COMMISSION DECISION

of 25 July 1973

on the tax concessions granted, pursuant to Article 34 of French law No 65-566 of 12 July 1965 and to the Circular of 24 March 1967, to French undertakings setting up businesses abroad

(Only the French text is authentic)

(73/263/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 54 (3) (h) and the first subparagraph of Article 93 (2), thereof;

Having regard to the general programme for the attainment of freedom of establishment, chapter VII, adopted by the Council on 18 December 1961 [1], and to the implementing Directives adopted since 1964;

Having regard to the written and oral observations of the Member States and other interested parties;

I

Whereas, by Article 34 of Law No 65-566 of 12 July 1965 amending the taxation of undertakings and of income from portfolio investment, and by the Circular of 24 March 1967 (OJFR, 13 July 1965, p. 6007 and OJFR, 29 March 1967 pp. 3020-3029)—provisions subsequently reproduced in Article 39 octies (2) of the General Tax Code—the French government introduced a system of aid, under which French undertakings and groups of undertakings may, with the consent of the Minister for Finance, be authorized for tax purposes to set-off against their profits and for the first of three financial years the expenses and certain administrative charges incurred in connection with the setting up abroad of sales offices, research offices, information offices, industrial undertakings and construction sites, the set-off being effected in the year in which the expenses or charges are incurred;

Whereas the tax benefits thus granted to French undertakings consist in the setting-off, for tax purposes, of the expenses and charges referred to above against profits, even though the businesses set up abroad are taxable not in France but abroad, where their administrative expenses are also taken into consideration for tax purposes; whereas those benefits constitute aid within the meaning of Article 92 (1) of the EEC Treaty, as the advantages thereby derived by undertakings are not only intended to encourage the setting up of businesses in other Member States of the Community, but also, as explicitly stated in the Circular of 24 March 1967, to accelerate the promotion of French exports thereby distorting competition and directly affecting trade within the common market;

Whereas aid to exports within the Community is incompatible with the common market and does not fall within any of the exceptions specified in Article 92 of the EEC Treaty;

Whereas, besides, the aid is also contrary to the provisions in force on the right of establishment, which prohibit Member States from granting aid which would distort conditions of establishment to nationals setting up business in another Community country; whereas, solely for this reason, the aid could not be regarded as compatible with the common market and whereas it ought, consequently, to be prohibited;

II

Whereas the Commission, by letter dated 18 May 1972 to the French government, initiated, as regards those tax concessions, the procedure laid down in Article 93 (2) of the EEC Treaty;

Whereas, following the initiation of the procedure, the French government, by letter dated 19 June 1972, informed the Commission of its intention to submit to legislative approval, before 31 December 1972, a bill to bring the provisions concerned into line with the rules of the EEC Treaty;

Whereas the French Parliament, by adopting Article 6 of the 1972 Finance Amendment Law, No 72-1147 of 23 December 1972 (OJFR No 301, 27 December 1972, p. 13476), has, by repealing Article 39 octies of the General Tax Code, replaced those tax concessions by a tax scheme which is neutral as regards competition and compatible with the rules on the right of estab-

[1] OJ No 2. 15. 1. 1962, p. 49/62.

lishment; whereas, however, Article 6 (5) of that law stipulates that the amendment shall not enter into force until 1 April 1973 and that the previous provisions shall continue to apply to offices and places of business set up before that date;

Whereas, consequently, in spite of the amendments made by the law of 23 December 1972, French undertakings will continue to benefit from aid to exports, which is incompatible with the common market, and whereas this situation will continue until the end of 1975;

III

Whereas the Commission, by letter dated 4 May 1973 to the French government, extended the procedure it had initiated on 18 May 1972 in order to take account of the enlargement of the European Communities; whereas the French government, in its letter of 14 May 1973, pointed out:

(a) that paragraph 5 of Article 6 of Law No 72-1147, of 23 December 1972, is, as regards the date of 1 April 1973, the result of an amendment moved in Parliament,

(b) that the time allowed is justified by the need to provide a transitional period between the previous aid system and the new tax provisions,

(c) that the application until the end of 1975 of the previous measures in favour of those undertakings which had set up businesses abroad before 1 April 1973 was justified because of the rights acquired by the undertakings upon being granted the concessions;

Whereas arguments of this kind cannot be invoked as grounds for disregarding the provisions of the EEC Treaty on state aid and the right of establishment; whereas those tax concessions have been incompatible with the common market from the time they were introduced; whereas the Commission, by reason of the circumstances, has not requested the repayment of the deductions allowed in the past; whereas, following publication of the communication in No C 53 of the *Official Journal of the European Communities* of 27 May 1972, French undertakings were no longer entitled to rely unreservedly on that aid; whereas the French Government cannot, therefore, with regard to the Commission, plead the rights acquired by its nationals;

Whereas neither the date on which a place of business was established abroad nor the date on which the French Minister for Finance signified his approval should be put forward as a ground justifying the continued retention of the tax concessions;

HAS ADOPTED THIS DECISION:

Article 1

The French Republic shall take the necessary measures to put an end, without delay, to the tax concessions which, under Article 39 octies of the General Tax Code are granted to French undertakings in respect of their export ventures and upon setting up businesses in the common market.

Article 2

This Decision is addressed to the French Republic.

Done at Brussels, 25 July 1973.

For the Commission

The President

François-Xavier ORTOLI