In conclusion, Agri-food Cooperatives Spain (formerly the Spanish Confederation of Agricultural Cooperatives) considers that the legislation on the taxation of agricultural cooperatives in Spain must be analysed as a whole. These tax arrangements make distinctions, and the advantages they confer are linked to specific obligations (financing the mandatory reserves, treatment of capital and double taxation).

#### IV. SPAIN'S COMMENTS

- (65) By letter of 11 June 2001, the Spanish authorities put forward the following arguments.
- (66) Spain maintains that the argument that the measures to support agricultural cooperatives constitute State aid because cooperatives will pay less tax than they did before the amendment does not stand up, for the following reasons.
- (67) The measures introduced by Royal Decree-Law No 10/2000 are actually measures to liberalise the supply of diesel, in that they remove barriers that prevented agricultural cooperatives from supplying such fuel to third parties, without this involving a tax advantage to cooperatives.
- (68) The tax regime for agricultural cooperatives makes a distinction between cooperative business transacted with members and that transacted with non-members, revenue from the latter being known as extra-cooperative results. Extra-cooperative results are subject to company tax under the general regime, i.e. at the same rate as any other organisation carrying out the same activity.
- (69) The cooperative tax regime is governed by Law No 20/1990, Article 21 of which defines extra-cooperative returns as revenue from carrying out cooperative business with non-member third parties, such that extra-cooperative results are subject to the general rate of company tax as laid down in paragraph 3 of Article 26 of Law No 43/1995 of 27 December 1995 on company tax<sup>(20)</sup>. Moreover, the sixth additional provision of Law No 27/1999 of 16 July 1999 on cooperatives requires the latter to keep separate accounts for transactions realised with non-member third parties.
- (70) The purpose of the measures introduced by Royal Decree-Law No 10/2000 is to liberalise the supply of B diesel by allowing agricultural cooperatives to supply such fuel, irrespective of what share of the cooperative's total business those transactions represent, without thereby losing their entitlement to special tax treatment for their cooperative business. The aim is to allow coop-

eratives to carry out this activity without having to set up a separate legal entity, since the same company tax is payable in both situations in so far as the revenue from sales of B diesel to third parties is subject to the general company tax regime.

- (71) Spain concludes that the measures introduced by Royal Decree-Law No 10/2000 are not State aid inasmuch as they do not alter or affect competition in the distribution of B diesel, since all firms, including agricultural cooperatives, engaging in this activity are subject to the same rate of company tax.
- (72) In addition to its comments on this measure in its letter of 6 June 2001, Spain also sent, by letters of 1 and 30 October 2001, comments on the comments from interested parties. In its letter of 1 October 2001, Spain added the following comments.
- (73) Both the increase in price of crude petroleum and the depreciation of the euro against the dollar constituted events that substantially changed normal farming conditions and brought about a crisis in the sector. This affected farms by worsening their economic results and, if the trend continued, threatened the survival of many.
- (74) In view of the situation, the Spanish Government decided to introduce not only short-term measures but also structural measures, such as further liberalising fuel distribution so that farmers could continue their activities while maintaining their competitiveness.
- (75) The support measures introduced by Royal Decree-Law No 10/2000 are part of the policy to further liberalise the fuel sector. Specifically, they remove certain restrictions imposed by Spanish law on agricultural cooperatives, thereby also certainly opening up the market in the distribution of B diesel in Spain.
- (76) Hence the waiving of the requirement that cooperatives restrict their distribution of B diesel to non-member third parties to 50 % of their transactions with members and the abolition of the rule that cooperatives may only undertake retail sales of petroleum products to non-member third parties if they have previously set up a legal entity distinct from the cooperative. This latter requirement restricted the scope of agricultural cooperatives' activities and, to some extent, contradicted Law No 27/1999, which provides that the societies it covers may embark on and engage in any economic activity whatsoever.

<sup>(20)</sup> BOE 310, 28.12.1995, p. 37072.

- (77) The amendment to the effect that cooperatives do not lose their specially protected status when they distribute B diesel to non-member third parties should be construed in its true meaning as removing a penalisation, without this conferring any special tax advantages in the distribution of agricultural fuel to third parties.
- (78) The assertion in the comments from the associations of service stations that liberalising the distribution of diesel by cooperatives to non-member third parties results in those transactions being charged only 20 % company tax is incorrect according to the Spanish authorities. All transactions between cooperatives and non-member third parties are taxed at the general tax rate of 35 %.
- (79) In its letter of 30 October 2001, supplementing its comments on the comments from interested parties made by letter of 1 October 2001, Spain added the following comments from the Ministry of Finance.
- (80) The comments from the associations of service stations incorrectly interpret the impact of Royal Decree-Law No 10/2000 on the tax regime for protected cooperatives. Extra-cooperative results, including those arising from the distribution of B diesel to non-member third parties, are taxed at the general rate of 35 %.
- (81) The sole purpose of the amendments introduced by Royal Decree-Law No 10/2000 is to liberalise the distribution of B diesel by allowing agricultural cooperatives to sell such fuel, irrespective of what share of the cooperative's total business those transactions represent, without losing their entitlement to special tax treatment for their cooperative business.
- (82) In any case, those amendments have in no way altered the tax arrangements applicable to the supply of B diesel by cooperatives, and so it should be concluded that there is no measure which might be considered to be State aid within the meaning of Article 107 of the TFEU.
- (83) Concerning the tax on capital transfers and documented legal acts, the comments of the associations of service stations indicate that those advantages predate Royal Decree-Law No 10/2000, so it cannot be said that cooperatives enjoy them as a result of the Decree-Law. Rather, those advantages are designed to encourage this type of society and the cooperative movement in Spain.
- (84) Lastly, concerning local taxes, the comments from the associations of service stations are aimed not so much at the tax advantages enjoyed by specially protected cooperatives themselves as at the change introduced by Royal Decree-Law No 10/2000, which alters the requirements to be met by agricultural cooperatives to qualify for specially protected status, specifically the fact of allowing such cooperatives to distribute B diesel to non-member third parties without restrictions.
- (85) Spain considers that the measures adopted by the Spanish Government to support agriculture should not be considered as 'State aid' since they are all fully compatible with Article 107(1) of the TFEU.
- V. DECISION 2003/293/EC**
- (86) In Decision 2003/293/EC, the Commission reached the following conclusions.
- (87) The changes made by Royal Decree-Law No 10/2000 to Law No 27/1999 and Law No 20/1999 merely restore the legal situation regarding the distribution of petroleum products by agricultural cooperatives that existed prior to the adoption of Law No 34/1998.
- (88) Spain has explained that under Law No 20/1990 agricultural cooperatives pay the general rate of company tax on income from their transactions with non-member third parties, so such transactions enjoy no rebate and the changes introduced by Royal Decree-Law No 10/2000 do not alter the tax regime applicable to sales of B diesel by cooperatives to non-member third parties.
- (89) The amendments made by Royal Decree-Law No 10/2000 allow agricultural cooperatives to distribute B diesel to non-member third parties without having to create a new legal entity for that purpose and allow those transactions to account for more than 50 % of their turnover in supply transactions with such third parties without losing their preferential tax treatment.
- (90) While it is true that agricultural cooperatives pay the same rate of company tax as other firms on their income from transactions with non-member third parties, it is nevertheless also true that, since these amendments were introduced, cooperatives may distribute B diesel to non-member third parties without any restriction in turnover and without having to set up a separate legal entity, while continuing to benefit from differentiated tax treatment as cooperatives.
- (91) Since before Royal Decree-Law No 10/2000, cooperatives have enjoyed advantages under the tax on capital transfers and documented legal acts, economic activities tax, immovable property tax and company tax. In the case of company tax, transactions with members are subject to a reduced rate and specially protected cooperatives, such as, in principle, agricultural cooperatives, also receive a 50 % rebate on their overall company tax bill.

(92) However, the Commission considered it desirable to examine the tax advantages enjoyed by cooperatives in the light of the obligations that the technical adjustment standards impose on them. 'As stated by the Spanish Confederation of agricultural cooperatives in its comments', says the Commission in Decision 2003/293/EC, 'this tax advantage cannot be considered in isolation from the tax paid by cooperative members on their share of their cooperative's profits when they pay their personal income tax, which is completely different from the dividends paid out by companies with share capital. The alleviation of double taxation in the case of companies with share capital and their shareholders (dividends) has no counterpart in the case of cooperatives and their members (cooperative income), with the result that cooperative income is more heavily taxed than dividends. The advantage that a cooperative might have enjoyed as a result of the company tax rebate is offset by the double taxation on personal income imposed on cooperative members and the increase in their tax burden in this way.'

(93) In its Decision, the Commission considered that the tax regime for agricultural cooperatives in Spain should be analysed as a whole. This tax regime makes structural distinctions so that the advantages it confers are linked to specific obligations (financing the mandatory reserves, treatment of capital and double taxation).

(94) Consequently, in view of the information provided by Spain and by Agri-food Cooperatives Spain, the Commission considered that the changes introduced by Royal Decree-Law No 10/2000 to the legislation on agricultural cooperatives did not confer an advantage that alleviated the normal tax burden on their budgets and did not constitute a selective tax measure affecting the resources of the State.

(95) The Commission concluded in its Decision that, on the basis of information provided by Spain, the measures to support agricultural cooperatives are to be considered as tax measures justified by the nature or general scheme of the tax system, which therefore do not meet the criteria for the application of Article 107(1) of the TFEU, with the result that these measures do not constitute State aid.

#### VI. JUDGMENT OF THE COURT OF FIRST INSTANCE IN CASE T-146/03

(96) In the action brought against Commission Decision 2003/293/EC, the Association of Service Station Managers of Madrid (*Asociación de Empresarios de Estaciones de Servicio de la Comunidad de Madrid*) and the Catalan Federation of Service Stations (*Federación Catalana de Estaciones de Servicio*) plead, in substance, that the Commission infringed Article 107(1) of the TFEU, in

so far as it affirms in the contested Decision that the disputed measures do not constitute State aid as they do not confer any advantage on agricultural cooperatives and are in keeping with the nature and scheme of the cooperative tax system.

(97) During the course of its examination, the Court of First Instance states that within the context of the first part of the plea, the complainant pleads that the Commission wrongly concluded that there was no advantage, due to an incorrect assessment of the Spanish tax system. In the context of the second part, the complainant pleads that the Commission made an incorrect determination of an absence of selectivity in relation to the disputed measures due to an incorrect assessment that the disputed measures are in keeping with the nature and scheme of the Spanish tax system.

#### 1. First part of the plea: error of assessment of the Spanish tax system vitiating the finding that the disputed measures do not confer any advantage on agricultural cooperatives

(98) The complainant pleads that the Commission failed to take into account the advantageous tax status of agricultural cooperatives in relation to tax on capital transfers and documented legal acts, tax on economic activities, and tax on immovable property.

(99) The Court of First Instance considers that it is unable to ascertain the merits of the contested Decision on this point. In the Court's view, the contested Decision does not provide clear and unequivocal reasons as to why the tax regime for agricultural cooperatives, as regards tax on capital transfers and documented legal acts, tax on economic activities, and tax on immovable property, does not constitute an advantage within the meaning of Article 107(1) of the TFEU. Therefore, on one hand, recital 145 of the contested Decision expressly states that the cooperatives enjoy tax advantages besides those relating to company tax, in relation to tax on capital transfers and documented legal acts, economic activities tax and immovable property tax. On the other hand, recital 148 of the contested Decision states that the disputed measures do not confer an advantage and, consequently, do not constitute State aid within the meaning of Article 107(1) of the TFEU.

(100) Whilst the European Commission argued during the hearing that the reasoning in recitals 146 and 147 of the contested Decision applied not only to company tax but also to the tax on capital transfers and documented legal acts, the tax on economic activities and the tax on immovable property, the Court considers this argument to be incomprehensible.

- (101) Firstly, the Court declares, recital 146 provides that the advantage that a cooperative might have enjoyed as a result of the 50 % company tax rebate is offset by the double taxation on personal income. Inasmuch as the Commission, in the Court's opinion, has not given the slightest reason as to why the advantages in relation to taxes on capital transfers and documented legal acts, on economic activities and on immovable property might also be offset by the double taxation on personal income tax, recital 146 may only be understood to refer to the offsetting of the 50 % rebate on company tax.
- (102) Secondly, the Court continues, recital 147 merely mentions that the tax regime applicable to agricultural cooperatives, examined as a whole, makes structural distinctions so that the advantages it confers are linked to specific obligations (financing the mandatory reserves, treatment of capital and double taxation). This recital remains silent as to the reasons why the specific obligations it mentions would offset not only the 50 % rebate on company tax, but also the advantages in relation to the taxes on capital transfers and documented legal acts, economic activities, and immovable property. The Court of First Instance finds such reasons to be all the more inadequate in the present case in consideration of the fact that the specific obligations expressly mentioned must be understood when reading the contested Decision to relate to company tax. In fact, in addition to the reference to these specific obligations in recital 147, they are also mentioned in recitals 83 to 95 of the contested Decision which consider company tax alone.
- (103) First and foremost, as regards the argument whereby the measures linked to taxes on capital transfers and documented legal acts, on economic activities and on immovable property have not been altered by the Decree-Law and that consequently, these aspects are not, in principle, evaluated in the contested Decision, the Court of First Instance states that this argument lacks any factual basis when recital 145 attests to the Commission's recognition of the existence of tax advantages enjoyed by cooperatives on these taxes.
- (104) Moreover, contrary to the Commission's assertion, the Court of First Instance is of the opinion that the tax situation of cooperatives in respect of taxes on capital transfers and documented legal acts, on economic activities, and on immovable property, was altered by the disputed measures. In fact, prior to the adoption of these measures, the tax status of cooperatives did not apply to the sale of fuel since this activity had to be carried out by a separate legal entity which would not have enjoyed this privileged tax status. Since the entry into force of the disputed measures, the scope of application of this privileged tax status has been extended to include the sale of fuel. The Court of First Instance therefore considers that the disputed measures have altered the tax situation of agricultural cooperatives.
- (105) Next, as regards the argument whereby the tax status in respect of taxes on capital transfers and documented legal acts, on economic activities, and on immovable property might constitute existing aid in so far as this status does not appear to have been altered since the accession of the Kingdom of Spain, the Court of First Instance finds that this argument does not contribute to an understanding of the reasons why the Commission made a determination of no advantage in recital 148 of the contested Decision. In fact, as much as the Commission means to affirm that the privileged tax status constitutes existing aid, it is forced to admit that this tax status constitutes aid and hence certainly does confer an advantage within the meaning of Article 107(1) of the TFEU.
- (106) Finally, as regards the argument whereby the advantage on taxes on capital transfers and documented legal acts, on economic activities and on immovable property is of little importance in relation to company tax, the Court of First Instance finds that even this does not make the logic of the contested Decision any clearer. In fact, states the Court of First Instance, to admit that the advantage is of little importance amounts inevitably to admitting that such an advantage does indeed exist. Furthermore, the Court of First Instance recalls that the Commission explained at the hearing that it did not wish to argue that the advantage from taxes on capital transfers and documented legal acts, on economic activities, and on immovable property is lower than the *de minimis* threshold. Consequently, the argument put forward does not allow the Court of First Instance to understand the reasons why the tax regime in respect of taxes on capital transfers and documented legal acts, on economic activities, and on immovable property does not constitute an advantage.
- (107) The Court of First Instance concludes from the above that the contested Decision is tainted by defective reasoning such that it is unable to ascertain the merits of the Commission's appraisal that no advantage is conferred on cooperatives by the tax regime in respect of taxes on capital transfers and documented legal acts, on economic activities, and on immovable property.
- (108) Nevertheless, the Court recalls that such defective reasoning can only bring about the annulment of a contested Decision if the Decision itself contains no sufficient statement of reasons to support the operative part which concludes that the disputed measures do not constitute State aid, within the meaning of Article 107(1) of the TFEU. The Court of First Instance states that in this respect the Commission affirms in the disputed Decision, on one hand, that the disputed measures do not constitute an advantage and, on the other, that if these measures constitute an advantage, this advantage is not of a selective nature given that it is in keeping with the nature and scheme of the system.

**2. Second part of the plea: error of assessment that the disputed measures are in keeping with the nature and scheme of the Spanish tax system vitiating the finding of an absence of selectivity in relation to these measures**

- (109) The Court of First Instance considers that the contested Decision does not contain any element which allows it to understand the reasoning adopted by the Commission to arrive at the conclusion that the disputed measures are not selective (recital 148), as they are justified by the nature and scheme of the system (recital 167).
- (110) Certainly, states the Court of First Instance, recital 148 of the contested Decision indicates that the Commission considers that the disputed measures are not selective in view of the information submitted by the Kingdom of Spain and Agri-food Cooperatives Spain.
- (111) Now, firstly, as regards the information submitted by Agri-food Cooperatives Spain as reported in the contested Decision, states the Court, there is no choice but to admit that it concerns the absence of any advantage and not the absence of any selectivity. This information does not therefore contain elements on which to base an argument in relation to the absence of any selective advantage conferred by the disputed measures. Next, as regards the information submitted by the Kingdom of Spain, it should be highlighted that this information, as reported in recitals 103 to 120 of the contested Decision, is mainly given over to justifying that the disputed measures fall within the scope of a policy to liberalise the fuel distribution sector. However, this explanation does not contribute to an understanding of the reasons why the disputed measures might be justified by the nature or scheme of the tax system. In fact, states the Court, in the absence of full clarification, which is lacking in this case, a consideration based on Spain's policy to liberalise the fuel sector does not necessarily concern the nature or scheme of the Spanish tax system.
- (112) Moreover, states the Court, the circumstance highlighted in recital 119 of the contested Decision, whereby the advantages in respect of taxes on capital transfers and documented legal acts predate the disputed measures and are designed to encourage cooperative societies and the cooperative movement in Spain, does not necessarily fall within the scope of the nature and the scheme of the tax system.
- (113) In any event, the Court of First Instance continues, even assuming that the Commission intended to consider, in spite of the absence of any detailed clarification on this point in the contested Decision, that the promotion of the cooperative movement constituted part of the nature and scheme of the Spanish tax system, it must never-

theless be conceded that recital 119 of the same Decision only refers to this reason in relation to the tax advantage in respect of capital transfers and documented legal acts and remains silent on the advantages conferred by the tax regime with regard to immovable property on the one hand and economic activities on the other.

- (114) The Court of First Instance concludes from the above that the contested Decision is tainted by defective reasoning such that it is unable to ascertain the merits of the Commission's appraisal whereby, assuming that the disputed measures constitute an advantage, this advantage is not selective because it is justified by the nature and scheme of the system.
- (115) Consequently, the Court finds that, as a result of the determination of the absence of reasons in point 90 above, as well as the determination in the previous point, the contested Decision does not contain sufficient grounds in its assessment as to why the disputed measures do not constitute State aid within the meaning of Article 107(1) of the TFEU.
- (116) The Court of First Instance concludes that there are grounds to annul the contested Decision in so far as the Commission infringed the obligation to state reasons pursuant to Article 296 of the TFEU. Therefore, the Court of First Instance ordered the annulment of Article 1 of Commission Decision 2003/293/EC, finding that the measures to support agricultural cooperatives laid down by Royal Decree-Law No 10/2000 on emergency support for agriculture, fisheries and transport do not constitute State aid within the meaning of Article 107(1) of the TFEU.

## VII. ASSESSMENT

- (117) Articles 107 and 108 of the TFEU apply to all the agricultural products listed in Annex I to the Treaty, subject to a common organisation of the market (all agricultural products, except horse meat, honey, coffee, alcohol of agricultural origin, vinegar derived from alcohol and cork) in accordance with the different regulations governing respective common organisations of markets.

### 1. Article 107(1) of the TFEU

- (118) Pursuant to the provisions of Article 107(1) of the TFEU, aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the internal market.
- (119) The measures in this case take the form of differentiated tax treatment in favour of agricultural cooperatives.

- (120) The Commission notice on the application of the State aid rules to measures relating to direct business taxation<sup>(21)</sup> provides that State aid relating to direct business taxation is subject to the application of Article 107 if:
- the advantage is granted by the State or through State resources,
  - the measure affects competition and trade between Member States,
  - the measure is specific or selective in that it favours certain undertakings or the production of certain goods, i.e. it distorts or threatens to distort competition,
  - the measure confers on beneficiaries an advantage which relieves them of charges that are normally borne from their budgets.
- (121) Firstly, as recalled in point 3.2.7 of the communication from the Commission to the Council and European Parliament, the European Economic and Social Committee and the Committee of the Regions on the promotion of cooperative societies in Europe<sup>(22)</sup>, it should be noted that cooperatives carrying out economic activities, which includes agricultural cooperatives, are considered as ‘undertakings’ in the sense of the TFEU and are therefore subject in full to European competition and State aid rules, and also to the various exemptions, thresholds and *de minimis* rules.
- (122) An examination of this case must focus on the particular notified measures in favour of agricultural cooperatives adopted following the increase in fuel prices (Article 1 of Royal Decree-Law No 10/2000) in terms, first and foremost, of the four criteria mentioned above.
- (123) Since the result of the notified measures was to extend the scope of application of the privileged tax status of cooperatives to include the sale of fuel to non-members, it is necessary to describe this tax status in the light of Article 107 of the TFEU.
- 1.1. *The ‘State resources’ criteria*
- (124) In accordance with the case law of the Court of Justice of the European Union, in order to classify an advantage as State aid, firstly, it must be granted directly or indirectly through State resources and, secondly, it must be attributable to the State<sup>(23)</sup>.
- (125) Point 10 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation explains that a loss of tax revenue is equivalent to consumption of State resources in the form of fiscal expenditure. Furthermore, State support may be provided just as much through tax provisions of a legislative, regulatory or administrative nature as through the practices of the tax authorities.
- (126) By virtue of Article 1 of Royal Decree-Law No 10/2000, Spain introduced certain amendments to Law No 27/1999 on cooperatives and Law No 20/1990 on the tax arrangements applying to cooperatives. On the one hand, it abolishes the maximum limit of 50 % of turnover imposed on agricultural cooperatives for transactions with non-member third parties without losing their preferential tax treatment as granted by Law No 20/1990 for deliveries of B diesel. On the other hand, Law No 34/1998 on hydrocarbons has also been amended to waive the requirement that agricultural cooperatives must set up a legal entity to which the general tax arrangements apply if they carry out deliveries of B diesel to non-member third parties.
- (127) It should be recalled that, as described in recital 20 of this Decision, several advantages are granted to agricultural cooperatives in respect of several taxes. By extending the volume of diesel B sales to non-member third parties beyond the maximum limit of 50 % of turnover permitted by law for agricultural cooperatives without losing their preferential tax treatment, Spain does indeed forego tax receipts and therefore, consumes State resources in the form of fiscal expenditure. Moreover, by waiving the requirement for cooperatives to set up a legal entity subject to the general tax system for the sale of B diesel to non-members, the Spanish Government is currently relinquishing any potential tax receipts related to this status and consequently, consuming State resources in the form of fiscal expenditure.
- (128) In its judgment of 27 January 1998, the Court of First Instance allowed that the criteria for the use of State resources may also take a negative form, if the intervention results in a loss of resources which should have been paid to the State budget, by means of a tax exemption for example, as in the case in question<sup>(24)</sup>.
- (129) Consequently, the measures considered in this case are indeed advantages attributable to the State and are granted directly through State resources.

<sup>(21)</sup> OJ C 384, 10.12.1998, p. 3. See also the judgment of the Court of Justice of 24 July 2003 in Case 280/00 *Altmark* [2003] ECR I-7747.

<sup>(22)</sup> COM(2004) 18 final of 23.2.2004.

<sup>(23)</sup> Case C-303/88 *Italy v Commission* [1991] ECR I-1433, paragraph 11, Case C-482/99 *France v Commission* [2002] ECR I-4397, paragraph 24, as well as Case C-126/01 *GEMO* [2003] I-13769, paragraph 24.

<sup>(24)</sup> Judgment of the Court of First Instance of 27 January 1998 in Case T-67/94 *Ladbroke Racing v Commission* [1998] ECR II-1; see also judgment of the Court of Justice of 29 April 2004 in Case C-159-01 *Netherlands v Commission* [2004] ECR I-4461.

1.2. *The 'affecting trade' criterion*

- (130) In order to fall within the scope of application of Article 107(1) of the TFEU, aid must also affect competition and trade between Member States. This criterion is based on the assumption that the beneficiaries of the aid engage in an economic activity.
- (131) According to established case law on this subject, trade is affected from the moment that the beneficiary business engages in an economic activity which involves trade between Member States. The Court has stated that if an advantage granted by a Member State strengthens the position of a category of businesses in relation to other competing businesses within the context of intra-Community trade, the latter must be deemed to be affected by this advantage <sup>(25)</sup>.
- (132) In the case under consideration, agricultural cooperatives engage in an economic activity which involves trade between Member States. In fact, there is a very high level of trade in agricultural products between the European Union and Spain. As an example, in 1999 Spain exported circa EUR 11,33 billion in agricultural products to the European Community and imported EUR 7,38 billion in products of the same nature. In 2007, Spain's total exports of agricultural products to European Union countries amounted to approximately EUR 33,12 billion and its total imports amounted to approximately EUR 27,14 billion <sup>(26)</sup>.
- (133) In this particular case, the beneficiary businesses operate in a sector which is subject to competition, namely the sale of fuel. It is worth mentioning that there is intense competition between Member State producers whose products are traded within the Community. Spanish producers are highly competitive within this market. Moreover, the considerable number of beneficiaries of these measures will increase their impact on trade.
- (134) Thus, it seems that these measures threaten to affect trade between Member States of the products in question, which occurs when such measures favour operators in one Member State to the detriment of other Member States. The two measures in question have a direct and immediate effect on the production costs of the products in question in Spain. Consequently, they affect competition and trade between Member States.

1.3. *The 'advantage' criterion*

- (135) According to established case law on the subject, aid is a more general concept than the concept of subsidies, as it includes not only positive benefits such as subsidies themselves, but also measures taken by the State in a variety of forms to relieve the charges which normally burden the budget of a business and which, although not subsidies in the strict sense of the word, are of the same nature and have identical effects <sup>(27)</sup>.
- (136) In the Court's view, it follows that a measure by which the public authorities grant a tax exemption to certain businesses which does not entail a transfer of State resources but does place its beneficiaries in a more favourable financial situation than other taxpayers constitutes State aid within the meaning of Article 107(1) of the TFEU.
- (137) According to the communication from the Commission on direct business taxation, such an advantage may be conferred by a reduction of the undertaking's tax burden in various ways, including: a reduction in the tax base (such as special deductions, special or accelerated depreciation arrangements or the entering of reserves on the balance sheet etc.); a total or partial reduction in the amount of tax (such as exemption or a tax credit); deferment, cancellation or even special scheduling of tax debt.
- (138) There is a comparison of the tax arrangements applying to cooperative societies as opposed to non-cooperative forms of enterprise existing in Spain in recital 20 of this Decision. It relates, in fact, to advantages enjoyed by all protected cooperatives, including agricultural cooperatives, to which other forms of enterprise are not normally entitled. It should also be specified that the 20 % reduced rate applied to the taxable amount for cooperative results (corresponding to transactions with members) is not included in this analysis of the tax privileges of the aforementioned cooperatives.
- (139) The changes introduced by Royal Decree-Law No 10/2000 are of a nature to allow agricultural cooperatives to devote most or all of their business to the sale of B diesel without, however, being subject to the same tax treatment as non-cooperative forms of enterprise.

<sup>(25)</sup> Case 730/79 *Philip Morris Holland BV v Commission* [1980] ECR 2671, paragraph 11.

<sup>(26)</sup> Source: Eurostat.

<sup>(27)</sup> Judgment of the Court of Justice of 15 June 2006 in Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* [2006] I-5293.

- (140) As the Court of First Instance states in Case T-146/03 <sup>(28)</sup>, prior to the adoption of these measures, the tax status of cooperatives did not apply to the sale of fuel since this activity had to be carried out by a separate legal entity which would not have enjoyed this privileged tax status. Since the entry into force of the disputed measures, the scope of application of this privileged tax status has been extended to include the sale of fuel. The Court of First Instance therefore considers that the disputed measures have altered the tax situation of agricultural cooperatives with regard to the sale of fuel to non-member third parties.
- (141) Indeed, the Commission finds that through these measures, agricultural cooperatives – which are now entitled to trade with non-member third parties without volume restrictions whilst keeping their legal status, which is different to that of non-cooperative forms of enterprise and even non-agricultural cooperatives – engaged in the sale of B diesel, are placed in an advantageous situation compared to non-cooperative forms of enterprise in relation to the sale of fuel to non-member third parties, given that they are still entitled to their special tax treatment.
- (142) Indeed, it should be recalled that for the purposes of establishing the taxable amount for cooperatives, the results of cooperative activities (transactions with members) and the results of extra-cooperative activities (transactions with non-members) are assessed separately and are not taxed in the same manner. Nevertheless, in spite of the separation of accounts, as the agricultural cooperative remains a single entity it will continue to enjoy other tax advantages that are not directly related to the taxation of profits at a lower rate, such as advantages in respect of company tax, tax on capital transfers and documented legal acts, tax on economic activities (wherein the total amount is completely independent of the enterprise's results) and tax on immovable property. Cooperatives therefore keep their special tax status even when they increase the volume of sales of B diesel to non-member third parties beyond 50 % without having to form a separate legal entity subject to the general tax system, thereby creating an exception to the national law on cooperatives.
- (143) Agricultural cooperatives consequently find themselves in a more favourable financial situation than other taxpayers, since they are still entitled to some <sup>(29)</sup> of the advantages in respect of company tax in particular, and all of the advantages in respect of other taxes.
- (144) As regards the arguments advanced by Agri-food Cooperatives Spain in relation to this context specifically to company tax, the Commission recalls as it did in Commission Decision 2003/293/EC, that specially protected cooperatives, which include agricultural cooperatives, receive a 50 % rebate on company tax. Moreover, there is a 50 % rebate on financing the mandatory reserves and a 100 % deduction on allocations to apprenticeship and training reserves. Finally, they are also completely free to decide on the depreciation of their new physical assets acquired during the three years following the date of their registration in the Register of Cooperatives.
- (145) However, the Commission admits that the tax advantages enjoyed by cooperatives should be examined in the light of the obligations that cooperatives, unlike non-cooperative forms of enterprise, must discharge.
- (146) According to Agri-food Cooperatives Spain, this tax advantage cannot be considered in isolation from the tax paid by cooperative members on their share of their cooperative's profits when they pay their personal income tax, which is different from the dividends paid out by companies with share capital. The alleviation of double taxation in the case of companies with share capital and their shareholders (dividends) has no counterpart in the case of cooperatives and their members (cooperative income), with the result that cooperative income is more heavily taxed than dividends. The advantage that a cooperative might enjoy as a result of the tax advantage in respect of company tax is offset by the double taxation imposed by taxing the cooperative in respect of company tax and then cooperative members in respect of personal income tax and the increase in their tax burden in this way.
- (147) Now, as stated by the Court of First Instance in its judgment, this argument must be understood to refer exclusively to the offsetting of the 50 % reduction on company tax, that is, the 50 % rebate in respect of this tax. Indeed, the Commission confirms that the argument put forward by Agri-food Cooperatives Spain addresses this measure.
- (148) The Commission considers that the advantage must be examined at the cooperative level and not at that of its members as the cooperative is actually the subject of interest for the purposes of this analysis. Consequently, the figures put forward by Agri-food Cooperatives Spain in relation to the corporate tax rate are not meaningful. Moreover, they only relate to the net availability of funds received by the cooperative member following taxation. Consequently, the Commission considers, for example, that the economic situation of the cooperative is not necessarily weakened by the allocation of capital to the mandatory reserves, since these are kept and used by the latter in very specific situations.
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- <sup>(28)</sup> Judgment of the Court of First Instance of 12 December 2006 in Case T-146/03 *Asociación de Estaciones de Servicio de Madrid, Federación Catalana de Estaciones de Servicio v Commission* [2003] ECR II-98.
- <sup>(29)</sup> That is, the advantages cited *supra* in the first paragraph of recital 20, with the exception of the lower rate of 20 %, which only applies to transactions with cooperative members and which as a result, is not concerned by this Decision.

- (149) The Commission considers, in the light of the explanations provided, that the taxation of agricultural cooperatives in Spain through company tax certainly does hold some advantages. Furthermore, the different treatment in respect of the aforementioned tax cannot be explained by certain constraints specific to cooperative business, such as double taxation. Indeed, when a cooperative engages in transactions with non-member third parties, it operates in the market in the same manner as any business and there is no justification for it to be treated differently to other companies. In the first place, cooperative revenue from transactions with non-member third parties must be taxed at cooperative level in the same way as if the activity was carried out by a company with share capital and the amounts distributed to its members should be taxed in the same way as dividends received by the shareholders of a company with share capital.
- (150) Finally, the Commission states that no argument has been advanced as regards the fact that cooperatives are free to decide on the depreciation of their new physical assets acquired during the three years following the date of their registration in the Register of Cooperatives or as regards other advantages related to company tax.
- (151) The Commission also recalls that cooperatives not only enjoy an advantage in relation to company tax but also other taxes as described in recital 20 (tax on capital transfers and documented legal acts, tax on economic activities and tax on immovable property) of this Decision. There is no question of any kind of offsetting for double taxation in relation to these taxes.
- (152) Cooperatives therefore keep their special tax status even when they increase the volume of sales of B diesel to non-member third parties beyond 50 % without having to form a separate legal entity subject to the general tax system, thereby creating an exception to the national law on cooperatives.
- (153) Spain concludes that the measures introduced by Royal Decree-Law No 10/2000 are not State aid inasmuch as they do not affect competing businesses in the same sector, since all firms, including agricultural cooperatives, engaging in this activity are subject to the same rate of company tax (35 %). However, as mentioned above, the changes introduced by Royal Decree-Law No 10/2000 are of a nature to allow agricultural cooperatives to devote most or all of their business to the sale of B diesel without, however, being subject to the same tax treatment as non-cooperative forms of enterprise as they do not lose their preferential tax treatment in relation to the other advantages in respect of company tax, tax on capital transfers and documented legal acts, tax on economic activities (where the total amount is completely independent of the enterprise's results) and tax on immovable property.
- (154) As a result, with regard to measures adopted by virtue of Article 1 of Royal Decree-Law No 10/2000, the Commission considers that the 'advantage' criterion is fulfilled.
- 1.4. *The 'selectivity' criterion*
- (155) In order to constitute State aid within the meaning of Article 107(1) of the TFEU, a measure must, inter alia, be of a nature to confer a selective advantage for the exclusive benefit of certain undertakings or certain business sectors. Effectively, this Article refers to aid which distorts or threatens to distort competition 'by favouring certain undertakings or the production of certain goods' <sup>(30)</sup>.
- (156) In ascertaining the selective nature of a measure, the Commission must examine whether the differentiation between enterprises introduced by the measure under consideration falls within the nature or scheme of the general system in terms of advantages or obligations. Indeed, according to existing case law, a specific tax measure which is justified by the internal organisation of the tax system is excluded from the application of Article 107(1) of the TFEU <sup>(31)</sup>. If this differentiation is to achieve aims that are different to those pursued by the general system, the measure in question is, in principle, considered to fulfil the criterion of selectivity provided for in Article 107(1) of the TFEU.
- (157) As regards differentiated tax measures, point 20 of the communication from the Commission on the application of State aid rules to measures relating to direct business taxation recalls that some tax benefits are on occasion restricted to certain types of undertaking, to some of their functions or to the production of certain goods. In so far as they favour certain undertakings or the production of certain goods, they may constitute State aid as referred to in Article 107(1) of the TFEU.
- 1.4.1. *Do the measures favour certain undertakings or the production of certain goods?*
- (158) It is advisable to determine whether, within the framework of the Spanish legal system, the measure in question is of a nature to favour certain undertakings or the production of certain goods in relation to others in a comparable factual or legal situation in the eyes of the aforementioned system <sup>(32)</sup>.

<sup>(30)</sup> Judgment of the Court of First Instance of 13 September 2006 in Case T-210/02 *British Aggregates* [2006] ECR II-2789.

<sup>(31)</sup> Judgment of the Court of Justice of 10 January 2006 in Case C-222/04 *Cassa di Risparmio di Firenze* [2006] ECR II-289.

<sup>(32)</sup> Judgments of 6 September 2006 in Case C-88/03 *Portugal v Commission* [2006] ECR I-7115, paragraph 54, and of 29 April 2004 in Case C-308/01 *GIL Insurance and Others* [2004] ECR I-4777, paragraph 68.

- (159) The communication from the Commission on the promotion of cooperative societies in Europe recognises that cooperatives act in the interests of their members, who are also its users, and that they are not managed for the profit of external investors. The profits are earned by members in proportion to their transactions with the cooperative, while the reserves and the assets are jointly held, unapportionable and given over to the common interests of the members. As there are generally close personal relationships between members, new members must be approved by them, whilst voting rights are not necessarily proportional to shares held. On resigning, a member is entitled to be reimbursed for their share, resulting in a reduction in capital.
- (160) This calls for a definition of the 'true mutual cooperative model', which can be used to evaluate whether cooperatives are in the same factual and legal situation in the eyes of the Spanish tax system as companies with share capital.
- (161) Firstly, the true mutual cooperative is characterised by a specific relationship with its members. Each member is a partner with a say in the administration of the cooperative whereby each member has one vote only, decisions are made by majority vote and the elected management is responsible to its members. There are numerous interactions between the cooperative and its members which go beyond mere commercial dealings.
- (162) Next, in a true mutual cooperative, the results of economic performance must be equitably and fairly distributed and any surplus must eventually be returned to its members. This is in line with the principle of mutuality, by which cooperatives act in the interest of their members. The members of a retail or consumers' cooperative receive financial benefits based on the total value of their transactions with the cooperative (individual dividends or profits) at the end of the financial year. They may however decide to allow the cooperative to keep some of these dividends or surpluses for the different reserves. Pure mutual cooperatives may thus be defined as trading solely with their members.
- (163) As a result, as regards company tax in particular, in true mutual cooperatives the cooperative does not make any profit because it only operates for the benefit of its members. For this reason, the Commission considers that true mutual cooperatives and corporations for profit are not in comparable legal and factual situations with regard to the taxation of profits. Given this situation, the deduction of the taxable income of true mutual cooperatives does not therefore constitute State aid.
- (164) Be that as it may, the Commission also recognises that Royal Decree-Law No 10/2000 introduces factors which alter the true cooperative model, particularly the possibility of waiving the maximum limit of 50 % imposed on agricultural cooperatives in their B diesel transactions with non-member third parties without losing their status as protected cooperatives; in other words, the principle of exclusivism in favour of agricultural cooperatives is called into question. Indeed, the mere fact that the cooperatives can exceed the 50 % limit taints their 'true mutual' nature and, what is more, a large proportion of this business may be concluded with non-members. The activity of the agricultural cooperative may also be altered profoundly by pursuing a profit-seeking objective and it is appropriate to ask whether the principles that characterise a true mutual cooperative (such as the active participation of cooperative members in the administration, decision-making or even management of the cooperative, the principles of exclusivism, altruism and democracy) can be upheld whilst the cooperative's services are made available to non-members on an unlimited basis. In addition, it cannot be ignored that the change in the nature of the revenues from transactions concluded with non-member third parties marks a departure from the nature of cooperativism.
- (165) Thus, it seems that the true mutual nature of cooperatives in the agricultural sector concerned by the measure is definitely called into question by Royal Decree-Law No 10/2000 in this case. For these reasons, and in the light of existing Spanish legislation, the Commission is unable unequivocally to confirm the true mutual nature of the Spanish agricultural cooperatives concerned. It would therefore seem that agricultural cooperatives and their revenue should be compared not to true mutual cooperative societies but indeed to companies with share capital.
- (166) It is however necessary to determine the legal system within which the measures must be evaluated, that is to say the reference framework. In this respect, it should be noted that as regards the tax advantages conferred on Spanish agricultural cooperatives, the measures in question constitute special exemptions provided for by Law No 20/1990 on the tax arrangements applying to cooperatives. Articles 16(5), 18(2), 33(1), 33(2), 33(3), 33(4), 34(1) and 34(2) of the Law provide for a whole series of favourable measures for specially protected cooperatives, including agricultural cooperatives, in respect of company tax, tax on capital transfers and documented legal acts, tax on economic activities and tax on immovable property (see recital 20 above for details of these advantages).
- (167) Next, it is important to determine the objective of each of these four taxes. To this end, it should be observed that the objective of company tax is the taxation of the profits of businesses. The objective of each of the remaining taxes is the taxation of capital transfers and of the execution of documented legal acts, the taxation of the exercise of an economic activity and the taxation of the possession of a right on immovable property.

- (168) Finally, as mentioned above, it is necessary to determine whether cooperatives and companies with share capital find themselves in comparable factual and legal situations as regards these objectives and these four types of taxation.
- (169) First of all, as far as company tax is concerned, since the Commission is unable to confirm the mutual nature of the Spanish agricultural cooperatives in question, which by definition would not make a profit, it is consequently also unable to exclude that cooperatives and companies with share capital find themselves in comparable factual and legal situations regarding advantages related to the tax.
- (170) When a cooperative engages in transactions with non-member third parties, it operates in the market in the same manner as any other business and, consequently, finds itself in a comparable factual and legal situation as far as the objective of company tax is concerned. In addition, as regards tax measures in respect of the undistributable reserves of cooperatives, the Commission considers that these can be compared to the reserves of companies with share capital for the purposes of company tax. Indeed, for the cooperative, the allocation of profits to the undistributable reserves would in essence be comparable to companies with share capital keeping their profits, because the undistributable reserves are used in the course of cooperative activities in a similar manner to the profits reserved by companies with share capital. The comparison must concern the business rather than cooperative members or shareholders. Even the mandatory nature of the cooperative's undistributable reserves cannot change the fact that the measure constitutes aid, since companies with share capital also have mandatory legal reserves which are in contrast subject to taxation. Thus, the Commission is of the opinion that the undistributable reserves are economically comparable to any other reserve of any other business.
- (171) As a result, any measure in relation to company tax which aims to introduce differentiated and more advantageous treatment of profits in general and of profits destined for undistributable reserves in particular is likely to provide cooperatives with an economic advantage over companies with share capital which would not be able to qualify for them even if their situation were comparable.
- (172) The Commission is of the opinion that these considerations suggest that companies with share capital are on the same plane as cooperative societies and that, consequently, it is possible to state that cooperative societies enjoy an advantage as regards company tax over companies with share capital.
- (173) In relation to tax on capital transfers and documented legal acts, it should be recalled that this indirect form of taxation is designed to be charged on different legal acts such as taxable capital transfers, documented legal acts or even certain company transactions (i.e., corporate financing such as increasing share capital, for example). A company with share capital would be taxed on the execution of these acts. Whereas, as explained in recital 20 of this Decision, cooperative societies enjoy a tax exemption on the same acts (incorporation, capital increase, taking out and cancelling loans, and so on <sup>(33)</sup>). Therefore, cooperative societies enjoy an advantage over companies with share capital.
- (174) Next, the tax on economic activities is charged directly on any type of entrepreneurial, professional or artistic economic activity performed by natural or legal persons on Spanish territory <sup>(34)</sup>. A company with share capital with a turnover in excess of one (1) million euro is subject to this tax depending on the economic activity that it is engaged in. As mentioned in recital 20 of this Decision, cooperative societies enjoy a 95 % rebate on this tax <sup>(35)</sup>. Therefore, cooperative societies enjoy an advantage over the aforementioned companies with share capital, which are taxed at the full rate.
- (175) Lastly, it should be recalled as regards tax on immovable property that this is a local tax charged on the rights of ownership and other property rights attached to a building. Companies with share capital are taxed at the full rate, unlike cooperative societies, as described in recital 20 of this Decision. Indeed, the latter enjoy a 95 % rebate on this local tax in respect of rural property belonging to agricultural cooperatives and community land cooperatives <sup>(36)</sup>. Therefore, cooperative societies in non-urban areas enjoy an advantage over companies with share capital, which are subject to the full rate of this tax.
- (176) Having found that companies with share capital definitely are on the same plane and find themselves in a similar situation to that of cooperative societies, the Commission is in a position to ascertain that they are excluded from enjoying the aforementioned advantages <sup>(37)</sup> and that as a result these advantages are indeed selective since they only apply to cooperative societies.
- <sup>(33)</sup> See recital 20 of this Decision, and Articles 33(1) and 34(1) of Law No 20/1990 of 19 December 1990 on the tax arrangements applying to cooperatives.
- <sup>(34)</sup> See recital 20 of this Decision.
- <sup>(35)</sup> Article 33(4)(a) of Law No 20/1990 of 19 December 1990 on the tax arrangements applying to cooperatives.
- <sup>(36)</sup> Article 33(4)(b) of Law No 20/1990 of 19 December 1990 on the tax arrangements applying to cooperatives.
- <sup>(37)</sup> See recitals 135 to 154 of this Decision on determining the existence of the advantages in question.

- (177) Therefore, the Commission finds that the measures introduced by Article 1 of Royal Decree-Law No 10/2000 do confer a selective advantage <sup>(38)</sup> on agricultural cooperatives.

#### 1.4.2. Are the measures justified by the nature or scheme of the system?

- (178) Next, it should be determined whether the tax measures in question can be justified by the nature or scheme of the tax system, which the Member State concerned has a duty to prove. A measure introducing an exception to the application of the general tax system may be justified by the general scheme and nature of the tax system if the Member State concerned can prove that this measure results directly from the founding principles or policy of its tax system <sup>(39)</sup>.

- (179) A justification based on the nature or scheme of the tax system at issue constitutes an exception to the principle that State aid is prohibited and must therefore be interpreted strictly <sup>(40)</sup>. It is the duty of the Member State to prove that the exception in question is justified by the nature and scheme of the system and therefore that it does not constitute aid within the meaning of Article 107 of the TFEU. To this end, a distinction should be drawn between the objectives assigned to a particular tax system and which are external to it, on the one hand, and the mechanisms inherent to the tax system itself which are necessary for the achievement of such objectives, on the other <sup>(41)</sup>.

- (180) In the case in question, Agri-food Cooperatives Spain considers that the measures provided for in Royal Decree-Law No 10/2000, particularly in relation to the impact on company tax, are intended to offset the double taxation of cooperative income through company tax and personal income tax. The Commission is unable to make a decision as to the accuracy of this assertion on the basis of the arguments put forward. Nevertheless, it recognises that this assertion is not made by the Spanish authorities in order to prove that the measure results directly from the founding principles or the policy of its tax system. Spain holds that the aim is to allow cooperatives to carry out this activity without having to set up a separate legal entity, since the same company tax is payable in both situations in so far as the revenue from sales of B diesel to third parties is subject to the general company tax regime. The objective of the two measures is to allow farms to continue their business activities and to maintain their

competitiveness so that they can cope with the difficult economic conditions created by the exorbitant increase in fuel prices and the depreciation of the euro against the dollar <sup>(42)</sup>. Concerning the other taxes, the Spanish authorities consider that the tax advantages predate Royal Decree-Law No 10/2000, so that cooperatives are not entitled to them as a result of the aforementioned Decree-Law.

- (181) However, the Commission considers that the mere fact that the tax advantages brought to bear on the various taxes by the two measures in question were designed to offset difficult economic conditions does not allow it to consider that all the disputed tax advantages granted by the Spanish authorities are justified by the nature and scheme of the national tax system <sup>(43)</sup>.

- (182) As a result, with regard to the measures provided for in Article 1 of Royal Decree-Law No 10/2000, the Commission considers that the 'selectivity' criterion is fulfilled.

#### 1.5. Conclusions on the nature of 'aid' within the meaning of Article 107(1) of the TFEU

- (183) The Commission considers, in light of the above explanations, that the measures in favour of agricultural cooperatives referred to in Article 1 of Royal Decree-Law No 10/2000 adopted following the increase in fuel prices confer an advantage on them to which other operators are not entitled, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, and that it is therefore likely to affect trade between Member States. Consequently, the Commission concludes that these measures fall within the scope of Article 107(1) of the TFEU.

- (184) As regards whether this aid was new or existed already, it should be remembered that these measures, adopted in 2000, refer directly to the advantages granted by the general tax arrangements for cooperatives as provided for in Law No 20/1990. Now this Law provides for tax advantages which should, in principle, be considered as new aid, since they were adopted after 1986, the year of Spain's accession to the EEC.

- (185) However, the Commission is aware that cooperative tax arrangements generally have ancient roots in Europe and that certain new provisions only serve to reinstate advantages that already existed before accession to the EEC.

<sup>(38)</sup> For the concept of advantage, see recitals 135 to 154 of this Decision.

<sup>(39)</sup> Judgment of 6 September 2006 in Case C-88/03 *Portugal v Commission* [2006] ECR I-7115, paragraphs 80-81.

<sup>(40)</sup> Judgment of 6 March 2002 in Joined Cases T-127/99, T-129/99 and T-148/99 *Diputación Foral de Álava and Others v Commission* [2002] ECR II-1275, paragraph 250.

<sup>(41)</sup> Judgment of the Court of Justice of 6 September 2006 in Case C-88/03 *Açores – Republic of Portugal v Commission* [2006] ECR I-7115.

<sup>(42)</sup> See recitals 65 to 85 of this Decision.

<sup>(43)</sup> See footnote 41.

(186) In the case in question, no information has been sent to the European Commission by the Spanish authorities or by interested third parties to establish beyond any doubt that the measures adopted by Law No 20/1990 and then confirmed by the Decree of 2000 represent a continuation of other identical measures which already existed before 1986.

(187) The Commission must therefore conclude that the measures specifically intended for the fuel sector constitute new aid which should have been notified to the Commission prior to its implementation.

## 2. The unlawfulness of the aid

(188) The Commission must emphasise that the Spanish authorities granted the aid under consideration in infringement of the provisions of Article 108(3) of the TFEU. Article 1(f) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty<sup>(44)</sup> defines unlawful aid as new aid put into effect in contravention of Article 108(3) of the TFEU (ex-Article 93 of the EC Treaty). Granting new aid was unlawful in so far as it was implemented before the Commission had decided whether it was compatible with the internal market.

(189) As the measures implemented by Spain contain State aid elements, it follows that this is unlawful aid within the meaning of the TFEU.

(190) The Commission notice on the determination of the applicable rules for the assessment of unlawful State aid<sup>(45)</sup> provides that unlawful State aid within the meaning of Article 1(f) of (EC) Regulation (EC) No 659/1999 must be assessed in accordance with the rules and guidelines in force at the time when the aid was granted.

## 3. Examination of the compatibility of the aid

(191) There are exceptions to the general principle of the incompatibility of State aid with the TFEU pursuant to Article 107 of the TFEU. The purpose here is to examine the measures provided for in Decree-Law No 10/2000.

(192) Article 107(2)(b) of the TFEU provides that aid to make good the damage caused by natural disasters or exceptional occurrences is compatible with the internal market. Spain justified this aid by arguing that it was to make good the damage caused by an exceptional occurrence.

(193) According to the Spanish Government, the exorbitant increase in fuel prices provoked public disturbances, strikes and energy and food shortages and difficulties affecting the free transit of goods through Community territory, which should be considered as an exceptional occurrence within the meaning of Article 107(2)(b) of the TFEU.

(194) Because it constitutes an exception to the general principle of the incompatibility of State aid with the internal market laid down by Article 107(1) of the TFEU, the Commission considers that the notion of 'exceptional occurrence' contained in Article 107(2)(b) of the TFEU must be interpreted restrictively. Hitherto the Commission has accepted that wars, internal disturbances or strikes, and with certain reservations and depending on their extent, major nuclear or industrial accidents and fires which result in widespread loss may constitute exceptional occurrences. Because of the inherent difficulties in foreseeing such events, the Commission determines the compatibility of aid on a case-by-case basis, having regard to its previous practice in this field. This line of reasoning is actually referred to under point V.B.2. of the Community guidelines for State aid in the agriculture and forestry sector 2007 to 2013<sup>(46)</sup>.

(195) In this case, the grounds for granting the aid were the increase in fuel prices and not public disturbances, strikes<sup>(47)</sup> or energy and food shortages<sup>(48)</sup>. These events were not the cause of the aid being granted but rather the consequence of the increase in fuel prices.

(196) The Commission considers that in any case, the increase in fuel prices does not constitute an exceptional occurrence and therefore this aid cannot qualify for the exception provided for in Article 107(2)(b) of the TFEU as aid to make good the damage caused by an exceptional occurrence. Moreover, it should be noted that in a communication of 9 March 2006<sup>(49)</sup> concerning the fishing industry, the Commission considered that it would not accept aid for the purpose of public intervention to compensate for a sudden increase in fuel costs in order to avoid any distortion of competition.

(197) Furthermore, the Commission considers that no direct link has been made between the damage and the exceptional occurrence as required under the case law of the Court of Justice of the European Union<sup>(50)</sup>.

<sup>(46)</sup> OJ C 319, 27.12.2006, p. 1, points 89 to 94.

<sup>(47)</sup> Commission Decision 96/148/EC (OJ L 34, 13.2.1996, p. 38).

<sup>(48)</sup> Commission Decision of 29 July 1999, SG(99) D/5879.

<sup>(49)</sup> COM(2006) 103 final of 9 March 2006, point 3.1.2 and COM(2008) 384 final of 13 June 2008, point 6.3.

<sup>(50)</sup> Judgment of the Court of First Instance in Case T-268/06 *Olympiaki Ypiresies AE v Commission* [2008] II-1091, paragraphs 51 and 52.

<sup>(44)</sup> 'New aid' is defined as all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid (OJ L 83, 27.3.1999, p. 1).

<sup>(45)</sup> OJ C 119, 22.5.2002, p. 22.

- (198) As regards the exceptions provided for in Article 107(3), they must be strictly interpreted when examining any regional or sectoral aid programme or any individual aid under general aid schemes. In particular, they can only be granted in cases where the Commission can establish that the aid is necessary to achieve one of the stated objectives. Granting the benefit of the aforementioned exceptions for aid without such consideration would amount to allowing trade between Member States to be damaged and competition distorted, which would be unjustifiable with regard to Community interests, and by the same token, would allow undue advantage for the operators of certain Member States.
- (199) The Commission considers that the contested aid is not intended to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment within the meaning of Article 107(3)(a). It is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State within the meaning of Article 107(3)(b). Nor is it intended to promote culture and heritage conservation within the meaning of Article 107(3)(d).
- (200) Article 107(3)(c) does however prescribe that aid intended to facilitate the development of certain economic activities or of certain economic areas where such aid does not adversely affect trading conditions to an extent contrary to the common interest may be considered to be compatible with the internal market. To qualify for the exception referred to in the aforementioned Article, the aid must contribute to the development of the sector in question.
- (201) With regard to the measures provided for in Article 1 of Royal Decree-Law No 10/2000, they have been in force since 2000. There have never been guidelines or concrete rules at Community level regarding the award of State aid to agricultural cooperatives as they are, in principle, treated like any other business<sup>(51)</sup>.
- (202) It is worth emphasising here the legal and economic nature of agricultural cooperatives and, at the same time, the European regulatory context relating to the agricultural sector.
- (203) According to the International Cooperative Alliance, a cooperative is an independent association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise<sup>(52)</sup>. Cooperatives are defined by different principles giving them a mutual or cooperative character<sup>(53)</sup> such as the principle of 'one person, one vote' or the principle of exclusivity. The status of cooperatives is also characterised by different constraints, particularly with regard to their financial management and the remuneration of members.
- (204) Point 3.2.6 of the Commission communication on the promotion of cooperative societies in Europe specifies that some Member States consider that the restrictions inherent in the specific nature of cooperative capital merit specific tax treatment. However, the principle should be observed that any type of protection or benefits afforded to a certain type of entity should be proportionate to any legal constraints, social added value or limitations inherent in that form and should not lead to unfair competition.
- (205) As pointed out by the Commission above, Article 107(3)(c) does prescribe that aid intended to facilitate the development of certain economic activities or of certain economic areas where such aid does not adversely affect trading conditions to an extent contrary to the common interest may be considered to be compatible with the internal market.
- (206) Moreover, the Commission notes that an analysis of compatibility pursuant to Article 107(3)(c) of the TFEU seeks to find a balance between the benefits of aid in terms of achieving an objective of common interest and the distortion of competition and trade. Therefore, the Commission must firstly analyse whether the aid does actually seek to address situations where the market does not allow fruitful economic results or to address other social or equitable objectives. Next, the Commission has to determine whether the aid constitutes an appropriate measure to remedy a market deficiency. Finally, the Commission has to establish if the aid is proportionate in relation to achieving the proposed objective.

<sup>(51)</sup> Save concerning the reference to the constitution of producer groups in the guidelines for State aid in the agriculture and forestry sector 2007 to 2013 and Article 9 of Commission Regulation (EC) No 1857/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to State aid to small and medium-sized enterprises active in the production of agricultural products, which also deals with the constitution of producer groups.

<sup>(52)</sup> An independent and non-governmental association which unites, represents and serves cooperatives worldwide. Founded in London in 1985, the ICA has 224 member organisations from 87 countries, representing all sector of the economy. <http://www.ica.coop>.

<sup>(53)</sup> *Cooperatives in Enterprise Europe*. Commission consultation document of 7 December 2001.

- (207) As regards the agricultural sector, the principle relating to economic development can be found in Article 42 of the TFEU, which prescribes that the provisions of the chapter relating to rules of competition apply to the production of and trade in agricultural products only to the extent determined by the Council, account being taken of the objectives set out in Article 39 of the TFEU.
- (208) Article 39 of the TFEU prescribes that the objectives of the common agricultural policy are, inter alia, to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production and so ensure a fair standard of living for the agricultural community. Furthermore, it specifies that in working out the common agricultural policy, account is to be taken of the particular nature of agricultural activity, which results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions; the need to effect the appropriate adjustments by degrees; and the fact that, in the Member States, agriculture constitutes a sector closely linked with the economy as a whole.
- (209) What emerges from these Articles is that competition policy must take these TFEU objectives into account. These extremely strong social and economic objectives are assured to a large extent by agricultural cooperatives, which play a major role in the economy generally and in rural areas in particular in relation to job creation and the development of the economic fabric of the regions in which they are established <sup>(54)</sup>.
- (210) The Commission admits that agricultural cooperatives fulfil the objectives of Article 39 of the TFEU and consequently facilitate the development of agricultural activity. Moreover, as agriculture constitutes a sector closely linked with the economy as a whole as emphasised in Article 39(2)(c) of the TFEU, it must also be concluded that agricultural cooperatives facilitate the development of economic regions in which they are established and that their activities and continued existence are thus of common interest.
- (211) In order that aid for the purpose of facilitating the development of certain economic activities or of certain economic areas may be considered to be compatible with the internal market, it must not affect trading conditions to an extent contrary to the common interest.
- (212) The common interest is directly linked to the extent to which the measures are in proportion to the aims sought as stated in point 33 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation.
- (213) In the case in question, the proportionate nature of measures in relation to the intended objective must be ascertained on the basis of the particular characteristics of cooperatives which define and shape their specific nature (i.e., their principles of mutuality), and the impact that they may have on competition, particularly due to the size of cooperatives.
- (214) Thus, any exceptions in favour of agricultural cooperatives with regard to State aid policy would have to promote action and measures directly linked to its principles of mutuality. Moreover, they would have to limit themselves to business activities between the cooperative and its members, which are the very essence of the principles of mutuality. In the absence of these conditions, they should have a limited impact on competition.
- (215) The aid provided for in Article 1 of Royal Decree-Law No 10/2000 exceptionally maintains the status of specially protected cooperative for agricultural cooperatives even if they increase the volume of B diesel sales to non-member third parties beyond 50 % of all transactions and provides for an exemption from the requirement to form a legal entity subject to the general tax system for the distribution of B diesel to non-members. This aid therefore derogates from the characteristics of specially protected cooperatives as defined by the Spanish authorities.
- (216) It consists in measures which only concern extra-cooperative transactions, targeting activities which are not directly linked to the principles of mutuality and not restricted to activities carried out between the cooperative and its members. In light of the above considerations, the Commission is unable to conclude that the aid does actually seek to address situations where the market does not allow fruitful economic results or to address other social or equitable objectives.
- (217) As they are measures which only concern extra-cooperative transactions, targeting activities which are not directly linked to the principles of mutuality and not restricted to activities carried out between the cooperative and its members, the Commission considers that the aid does not meet the compatibility criteria stated above.
- <sup>(54)</sup> The major role of cooperatives in the agricultural sector is recalled in point 4 of the Commission communication on the promotion of cooperative societies in Europe, which states that 'the multiple benefits of cooperatives to Europe's economy make them an integral element in achieving the Lisbon objectives; in fact, cooperatives are an excellent example of company type which can simultaneously address entrepreneurial and social objectives in a mutually reinforcing way. In addition to the entrepreneurship policy, cooperatives play an important role in the agricultural economy, for the development of regions with economic difficulties, while their structure is ideal to enhance employment and social cohesion.'

(218) This Decision concerns the two aid schemes examined and is to be executed without delay, especially in relation to the recovery of all individual aid awarded under these schemes. The Commission further declares that a decision on aid schemes does not prejudice the possibility that individual aid might be deemed as partially or wholly compatible with the common market for reasons specific to the case in question (for example, because the individual award of aid falls within the scope of the *de minimis* rules or within the context of a future Commission decision or by virtue of an exempting regulation).

#### 4. Conclusion in the light of existing provisions

(219) State aid in favour of agricultural cooperatives in the form of tax benefits must in principle be considered as operating aid, prohibited within the meaning of point 32 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation and prohibited by Community rules.

(220) The concept of operating aid was already applied to the agricultural sector in Commission practice before the year 2000, and was then referred to in point 3.5 of the Community guidelines for State aid in the agriculture sector<sup>(55)</sup> and again in point 15 of the Community guidelines for State aid in the agriculture and forestry sector 2007 to 2013. According to these rules, in order to be considered compatible with the internal market, any aid measure must contain some incentive element or require some counterpart on the part of the beneficiary.

(221) The aid in this case consists in tax reduction measures lacking any incentive element or counterpart on the part of the beneficiaries and its compatibility with competition rules has not been proven. As a result, the exception to the principle that State aid is prohibited as provided for in Article 107(3)(c) does not apply and this aid is incompatible with the TFEU.

#### VIII. RECOVERY

(222) The State aid in favour of agricultural cooperatives implemented by Spain by virtue of Article 1 of Royal Decree-Law No 10/2000 is not entitled to benefit from the exception to the principle that State aid is prohibited as provided for in Article 107(3)(c), thus constituting State aid incompatible with the TFEU.

(223) In cases of incompatibility of unlawful aid with the internal market, Article 14(1) of (EC) Regulation (EC) No 659/1999 stipulates that the Commission decides that the Member State concerned must take all

necessary steps to recover the aid from its beneficiary. Such reimbursement is necessary to re-establish the situation applying previously and involves cancelling all the financial advantages from which beneficiaries of the unlawfully granted aid have unduly benefited since the date the aid was granted.

(224) Nevertheless, Article 14(1) of Regulation (EC) No 659/1999 stipulates that 'the Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law.' It is desirable to examine whether in this case, a general principle of Community law such as, for example, the principle of legitimate expectations, could be applied to preclude recovery of unlawful and incompatible aid from its beneficiaries. According to well-established case law, the principle of the protection of legitimate expectations aims to ensure the predictability of legal relations and situations which only arise by virtue of Community law.

(225) However, according to the case law of the Court, the observance of legitimate expectation may only be relied upon against a Community rule to the extent that the European Union itself has created a prior situation capable of causing a legitimate expectation<sup>(56)</sup>. The Court has repeatedly held that the right to argue the principle of the protection of legitimate expectation is extended to any party according to whom a Community institution has caused justified expectations. Moreover, a breach of this principle cannot be invoked in the absence of specific assurances provided to the party by the administration<sup>(57)</sup>. Thus, the right to invoke the principle of the protection of legitimate expectation is extended to any party according to whom a Community institution has caused justified expectations on the basis of the specific assurances that it has provided them.

(226) In this case, there is no element that can be considered to have provided precise reassurance to the beneficiaries of the unlawful aid that it was in fact lawful. In fact, first of all, it should be specified that this aid was implemented without waiting for the Commission's final decision on the issue within the meaning of Article 108(3) of the TFEU. The Court of Justice<sup>(58)</sup> has moreover specified

<sup>(56)</sup> Judgment of the Court of First Instance of 12 September 2007 in Case T-348/03 *Koninklijke Friesland Foods NV* [2007] ECR II-101.

<sup>(57)</sup> Judgment of the Court of Justice of 24 November 2005 in Case C-506/03 *Germany v Commission*, p. 58, not yet published in the ECR; judgment of 22 June 2006 in Joined Cases C-182/03 and 217/03 *Belgium and Forum 187 ASBL v Commission* [2006] ECR I-5479.

<sup>(58)</sup> Judgments of the Court of Justice of 20 September 1990 in Case C-5/89 *Commission v Germany* [1990] ECR I-3437, of 14 January 1997 in Case C-169/95 *Kingdom of Spain v Commission* [1997] I-135, of 20 March 1997 in Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591 and of 11 November 2004 in Joined Cases C-183/02 and C-187/02 *Daewoo Electronics Manufacturing España and Territorio Historico de Alava, Diputación Foral de Alava v Commission* [2004] ECR I-10609.

<sup>(55)</sup> OJ C 28, 1.2.2000, p. 2.

on several occasions that 'in view of the mandatory nature of the supervision of State aid by the Commission pursuant to Article 93 of the Treaty [now Article 108 of the TFEU], undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that Article' and that furthermore, 'A diligent businessman should normally be able to determine whether that procedure has been followed.' To this effect, the Court of Justice has also specified that 'a Member State whose authorities have granted aid contrary to the procedural rules laid down in Article 88 EC [now Article 108 of the TFEU] may not rely on the legitimate expectations of recipients in order to justify a failure to comply with the obligation to take the steps necessary to implement a Commission decision instructing it to recover this aid. If it could do so, Articles 87 EC and 88 EC [now Articles 107 and 108 of the TFEU] would be set at naught, since national authorities would thus be able to rely on their own unlawful conduct in order to deprive decisions taken by the Commission under provisions of the Treaty of their effectiveness' <sup>(59)</sup>.

(227) Next, the fact that the Commission made a decision specifying that the disputed aid did not constitute State aid <sup>(60)</sup> subject to appeal and therefore not yet final, then the annulment of the aforesaid Decision by the Court of First Instance cannot create legitimate expectation in its beneficiaries. In fact, according to consistent case law, the Court of Justice has ruled that the fact that the Commission had initially already given a decision without raising objections to the disputed aid cannot be regarded as capable of having caused the beneficiary to entertain any legitimate expectation since that decision was challenged in due time before the Court, which annulled it <sup>(61)</sup>. Consequently, 'it follows that, so long as the Commission has not taken a decision approving aid and also so long as the period for bringing an action against such a decision has not expired, the recipient cannot be certain as to the lawfulness of the proposed aid which alone is capable of giving rise to a legitimate expectation on his part' <sup>(62)</sup>. In this case, Commission Decision 2003/293/EC considering the measures not to constitute State aid, was subject to an action in due time and, in accordance with the aforementioned case law, could not therefore be a final Decision capable of having caused the addressee of the aforementioned Decision to entertain any legitimate expectation.

(228) Consequently, in the absence of conditions capable of having caused any legitimate expectation, the Commission demands the recovery of the disputed aid.

(229) This Decision concerns the aid measures considered and must be implemented immediately, particularly in so far as concerns the recovery of all individual aid granted under these schemes, with the exception of those awarded for specific projects which, at the time the aid was granted, fulfilled all the conditions prescribed in the applicable *de minimis* Regulation <sup>(63)</sup> or exemption regulation or in an aid scheme approved by the Commission,

HAS ADOPTED THIS DECISION:

#### Article 1

The State aid in favour of agricultural cooperatives implemented by Spain by virtue of Article 1 of Royal Decree-Law No 10/2000 is, without prejudice to the application of Article 2, State aid incompatible with the internal market pursuant to Article 107(3)(c) of the TFEU.

#### Article 2

The measures referred to in Article 1 shall not constitute State aid if they satisfy the conditions laid down in Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid.

#### Article 3

1. Spain shall take the necessary steps to recover the incompatible aid referred to in Article 1 from its beneficiaries, without prejudice to Article 2.

2. The aid to be recovered shall include interest applicable from the date on which the aid was made available to the beneficiaries until the date of its recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 <sup>(64)</sup>.

4. Recovery of the aid shall be implemented without delay in conformity with procedures laid down under national law, in so far as they allow the immediate and effective implementation of this Decision.

<sup>(59)</sup> Judgment of the Court of Justice of 1 April 2004 in Case C-99/02 *Commission v Italy* [2004] ECR I-3353, paragraph 21, with particular reference to the judgment of the Court of Justice of 20 September 1990, cited above.

<sup>(60)</sup> Decision 2003/293/EC, cited above.

<sup>(61)</sup> See footnote 58.

<sup>(62)</sup> Judgment of the Court of Justice of 29 April 2004 in Case C-91/01 *Commission v Italy* [2004] ECR I-4355.

<sup>(63)</sup> Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ L 379, 28.12.2006, p. 5).

<sup>(64)</sup> Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

*Article 4*

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

*Article 5*

1. Within two months of notification of this Decision, Spain shall submit the following to the Commission:
  - (a) a list of beneficiaries who have received aid under the scheme referred to in Article 1 and the total amount of aid received by each one;
  - (b) details of the total amount (principal and interest) to be recovered from each beneficiary;
  - (c) a detailed description of the measures already taken and those planned to comply with this Decision;
  - (d) documents demonstrating that the beneficiaries have been ordered to repay the aid.

2. Spain shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed.

After the two-month period referred to in paragraph 1, Spain shall submit, on simple request by the Commission, a report on the measures already taken and planned to comply with this Decision. The report shall also contain detailed information concerning the amounts of aid and interest already recovered from the beneficiaries.

*Article 6*

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 15 December 2009.

*For the Commission*

Mariann FISCHER BOEL

*Member of the Commission*

**COMMISSION DECISION****of 24 March 2010****on the State aid C 4/03 (ex NN 102/02) implemented by Italy for WAM SpA***(notified under document C(2010) 1711)***(Only the Italian text is authentic)****(Text with EEA relevance)**

(2010/474/EU)

THE EUROPEAN COMMISSION,

1999, and announced that it intended to carry out a formal investigation.

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

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

Having regard to the decision by which the Commission decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, in respect of the aid C 4/03 (ex NN 102/02) <sup>(2)</sup>,

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

Whereas:

(3) At the same time, a survey on national support schemes for foreign direct investment outside the EU (FDI) was being carried out which was expected to result in a Commission communication on the matter.

(4) By letter dated 18 December 2001, the Commission asked Italy for further information, following renewed action by the complainant (two reminders were addressed to the Commission by letters of 31 March 2000 and of 11 October 2000), given that the FDI survey had been postponed by the Commission.

(5) In the light of the information provided by the letters of 20 February 2002 and of 27 March 2002, further questions were put to the Italian authorities by letter of 12 April 2002.

**I. PROCEDURE****Procedure before the Commission**

(1) By letter dated 26 July 1999, the Commission received a complaint against WAM Engineering Ltd. It was alleged in the complaint that WAM SpA had been granted illegal public subsidies by Italy.

(2) Requests for information were addressed to the Italian authorities by letters of 5 August 1999 and 10 September 1999. The complainant submitted additional information by letter of 2 September 1999. By letter dated 13 December 1999, the Commission communicated to the complainant the reply of the Italian authorities submitted by letter of 11 October

(6) The Italian authorities replied by letter of 21 May 2002. By letter dated 5 June 2002, the Commission informed the Italian authorities that it considered the information submitted to be incomplete and asked for the missing information and further clarifications to be provided within 20 working days from receipt of the letter.

(7) As no reply was received, and in spite of a request from the Italian authorities by letter of 25 June 2002 for an extension of the deadline until 31 July 2002, an information order within the meaning of 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 <sup>(3)</sup> (hereinafter: Regulation (EC) No 659/1999) was adopted by the Commission on 26 September 2002. Meanwhile, the case was transferred into the non-notified aid register and was given the Number NN 102/02.

<sup>(1)</sup> With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU; the two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate and the reference to the Court of First Instance as a reference to the General Court.

<sup>(2)</sup> C(2003) 35 final (OJ C 142, 18.6.2003, p. 2).

<sup>(3)</sup> OJ L 83, 27.3.1999, p. 1.

- (8) By letters of 26 June 2002 and 4 October 2002, the complainant was kept informed of the progress of the dossier. By letter of 31 October 2002, it asked to know the outcome of the order.
- (9) The Italian authorities submitted the requested information by letter of 16 October 2002 and supplied additional elements by letter of 24 October 2002.
- (10) The Commission informed Italy by letter of 24 January 2003 that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty, now Article 108(2) of the TFEU, in respect of the aid in question <sup>(4)</sup>.
- (11) By letter of 29 January 2003, the complainant was informed accordingly.
- (12) Having not yet received the abovementioned letter, the complainant sent the Commission a reminder by letter of 10 February 2003.
- (13) Further to the communication to the Italian authorities, concerning the opening of the procedure, WAM SpA immediately sent a letter to the Commission (letter of 10 February 2003).
- (14) By letter of 27 February 2003, Italy asked for an extension, until 7 March 2003, of the fifteen-day deadline for presentation of observations on confidentiality, as laid down in the Commission's decision.
- (15) By letter of 10 March 2003, Italy asked the Commission not to publish the decision, given the willingness of the beneficiary to repay the aid, as also stated by WAM SpA itself in a letter of 13 March 2003 sent directly to the Commission.
- (16) By letter of 18 March 2003, the Commission pointed out that, in order to avoid publication, a final decision closing the case was necessary, which was conditional on proof being submitted that the two tranches of aid, plus interest calculated in a way acceptable to the Commission, had actually been recovered.
- (17) As the amount proposed by the Italian Government, by letter of 13 May 2003, was significantly lower than the first estimate of the grant equivalent of the aid calculated by the Commission on the basis of the elements available at the time of the opening of the procedure, the Commission informed Italy, by letter of 22 May 2003 that, since the proposed amount to be repaid was considered not to satisfy its criteria, publication would go ahead shortly.
- (18) By letter of 13 June 2003, the complainant asked for information about the publication of the decision. The Commission replied by letter of 18 June 2003. A further communication was sent that same day, via e-mail to the complainant informing it promptly that publication had just taken place.
- (19) By letter of 1 July 2003, preceded by a fax of the same date, a request for access to the whole file was submitted by WAM SpA. The request was rejected by the Commission by letter of 14 July 2003.
- (20) By letter of 20 June 2003, WAM SpA replied directly to the Commission's communication to Italy to the effect that it had published the decision. The Commission replied by letter of 11 July 2003.
- (21) By letter of 27 June 2003, the complainant expressed the intention to claim compensation from WAM SpA in view of the losses it had incurred, if the Commission's final decision was negative. It asked to be informed of the procedure to be followed.
- (22) By letter of 4 July 2003, Morton Machine Company Limited announced that it had been summoned to appear in an Italian court by WAM SpA, which in turn was claiming compensation, and asked the Commission whether it could arrange for the summons to be withdrawn.
- (23) By letter of 10 July 2003, the Commission replied to the two abovementioned letters from Morton Machine Company.
- (24) By letter of 16 July 2003, interested third parties submitted comments and requested that they be kept confidential.
- (25) On 23 July 2003 a meeting took place between the Commission departments and the Italian authorities. Ahead of the meeting, the Italian authorities had provided some information by letter of 22 July 2003, registered as received on 25 July 2003. Additional information was sent directly to the Commission by letter of 8 August 2003 from the Prime Minister's Office (Department for Coordination of Community Policies).
- (26) By letter of 21 August 2003, Morton Machine Company Limited asked whether a final decision had already been taken and asked to be kept informed of the situation. The Commission replied by letter of 28 August 2003.

<sup>(4)</sup> See footnote 2.

- (27) By letter of 19 September 2003, Italy submitted to the Commission its observations on the decision to open the formal investigation procedure.
- (28) By letter of 3 November 2003, Italy submitted its observations on third-party comments.
- (29) Further to the request for compensation submitted by WAM SpA of 30 July 2003, the refusal of access to the documents was confirmed by the Secretariat-General by letter of 16 September 2003.
- (30) The information missing from the reply of 19 September 2003 was provided by Italy by letter of 14 January 2004.
- (31) On 19 May 2004 the Commission adopted a decision under Article 7(3) and (5) of Regulation (EC) No 659/1999 <sup>(5)</sup>.
- (35) As regards WAM SpA's presence in the Italian market, the company's market share in the cement screw conveyor market was 60 % in 1991, 50 % in 2000 and 55 % in 2003. In the dust collector market, the company's market share was 40 % in 1991 and increased to 50 % in 2000 and to 60 % in 2003 <sup>(9)</sup>.
- (36) From 1997 onward, WAM SpA expanded into other EU markets, in particular West Germany and France. In 2000, it had a market share for cement screw conveyors of 70 % in France and Germany and 60 % in the UK, whilst the corresponding figures for round dust collectors were 50 % in France, 20 % in Germany and 10 % in the UK <sup>(10)</sup>.
- (37) In 1994 a Japanese subsidiary, WAM Japan, was established. It focused on the marketing of two products which were manufactured in Italy and whose transport costs were relatively low: dust collectors and valves. In 1995 a Chinese subsidiary was established which was run first as a joint venture with a local partner and, from 1998 as a wholly owned subsidiary of WAM SpA <sup>(11)</sup>.

#### Procedure before the Court of First Instance and the Court of Justice

- (32) Both WAM SpA and Italy appealed against the Commission Decision of 19 May 2004 before the Court of First Instance. The Court of First Instance, having decided to join the cases, handed down its judgment on 6 September 2006 and overturned the Commission Decision on the grounds that it had failed to provide sufficient evidence that the aid was likely to affect trade and competition in the EU market, given the circumstances of the case <sup>(6)</sup>.
- (33) The Court of First Instance's judgment was appealed against by the Commission. On 30 April 2009 the Court of Justice dismissed the Commission's appeal <sup>(7)</sup>.
- (38) In the period in question, WAM SpA also held 84 % of the shares in 'WAM Engineering Ltd', a company under English law with its registered office in Tewkesbury, United Kingdom. The market segment in which WAM Engineering Ltd was active was the design, manufacture and sale of industrial mixing machinery used mainly in the food, chemical, pharmaceutical and environmental industries.
- (39) With reference to the pricing policy of WAM Engineering Ltd in the United Kingdom, the complainant argued that WAM was able to offer the same products (industrial mixing machinery) that the complainant's company manufactured and marketed for about one third of the price – a figure which the complainant claimed would barely cover the raw materials needed to manufacture the machines, thanks – in its view – to Italian Government funding, in particular funding under Law No 394/81.

#### II. DESCRIPTION OF THE AID

- (34) WAM SpA is a company under Italian law with its registered office in Cavezzo, Italy. During the relevant period between 1995 and 2000 it was active in the market for the production and marketing of screw conveyors and feeders, dust collectors and valves for industrial plants. There are numerous EU producers in this market. In the dust collectors market in particular, WAM SpA had a number of larger EU competitors with advanced technology and a well-developed commercial structure <sup>(8)</sup>.
- (40) According to the complainant, WAM Engineering Ltd was granted financial support for market penetration programmes in non-EU countries under Law No 394/81. In particular, Law No 394/81 allegedly provided support to Italian companies wishing to establish a subsidiary abroad, in the form of representative offices, sales branches and warehouses.

<sup>(5)</sup> OJ L 63, 4.3.2006, p. 11.

<sup>(6)</sup> Joined Cases T-304/04 and T-316/04 *Italian Republic and Wam SpA v Commission* [2006] ECR II-64.

<sup>(7)</sup> Judgment of the Court of Justice of 30 April 2009 in Case C-494/06 P *Commission v Italian Republic and Wam SpA*, not yet reported.

<sup>(8)</sup> Such as Dce and R-Master (UK), Infa-Stauband Ats (Germany) and Fda (France). See Recent, Centre for economic research (Department of political economy of the University of Modena and Reggio Emilia), 'The Rise of a District Lead Firm: The case of WAM (1968 – 2003)', February 2009.

<sup>(9)</sup> Recent, Centre for economic research (Department of political economy of the University of Modena and Reggio Emilia), 'The Rise of a District Lead Firm: The case of WAM (1968 – 2003)', February 2009.

<sup>(10)</sup> See footnote 9.

<sup>(11)</sup> See footnote 9.

- (41) The Italian authorities confirmed the granting of aid in the form of subsidised loans amounting to ITL 2 281 450 000 (approx. EUR 1,8 million) to WAM SpA in 1995 for projects in Japan, South Korea and Taiwan. According to the Italian authorities, the beneficiary was actually granted a subsidised loan of ITL 1 358 505 421 (approx. EUR 0,7 million) as the planned projects in Korea and Taiwan were not implemented due to the economic crisis in those countries.
- (42) The subsidised loan covered 85 % of the eligible expenditure. The interest-rate subsidy could amount to up to 60 % of the reference rate. The loan was to be repaid in five years, on a straight-line basis and in equal half yearly amounts, with interest payable on the outstanding balance. A grace period of two years was envisaged.
- (43) The subsidised interest rate of the specific loan (equal to 4,4 %) was calculated with reference to a market rate of 11 %. In the light of the above and on the basis of the information available at the time of the opening of the procedure, the aid intensity seemed to be equivalent to 16,38 % gross grant equivalent (gge) which would have resulted in aid of ITL 222 523 000 (approx. EUR 0,115 million).
- (44) The eligible costs of this aid have been divided into two categories: costs related to permanent structures abroad and trade promotion costs. The following costs, expressed in ITL million, were taken into account:

| (million ITL)                                                                           |               |
|-----------------------------------------------------------------------------------------|---------------|
| ELIGIBLE COSTS                                                                          | LOANS GRANTED |
| <b>PERMANENT STRUCTURES</b>                                                             |               |
| Rent, insurance, miscellaneous facilities                                               | 122,56        |
| Operating costs (in particular personnel, fittings, equipment for permanent structures) | 556,94        |
| Display models                                                                          | 38,23         |
| Consultancy services                                                                    | 29,43         |
| Subtotal 1                                                                              | 747,18        |
| <b>TRADE PROMOTION</b>                                                                  |               |
| Storage of goods                                                                        | 456,28        |
| Market surveys                                                                          | 40,95         |
| Fairs and exhibitions                                                                   | 12,19         |
| Advertising                                                                             | 94,39         |
| Business trips                                                                          | 7,52          |
| Subtotal 2                                                                              | 611,33        |
| Grand total                                                                             | 1 358,51      |

- (45) Moreover, by letter of 21 May 2002, the Italian authorities, in response to a request for information from the Commission, stated that WAM SpA was granted another subsidised loan of ITL 1 940 579 808 (approx. EUR 1 million) under the same scheme on 9 November 2000.
- (46) The Commission was not aware, at the time of the opening of the procedure, of any other details concerning this additional aid.

### III. GROUNDS FOR INITIATING THE PROCEDURE

#### Aid granted to WAM SpA in 1995

- (47) The Italian authorities maintained in their letter of 21 May 2002 that the aid granted to WAM SpA in 1995 under Law No 394/81 was significantly below the *de minimis* threshold and that no other *de minimis* aid had been granted to the same beneficiary over the same three-year period. Furthermore, they stressed that the aid could not in any way be considered as being directly linked to the quantities exported.
- (48) The Commission pointed out that most of the eligible costs taken into account for the specific aid granted to WAM SpA in 1995, such as rent, insurance, miscellaneous facilities and operating costs (in particular for staff, fittings and equipment) in connection with a permanent place of business abroad, could have been considered aid for the establishment and operation of a distribution network.
- (49) Likewise, in the Commission's opinion, costs for consultancy services related to permanent structures abroad, advertising and business trips should have been classified as current expenditure relating to export activities.
- (50) In the decision to open the formal investigation procedure, the Commission stated that, pursuant to the last paragraph of the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid<sup>(12)</sup>, where, at the time of a decision, guidelines have been replaced by a regulation, the Commission considers that the rules set out in the regulation have to be applied to the extent that they are more favourable than those set out in the guidelines. Accordingly, the Commission noted in the decision to open the formal investigation procedure that as regards *de minimis* aid, the rules of Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid<sup>(13)</sup> (hereinafter: Regulation (EC) No 69/2001) in principle had to be applied.

<sup>(12)</sup> OJ C 119, 22.5.2002, p. 22.

<sup>(13)</sup> OJ L 10, 13.1.2001, p. 30.

- (51) However, Regulation (EC) No 69/2001 did not apply to aid for export-related activities, that is, aid directly linked to the quantities exported as well as to the establishment and operation of a distribution network or to other current expenditure linked to export activities, as provided in Article 1(a).
- (52) As regards the compliance of the aid in question with the relevant *de minimis* rules, it must be noted that the Commission stated in the decision to open the formal investigation procedure that the 1992 Community guidelines on State aid for SMEs<sup>(14)</sup> (hereinafter: the 1992 SME guidelines) did not explicitly exclude export aid but set a lower threshold for *de minimis* aid of ECU 50 000.
- (53) In the light of the above, the Commission expressed doubts in the decision to open the formal investigation procedure as to whether the aid granted to WAM SpA in 1995 under Law No 394/81 could be considered to comply with any relevant *de minimis* rule.
- (54) Furthermore, in the light of a preliminary examination, the Commission had serious doubts whether the aid to WAM SpA could be declared compatible with the EC Treaty (now the TFEU) on the basis of any provision.

#### Aid granted to WAM SpA in 2000

- (55) At the time the formal investigation procedure was initiated, the Commission was not aware of any specific feature, such as aid intensity or eligible expenditure, of the 'WAM group' aid (as the Italian authorities term it) granted in 2000, again in the form of a subsidised loan, under Law No 394/81. No information concerning it had been submitted by the Italian authorities.
- (56) Accordingly, the Commission was not able at that stage of the procedure to assess the specific aid in depth. However, given that it served the same purpose and was granted on the same legal basis as the aid granted in 1995, it doubted whether the aid could be deemed to be in compliance with any of the relevant provisions of the EC Treaty (now the TFEU).
- (57) The Italian authorities also pointed out, in their letter of 24 October 2002, that no aid had ever been granted directly to 'WAM Engineering' and that there was no undertaking registered as such in the Italian business register. The Commission however noted, firstly, that 'WAM SpA' held 84 % of 'WAM Engineering Ltd' shares and, secondly, that since their letter of 11 October 1999, the Italian authorities had

announced that 'WAM SpA' had been granted a subsidised loan in 1995 under Law No 394/81 and had added, by letter of 21 May 2002, that 'WAM group' had been granted another subsidised loan under the same scheme on 9 November 2000.

#### IV. COMMENTS FROM INTERESTED PARTIES

- (58) Comments on the decision to open the formal investigation procedure were received from an interested third party who asked not to be named.
- (59) The third party comments supported the Commission's efforts to restore a level playing field for competitors in the sector concerned and complained about the technical skills and jobs being lost on account of WAM SpA's position in the market.
- (60) By letter of 3 November 2003, the Italian authorities, who were made aware of the third party's comments by letter of 25 September 2003 from the Commission, stated that in their view these comments added nothing new as they simply confirmed some of the assertions already made in the case, by the complainant among others. In particular, the Italian authorities considered that sufficient proof had been provided to demonstrate that there was no link between the claims made in the abovementioned comments and the funding of WAM SpA under Law No 394/81.

#### V. COMMENTS FROM THE ITALIAN AUTHORITIES

- (61) With regard to the 1995 loan, the Italian authorities provided evidence that, at the point at which the application was made for the first aid measure and the loan granted, WAM SpA complied with the definition of a medium-sized enterprise given at point 2.2 of the 1992 SMEs guidelines, as illustrated by the company's 1994 annual accounts, on the grounds that it had 163 employees, an annual turnover of EUR 16,8 million and a balance-sheet total of EUR 20,1 million and was owned by two undertakings, both fulfilling the definition of an SME. But the Italian authorities themselves agreed that WAM SpA was no longer an SME after 1998, or when the second aid was granted (2000).
- (62) No other new substantive element concerning the first aid measure was added to the information that the Commission already possessed when the procedure was initiated, except for the fact that the loan was made available to the beneficiary in several instalments for which the grace period could vary from 2 years to zero. Apparently, there was no provision in the original contract for reviewing the interest rate. This loan was scheduled to be repaid in full in April 2004.

<sup>(14)</sup> OJ C 213, 19.8.1992, p. 2.

- (63) As far as the 2000 loan is concerned, the Italian authorities provided clarification, by letter of 25 July 2003, that the actual total amount of the loan was ITL 3 603 574 689 (corresponding to EUR 1 861 091,01), rather than ITL 1 940 579 808 (about EUR 1 million), as previously stated in the letter of 21 May 2002, and indicated in the decision to initiate the formal investigation procedure, since the latter figure referred only to the part of the loan which had already been paid at the point at which the letter was written, not the overall amount of aid granted.
- (64) Two more instalments were in fact paid. The last one, amounting to EUR 248 091,01, was paid on 22 January 2003. The conditions under which this loan was granted are the same as those for the 1995 loan since both were granted under Law No 394/81. The granting of the entire amount of the 2000 loan in question was decided on 9 November 2000 and the contract was signed on 20 December 2000.
- (65) Below is a schedule of the eligible costs taken into consideration as regards this aid, forwarded by the Italian Government in an annex to the letter of 22 July 2003.

(thousand EUR)

| ELIGIBLE COSTS                                    | LOANS GRANTED |
|---------------------------------------------------|---------------|
| <b>PERMANENT STRUCTURES</b>                       |               |
| Rent and fitting-out of premises, vehicles        | 331,27        |
| Operating costs (management, goods and personnel) | 973,50        |
| Display models                                    | 0,87          |
| Training                                          | 25,24         |
| Consultancy                                       | 30,29         |
| Subtotal 1                                        | 1 361,17      |
| <b>TRADE PROMOTION</b>                            |               |
| Storage of goods                                  | 353,39        |
| Fairs and promotions                              | 6,37          |
| Advertising                                       | 42,74         |
| Business trips                                    | 94,84         |
| Trips by customers to Italy                       | 2,59          |
| Subtotal 2                                        | 499,92        |
| Grand total                                       | 1 861,09      |

- (66) Furthermore, it is evident from the documents annexed to the letter of 14 January 2004 that the programme in question should have been carried out in China jointly by

WAM SpA and 'WAM Bulk Handling Machinery Shanghai Co Ltd', a local firm wholly owned by WAM SpA.

- (67) Eligible costs were considered to include the rent of premises for offices, storage, showrooms and technical assistance (total surface area of 7 500 m<sup>2</sup>), the purchase, renting or leasing of 3 vehicles and staff costs at the parent firm and abroad (specifically: 1 sales manager and 6 technicians).
- (68) The interest rate applied to the specific loan was 2,32 %, i.e. 40 % of the reference rate of 5,8 %, in force when the aid was granted. Once again, it seems that no change in the interest rate during the period of the loan was provided for in the contract. The loan was paid to the beneficiary in several instalments, so the grace period varied from 2 years to zero.
- (69) As regards repayment, the data supplied by the Italian authorities shows that the grace period of two years, during which only the interest on the loan instalments already disbursed to the beneficiary was paid, elapsed on 20 February 2003. On 20 August 2003, the five-year repayment period started. Repayment was on a straight-line basis and in equal half-yearly instalments, with interest due on the outstanding balance. According to the schedule, repayment should therefore have been completed by 20 February 2008.
- (70) Furthermore, as regards the modification of the interest rate during the repayment period, the Italian authorities argued that general rules allowing such reductions did exist within the Italian legal framework.
- (71) In addition, with regard to both loans, the Italian authorities claimed that the cost of the compulsory bank guarantee, which was requested prior to the granting of the loans, had to be deducted from the amount of the aid.
- (72) As regards WAM SpA's exports inside and outside the EU, the following data were provided:

| YEAR | EXPORTS INSIDE EU | EXPORTS OUTSIDE EU | TOTAL EXPORTS |
|------|-------------------|--------------------|---------------|
| 1995 | 10 237 196        | 4 477 951          | 14 715 147    |
| 1996 | 9 338 640         | 5 592 122          | 14 930 762    |
| 1997 | 9 974 814         | 5 813 442          | 15 788 256    |
| 1998 | 10 780 161        | 5 346 514          | 16 126 675    |
| 1999 | 11 885 473        | 5 276 525          | 17 161 998    |

- (73) The Italian authorities informed the Commission that the total export figures indicated above represented 52 % to 57,5 % of WAM SpA's total annual turnover in 1995 and 1999 respectively.
- (74) Finally, while the Italian authorities acknowledge that the two loans under examination are covered neither by Regulation (EC) No 69/2001 nor by Commission Regulation (EC) No 70/2001<sup>(15)</sup>, they take the view that the incentives for enterprises from the EU designed to support programmes to be implemented outside the EU do not fall under the scope of Article 87(3) of the EC Treaty, now Article 107(3) of the TFEU.
- (75) The aid measures under scrutiny were granted by the committee set up pursuant to Article 2 of Law No 394/81<sup>(17)</sup> for the 1995 loan and by the 'Comitato Agevolazioni'<sup>(18)</sup> for the 2000 loan.
- (76) Mediocredito Centrale SpA<sup>(19)</sup> entered into the 1995 financing contract with WAM SpA in order to implement the decision of the committee set up pursuant to Article 2 of Law No 394/81. SIMESIT SpA<sup>(20)</sup> entered into the 2000 financing contract with WAM SpA in order to implement the decision of the 'Comitato Agevolazioni'.
- (77) In this case the aid was granted from state resources by entities which acted on behalf of the State, with the objective of promoting economic activities according to

## VI. ASSESSMENT OF THE AID

### Existence of aid within the meaning of Article 107(1) of the TFEU

- (75) Article 107(1) of the TFEU states that 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.
- (76) It follows from Article 107(1) of the TFEU that, in order for a measure to qualify as State aid, four conditions must be met. First, there must be an intervention of the State through state resources. Secondly, that intervention must confer a selective advantage on its recipient. Thirdly, it must be liable to affect trade between Member States and, fourthly, it must distort or threaten to distort competition.

### State resources and imputability to the State

- (77) The concept of State aid applies to any advantage, granted directly or indirectly, financed out of state resources, granted by the State itself or by any intermediary body acting by virtue of powers conferred on it. Court of Justice case law establishes very clearly that there is no difference between aid transferred directly by the State and aid transferred by public or private entities instituted by the State to do so<sup>(16)</sup>.

<sup>(15)</sup> OJ L 10, 13.1.2001, p. 33.

<sup>(16)</sup> See Case 78/76 *Steinike & Weinlig* [1977] ECR 595, paragraph 21; Case 290/83 *Commission v France* [1985] ECR 439, paragraph 14; Joined Cases 67/85 68/85 and 70/85 *Van der Kooy and Others v Commission* [1988] ECR 219, paragraph 35 and Case C-305/89 *Italy v Commission* [1991] ECR I-1603, paragraph 13.

<sup>(17)</sup> According to Article 2 of Law No 394/81 a fund was created at Mediocredito Centrale for granting subsidised loans to companies for market penetration abroad. This fund is administered by a committee which ensures that the support is granted in compliance with the law. The committee is appointed by decree of the Minister of Trade in cooperation with the Minister for the Treasury and the Minister for Industry, Trade and Crafts. The committee, established at the Ministry of Foreign Trade, is made up of:

- (a) the Minister for Trade, or, by delegation, the Secretary of State, who chairs it;
- (b) a manager from each of the following departments: Treasury, Ministry of Industry, Commerce and Crafts, Ministry of Trade, or similarly qualified replacements appointed by the respective Ministers;
- (c) the Director-General of Mediocredito Centrale, or in his absence, a replacement designated by him;
- (d) the Director-General of the National Institute for Foreign Trade (Istituto nazionale per il commercio estero), or in his absence, a replacement designated by him.

<sup>(18)</sup> Article 1 of the Ministerial Decree of 19 January 1999 stipulates the composition of the committee within the meaning of the Legislative Decree of 31 March 1998, No 143, and in particular, Article 25 paragraph 1, as including two representatives of the Ministry of Trade, one representative of the Treasury, Budget and Economic Planning, one representative of the Ministry of Foreign Affairs, Minister for Industry, Trade and Crafts, one representative appointed by the Conference of presidents of Regions and Autonomous provinces and one representative of the Italian Banking Association.

<sup>(19)</sup> At the time in question, a fund within the meaning of Article 2 of Law No 394/81 holding state resources was set up at Mediocredito Centrale and administered by the committee set up under Article 2 of Law No 394/81. By letter of 27 December 1995, the Ministry of Foreign Trade asked Mediocredito Centrale to enter into a contract with WAM SpA (within three months) in order to implement the decision of the committee set up under Article 2 of Law No 394/81 at its session of 24 November 1995.

<sup>(20)</sup> According to Legislative decree No 143 of 31 March 1998, and in particular Article 25(1) thereof, as from 1 January 1999 SIMESIT SpA was appointed to manage financial support for promoting trade abroad under Law No 394/81. SIMESIT SpA is a public entity which was established in 1990 (Law No 100 of 24 April 1990) by the Italian Government to promote Italian companies in third countries. The company is controlled by the Italian Government, which holds 76 % of its shares and sets the guidelines for selecting the investments that SIMESIT SpA supports. Furthermore, the management board of SIMESIT ('consiglio d'amministrazione') consists of nine members, five of whom are appointed by the Italian Government.

the guidelines laid down by the State, and is therefore – in accordance with Court of Justice case law – imputable to the State <sup>(21)</sup>.

### Selective advantage granted to an undertaking

- (81) Loans on advantageous terms improve the financial situation of the recipient of the aid, releasing it from costs that it would otherwise have to bear if it were to set up a market penetration programme without state intervention. Therefore the State aid measures under scrutiny confer a selective advantage on WAM SpA over its competitors from the EU.
- (82) As it is active in the market for the production and distribution of screw conveyors and feeders, dust collectors and valves for industrial plants, there is no doubt that WAM SpA carries out an economic activity in that market, which fulfils the definition of an undertaking under EU law <sup>(22)</sup>.
- (83) In conclusion, the aid granted to WAM SpA can be regarded as having conferred a selective advantage on an undertaking.

### Effect on trade between Member States and distortion of competition

- (84) In its judgment of 30 April 2009 the Court of Justice emphasises <sup>(23)</sup> that ‘even in cases where it is apparent from the circumstances under which it was granted that the aid is liable to affect trade between Member States and to distort or threaten to distort competition, the Commission must at least set out those circumstances in the statement of reasons for its decision’. However, the Court also considers that the Commission does not have to demonstrate that the aid has a real effect on trade between Member States but only ‘to examine whether that aid is liable to affect such trade and distort competition’ <sup>(24)</sup>. Furthermore, the Court of Justice has also ruled that ‘the Commission was not obliged to carry out an economic analysis of the actual situation of the relevant market or the patterns of the trade in question between Member States or to show the real effect of the aid at issue’ in order to demonstrate that

the conditions concerning the effects on trade and competition were fulfilled.

- (85) WAM SpA is a company operating in the EU and international markets. It has subsidiaries in many Member States and sells its products throughout the EU as well as outside of it. Between 1995 and 1999, two thirds of its turnover, EUR 10 million in absolute figures, came from sales in the EU market and one third from sales outside the EU. In these markets, WAM SpA actually or potentially competes with other EU companies, which are also present internationally. As mentioned above (see recital 34), there were at least three other large EU producers of dust filters from various Member States which were present internationally and which could have been potential competitors of WAM SpA in the export of dust filters to Japan or China <sup>(25)</sup>. These companies were, at least potentially, in competition with WAM SpA, because if they decided to export their products to Japan or China, they would be in a worse starting position than WAM SpA, which had received aid in order to penetrate those markets.
- (86) Moreover, as explained in recitals 34 and 35, during the relevant period WAM SpA had a large share of both the national and the European markets. As indicated in recital 38, it also had a commercial presence through a subsidiary in another Member State.
- (87) As a result of the aid, WAM SpA’s overall position in the market strengthened, or could potentially have strengthened, by comparison with undertakings from other Member States which are not only WAM SpA’s actual but also potential competitors. According to settled case law ‘aid which is intended to relieve an undertaking of the expenses which it would normally have to bear in its day-to-day management or its usual activities in principle distorts competition’ <sup>(26)</sup>.
- (88) In the present case three further arguments support this finding:
- (89) Firstly, the export loans granted to WAM SpA were likely to alter the normal competitive market structure, making it easier for WAM SpA than for its actual or potential competitors from the EU to export their products to foreign markets, as the latter would have to finance the export penetration programme from their own funds.

<sup>(21)</sup> See Case C-482/99 *French Republic v Commission* (Stardust) [2002] ECR I-4397, paragraphs 55 and 56.

<sup>(22)</sup> See Case C-41/90 *Höfner and Elser* [1991] ECR I-01979, paragraph 21.

<sup>(23)</sup> Case C-494/06 P *Commission v Italian Republic and Wam SpA*, not yet reported, paragraphs 49 et seq.

<sup>(24)</sup> See also Case C-372/97 *Italy v Commission* [2004] ECR I-3679, paragraph 52 and Case C-66/02 *Italy v Commission* [2005] ECR I-10901.

<sup>(25)</sup> Recent, Centre for economic research (Department of political economy of the University of Modena), ‘The Rise of a District Lead Firm: The case of WAM (1968 – 2003)’, February 2009.

<sup>(26)</sup> See Case T-459/93 *Siemens v Commission* [1995] ECR II-1675, paragraphs 48 and 77, Case T-214/95 *Vlaams Gewest v Commission* [1998] ECR II-717, paragraph 43 and Case T-217/02 *TerLembeek v Commission* [2006] ECR II-4483, paragraph 177.

- (90) Secondly, WAM SpA received aid for setting up the market penetration programme and therefore made certain savings. As WAM SpA invested in the penetration of foreign markets with the aim of exporting its products, these savings could have consequently enabled it to export products manufactured in the EU outside the EU for a lower price or with a higher margin.
- (91) Thirdly, as money is fungible, any profits from this activity could have been reinvested within the EU. Another possibility is that, having received aid, WAM SpA was freed from the expense of foreign market penetration and was able use the money saved to strengthen its position in the EU market for other purposes<sup>(27)</sup>. Moreover, after the exports have been carried out, any profits from this activity could be reinvested within the EU.
- (92) In all these cases, the aid would have a direct impact on the EU market and a distorting effect vis-à-vis WAM's competitors in the EU.
- (93) Likewise, it is established case law that 'when aid granted by Member States strengthens the position of an undertaking compared with other undertakings competing in the trade within the EU, the latter must be regarded as affected by that aid'<sup>(28)</sup>. As the aid granted to WAM SpA by Italy strengthened its position vis-à-vis its actual or potential EU competitors, as explained above, such aid also affected trade within the EU.
- (94) As regards the amount of aid, the Court of Justice held in *Philip Morris v Commission*<sup>(29)</sup> and *France v Commission*<sup>(30)</sup> that, even if the amount of aid received is relatively low or the undertaking is small, there is still a possibility that trade within the EU may be affected. In the same vein, in *Vlaams Gewest v Commission*<sup>(31)</sup> the Court of First Instance stated that 'even a relatively small amount is liable to affect trade between Member States where there is strong competition in the sectors in which undertakings operate'. Moreover, the Court of Justice stated in *Heiser*<sup>(32)</sup> that there is no threshold or percentage below which it might be considered that trade between Member States is not affected.
- (95) In the case at hand, therefore, the relatively small amount of the aid does not contradict the finding that there may be an effect on trade within the EU and on competition. Although the amount of aid is quite low, because of the intense nature of existing as well as potential competition in the sector in which WAM SpA operates, there is a great risk that competition would be distorted and that trade within the EU would be affected.
- (96) On the basis of the above, it can be concluded that the aid granted to WAM SpA by Italy is very likely to affect trade and distort competition in the internal market.
- (97) In conclusion, the public support given to WAM SpA constitutes State aid within in the meaning of Article 107(1) of the TFEU.

#### Applicable rules

- (98) In accordance with the *tempus regis actum* principle, the procedural rules in force when the decision is to be adopted have to be applied to non-notified aid unless explicitly provided otherwise<sup>(33)</sup>.
- (99) Given that the exemption rules (including the *de minimis* rules) exempt certain aid measures from the notification obligation and replace the centralised system of State aid control with a decentralised system of State aid control, they are considered as being of a procedural nature.
- (100) In the case at hand, even if in its decision to open the formal investigation procedure the Commission expressed doubts about the possibility of exempting aid under Commission Regulations (EC) No 69/2001 and (EC) No 70/2001, the corresponding rules in force at the time of the decision must be applied, i.e. Commission Regulation (EC) No 1998/2006<sup>(34)</sup>. Likewise, Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty<sup>(35)</sup> (hereinafter: the 2008 Block Exemption Regulation) applies to individual aid granted before its entry into force, if the aid fulfils all the conditions laid down in this Regulation, with the exception of Article 9.

<sup>(27)</sup> In Case T-369/06 *Holland Malt v Commission*, not yet reported, the Court of First Instance held in paragraph 55 that 'it is therefore clear from the case-law that it is not only the reduction, by virtue of state resources, of the expenses of the day-to-day management or the usual activities of an undertaking which is, in itself, liable to distort competition, but also a subsidy which relieves the recipient of all or part of the costs of an investment'.

<sup>(28)</sup> See Case 730/79 *Philip Morris Holland v Commission* [1980] ECR 2671, paragraph 11, Case C-53/00 *Ferring* [2001] ECR I-9067, paragraph 21 and Case C-372/97 *Italy v Commission* [2004] ECR I-3679, paragraph 52.

<sup>(29)</sup> See Case 730/79 *Philip Morris v Commission* [1980] ECR 2671.

<sup>(30)</sup> See Case 259/86 *France v Commission* [1978] ECR 4393.

<sup>(31)</sup> See Case T-214/95 *Vlaams Gewest v Commission* [1998] ECR II-717, paragraph 49.

<sup>(32)</sup> See Case C-172/03 *Heiser* [1998] ECR I-1627, paragraph 32.

<sup>(33)</sup> See Joined Cases 212/80 and 217/80 *Meridionale Industria Salumi and Others* [1981] ECR 2735; Joined Cases *CT Control Rotterdam and JCT Benelux v Commission* [1981] ECR I-3873 and Case C-61/98 *De Haan Beheer* [2000] ECR I-5003.

<sup>(34)</sup> OJ L 379, 28.12.2006, p. 11.

<sup>(35)</sup> OJ L 214, 9.8.2008, p. 3.

### Lawfulness of the aid

- (101) The Italian authorities declared, in their letter of 11 October 1999, that the legal basis of the aid granted to WAM SpA, namely Law 394 of 29 July 1981, had been notified to the Commission and to the World Trade Organisation (WTO) pursuant to Article 25 of the Agreement on Subsidies and Countervailing measures (WTO-GATT 1994) <sup>(36)</sup>.
- (102) The Commission notes that the Italian authorities are trying by this means to qualify as a notification the communication of some very concise data relating to the scheme in a table which has been sent to the Commission either for the purpose of transmission to the WTO Subsidies Committee or for the purpose of the annual report on State aid in the European Union since at least the sixth report (1996). The Commission has also been informed of the existence of the scheme as part of its survey on national support schemes for foreign direct investment (FDI) outside the European Union that exist in the Member States.
- (103) These kinds of communications, however, cannot be deemed to be in compliance with Article 88(3) of the EC Treaty, now Article 108(3) of the TFEU, which states that 'the Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid'.
- (104) Since it has not been previously notified to the Commission as regards its compatibility with the State aid rules, the aforementioned aid scheme has been implemented in contravention of Article 88(3) of the EC Treaty, now Article 108(3) of the TFEU, and is therefore unlawful. As the aid to WAM SpA was granted under that scheme, apart from any block-exempted aid, it must also be considered unlawful.

### Aid exempted under the *de minimis* rules and compatibility of the aid with Article 107 of the TFEU

- (105) The Commission has to verify whether any of the aid granted to WAM SpA can be exempted on the basis of the *de minimis* rules.
- (106) In the same vein, having concluded that the measures under scrutiny constitute State aid within the scope of

Article 107(1) of the TFEU, this aid has to be assessed for its compatibility under the relevant State aid rules.

### First loan granted to WAM SpA

- (107) Evidence has been provided by the Italian Government that at the time the first loan was granted (1995), WAM SpA fulfilled the requirements for it to be considered an SME within the meaning of Commission Recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises <sup>(37)</sup>. To be more precise, WAM SpA was a medium-sized enterprise as it had 163 employees, an annual turnover of EUR 16,8 million and a balance sheet total of EUR 20,1 million. It was controlled by two finance companies which were themselves SMEs within the meaning of the abovementioned recommendation.
- (108) In the case at hand, the Commission is basing its analysis on the actual expenditure taken into consideration in granting the loan (see table in recital 44).
- (109) Bearing in mind that the objective of the loan contract was to subsidise a market penetration programme and, in particular, to subsidise export undertakings carrying out market penetration programmes outside the European Union, the aid in question must be classified as export aid, i.e. aid for export-related activities, in the sense that it is directly linked to the establishment and operation of a distribution network or to other current expenditure related to the export activity. Similarly, the ultimate goal of the market penetration programme was to sell WAM SpA's products in Japan. This is another reason why it cannot be regarded as being linked to foreign direct investment (FDI).
- (110) Regulation (EC) No 1998/2006 excludes export aid from its scope. Article 1(d) stipulates in fact that this Regulation does not apply to 'aid towards export-related activities towards third countries or Member States, namely directly linked to the quantities exported, to the establishment and operation of the distribution network or to other current expenditure linked to export activity'.
- (111) However, Article 5 of Regulation (EC) No 1998/2006 stipulates that aid not meeting the conditions of Article 1 shall be assessed in accordance with the relevant frameworks, guidelines, communications and notices.

<sup>(36)</sup> Uruguay Round of Multilateral Trade Negotiations (1986-94) — Annex 1 — Annex 1A — Agreement on Subsidies and Countervailing Measures (WTO-GATT 1994) (OJ L 336, 23.12.1994, p. 156).

<sup>(37)</sup> OJ L 107, 30.4.1996, p. 4.

- (112) As the aid was granted in 1995 when the 1992 SMEs guidelines were in force, the 1992 SMEs guidelines must be applied<sup>(38)</sup>. These guidelines did not explicitly exclude export aid from their scope. However, as in the present case a portion of the aid exceeds the permissible *de minimis* threshold (EUR 50 000), the whole of the aid has to be regarded as not falling under the *de minimis* exemption and for this reason must be considered to constitute State aid<sup>(39)</sup>.
- (113) Having established that the measure constitutes State aid, it must be decided whether this can be considered compatible with the internal market under the rules on State aid.
- (114) Article 44(2) of the 2008 Block Exemption Regulation stipulates that any aid granted before the entry into force of the Regulation which fulfils neither the conditions laid down in it nor the conditions laid down in Commission Regulations (EC) No 68/2001<sup>(40)</sup>, (EC) No 70/2001, (EC) No 2204/2002<sup>(41)</sup> or (EC) No 1628/2006<sup>(42)</sup> must be assessed according to the frameworks, guidelines, communications and notices in force at the time it was granted.
- (115) In the present case, the 2008 General Block Exemption Regulation is not applicable since it introduces an additional step – verifying the incentive effect of a project or activity before it begins – which was not carried out by Italy. Therefore, by virtue of Article 8(6) of the 2008 General Block Exemption Regulation, the entire aid measure cannot be exempted under that Regulation. Moreover, the expenses mentioned in the table in recital 44 and listed at recital 118 cannot be block-exempted on the basis of Regulations (EC) No 68/2001, (EC) No 70/2001, (EC) No 2204/2002 nor (EC) No 1628/2006 either as the conditions laid down in those Regulations are not fulfilled.
- (116) As none of these instruments justifies the compatibility of the aid, it must be assessed on the basis of the 1992 SME guidelines since they contain the substantive rules in force when the aid was granted in 1995<sup>(43)</sup>.
- (117) A portion of the aid can be considered compatible with the internal market on the basis of the 1992 SME guidelines. In particular the aid for consultancy services (ITL 29,43 million) and market surveys (ITL 40,95 million) can be considered compatible as it complies with point 4.3 ‘Aid for consultancy help, training and dissemination of knowledge’. As regards the aid for participation in fairs and exhibitions (ITL 12,19 million), it can be considered compatible with the 1992 SME guidelines on the basis of point 4.5 ‘Aid for other purposes’, as it can be regarded as aid for other means of SME promotion, such as encouraging cooperation. The remainder of the aid (see the table in recital 44) cannot be considered compatible as it is not intended to support any productive investments nor any other admissible aim laid down in the 1992 SME guidelines, i.e. aid for general investments outside or inside national assisted areas, aid for environmental protection investment and aid for research and development.
- (118) Accordingly, the Commission is of the opinion that the bulk of the eligible costs for the establishment of permanent structures abroad which were taken into consideration by the Italian Government in granting the first subsidised loan to WAM SpA in 1995 can in no way be regarded as productive investment; on the contrary, aid towards them must be classified as operating aid. The costs considered eligible: rent of premises, insurance and miscellaneous facilities (ITL 122,56 million) and operating costs such as personnel, fittings and equipments for premises (ITL 556,94 million) are costs which the firm should itself have borne; the same applies to display models and spare parts for after-sale service (ITL 38,23 million). Similarly, with respect to the eligible costs in support of trade promotion, the cost of storage of goods (ITL 456,28 million) does not comply with the 1992 SME guidelines, in the Commission’s opinion, as it cannot be considered an initial investment; the advertising costs (ITL 94,39 million) and business trips (ITL 7,52 million) do not comply with the guidelines either.
- (119) On the basis of the above assessment, the Commission therefore concludes that
- (a) the portion of aid relating to the aid for consultancy services (ITL 29,43 million) and market surveys (ITL 40,95 million) as well the aid for participation in fairs and exhibitions (ITL 12,19 million) constitutes State aid compatible with the internal market on the basis of the 1992 SME guidelines; the portion of the aid not mentioned under (a) (see recital 118) constitutes State aid incompatible with the internal market.

<sup>(38)</sup> OJ C 119, 22.5.2002, p. 22.

<sup>(39)</sup> In line with Commission established practice. See for example: Commission Decision 2003/643/EC of 13 May 2003 on the State aid implemented by Germany for Kahla Porzellan GmbH and Kahla/Thüringen Porzellan GmbH (OJ L 227, 11.9.2003, p. 12).

<sup>(40)</sup> OJ L 10, 13.1.2001, p. 20.

<sup>(41)</sup> OJ L 337, 13.12.2002, p. 3.

<sup>(42)</sup> OJ L 302, 1.11.2006, p. 29.

<sup>(43)</sup> OJ C 119, 22.5.2002, p. 22.

### Second loan granted to WAM SpA

- (120) At the time the second amount of aid was granted in 2000, WAM SpA was, as the Italian authorities themselves admitted, a large undertaking. Furthermore, it was located in a non-assisted area.

- (121) The 2000 loan can also be regarded as an export aid to WAM SpA as it had the same objective as the 1995 loan and was also intended for the purpose of penetrating and exporting to foreign markets (specifically the Chinese market). It is obvious that aid for technical assistance, workshop premises and staff abroad (1 sales manager, 1 general manager, 4 employees and 6 technicians) was unlikely to have been intended for anything other than commercial activities. As a consequence, the reasoning used for the 1995 loan is also applicable to the 2000 loan.
- (122) Moreover, the same wording used to classify the first loan to WAM SpA as an incentive to undertake market penetration programmes was also used in the contract for granting the aid in 2000. It should also be noted that the specific programme was to have been carried out jointly by WAM SpA and the local firm, WAM Bulk Handling Machinery Shanghai Co Ltd, a wholly owned subsidiary of WAM SpA. This constitutes evidence of the established presence of WAM SpA in the specific market in question.
- (123) As the aid in question is an export aid, Regulation (EC) No 1998/2006, as has been stated above, does not apply.
- (124) The compatibility of the aid with the internal market must therefore be assessed. The Commission takes the view that the procedural rule in force at the time the decision was taken, the 2008 General Block Exemption Regulation, does not apply to the case in question. This Regulation introduces an additional step – verifying the incentive effect of a project or activity before it begins – which was not carried out by Italy. Therefore, by virtue of Article 8(6) of that Regulation, the entire aid measure cannot be exempted under the 2008 General Block Exemption Regulation. Thus, in accordance with Article 44(2) of the 2008 general block exemption Regulation, the compatibility of the aid with Regulations (EC) No 68/2001, (EC) No 70/2001, (EC) No 2204/2002 and (EC) No 628/2006 must be assessed.
- (125) The Commission takes the view that the training expenses detailed in the letter of 22 July 2003 (EUR 25 240 out of total loan of EUR 1,8 million in 2000) (as shown in the table in recital 65), may be exempted on the basis of Article 4 of Regulation (EC) No 68/2001 and are therefore compatible with the internal market according to Article 87(3) of the EC Treaty, now Article 107(3) of the TFEU, whether the assessment is based on Article 4(2) (specific training) or (3) (general training).
- (126) However, the remainder of the aid in question cannot be considered compatible on the basis of Regulations (EC) No 70/2001, (EC) No 2204/2002 or (EC) No 1628/2006 or any other any legal basis, as it does

not promote any other horizontal objective of the European Union within the meaning of Article 107(3)(c) of the TFEU, such as research and development, employment, the environment or rescue and restructuring within the meaning of the relevant guidelines, frameworks and regulations.

- (127) Therefore, it must be concluded that since export-related activities are excluded from the application of Regulation (EC) No 1998/2006 and they cannot be considered compatible with Article 107(3)(c) of the TFEU on any legal basis, the aid provided by means of the second loan is incompatible with the internal market, with the exception of the compatible portion of training aid as described above.

### General observations

- (128) As regards the modification of the interest rate during the loan repayment period, the Italian authorities argued that general rules allowing such reductions did exist within the Italian legal framework. However, the Ministerial Decree of 31 March 2000, which is the only legal basis provided for this purpose, applies only to the initiatives funded by Laws Nos 394/81 and 304/1990, and is therefore very restrictive. Moreover, it must be emphasised that no further evidence has been provided that the interest rate in respect of the aid in question was modified <sup>(44)</sup>.
- (129) With regard to both loans, the Italian authorities argue that the cost of the compulsory bank guarantee which was requested prior to the granting of the loans has to be deducted from the amount of the aid. The Commission observes, first of all, that such a guarantee, or its equivalent, would usually have been requested even by a private credit institution granting loans according to the market economy investor principle. Secondly, the specifications annexed to the contract stipulate that the overlapping of aid for the same programme is not allowed, except for aid related to the guarantee, which consequently is deemed to be itself eligible for aid.

### VII. CLOSING REMARKS

- (130) The Commission notes that the exemptions provided for in Article 107(2)(a) to (c) <sup>(45)</sup> of the TFEU do not apply to the loans in question since they do not pursue any of the objectives listed in that Article, nor has the Italian Government argued that this was the case.

<sup>(44)</sup> Such a modification could, in any event, only have been made to the first subsidised loan granted to WAM SpA as it applied to funding which already existed when it came into force, whereas the second loan had not yet been granted to WAM SpA.

<sup>(45)</sup> Article 107(2) TFEU stipulates that the following aid is compatible with the common market: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; (c) aid granted to the economy of certain areas of the Federal Republic of Germany.

- (131) The loans were not intended to promote the economic development of certain areas or promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State, nor were they intended to promote culture or heritage conservation. The Commission therefore considers that Article 107(3)(a) <sup>(46)</sup>, (b) <sup>(47)</sup> and (d) <sup>(48)</sup> of the TFEU do not apply to the loans under consideration.

### VIII. CONCLUSION

- (132) Both loans to WAM SpA were granted without being previously notified to the Commission. Indeed, the 1995 loan was granted on 24 November 1995 and the 2000 loan was granted on 9 November 2000. Accordingly, the Commission finds that, with the exception of the block-exempted compatible portion of the aid, in so far as these loans have been implemented in breach of Article 88(3) of the EC Treaty, now Article 108(3) of the TFEU, they were granted unlawfully to the beneficiary.

#### First loan granted to WAM SpA

- (133) The aid Italy granted to WAM SpA on 24 November 1995 in the form of an interest-rate subsidy constitutes State aid. The portion corresponding to eligible costs for consultancy services, participation in fairs and exhibitions and market surveys constitutes State aid compatible with the internal market.
- (134) As regards the overall grant equivalent of the specific aid, consideration has been given to the fact that the loan was made available to the beneficiary in three instalments (on 24 April 1996, 23 July 1997 and 24 April 1998) and that the grace period therefore varied from 2 years to zero. The interest rate stipulated by the loan contract (4,4 %), relative to the reference rate periodically fixed by the Commission <sup>(49)</sup> and in force at the time the loan was granted (11,35 %), has also been taken into consideration. The aid element is calculated as the difference between the interest rate stipulated in the contract and the reference rate at the moment the loan was granted. On the basis of this calculation, the grant equivalent, discounted as of 24 April 1996 (date on which the first instalment of the loan was paid to WAM SpA) is equivalent to EUR 108 165,10.

<sup>(46)</sup> Namely, 'aid to promote economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation.'

<sup>(47)</sup> Namely, 'aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State.'

<sup>(48)</sup> Namely, 'aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest.'

<sup>(49)</sup> Published regularly in the *Official Journal of the European Union*.

- (135) However, this aid amount must be adjusted by the compatible portion of the State aid.

- (136) As a part of the loan in question has been considered compatible, this amount must be deducted from the State aid component of the 1995 loan (EUR 108 165,10). Given the impossibility of establishing a direct link between a given instalment of the loan and certain specific expenses, the percentage represented by the compatible items in the overall loan (ITL 82,57 million out of ITL 1 358,51 million, i.e. 6 %) has been applied to the overall grant equivalent. As 6 % of EUR 108 165,10 is EUR 6 489,916, this amount is considered to constitute the compatible portion of the aid.

- (137) Thus, the grant equivalent of the portion of the State aid incompatible with the internal market is quantified at EUR 101 675,194.

#### Second loan granted to WAM SpA

- (138) The aid granted to WAM SpA in 2000, except for the compatible portion in support of training activities amounting to EUR 25 240 in eligible expenses, is incompatible with the internal market.

- (139) In this case the loan was made available to WAM SpA in five instalments (on 12 February 2001, 28 September 2001, 26 April 2002, 27 September 2002 and 22 January 2003); consequently, as with the first loan, the grace period also varied from 2 years to zero. Likewise, the interest rate stipulated in the loan contract (2,32 %) relative to the reference rate, periodically fixed by the Commission and in force at the time the loan in question was granted (5,70 %) has been taken into consideration by the Commission in calculating the grant equivalent. The overall repayment, including principal and interest, was to have been made by 20 February 2008. Accordingly, the grant equivalent of the aid component of the full loan as at 12 February 2001 (date on which the first instalment of the specific loan was made available to WAM SpA) is EUR 182 550,80, providing that the repayments were made according to the repayment schedule.

- (140) As regards the compatible portion of the loan, the percentage of the compatible portion of the loan with respect to the full loan (1,35 %) must be deducted from the grant equivalent of the aid. Accordingly, providing that the repayments have been made according to the repayment schedule, the grant equivalent of the second loan has been calculated as EUR 180 086,36 (EUR 182 550,80 - EUR 2 464,44).

(141) It is the Commission's standard practice, in accordance with Article 107 of the TFEU, to recover from the beneficiary aid that has been unlawfully granted under that Article and is incompatible with the internal market, provided that such aid is not covered by the *de minimis* rules. This practice has been confirmed by Article 14 of Regulation (EC) No 659/1999.

(142) In accordance with Article 14(2) of Regulation (EC) No 659/1999, the aid to be recovered pursuant to a recovery decision shall include interest at an appropriate rate fixed by the Commission. Interest is payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery, for the period for which it was at the company's disposal.

(143) The method of application of the interest rate is set out in Chapter V of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty<sup>(50)</sup> (hereinafter Regulation (EC) No 794/2004) and in Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty<sup>(51)</sup> (hereinafter Regulation (EC) No 271/2008).

(144) The Commission wishes to point out that this Decision is without prejudice to the compatibility of the national framework represented by Law No 394/81, which is the legal basis of the State aid granted to WAM SpA, with respect to which the Commission, in line with the case law of the Court of First Instance<sup>(52)</sup>, did not find it necessary, in the current case, to initiate proceedings. It nevertheless does not rule out the possibility of doing so at a later stage,

HAS ADOPTED THIS DECISION:

#### Article 1

The aid granted to WAM SpA pursuant to Law No 394/81 falls within the scope of Article 107(1) of the TFEU.

Since this aid was not previously notified to the Commission in breach of Article 88(3) of the EC Treaty, now Article 108(3) of the TFEU, it constitutes unlawful aid, with the exception of the block-exempted portion of the aid.

<sup>(50)</sup> OJ L 140, 30.4.2004, p. 1.

<sup>(51)</sup> OJ L 82, 25.3.2008, p. 1.

<sup>(52)</sup> See Cases T-92/00 and T-103/00 *Diputación Foral de Álava v Commission (Ramondín)* [2002] ECR II-1385.

#### Article 2

1. The aid of EUR 108 165,10 which Italy granted to WAM SpA on 24 November 1995 in the form of an interest-rate subsidy, constitutes State aid. The aid portion corresponding to eligible costs for consultancy services, participation in fairs and exhibitions and market surveys and amounting to EUR 6 489,906, constitutes State aid compatible with the internal market.

Italy shall take all necessary measures to recover the incompatible aid amount of EUR 101 675,194 from the beneficiary, WAM SpA.

2. The aid amounting to EUR 182 550,80 which Italy granted to WAM SpA on 9 November 2000 in the form of an interest-rate subsidy, constitutes State aid. The aid portion corresponding to eligible costs for training measures and amounting to EUR 2 464,44, constitutes State aid compatible with the internal market.

Italy shall take all necessary measures to recover the incompatible aid amount of EUR 180 086,36 from the beneficiary, WAM SpA.

3. Interest on the amounts to be recovered under this Decision shall be calculated from the date on which the incompatible State aid was put at the disposal of the beneficiary, WAM SpA, until the date of recovery.

4. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 and Regulation (EC) No 271/2008 amending Regulation (EC) No 794/2004.

#### Article 3

1. Recovery of the aid referred to in Article 2 shall be immediate and effective.

2. Italy shall ensure that this Decision is implemented within four months following the date of notification to Italy of this Decision.

#### Article 4

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

(a) the total amount (principal and interest) to be recovered from the beneficiary, WAM SpA;

(b) a detailed description of the measures already taken or envisaged to comply with this Decision;

comply with this Decision. It shall also provide detailed information concerning the amounts of aid and interest already recovered from the beneficiary.

(c) documents demonstrating that the beneficiary, WAM SpA, has been ordered to repay the aid.

*Article 5*

This Decision is addressed to the Italian Republic.

Done at Brussels, 24 March 2010.

2. Italy shall keep the Commission informed of the progress of the national measures taken to implement this Decision until the aid referred to in Article 2 has been recovered. It shall submit without delay, at the request of the Commission, information on the measures envisaged and already taken to

*For the Commission*  
Joaquín ALMUNIA  
*Vice-President*

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