II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 9 July 1997

on measures taken by Portugal to assist EPAC — Empresa Para a Agroalimentação e Cereais, SA

(Only the Portuguese text is authentic)

(97/762/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Having regard to Council Regulation (EEC) No 1766/92 of 30 June 1992 on the common organization of the market in cereals [1], as last amended by Regulation (EC) No 923/96 [2], and in particular Article 19 thereof,

Having given notive to the parties concerned to submit their comments [3] in accordance with the first subparagraph of Article 93 (2),

Whereas:

I

(1) On 15 October 1996 the Commission received a complaint about a possible State aid to the public-sector undertaking Empresa Para a Agroalimentação e Cereais, SA (EPAC) in the form of a State guarantee of Esc 30 billion, accompanied by a supplementary loan of Esc 20 billion on special terms.

Having received no notification under Article 93 (3) of the Treaty from the Portuguese authorities, the Commission sent them a letter on 31 October 1996 asking them whether this aid had been granted. If so, the Commission also asked them to notify it so that it could be examined pursuant to Articles 92 and 93 of the Treaty.

In a letter dated 26 November 1996, registered on 29 November 1996, the Portuguese Permanent Representative to the European Union confirmed the existence of a State guarantee for EPAC. However, the Commission received no notification of the aid under Article 93 (3) of the Treaty. Consequently, the aid was entered in the register of non-notified aid under No NN 13/97.

(2) Before the accession of Portugal to the European Community, the marketing of cereals in Portugal was covered by a public monopoly. EPAC (at that time Empresa Pública de Abastecimento de Cereais) was the public-sector undertaking responsible for managing the market. This public monopoly was gradually dismantled after accession, and EPAC, which was made into a limited company with public capital became one of a number of operators in the cereals market, which was liberalized in 1991.

By joint decision of the Secretary of State for the Treasury and Finance and the Secretary of State for Food Production of 26 July 1996, the board of directors of EPAC was authorized to negotiatie the terms of a loan on market conditions up to a total of Esc 50 billion, Esc 30 billion of which would be covered by a State guarantee for a maximum of seven years.

[1] OJ L 181, 1. 7. 1992, p. 21.
[2] OJ L 126, 24. 5. 1996, p. 37.
[3] OJ C 140, 7. 5. 1997, p. 16.

By Finance Ministry Decision No 430/96-XIII of 30 September 1996 [1], the abovementioned guarantee was granted in connection with a loan obtained by EPAC from a group of banks. The loan was equal to EPAC's total debt, which amounted to Esc 48,7 billion on 30 June 1996.

The purpose of the loan is to restructure EPAC's short-term bank debt into medium-term bank debt. The period set is seven years at an interest rate equal to six-month Lisbor for the guaranteed amount and six-month Lisbor +1,2 % for the remainder. Payments will be made six-monthly in advance as follows: for the amount not guaranteed, in 10 instalments of Esc 1,87 billion, from the fifth half-year onwards; the guaranteed amount will be paid off after repayment of the amount not guaranteed, within seven years at the latest.

(3) On 28 January 1997 the complainant asked the Commission to adopt urgent temporary measures to have the State guarantee granted to EPAC suspended. The request was submitted following Commission Regulation (EC) No 145/97 of 27 January 1997 opening an invitation to tender for the reduction in the duty on maize imported into Portugal from third countries [2] and the notice of that invitation to tender [3]. The latter states that the reduction in the import duty applies to 350 000 tonnes of maize.

II

(4) By letter SG(97) D/1550 of 27 February 1997 addressed to the Portuguese authorities, the Commission decided to open the procedure under Article 93 (2) of the Treaty in respect of the aid granted to EPAC.

In that letter the Commission stated its view that the guarantee by the State did not comply with the Commission letter to the Member States (SG(89) D/4328) of 5 April 1989 stating that guarantees were subject to specific obligations. Furthermore, it said that the interest rates on the loans, which were considerably lower than the reference rates, included an aid element since an undertaking in financial difficulties such as EPAC could not under normal market conditions obtain loans on more favourable conditions than those available to operators in a balanced financial situation. The Commission took into consideration the fact that the mechanism for consolidating the EPAC debt seemed to constitute an aid with substantial knock-on advantages to another undertaking (Silopor). Finally, the Commission gave its opinion that the State guarantee granted to EPAC did not meet the conditions necessary to be compatible with the common market in the light of Community criteria for restructuring aid for undertakings in difficulty.

In conclusion, the Commission informed the Portuguese authorities that it did not consider the aid to be such as to facilitate any development of either the sector or the region concerned, and that it seemed to be an operating aid, contrary to the Commission's constant practice in applying Articles 92, 93 and 94 of the Treaty. It also expressed the view that the measures concerned would lead directly to an improvement in the conditions of production and marketing of products of the undertaking *vis-à-vis* other operators in the Community not benefiting from comparable aid. The aid concerned therefore fell, the Commission said, within the scope of application of Article 92 (1) of the Treaty without being eligible, on the basis of the information available to the Commission, for any of the derogations provided for in Article 92 (2) and (3).

As part of this procedure, the Commission gave the Portuguese Government notice to submit its comments. It also gave the other Member States and other interested parties notice to submit their comments.

(5) In the same letter the Commission asked the Portuguese Government to take all measures necessary to suspend with immediate effect the guarantee granted to EPAC for any new business activity by that company on the cereal market. The Portuguese Government was given 15 days from the notification contained in that letter to inform the Commission what measures it had taken to comply with that request. The Portuguese authorities were informed that, pursuant to the Commission letter to the Member States No SG(91) D/4577 of 4 March 1991 concerning detailed rules for notifying aid and rules of procedure concerning aid implemented in contravention of Article 93 (3) pursuant to the judgment of the Court of Justice of 14 February 1990 in Case C-301/87 *(Boussac) French Republic* v. *Commission* [4], the Commission reserved the right to adopt a provisional decision requiring the Member State to suspend immediately the aid in question for future operations.

[1] Published in the Portuguese Official Journal, Series II, No 237, 12. 10. 1996.
[2] OJ L 25, 28. 1. 1997, p. 17.
[3] OJ C 27, 28. 1. 1997, p. 12.
[4] [1990] ECR I-307.

In a letter of 27 March 1997 the Portuguese Government argued that there had been no intervention by the State administration in the negotiation of the loans granted to EPAC by the banks to finance commercial operations and provided more specific information on some of those loans. The Portuguese Government did not refer to any measure taken to comply with the demand to suspend the effect of the State guarantee.

On 30 April 1997 the Commission adopted Decision 97/433/EC [1] which required Portugal to suspend with immediate effect the grant of the State guarantee to the undertaking EPAC provided for by Finance Ministry Decision No 430/96-XIII of 30 September 1996, granted in contravention of Article 93 (3), and to notify the Commission within 15 days of the measures it had taken to comply with that Decision. That Commission Decision was addressed to Portugal in letter No SG(97) D/3395 of 30 April 1997.

III

(6) In a letter of 8 April 1997 the Portuguese Government submitted its comments on the measures described above to the Commission.

EPAC — Empresa Para a Agroalimentação e Cereais, SA — is a limited company with exclusively public capital, created in 1991. It had its origin in EPAC — Empresa Pública de Abastecimento de Cereais (Public cereal supply undertaking) — which was created in 1977 following the merger of 19 institutions associated with the protection and development of cereal production and trade. Between 1977 and 1985, EPAC functioned as a public intervention agency. During the first years of Portugal's integration into the Community, EPAC continued to perform these functions in the context of gradual liberalization of the cereals market (1986-1989) and State support for the direct marketing of domestically produced cereals (1987-1990). Account must also be taken of the creation of Silopor — Empresa de Silos Portuários, SA (1987) — as well as the complete liberalization of trade in domestically produced cereals in June 1991.

In this context, when analysing the current situation of EPAC, account must be taken of constraints on the undertaking arising from its history, in particular:

(a) EPAC's asset situation is unbalanced, with an excess of fixed assets and insufficient own capital for financing current activity. Since it used to be a public intervention agency, EPAC had to maintain a large storage, calibration and drying infrastructure permanently available and ready for use, this infrastructure being dispersed over the entire national territory.

Maintaining this network of facilities entailed heavy annual investment and up-keep costs as well as constantly available staff on a scale appropriate to its large size. Since 1991 it has become clear that those costs, combined with the natural reduction in the undertaking's share of the market, are preventing the undertaking from becoming profitable and reaching a competitive level of activity.

(b) There is obvious overstaffing as a result of the need to operate hundreds of local facilities all over the national territory as well as the fact that EPAC has acquired a considerable number of officials from some of the corporate and State organizations which preceded it.

When EPAC was first formed, it had 2 027 employees. Furthermore, their average age was very high and their level of qualification very low. In 1988, in the context of market liberalization, the undertaking created a pension fund and introduced an early retirement system for workers over 55. Between 1990 and 1993, the undertaking terminated the contracts of active workers and began payment of 169 retirement supplements.

(c) Account must be taken of the creation of Silopor, a company with exclusively public capital, formed by Decree-Law No 293-A/86 of 12 September 1986 through the transfer of EPAC assets, debt and capital.

The port silos and all the equipment, installations and material associated with them, which previously belonged to EPAC, were transferred to Silopor. The debt burden on financing specifically committed to the construction of the silos was also transferred to Silopor. This financing was considerably lower than the total cost of the work carried out, since most of the funds necessary for this investment had their origin in the roll-over re-financing of credit operations for the import of cereals, with the additional debt incurred being attributed to EPAC's liabilities. Furthermore, all the initial capital stock of Silopor (Esc 3,5 billion) was transferred from EPAC's capital stock.

The value of Silopor's debt to EPAC was established at Esc 7,596 billion in 1989. At that time it was also concluded that Silopor was not capable of paying off this debt from its own funds and that it was essential for EPAC to charge interest to Silopor in respect of delays in repayment of the debt.

[1] OJ L 186, 16. 7. 1997, p. 25.

Silopor proved to be incapable of repaying its debt because of the imbalance in its capital structure which was not corrected in time. On 30 June 1996 the total value of interest debited by EPAC to Silopor was Esc 21,5 billion. In February 1997, when it was last valued, the total value of the initial debt plus interest was Esc 31,22 billion.

(d) Apart from these historical factors of a structural nature, the Portuguese Government also stresses that during the period of adjustment of the undertaking to the conditions required by liberalization, the Portuguese State supported the construction of silos by cooperatives in order to render viable their attempt to expand their activity to the sphere of cereal marketing.

In May/June 1995, faced with the restriction of access to new credit, EPAC decided, the Portuguese Government says, to channel its scarce financial resources towards its clients in the agricultural sector. According to the Portuguese authorities, the vulnerability of this sector is a recognized fact, and interruption of the undertaking's activity at the beginning of the cereal marketing year would have caused disruption which is difficult to imagine. According to the Portuguese authorities, the position of the undertaking, combined with its interventionist tradition nearly paralysed the marketing of products for industry, which accounts for a substantial part of the undertaking's turnover.

According to the Portuguese Government, that course of action was also the reason for the lack of financial resources leading to the difficulties caused by the loss of business opportunities by the undertaking.

(7) The Portuguese Government states that the level of debt and the financial charges to be paid became so high that EPAC could no longer shoulder the burden from its own resources. From April 1996 EPAC stopped paying most of its financial commitments. Faced with the possibility of an undertaking wholly owned by the Portuguese State being unable to honour its commitments, the State decided to take an exceptional and temporary measure to deal with the problem pending an overall solution.

According to the Portuguese Government, that measure temporarily alleviated some of the effects of the situation resulting from the past but did nothing to provide a long-term solution to the undertaking's problems regarding the cash flow needed for current trading operations and investment in restructuring the enterprise and paying severance pay to workers. To finance its current trading activity, the undertaking had to take on loans from banks on market terms.

(8) Given the inadequacy of the plan presented by the old EPAC administration for making the undertaking viable and financially sound, the new administration (which came into office on 25 November 1996) developed, according to the Portuguese authorities, the measures necessary to solve the current problems: excessive size, high operating costs, lack of efficiency in trading circuits and processes. According to the same authorities, both the staff cuts (66 contracts terminated in January and February) and reductions in operating costs currently underway give grounds for expecting improvement in 1997.

Finally, the Portuguese Government indicated that the privatization of EPAC and Silopor is planned for the 1998-99 privatization programme approved by the Portuguese Government on 26 March 1997. Financial restructuring will begin at the end of the first half of 1997. Following restructuring, the State guarantee will be cancelled.

(9) In a letter of 21 May 1997 the Portuguese Government sent the Commission its response to Commission Decision No 97/433/EC requiring Portugal to suspend the guarantee granted to EPAC immediately. In its answer the Portuguese Government, in addition to questions concerning the suspension of the guarantee, made the following comments:

(a) The guarantee concerned covers obligations taken on by EPAC and arising from the loan-restructuring contract concluded with the creditor banking consortium. The financial contribution results exclusively from that contract, to which the State was not party.

The State is itself responsible for the need for the loan concerned, whose effect is not to give the undertaking an advantage over others but to alleviate the damage caused to the undertaking by the State on its own initiative in setting up Silopor.

The Portuguese authorities indicate that the conditions of the operation guaranteed are appropriate, in a normal market context, to the size of EPAC, its status as an undertaking wholly owned by the State, the volume of the Silopor debt to EPAC and the nature of the operation.

(b) According to the Portuguese authorities, the guarantee granted to EPAC does not constitute financial operating aid to the undertaking and has not therefore distorted the conditions of competition. It was only a means of dealing with a situation arising from the undertaking's history with the purpose of putting EPAC in the situation in which it would be if its main debtor, Silopor, had paid a publicly recognized debt. Furthermore, the guarantee covers only that part of the EPAC debt which is a result of action taken by the State on its own responsibility.

(c) According to the Portuguese authorities it has not been demonstrated how and to what extent granting the State guarantee to EPAC would affect trade between Member States, which is an essential condition for applying the law on competition.

(d) As to the absence of measures taken to suspend the effect of the State guarantee, the Portuguese authorities claim that the financing of the undertaking's current business has not benefited from the operation underwritten by the State guarantee. The State has neither taken part nor will take part in the negotiation of the bank loans contracted by EPAC from financial institutions as part of its routine business.

(10) The Commission has received no comments from other Member States or interested parties.

IV

(11) Article 19 of Regulation (EEC) No 1766/92 lays down that Articles 92, 93 and 94 of the Treaty apply to the production of and trade in the products listed in Article 1 thereof save as otherwise provided in that Regulation.

Under Article 92 (1) of the Treaty, aid granted by a Member State or through State resources in any form which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with the common market in so far as it affects trade between Member States.

The Portuguese Government argues in its letter of 21 May 1997 that it has not been demonstrated how the State guarantee to EPAC affects trade between Member States, which is an essential condition for the application of Community competition law.

Community cereal production is 173,9 million tonnes. Portuguese cereal production is 1,52 million tonnes. Trade between the rest of the Community and Portugal is considerable, since Portugal is not self-sufficient in cereals and imports more cereals from other Member States every year than it produces itself (1,83 million tonnes) and exports 32 530 tonnes to those Member States. In 1996 (1) the monetary value of Portugal's exports to those Member States was around ECU 5,8 million and that of its imports from them, ECU 310 million.

The measures in question are therefore likely to affect trade in cereals between the Member States since trade is affected where one operator active in intra- or extra-Community trade receives aid which gives it an advantage over others. The measures concerned in fact have a direct and immediate effect on the primary costs of the undertaking which enjoyed an economic advantage over other undertakings in the sector which have not had access, either in Portugal or in the other Member States, to comparable aid. This aid therefore distorts or threatens to distort competition.

In the light of the foregoing, the aid in question is to be considered to be State aid according to the criteria specified in Article 92 (1) of the Treaty.

V

(12) Article 92 (1) of the Treaty lays down that aid meeting the criteria it specifies is in principle incompatible with the common market.

The derogations provided for in Article 92 (2) clearly do not apply to the aid in question. Nor have they been invoked by the Portuguese Government.

For derogations under Article 92 (3), it is provided that State aid must have objectives that are in the interest of the Community and not only of particular sectors of the national economy. Those derogations (which must be very strictly interpreted) may be allowed only in cases where the Commission can establish that the aid is necessary to

(1) Source Eurostat.

achieve one of the objectives provided for in those rules. If such derogations were to be allowed without this condition being fulfilled, it would in effect allow measures affecting trade between Member States and distorting competition without justification in terms of the common interest and, as a corollary, would confer undue advantages as regards operators in other Member States.

In the case in question, there is no evidence of any such Community interest being served. The Portuguese Government has not furnished, nor has the Commission found, any justification for a claim that the aid concerned meets the conditions required for the application of any of the derogations provided for in Article 92 (3) of the Treaty.

The measure does not promote the execution of an important project of common European interest within the meaning of Article 92 (3) (b) since, through the effect it may have on trade, it goes against the common interest.

Nor is it for the purposes of remedying a serious disturbance in the economy of the Member State concerned within the meaning of the same provision.

(13) The Commission wishes to make the following points in response to the arguments advanced by the Portuguese Government:

(a) The description of the history of EPAC and the resulting negative effects on the undertaking's activity, in particular its unbalanced asset situation, the obvious overstaffing, the creation of Silopor and other factors, is relevant as an explanation of EPAC's difficult financial situation and the reasons for it. Nevertheless, it is not such as to modify the Commission's position regarding the opening of the procedure under Article 93 (2) of the Treaty.

(b) When it opened that procedure, the Commission analysed the conformity of the aid granted to EPAC with reference to the content of the communication 'Community guidelines on State aid for rescuing and restructuring firms in difficulty' [1]. That communication lays down rules regarding the conformity of rescue and restructuring aid.

The Commission considered that the criteria relating to aid for rescuing undertakings, intended simply to ensure the continuing activity of the undertaking over a short period pending an assessment of the prospects for its viability, did not apply in this case, since the Portuguese authorities had mentioned the existence of a plan for restoring the economic viability and financial health of EPAC. It therefore considered the aid in the light of the criteria applicable to restructuring aid.

On the basis of the information sent by the Portuguese Government, the Commission now notes that the Government considers that the plan (which has not been sent to the Commission) for restoring the economic viability and financial health of EPAC is inadequate to solve its current problems. As the Portuguese Government stresses, the level of indebtedness and the financial commitments arising therefrom have become so high that it has become impossible for EPAC to continue to meet its obligations from its own resources. The State guarantee was therefore an exceptional and temporary measure to allow the undertaking to continue its business activity until a definitive solution could be found. On the basis of that information, the Commission has to consider the aid in terms of rescue aid to an undertaking in difficulty within the meaning of the above provisions.

In any case, the Commission stresses that the State aid to EPAC does not fulfil the criteria laid down in the communication for it to be considered rescue aid compatible with the common market. Rescue aid must:

— consist of liquidity help in the form of loan guarantees or loans bearing normal commercial interest rates,

— be restricted to the amount needed to keep a firm in business (for example, covering wage and salary costs and routine supplies),

— be paid only for the time needed (generally not exceeding six months) to devise the necessary and feasible recovery plan,

— be warranted on the grounds of serious social difficulties and have no undue adverse effects on the industrial situation in other Member States.

[1] OJ C 368, 23. 12. 1994, p. 12.

All the evidence indicates that the State aid to EPAC does not fulfil these criteria. The interest rates on the loans obtained by EPAC are low thanks to the guarantee and the planned duration of the credit operation is seven years (greatly exceeding the established general rule of six months). Furthermore, it is difficult to argue that a State guarantee on such a large scale is the amount strictly necessary for keeping the firm in business. Finally, no serious social situation requiring the undertaking to be kept in business such as to justify granting the aid has been cited by the Portuguese Government or found by the Commission.

In the light of the foregoing, the abovementioned Community criteria for restructuring aid for undertakings in difficulty do not apply in this case.

(c) The Portuguese Government considers that the creation of Silopor and the debt not paid by this undertaking to EPAC constitute factors with their roots in the past affecting EPAC's current financial situation. It also argues that the guarantee is not operating aid but a way of putting right a situation created in the past and alleviating the damage done to EPAC by the initiative of the State; it stresses that the guarantee covers only that part of the EPAC debt which is the result of the creation of Silopor.

The Commission cannot accept those arguments which, in its view, take account only the effects of the aid on EPAC and not the effects on Silopor. The Commission had already indicated when it opened the procedure provided for under Article 93 (2) of the Treaty that the mechanism for consolidating the EPAC debt appeared to constitute an aid with major beneficial effect for Silopor. The Portuguese Government has now indicated that Silopor, because of the imbalance in its capital situation, is not able to pay its debt to EPAC or the interest on that debt which, when last valued, was some ESC 31,2 billion.

The Commission can therefore conclude that the State guarantee for EPAC also constitutes State aid to Silopor, the undertaking created directly from EPAC. The Portuguese State, the only shareholder in both undertakings, by providing a State guarantee for EPAC is enabling the latter not to demand payment of the debt owed to it, so that in effect the guarantee is indirect aid to Silopor. Furthermore, to deal with the financial difficulties of EPAC, due in part to the non-payment of debt by Silopor, the Portuguese State is standing in for Silopor and guaranteeing the amount owed.

(d) The Portuguese Government argues that the conditions of the bank operation guaranteed by the State are appropriate in a normal market context to the size of EPAC, its status as an entirely State-owned enterprise, the volume of debt and the nature of the operation.

The Commission cannot accept those arguments. Commission policy in calculating the element of aid in State guarantees takes account of the difference between the rate which a borrower would pay on the free market and the rate actually obtained with the help of the guarantee, minus any premium paid for the guarantee [1]. The Community reference rate on the date the loan was granted was 12,51 %, which in the case in question may be considered a minimum rate, since EPAC's financial difficulties would have prevented it from obtaining a loan on more favourable terms than operators in a balanced financial situation. Furthermore, the interest rates on the loans are indexed to the six-month Lisbor rate for the guaranteed part of the loan and the six-month Lisbor rate + 1,2 % for the non-guaranteed part of the loan. The six-month Lisbor rate on the date when the loan was granted was 6,75 % [2]. The premium for the guarantee is 0,2 % per year. The aid element therefore corresponds to at least the difference between the Community reference rate and the rates actually applied, reduced where appropriate by the premium for the guarantee.

(e) In its letter No SG (89) D/4328 of 5 April 1989, the Commission specified that only State guarantees the mobilization of which is made subject by contract to specific obligations — which may go as far as a compulsory declaration of bankruptcy by the beneficiary undertaking, or an analogous procedure — will be considered compatible with the common market. When it opened the procedure under

[1] See Commission Communication concerning the application of Articles 92 and 93 of the Treaty and Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector (OJ C 307, 13. 11. 1993, p. 3) and Commission notice on the *de minimis* rule for State aid (OJ C 68, 6. 3. 1996, p. 9).

[2] Bank of Portugal Statistical Bulletin, January 1997.

Article 93 (2) of the Treaty, the Commission stated that in its view the State guarantee in question did not comply with this minimum criterion. The Commission notes that the Portuguese Government has not contested this statement.

As regards the derogations provided for in Article 92 (3) (a) and (c) for aid to promote the economic development of certain regions or economic activities, the Commission has concluded, on the basis of the foregoing analysis and in the light of the relevant Community rules, that the aid in question, because of its nature as operating aid, cannot promote the sustainable improvement of conditions in the sector or the region concerned [1].

Therefore this aid may not benefit from any of the derogations provided for in Article 92 (3) of the Treaty.

(14) The aid concerned is therefore incompatible with the common market.

VI

(15) Portugal failed to fulfil its obligation under Article 93 (3) of the Treaty, first, by failing to notify the measures taken to assist EPAC referred to in section I above at the planning stage and, secondly, by implementing the aid when the Commission had not been able to state its position on it. Consequently, the measures have been illegal under Community law since they were implemented because they were introduced in contravention of Article 93 (3) of the Treaty. Those failings have led to a particularly serious situation since the aid concerned is, intrinsically and for the reasons explained above, incompatible with the common market under Article 92 of the Treaty. The measures are by their nature particularly likely to have a direct and immediate harmful effect on the market in cereals.

In this respect it should be noted that in the light of the imperative nature of the procedure referred to in Article 93 (3) of the Treaty, whose direct effect has been recognized by the Court of Justice in (among others) its judgments in Case 77/72, Carnima Capolongo v. Azienda Agricola Maya [2] and Case 354/90, Fédération National du Commerce extérieur des produits alimentaires and others v. France [3], the illegality of the aid concerned cannot be remedied retroactively.

Furthermore, where aid is incompatible with the common market, the Commission may use the possibility envisaged by the judgment of the Court of Justice in Case 70/72, Commission v. Federal Republic of Germany [4], confirmed by its judgments in Case 310/85, Denzel v. Commission [5] and Case C-5/89, Commission v. Federal Republic of Germany [6], and require the Member State to recover from the beneficiaries all aid illegally granted.

In the light of the foregoing, the aid granted by the Portuguese Government to EPAC must be repaid.

Since the aid concerned is in the form of a State guarantee which has the effect of reducing the interest rate, the financial advantage unduly obtained is represented by the difference between the market financial cost of bank loans (represented by the reference rate) and the financial cost actually paid by EPAC in the financial operation (taking account of the cost of the guarantee). Since the interest rate is indexed to the six-month Lisbor rate and the interest is payable every six months, this difference should be calculated on a six-monthly basis.

The reimbursement must be made in accordance with the procedures and provisions of Portuguese legislation, with interest payable from the date that the illegal aid in question was granted [7]. The interest rate to be applied is the reference rate used to calculate subsidy equivalents in the context of regional aid [8].

This decision is without prejudice to any conclusions the Commission may draw with regard to the financing of the common agricultural policy by the European Agricultural Guidance and Guarantee Fund (EAGGF),

HAS ADOPTED THIS DECISION:

Article 1

The aid granted by the Portuguese Government to EPAC is illegal since it was granted in contravention of the procedural rules referred to in Article 93 (3) of the Treaty. Furthermore, it is incompatible with the common market pursuant to Article 92 (1) of the Treaty and does not meet the conditions for derogations provided for in Article 92 (2) and (3) of the Treaty.

[1] Judgment of the Court of First Instance in Case T-459/93 Siemens v. Commission of the European Communities [1995] ECR II-1675.
[2] [1973] ECR 611.
[3] [1991] ECR 5505.
[4] [1973] ECR 813.
[5] [1987] ECR 901.
[6] [1990] ECR I-3437.
[7] Commission letter to the Member States SG (91) D/4577, 4. 3. 1991.
[8] OJ C 232, 10. 8. 1996, p. 10.

Article 2

1. Portugal must cancel the aid referred to in Article 1 within 15 days of the date of notification of this Decision.

2. Within two months of the rate of notification of this Decision, Portugal shall take the measures necessary to recover the aid referred to in Article 1.

3. Recovery of the aid shall be carried out in accordance with the procedures laid down in Portuguese legislation, with interest due from the date on which the aid was paid. The interest rate to be applied must be the reference rate used to calculate subsidy equivalents in the context of regional aid.

Article 3

1. Portugal shall keep the Commission regularly informed of the measures it adopts to meet the requirements of this Decision. Its first communication shall be made not later than one month from the notification of this Decision.

2. Not later than two months after the expiry of the period provided for in Article 2 (2), Portugal shall send the Commission information to enable it to verify without any additional investigation that the obligation to recover the aid has been met.

Article 4

This Decision is addressed to the Portuguese Republic.

Done at Brussels, 9 July 1997.

For the Commission

Franz FISCHLER

Member of the Commission