COMMISSION DECISION

of 11 December 2002

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

(notified under document number C(2002) 4378)

(Only the Spanish text is authentic)

(2003/293/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Having invited interested parties to submit comments in accordance with the above Article ([1]), and taking account of such comments,

Whereas:

I. PROCEDURE

(1) By letter of 29 September 2000, the Spanish authorities notified the Commission, in accordance with Article 88(3) of the EC Treaty, of measures to support agriculture following the increase in fuel prices, as set out in the decision to initiate the procedure.

(2) 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.

(3) Since most of the measures covered by the notification had already been adopted, they were accordingly transferred to the register of unnotified aid measures (aid NN 19/2001). The notified measures which had not yet been adopted were entered in the register of notified aid (N 681/A/2000).

(4) By letter of 11 April 2001, amended on 25 April 2001, the Commission notified Spain of its decision to initiate the procedure laid down in Article 88(2) of the Treaty concerning some of the measures, and to consider that others did not meet the requirements to fall within the scope of Article 87 of the Treaty.

(5) The Commission's decision to initiate the procedure was published in the *Official Journal of the European Communities* ([2]). The Commission invited interested parties to submit their comments on the measures concerned.

(6) By letters of 6 June and 20 December 2001, Spain sent a series of comments.

(7) The Commission has received comments from interested parties. It passed on those comments to Spain, giving it the opportunity to comment on them, and received its comments by letters of 1 and 30 October 2001.

II. DETAILED DESCRIPTION OF THE AID

(8) Name of scheme: measures to support agriculture following the increase in fuel prices.

(9) Budget: not specified.

(10) Duration: varies according to the measures.

(11) Beneficiaries: farmers and agricultural cooperatives.

(12) Aim of the measures: to compensate the agricultural sector for the increase in fuel prices.

(13) Possible impact of the measures: distorting competition, favouring the production of certain agricultural products and infringing the rules of the relevant common organisations of the market.

(14) Rate of aid, costs qualifying for subsidies, accumulation: various according to the measures.

([1]) OJ C 172, 16.6.2001, p. 2.

([2]) See footnote 1.

(15) Reasons why the procedure was initiated: amendment of Law No 37/1992 on value-added tax ([3]).

(16) This measure is contained in Royal Decree-Law No 10/2000 of 6 October 2000 on emergency support for agriculture, fisheries and transport ([4]). It increases the percentage of compensation payable to taxable persons covered by the special value added tax (VAT) arrangements for agriculture and fisheries with a view to offsetting an increase in VAT.

(17) The measure falls under the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes ([5]) (hereinafter called the Sixth Directive), as last amended by Directive 2002/92/EC ([6]), and in particular Article 25 thereof.

(18) An analysis of the changes in macroeconomic statistics in the sector relating to farmers covered by the scheme over the preceding three years showed that it was necessary to increase the compensation by no more than 2,5 percentage points on the volume of transactions to offset the VAT charged on purchases of goods and services. In accordance with Article 25(3) of the Sixth Directive, it was decided to introduce varying increases for agriculture, livestock farming and fisheries. The increase was of three points for agriculture and two points for stockfarming and fisheries, bringing the percentage of compensation up to 8 % for the former and 7 % for the latter.

(19) The measure was introduced to restore the necessary balance between the VAT borne by and the VAT charged to taxable persons covered by the special VAT arrangements for agriculture and fisheries. According to the Spanish authorities it does not constitute State aid.

(20) In initiating the procedure, the Commission took the following view:

(21) Article 25 of the Sixth Directive provides that Member States may apply to farmers a flat-rate compensation scheme to offset the VAT charged on purchases of goods and services made by farmers subject to the scheme (flat-rate farmers). The Member States are to fix the flat-rate compensation percentages, where necessary, and notify the Commission before applying them. Such percentages are to be based on macro-economic statistics for flat-rate farmers alone for the preceding three years. They may not be used to obtain for flat-rate farmers refunds greater than the VAT charges previously in force. The Member States may reduce such percentages to a nil rate and round them up or down to the nearest half point. The Member States may fix varying flat-rate compensation percentages for forestry, for the different sub-divisions of agriculture and for fisheries.

(22) According to the information available to it at the time, the Commission considered that the Spanish authorities had not notified it of the increase in the overall compensation percentages before implementing it, thereby failing to comply with Article 25 of the Sixth Directive. Consequently, the Commission had been unable to judge whether the amendment to Law No 37/1992 was in line with Article 25 of the Sixth Directive, or whether the increase had resulted in all the farmers covered by the flat-rate scheme receiving refunds greater than the VAT charges previously in force, in which case the amendment would constitute a selective tax measure that would affect the resources of the State.

Measures to support agricultural cooperatives

(23) This measure is provided for in Royal Decree-Law No 10/2000, which amends Law No 27/1999 of 16 July 1999 on cooperatives ([7]) and Law No 20/1990 of 19 December 1990 on the tax arrangements applying to cooperatives ([8]). It abolishes the maximum limit of 50 % of turnover on which agricultural cooperatives must pay tax in their transactions with non-member third parties without losing their preferential tax treatment as granted by Law No 20/1990 for deliveries of B diesel to non-member third parties. Law No 34/1998 of 7 October 1998 on hydrocarbons ([9]) has also been amended to waive the requirement that agricultural cooperatives delivering B diesel to non-members must set up a legal entity to which the general tax arrangements apply.

(24) In initiating the procedure, the Commission took the following view:

([3]) Official State Gazette No 312, 29.12.1992, p. 44247.
([4]) Official State Gazette No 241, 7.10.2002, p. 36614.
([5]) OJ L 145, 13.6.1977, p. 1.
([6]) OJ L 331, 7.12.2002, p. 27.
([7]) Official State Gazette No 170, 17.7.1999, p. 27027.
([8]) Official State Gazette No 304, 20.12.1990, p. 37970.
([9]) Official State Gazette No 241, 8.10.1998, p. 33517.

(25) Royal Decree-Law No 10/2000 granted tax advantages to agricultural cooperatives which they did not enjoy previously.

(26) The first advantage is the waiver of the requirement to set up a legal entity to which the general tax arrangements apply (i.e. higher 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.

(27) 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 lose 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.

(28) This would seem to be a specific measure applying only to agricultural cooperatives which confers a tax advantage whereby they now pay less tax than they did before Law No 27/1999 was amended. This advantage was granted in the context of the increase in fuel prices.

(29) According to the information available at the time, the Commission considered that these measures conferred an advantage on recipients (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 ([10])). Accordingly, the measure should be considered a selective tax measure affecting the resources of the State.

([10]) OJ C 384, 10.12.1998, p. 3.

Loans to farmers

(30) This measure is provided for in a Ministry of Agriculture Decision of 15 November 2000 ([11]) publishing a Council of Ministers agreement of 10 November 2000, which instructs the credit sections of agricultural cooperatives to sign agreements with the Ministry of Agriculture and the Institute of Official Credit (ICO) to grant to farmers through financial organisations loans of up to ESP 35 billion with an interest rate subsidised by the Ministry of Agriculture.

(31) These loans are granted on the following terms: a duration of five years with a one-year exemption as regards the repayment of the principal; the interest rate is the ICO's lending rate to financial organisations, the ICO reference rate; the profit margin for the financial organisations is one percentage point; the interest-rate subsidy from the Ministry of Agriculture is three percentage points; the risk of the loans falls on the financial organisations and the maximum amount of loans is ESP 75 000 per hectare, up to a maximum per beneficiary of ESP 4,5 million for individuals and ESP 13,5 million for groups.

(32) The Ministry of Agriculture may also subsidise the guarantees granted by the State Limited Company for Agricultural Guarantees, when such guarantees are required for the grant of subsidised loans. The guarantee subsidy is intended to cover the management costs and may not amount to more than 1 % of the amount outstanding on the guaranteed loan.

(33) The Spanish authorities reported that the maximum aid which a farmer received each year averaged over the five-year loan period would be ESP 1 575 per hectare ([12]). The average price of diesel was ESP 54,4 per litre in 1999 and ESP 79,8 per litre in 2000. The increase from 1999 to 2000 was thus 47 %.

(34) According to the Spanish authorities, a comparison between the increase in costs and the annual average aid in the form of interest-rate subsidies (ESP 1 575 per hectare for five years) shows that the aim of the aid is not to compensate farmers for their losses but to allow them to benefit from loans from financial organisations in order to solve their cash-flow difficulties caused by

([11]) Official State Gazette 276, 17.11.2000, p. 40088.

([12]) Interest rate subsidy: 3 %, duration of loan: five years. One-year exemption, maximum amount of the loan per hectare: ESP 75 000. 0,03 × 75 000 (1 + 1+ 1/4 + 2/4 + 3/4)1/5 = ESP 1 575 per hectare.

the disproportionate increase in diesel costs. That increase, which caused public disturbances, strikes, energy and food shortages and difficulties for the free transit of goods across Community territory, should be considered an exceptional occurrence within the meaning of Article 87(2)(b) of the Treaty.

(35) The Spanish authorities argued that this measure cost less than the reduction in special taxes and VAT applied by other Member States and disapproved of by the Commission. If this aid were to be considered incompatible with the common market, Spanish farmers would be at a disadvantage compared to farmers in other Member States who had benefited from tax reductions.

(36) In initiating the procedure, the Commission took the following view:

(37) Subsidising the interest rate on loans is tantamount to granting State aid to farmers. Furthermore, some farmers would receive State aid in the form of a rebate on part of the administrative costs on guarantees on the subsidised loans. Consequently, these measures should be considered selective aid granted by the State.

Tax measures relating to personal income tax and VAT

(38) These measures are provided for in an Order of 29 November 2000 of the Ministry of Finance developing for 2001 the scheme for the objective assessment of personal income tax and the simplified special arrangements for VAT ([13]).

For 2000, a corrective index was applied 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

(39) A 5 % reduction in the calculation of the net yield of certain livestock farming activities subject to the objective assessment scheme by increasing the corrective index applied to fodder purchased from third parties.

([13]) Official State Gazette 287, 30.11.2000, p. 41611.

(40) In initiating the procedure, the Commission took the following view:

(41) This change in the corrective index appeared to confer on its beneficiaries an advantage which relieved them of charges that were normally borne from their budgets. A loss of tax revenue is equivalent to the consumption of State resources in the form of tax expenditure. The Spanish authorities did not justify this measure by the nature or general scheme of the tax system.

(42) Consequently, on the basis of the information available at that time, the Commission considered that this tax measure, which was attributable to the State, affected the resources of the State and conferred a selective advantage, did not seem justified by the nature or general scheme of the tax system.

For 2001, a reduction in the net yield under the scheme for the objective assessment of personal income tax for farming activities

(43) All the farming activities for which the yield is determined using the objective assessment scheme are granted a 35 % reduction on the purchase price of the agricultural diesel needed to carry out those activities, duly documented by means of invoices.

(44) In initiating the procedure, the Commission took the following view:

(45) The Spanish authorities did not provide an explanation for the reduction in yield which would justify its introduction as a means of bringing tax into line with actual economic activity in the light of the exceptional circumstances caused by the increase in fuel prices.

(46) Consequently, according to the information available at that time, this measure did not appear to be justified by the nature or general scheme of the system, and was to be considered as selective aid granted by the State.

Also for 2001, reduction of the percentage for calculating quarterly VAT payments under the simplified arrangements for certain agricultural activities

(47) The reductions in the percentage applied for calculating quarterly VAT payments under the simplified arrangements for certain agricultural activities are as follows: intensive pig and poultry farming (for meat), 7 %; intensive farming of laying hens and sheep, goats and cows for dairy production, 1 %; intensive farming of

beef cattle and rabbits, 14 %; intensive farming of breeding pigs and cattle and other forms of livestock farming, whether intensive or extensive, not explicitly included under other headings, 19 %; intensive farming of sheep and goats for meat, 24 %; breeding, keeping and fattening poultry, 24 %; other activities and related services carried out by farmers or stockfarmers, 28 %.

(48) In initiating the procedure, the Commission took the following view:

(49) This reduction in the percentage used for calculating quarterly VAT payments under the simplified arrangements reduced payments and conferred on beneficiaries an advantage which relieved them of charges that were normally borne from their budgets. A loss of tax revenue is equivalent to the consumption of State resources in the form of tax expenditure. The Spanish authorities did not justify this measure by the nature or general scheme of the tax system. Consequently, according to the information available at the time, this tax measure did not seem justified by the nature or general scheme of the tax system.

Extension, for 2000 and 2001, of tax benefits applicable to personal income tax on the transfer of certain agricultural land and holdings

(50) This extension of tax benefits on the transfer of certain agricultural land and holdings, provided for in the sixth additional provision of Law No 19/1995 of 4 July 1995 on modernising agricultural holdings ([14]), is contained in the seventh transitional provision of Law No 14/2000 of 28 December 2000 on measures relating to taxation, administration and social order ([15]).

(51) In initiating the procedure, the Commission took the following view:

(52) This measure conferred on its beneficiaries an advantage which relieved them of charges that were normally borne from their budgets. A loss of tax revenue is equivalent to the consumption of State resources in the form of tax expenditure. Accordingly, this extension of tax benefits appeared to constitute State aid. This position related only to 2000 and 2001 and did not prejudge the Commission's position on the compatibility or incompatibility of aid granted before that period.

Increase in the percentage of expenditure which is difficult to substantiate in the context of personal income tax

(53) This was the only measure that had not yet been adopted when Spain sent its comments, and therefore constitutes notified aid. The percentage of expenditure which is difficult to substantiate in the context of personal income tax was increased from 5 % to 10 %, for agriculture only and for the 2000 and 2001 financial years only.

(54) In initiating the procedure, the Commission took the following view:

(55) The Spanish authorities had not given any data on this increase in the percentage of expenditure which is difficult to substantiate, as applied to farmers covered by the objective assessment scheme, that would justify it by the nature or general scheme of the tax system and demonstrate that it had been introduced to bring tax into line with actual economic activity in the light of the exceptional circumstances caused by the increase in fuel prices.

(56) Consequently, in the light of the information available at the time, this tax measure did not appear justified by the nature or the general scheme of the tax system and appeared to confer on its beneficiaries an advantage which relieved them of charges that were normally borne from their budgets. A loss of tax revenue is equivalent to the consumption of State resources in the form of tax expenditure.

In conclusion, the Commission took the following view when initiating the procedure:

(57) According to the information available to it at the time, all 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.

(58) 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

([14]) Official State Gazette 159, 5.7.1995, p. 20394.
([15]) Official State Gazette 313, 30.12.2000, p. 46631.

exceptional occurrence within the meaning of Article 87(2)(b) of the EC Treaty.

(59) The measure extending, for 2000 and 2001, tax benefits applicable to personal income tax on transfer of certain agricultural land and holdings could be considered an investment aid in the primary production sector, given that the tax benefit is linked to the transmission of farm land and agricultural holdings. However, Law No 14/2000, which provides the legal basis for the grant of that aid, laid down no requirement to meet any of the conditions set out in point 4.1 of the Community Guidelines for State aid in the agriculture sector ([16]).

(60) According to the information available at that time, the other measures appeared to constitute State aid measures which was simply intended to improve the financial situation of producers without contributing to the development of the sector (point 3.5 of the Community Guidelines for State aid in the agriculture sector). Consequently, at the time the procedure was initiated, it appeared that these measures were to be regarded as operating aid incompatible with the common market.

(61) Moreover, the aid in the form of guarantees made no provision for the conditions which such aid must meet in order to be compatible, as set out in the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees ([17]).

(62) Furthermore, it had to be borne in mind that the aid for agricultural products covered by Annex I to the Treaty concerned products most of which are covered by a common organisation of market, and that the Member States have limited power to intervene in the operation of such market organisations, which are the exclusive competence of the Community. This aid was to be considered as in breach of the common market organisations and hence of the Community rules.

(63) In view of the above, the Commission considered that the measures in question, in so far as they were aid, did not appear to be eligible for any of the exceptions provided for in Article 87(2) and (3) of the EC Treaty, and consequently decided to initiate the procedure laid down in Article 88(2) of the Treaty.

([16]) OJ C 28, 1.2.2000, p. 2. (Corrected version in OJ C 232, 12.8.2000, p. 19).
([17]) OJ C 71, 11.3.2000, p. 14.

III. **COMMENTS FROM INTERESTED PARTIES**

(64) All the comments from interested parties concern the support measure for agricultural cooperatives.

Comments from the Association of Service Station Managers (Asociación de Gestores de Estaciones de Servicio)

(65) This Association considers that Royal Decree-Law No 10/2000 grants tax advantages to agricultural cooperatives.

(66) 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.

(67) 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.

(68) 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 would be to enable cooperatives to offer prices lower than those prevailing under normal market conditions, without providing any compensation for holders of facilities selling to the general public (retail distributors), many of whom will be eliminated from the market.

Comments from the Association of Service Station Managers of Madrid, the Catalan Federation of Service Stations and the Spanish Confederation of Service Stations

(69) 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-members by bringing that activity within a specially-protected tax system.

(70) These associations argue that since Royal Decree-Law No 10/2000 came into force agricultural cooperatives have obtained the following tax advantages on their sales of B diesel to third parties:

(71) 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), 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.

(72) Company tax: given that 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 fixed 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.

(73) Cooperatives receive a 95 % rebate on their economic activities tax.

(74) Cooperatives receive a 95 % rebate on their immovable property tax.

Comments from the Spanish Confederation of Agricultural Cooperatives

(75) Most of Spain's agricultural cooperatives belong to this Confederation. Agricultural cooperatives began selling petroleum products following an Order of 31 July 1986 ([18]) 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 ([19]). Law No 34/1992 of 22 December 1992 regulating the petroleum sector ([20]) introduced a new system for the distribution of petroleum products.

(76) 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.

(77) 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.

(78) The tax advantages enjoyed by cooperative societies must be seen in the light of the technical adjustment standards and the obligations which these impose on cooperatives.

(79) 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.

(80) 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.

(81) 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 when positive. Here, according to Article 34 of

([18]) Official State Gazette 188, 7.8.1986, p. 27907.
([19]) Official State Gazette 58, 9.3.1970, p. 3820.
([20]) Official State Gazette 308, 24.12.1992, p. 43867.

the 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.

(82) 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.

(83) 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.

(84) This situation is reflected in Article 23 of Law No 40/1998 of 9 December 1998 on personal income tax and other tax rules ([21]), which ratifies the unequal treatment of dividends (specific to capital companies subject to the general tax system) in relation to returns (specific to cooperatives subject to special tax arrangements).

(85) Moreover, under Article 66 of Law No 40/1988, 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.

(86) 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 may not be distributed among members, as in the case of the mandatory social reserves.

(87) Firstly, the mandatory reserve, as provided for in Article 55 of Law No 27/1999, which 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.

(88) 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.

(89) Consequently, the maximum 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.

(90) 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.

(91) A general overview of the cooperative tax regime, showing both the advantages and the obligations, can be seen in the following practical examples.

([21]) Official State Gazette 295, 10.12.1998, p. 40730.

(92) 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 same initial results, namely 150 monetary units (mu).

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

	Cooperative	Company with share capital
Results	Cooperative result (CR): 75 (50 %) Extra-cooperative result (ER): 75 (50 %) Total: 150	150
Financing the social reserves	Apprenticeship and training reserve: 5 % CR = 3,75 Mandatory reserves: 20 % CR = 15 50 % ER = 37,5 Total: 56,25	0
Results after reserves have been financed	CR: 56,25 ER: 37,5 Total: 93,75	150
Company tax	CR: (75 – 11,25) × 20 % = 12,75 RE: (75 – 18,75) × 35 % = 19,687 Total: 32,437	150 × 35 % = 52,5
Available profit	93,75 – 32,437 = 61,313	150 – 52,5 = 97,5
Personal income tax	Taxable amount: 61,313 × 100 % = 61,313 Tax payable (marginal rate): 61,313 × 48 % = 29,430 Rebate: 61,313 × 10 % = 6,131 Amount payable: 29,430 – 6,131 = 23,299	Taxable amount: 97,7 × 140 % = 136,5 Tax payable (marg. rate): 136,5 × 48 % = 65,52 Rebate: 97,5 × 40 % = 39 Amount payable: 65,52 – 39 = 26,52
Net amount received	61,313 – 23,299 = 38,014	97,5 – 26,52 = 70,98

(93) 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, the double taxation of company tax and personal income tax cancels out the initial effect of the rebate on the full amount of company tax payable.

(94) 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 company 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 % ER: 25 %	CR: 66,66 % ER: 33,33 %	CR: 50 % ER: 50 %	CR: 25 % ER: 75 %	
Results	150	150	150	150	150
Financing the social reserves	46,875	50	56,25	65,625	0
Results 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
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

(95) In conclusion, 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 structural 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

(96) By letter of 11 June 2001, the Spanish authorities put forward the following arguments.

Amendment of Law No 37/1992

(97) Article 25 of the Sixth Directive allows Member States to set up a flat-rate scheme for farmers engaged in farming and fishing. Spain has applied such a scheme since it joined the Community.

(98) Article 25(3) of the Sixth Directive provides that the Member States may 'fix flat-rate compensation percentages, where necessary, and shall notify the Commission before applying them'. The sense of this provision is, firstly, that the Member States wishing to introduce this type of compensation must notify the amount of compensation before approving it. However, it does not follow from this that changes in the amount of compensation must also be notified to the Commission. If this were indeed the conclusion to be drawn from the Sixth Directive, a separate monitoring system would have to be set up for this compensation scheme alongside the general arrangements already in place for monitoring the amendments which the Member States make to their laws, which would not be consistent. Moreover, the text of the Sixth Directive does not require the Commission to authorise the introduction of compensation, but only that it be informed.

(99) Despite the above, the Spanish Tax Authority notified the Commission (a copy of the document is attached), before the regulation increasing the compensation rate was approved and published in the Official State Gazette, of the Government's intention to increase the compensation rate and to differentiate it according to the product to which it was to be applied, an option expressly provided for in the second subparagraph of Article 25(3) of the Sixth Directive.

(100) Secondly, a further obligation on Member States can be construed from Article 25(3) of the Sixth Directive, namely that they must ensure that the amount of compensation does not exceed the tax charged on the taxable individuals covered by the scheme thereby conferring an economic advantage on them. The Spanish rules also comply with this requirement, as

confirmed by the data on which the Spanish authorities based their calculation of the new compensation rates, which were included in a study annexed to Spain's comments in the context of this procedure.

(101) The method consists of two phases: the first is to calculate the amount of sales of products obtained on holdings subject to the special VAT regime for agriculture and fisheries, the second is to determine the total VAT paid by those holdings on purchases. The result of this exercise shows that the percentage of real compensation has largely exceeded the legally established level since 1987, standing at 8,28 % in 1999.

(102) Spain concludes that the increase in the flat-rate compensation percentage has at all times complied with Article 25(3) of the Sixth Directive, in the sense that the increase at issue has not conferred an economic advantage on taxable persons covered by the arrangements by granting refunds greater than the charges borne.

Measures to support agricultural cooperatives

(103) 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:

(104) The measures introduced by Royal Decree-Law No 10/2000 are actually measures to liberalise the supply of B 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 that would imply favourable treatment.

(105) 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, which are subject to company tax under the general regime, i.e. at the same rate as any other organisation carrying out the same activity.

(106) 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 Article 26(3) of Law No 43/1995 of 27 December on company tax ([22]). On the other hand, the sixth additional provision of Law No 27/1999 requires cooperatives to keep separate accounts for their transactions with non-member third parties.

(107) 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 preferential tax treatment for their cooperative business. The aim is to allow cooperatives to carry out this activity without having to set up a separate 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.

(108) 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.

(109) 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:

(110) Both the increase in price of crude oil and the depreciation of the euro against the dollar led to 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, threatening the survival of many.

(111) In view of the situation, the Spanish Government decided to introduce not only anticyclical measures but

([22]) Official State Gazette No 310, 28.12.1995, p. 37072.

also structural measures, such as further liberalising fuel distribution so that farms could continue their activities while maintaining their competitiveness.

(112) The support measures introduced by Royal Decree-Law No 10/2000 are part of the objective 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.

(113) Hence the waiving of the requirement that cooperatives restrict their distribution of B diesel to non-members to less than 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 separate 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 confirms that the societies it covers may embark on and engage in any economic activity whatsoever.

(114) 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 by restoring a pre-existing entitlement that had been taken away, without this conferring any special tax advantages in the distribution of agricultural fuel to third parties.

(115) 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. All transactions between cooperatives and non-member third parties are taxed at the general rate of 35 %.

(116) In its letter of 30 October 2001 supplementing its comments on the comments from interested parties made in letter of 1 October 2001, Spain added the following comments from the Ministry of Finance: 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 %.

(117) 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 thereby losing their entitlement to preferential tax treatment for their cooperative business.

(118) 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 87 of the Treaty.

(119) 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, but rather that those advantages are designed to encourage this type of society and the cooperative movement in Spain.

(120) 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.

Loans to farmers

(121) Spain restricts itself to repeating the arguments already set out in the notification and insisting that this case concerns an exceptional occurrence (Article 87(2)(b) of the Treaty). While accepting that the Commission is right to interpret the notion restrictively, this does not detract from the fact that the exceptional occurrences and the resulting mitigating measure both came into being because the Spanish Government decided to

follow the public line taken by the Commission and not to give in to the Organisation of Petroleum Exporting Countries (OPEC) by cutting fuel taxes, deciding instead to leave the taxes unchanged and to find another way of compensating for the excessive rise in prices that was seriously threatening the survival of farms, provoking strikes, public disturbances and energy and food shortages.

(122) In its letter of 6 June 2001, Spain confirmed that this type of loan was not being used. However, by letter of 20 December 2001 it reported that these loans had been in operation from 22 November 2001, that funds had already been made available to beneficiaries and that aid payments had accordingly also been made.

(123) In any case, Spain argues that the cost of this measure is lower than the possible reduction in special taxes and VAT applicable to diesel advised against by the Commission.

Tax measures relating to personal income tax and VAT

Application of a corrective index for feed purchased from third parties to certain livestock farming activities subject to the flat-rate tax arrangements

(124) This corrective index has existed since 1995 and is applied to certain stockfarming activities according to the percentage of fodder purchased from third parties used in farming operations. Since 2000, this corrective index has been extended to all stockfarming activities, provided that the market value of the fodder purchased from third parties represents more than 50 % of the value of the fodder consumed.

(125) The use of this index was extended because the net yield indices applicable to these activities were not changed for 2000 or 2001, implying that no account was taken of the increase in the price of fodder when calculating the net return. Thus, when the consumption of fodder purchased from third parties is significant (more than 50 % of all fodder consumed) instead of reducing the net return index, a correcting index (0,95) was introduced.

(126) Spain concludes that this cannot be considered a selective advantage, rather an objective means of adjusting the net return to reflect the real yield from the activity.

A reduction in the net yield under the scheme for the objective assessment of personal income tax for farming activities

(127) The objective assessment scheme for farming activities works by applying a number of net yield indices — determined on the basis of a standard operating account — to the income from the activity concerned. In determining the standard operating account for 2001, the diesel bill was calculated using January 1999 diesel prices. Since the price of diesel rose by around 35 % between January 1999 and 1 January 2001, it was decided to opt for this reduction instead of amending the standard operating account.

(128) Spain concludes that this cannot be considered a selective State aid, but rather, it is an objective means of adjusting the net return to reflect the real yield from the activity.

Reduction in the percentage used for calculating quarterly VAT payments under the simplified arrangements for certain farming activities

(129) Concerning the statement that reducing the percentages used for calculating quarterly VAT payments under the simplified arrangements reduces the amount of those payments and therefore confers an advantage to beneficiaries by reducing their tax burden, Spain indicates that this reduction does not affect the indices used to determine the quarterly payments, which are calculated provisionally and regularised at the end of the year.

(130) The measure was justified by the increase in diesel prices during last six months of 2000, and is provisional, as indicated in the preamble to the Ministerial Order of 29 November 2000 on the simplified arrangements for 2001. That the measure is provisional can be seen in the fact that the reduction in the indices affects only the quarterly payments by instalment, not those used to determine the annual tax due. This means that at the end of the financial year, any difference between the amount due according to the annual indices and the amounts paid on a quarterly basis must be settled.

(131) Spain concludes that there are no grounds for conceding that there was any reduction in the tax burden calculated for 2001.

Extension, for 2000 and 2001, of tax advantages applicable to personal income tax on the transfer of certain agricultural land and holdings

(132) This measure, which extends until 31 December 2001 the tax advantages provided for in the sixth additional provision of Law No 19/1995, must be seen in the broader context of the advantages granted to transferors, which are granted only in certain circumstances, depending on the party acquiring the land and holdings which are being transferred.

(133) Consequently, according to Spain, the measure is not exclusively a tax advantage, but rather an advantage granted when the purchaser meets certain conditions aimed at improving the management of agriculture in Spain and rationalising the size of holdings.

Increase in the percentage of expenditure which is difficult to substantiate in the context of personal income tax

(134) Spain stated in its comments that the measure had not yet been adopted at the time of writing, and that if it were finally adopted, this would be in order to bring the percentage of expenditure applicable under the simplified method of the objective assessment scheme into line with the actual expenditure which that percentage is supposed to represent (expenditure which is difficult to substantiate and provisions), which has risen because of the increase in the price of diesel.

Conclusion

(135) 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 87(1) of the Treaty.

V. ASSESSMENT OF THE AID

Article 87(1) of the Treaty

Amendment of Law No 37/1992

(136) The amendment to Law No 37/1992, provided for in Royal Decree-Law No 10/2000, increases the percentage of compensation payable to taxable persons covered by the special VAT arrangements for agriculture and fisheries in order to offset an increase in VAT, and falls within the scope of the Sixth Directive, in particular Article 25 thereof.

(137) The measure was introduced to restore the necessary balance between the VAT borne by and that charged to taxable persons covered by the special VAT arrangements for agriculture and fisheries.

(138) Before the regulation increasing the compensation rate was approved, the Spanish Tax Authority notified the Commission of the Government's intention to increase that rate and differentiate it according to the product to which it is to be applied, an option expressly provided for in the second subparagraph of Article 25(3) of the Sixth Directive.

(139) Spain also supplied the Commission, in accordance with Article 25(3) of the Sixth Directive, with the data which the Spanish authorities used to calculate the new compensation rates and which prove that the amount of compensation paid does not exceed their actual tax charges, and so does not confer any economic advantage on individuals taxable under these arrangements. The Commission has examined these data and made no comments concerning them.

(140) Consequently, in view of the information supplied by Spain in its comments, the Commission considers that this measure falls within the scope of the Sixth Directive and does not constitute a selective tax measure.

Measures to support agricultural cooperatives

(141) 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 oil products by agricultural cooperatives prior to adoption of Law No 34/1998.

(142) Spain has explained in its comments that, under Law 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.

(143) 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.

(144) 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 the amendments introduced by Royal Decree-Law No 10/2000, 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, thereby benefiting from the differentiated tax treatment as cooperatives.

(145) 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 agricultural cooperatives, in principle, also receive a 50 % rebate on their overall company tax bill.

(146) But the tax advantages enjoyed by cooperatives must be seen in the light of the technical adjustment standards and the obligations which these impose on cooperatives. As stated by the Spanish Confederation of agricultural cooperatives in its comments, 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.

(147) The tax regime for agricultural cooperatives in Spain must be analysed as a whole since it makes structural distinctions so that the advantages it confers are linked to specific obligations (financing the mandatory reserves, treatment of capital and double taxation).

(148) Consequently, in view of the information provided by Spain and by the Spanish Confederation of agricultural cooperatives, the Commission considers that the changes introduced by Royal Decree-Law No 10/2000 to the legislation on agricultural cooperatives do not confer an advantage which alleviates the normal tax burden on their budgets and are not a selective tax measure affecting the resources of the State. This measure does not therefore constitute State aid within the meaning of Article 87(3) of the Treaty.

Loans to farmers

(149) Subsidising the interest rate on loans is tantamount to granting State aid to farmers. Furthermore, some farmers would receive State aid in the form of a subsidy on part of the administrative costs on guarantees on the subsidised loans. Consequently, the Commission believes that these measures are to be considered selective aid granted by the State.

Tax measures relating to personal income tax and VAT

Application of a corrective index for feed purchased from third parties to certain stockfarming activities subject to the flat-rate tax arrangements

(150) In its comments, Spain has explained that this corrective index, which had already existed since 1995, has been extended since 2000 to all stockfarming activities, provided that the market value of the fodder purchased from third parties represents more than 50 % of the value of the fodder consumed. This extension was granted because the net yield indices applicable to these activities were not changed for those years, implying that no account was taken of the increase in the price of fodder when calculating the net return. Thus, when the consumption of fodder purchased from third parties is significant, instead of reducing the net return index, a corrective index is applied. This corrective index was introduced to bring taxation into line with the actual costs created by the increase the price of fodder acquired from third parties. Had that adjustment not

been made, an overpayment of tax would have occurred. This measure is not, therefore, a selective advantage, but an objective method for adjusting the net return to reflect the real yield from the activity.

(151) Point 27 of the Commission Notice on the application of the State aid rules to measures relating to direct business taxation states that 'specific provisions that do not contain discretionary elements, allowing for example tax to be determined on a fixed basis (for example, in the agricultural and fisheries sectors), may be justified by the nature and general scheme of the system (…). Such provisions do not therefore constitute State aid'.

(152) The Spanish rules on the tax on earnings of producers subject to the objective estimate arrangements provide for a tax regime based on units corresponding to the economic results of farms under normal price, cost and income conditions. Those rules stipulate that in the event of exceptional circumstances which alter the economic reality, units can be adjusted to bring the situation back into balance. According to the Spanish authorities, the increase in fuel prices led to increased fodder prices, giving rise to exceptional circumstances that caused a substantial change in conditions, requiring the introduction of an index to correct the net yield for the activity.

(153) That adjustment was made in order to bring tax into line with actual economic activity. Had it not been made, an overpayment of tax would have occurred. This adjustment is therefore justified by the nature or general scheme of the objective estimate arrangements to bring the quantifiable yield into line with actual income for tax purposes.

(154) In view of the information provided in Spain's comments, the Commission consequently considers that these measures are tax measures justified by the nature or general scheme of the tax regime.

A reduction in the net yield under the scheme for the objective assessment of personal income tax for agricultural and stockfarming activities

(155) In its comments, Spain explained that under the objective assessment scheme for farming activities, the net yield is determined on the basis of a standard operating account. In determining the standard operating account for 2001, the diesel bill was calculated using January 1999 diesel prices. Since the price of diesel rose between January 1999 and 1 January 2001, it was decided to reduce the net yield instead of amending the standard operating account. This measure is not, therefore, a selective State aid, but an objective method for adjusting the net yield to reflect the real yield from the activity.

(156) Under the Spanish rules governing the tax on earnings of producers subject to the objective estimate scheme, the net yield for farming activities is determined on the basis of a standard operating account. Those rules stipulate that in the event of exceptional circumstances which alter the economic reality, units can be adjusted to bring the situation back into balance. According to the Spanish authorities, the increase in fuel prices led to exceptional circumstances that caused a substantial change in conditions, requiring the net yield to be reduced to bring it in line with the actual yield for the activity.

(157) That adjustment was made in order to bring tax into line with actual economic activity. Had that adjustment not been made, an overpayment of tax would have occurred. This adjustment is therefore justified by the nature or general scheme of the objective estimate arrangements, the aim of which is to bring the quantifiable yield into line with actual income for tax purposes.

(158) In view of the information provided in Spain's comments, the Commission consequently considers that these measures are tax measures justified by the nature or general scheme of the tax regime.

Reduction in the percentage used for calculating quarterly VAT payments under the simplified arrangements for certain farming activities

(159) Spain has explained in its comments that the reduction in the percentages used for calculating quarterly VAT payments under the simplified arrangements does not affect the indices used to determine the payments. The percentages were reduced provisionally because of the increase in diesel prices, and neutralised in the end-of-year payments. The reduction in the indices affects only quarterly payments on account, not those used to determine the annual tax due. This means that at the end of the financial year, any difference between the amount due according to the annual indices and the amounts paid on a quarterly basis must be settled. In conclusion, there was no reduction in the overall tax burden calculated for 2001.

(160) Consequently, in view of the information provided by Spain in its comments, the Commission considers that these measures do not entail any reduction in the tax burden. This position is based on the specific features of the agricultural sector and does not prejudge decisions that the Commission might adopt in other sectors.

Extension, for 2000 and 2001, of tax advantages applicable to personal income tax on the transfer of certain agricultural land and holdings

(161) Spain maintains that this measure is not exclusively a tax advantage, but rather that the advantage is granted when the purchaser meets certain conditions, which are designed to improve the management of agriculture in Spain and rationalise the size of holdings.

(162) This extension of tax benefits for the transfer of certain agricultural land and holdings confers on its beneficiaries an advantage which relieves them of charges that are normally borne from their budgets. A loss of tax revenue is equivalent to the consumption of State resources in the form of tax expenditure.

(163) Consequently, the Commission considers that this extension of tax benefits constitutes a selective aid granted by the State.

Increase in the percentage of expenditure which is difficult to substantiate in the context of personal income tax

(164) Spain has explained in its comments that the reason for the increase in the percentage of expenditure which is difficult to substantiate in the context of personal income tax, which applied to agriculture and the 2000 and 2001 financial years only, was to bring the percentage of expenditure applicable under the simplified method of the objective assessment scheme into line with the actual expenditure which that percentage is supposed to represent (expenditure which is difficult to substantiate and provisions), which has risen because of the increased in the price of diesel.

(165) This increase in the percentage of expenditure which is difficult to substantiate in the context of tax on personal income tax is justified in that this expenditure has increased for farmers because of the rise in the price of diesel, and if the percentage had not been increased, the said farmers would have been unable to deduct expenditure which they had actually incurred. The increase was introduced to bring taxation into line with the actual costs, and had it not been made, an overpayment of tax would have occurred. This adjustment is therefore justified by the nature or general scheme of the objective estimate arrangements, the aim of which is to bring the quantifiable yield into line with actual income for tax purposes.

(166) In view of the information provided in Spain's comments, the Commission consequently considers that these measures are tax measures justified by the nature or general scheme of the tax regime.

Conclusion

(167) In view of the information provided by Spain in its comments, the amendment to Law No 37/1992, the measures to support agricultural cooperatives, the measure applying a corrective index to feed purchased from third parties in the case of certain stockfarming activities subject to the objective assessment scheme, the measure reducing the net yield in the scheme for the objective assessment of personal income tax for farming activities, the measure reducing the percentage for calculating quarterly VAT payments under the simplified arrangements for certain agricultural activities and the tax measure increasing the percentage of expenditure which is difficult to substantiate in the context of tax on personal income tax must be considered as tax measures which are justified by the nature or general scheme of the tax system, and therefore do not meet the criteria for falling within the scope of Article 87 of the Treaty.

(168) Conversely, the subsidy on loans and guarantees to farmers and the tax measure extending, for 2000 and 2001, tax benefits applicable to personal income tax on transfer of certain agricultural land and holdings must be considered, in the first case as selective aid granted by the State, and in the second case as a tax measure attributable to the State and affecting the resources of the State, both of which entail a selective advantage and do not appear to be justified by the nature or general scheme of the tax system.

(169) Articles 87 and 88 of the Treaty apply to all the agricultural products in Annex I to the Treaty subject to a common organisation of the market (all agricultural products except for potatoes not intended for the production of starch, horsemeat, honey, coffee, alcohol of agricultural origin, vinegar made from alcohol and cork) in accordance with the various Regulations governing the common organisations of the market.

(170) Under Article 87(1) of the Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with the common market, in so far as it affects trade between Member States.

(171) In this case, the aid measures confer on beneficiaries an advantage that alleviates the normal burden on their budget. They are granted by the State or through State resources. They are specific or selective in that they favour certain companies or products, in this case farmers.

(172) To fall within the scope of Article 87(1) of the Treaty, aid must also affect competition and trade between Member States. This criterion implies that the beneficiaries of the measure must engage in an economic activity. The case law on this provision has repeatedly stated that international trade is considered to be affected when the beneficiary company engages in an economic activity which is the subject of trade between the Member States. By the very fact that the aid strengthens the position of the beneficiary company in relation to other companies competing in intra-Community trade, trade can be considered to be affected.

(173) In the case at issue, the beneficiaries engage in an economic activity which is the subject of trade between the Member States. Indeed, there is substantial trade in agricultural products between Spain and the Community. In 1999, Spain exported EUR 11 329 million worth of agricultural products to the Community and imported agricultural products worth EUR 7 382 million ([23]).

(174) Indeed, the beneficiaries operate in a sector which is particularly open to competition. It must therefore be pointed out that there is intense competition in the farming sector between producers of the Member States whose products are the subject of intra-Community trade. Spanish producers participate fully in that competition by exporting substantial quantities of agricultural products to other Member States. Furthermore, the large number of beneficiaries of these aid measures will increase their impact on trade.

(175) Consequently, these aid measures can affect trade in agricultural products between Member States, as happens when aid confers an advantage on operators in one Member State to the detriment of producers in other Member States. The measures concerned have a direct and immediate effect on the production costs of agricultural products in Spain. They therefore confer an economic advantage over farms in other Member States which do not have access to comparable aid. They thereby distort or threaten to distort competition.

(176) In view of the above, the aid at issue must be considered as State aid meeting the criteria of Article 87(1) of the Treaty. However, there are some exceptions to the principle of incompatibility laid down in Article 87(1).

Article 87(2)(b) of the Treaty

(177) Article 87(2)(b) the Treaty provides that aid to make good the damage caused by natural disasters or exceptional occurrences is compatible with the common market. According to Spain these aid measures are justified on the grounds that they were intended to make good the damage caused by an exceptional occurrence.

(178) Spain argues that the disproportionate rise in the cost of diesel caused public disturbances, strikes, energy and food shortages and difficulties for the free transit of goods across Community territory, which should be considered an exceptional occurrence within the meaning of Article 87(2)(b) of the Treaty.

(179) When considering exceptions from the general principle laid down by Article 87(1) of the Treaty that State aid is incompatible with the common market, the Commission holds that the notion of 'exceptional occurrence' contained in Article 87(2)(b) must be interpreted restrictively. Hitherto, the Commission has accepted as exceptional occurrences 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. Because of the inherent difficulties in foreseeing such events, the Commission evaluates the compatibility of such aid on a case-by-case basis, having regard to its previous practice and the scale of the occurrence at issue (point 11.2.1 of the Community guidelines for State aid in agriculture).

(180) The very wording of Article 87(2)(b) of the Treaty excludes any overcompensation of damage. Once the existence of an exceptional occurrence has been demonstrated, the Commission will permit aid of up to 100 % to compensate for material damage.

([23]) Source: Eurostat.

Compensation should normally be calculated at the level of the individual beneficiary, and in order to avoid overcompensation, any payments due should be deducted from the amount of aid (point 11.2.2 of the Community guidelines for State aid in agriculture).

(181) In the case at issue, the aid was granted because of the rise in fuel prices, not the public disturbances, strikes and energy and food shortages. These circumstances did not cause the aid to be granted, but came about as a result of the increase in fuel price.

(182) Spain has not demonstrated any link between the aid granted and the damage sustained by beneficiaries as a result of the rise in fuel prices. It has not been demonstrated that all the beneficiaries of these aid measures suffered damage from that circumstance nor that the amount of the aid relates to and does not exceed the damage sustained by the farmers.

(183) According to the Spanish authorities, the aim of the aid is not to make good the losses borne by farmers but to enable them to take out loans with financial organisations in order to solve their cash-flow difficulties caused by the disproportionate increase in diesel costs.

(184) The information provided by the Spanish authorities does not conclusively show that all the beneficiaries of these aid measures have sustained damage from this cause or that the aid paid does not exceed the damage sustained. The Commission is not pronouncing in this decision on whether the increase in fuel prices constitutes an exceptional occurrence within the meaning of Article 87(2)(b) of the Treaty. This Decision does not prejudge other decisions the Commission might adopt in other sectors.

(185) Consequently, these aid measures do not qualify for exemption under Article 87(2)(b) of the Treaty as aid to make good the damage caused by exceptional occurrences.

Article 87(3) of the Treaty

(186) The exceptions provided for in Article 87(3) may be granted only when the Commission determines that the aid measure is needed to attain one of the listed objectives. To allow measures which do not meet that condition to benefit from these exceptions would be tantamount to allowing infringements of trade between Member States and distortions of competition without any justification of Community interest and would consequently be granting illegal advantages to operators in certain Member States.

(187) The Commission considers that the aid measures in question were not intended as regional aid to encourage new investments or job creation, nor to compensate for disadvantages relating to infrastructure affecting all the producers in a region, but as aid to the agricultural sector. Consequently, this aid is eminently sectoral and must be evaluated in accordance with Article 87(3)(c).

(188) Article 87(3)(c) provides that aid to facilitate the development of certain economic activities or certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest may be considered compatible with the common market.

(189) The measure extending, for 2000 and 2001, tax benefits applicable to personal income tax on transfer of certain agricultural land and holdings could be considered an investment aid in the primary production sector, given that the tax benefit is linked to the transmission of farm land and agricultural holdings. However, Law No 14/2000, which provides the legal basis for the grant of that aid, lays down no requirement to meet any of the conditions set out in point 4.1 of the Community guidelines for State aid in the agriculture sector.

(190) Specifically, investment aid may be granted only to agricultural holdings the economic viability of which can be demonstrated by an assessment of the holding's prospects ([24]) and where the farmer possesses adequate occupational skill and competence. In addition, the holding must comply with minimum Community standards regarding the environment, hygiene and animal welfare. No aid may be granted for investments having as their objective increased production for which normal market outlets cannot be found. The maximum rate of public support for investment is limited to 40 % (50 % in less-favoured areas as defined in Article 17 of

([24]) Aid for agricultural holdings in financial difficulty may not be granted unless that aid meets the conditions set out in the Community guidelines on State aid for rescue and restructuring firms in difficulty (OJ C 288, 9.10.1999, p. 2).

Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund ([25])), (see also Article 51(2) in conjunction with Article 7 of that Regulation).

(191) In its comments, Spain provided no information permitting verification of whether the investment aid at issue meets the conditions set out in the aforementioned guidelines. The Spanish authorities merely indicated that these measures must be seen in the broader context of the advantages granted to transferors, which are granted only under certain circumstances, depending on the party acquiring the land and holdings being transferred. This measure is not just a tax advantage, rather the advantage is granted when the purchaser meets certain conditions which are intended to improve the management of agriculture in Spain and rationalise the size of holdings.

(192) Moreover, the aid in the form of guarantees made no provision for the conditions which such aid must meet in order to be compatible, as set out in the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees.

(193) Consequently, the aid measures extending tax advantages on transfer of certain agricultural land and holdings and the aid in the form of subsidies on loans and guarantees must be regarded as incompatible with the common market. This type of aid has no lasting effect on development of the sector, since its immediate effects disappear once the measure is abolished (see the judgment of the Court of First Instance in Case T-459/93 Siemens SA v Commission ([26])). The direct consequence of these aid measures is to improve the production and marketing prospects of the beneficiaries in relation to other operators not receiving comparable aid, both in Spain and in other Member States.

(194) It should also be borne in mind that these aid measures for agricultural products covered by Annex I to the Treaty (all agricultural products except for potatoes not intended for the production of starch, horsemeat, honey, coffee, alcohol of agricultural origin, vinegar made from alcohol and cork) are subject to common organisations of the market, and that the Member States have limited power to intervene in the operation of such market organisations, which are the exclusive competence of the Community.

(195) Common market organisations are not restricted to provisions governing the price regime, but consist of a number of mechanisms and measures which, taken together, form a 'complete and exhaustive' framework to which the Commission confirms that there can be no exceptions and which, according to the consistent case law of the Court of Justice, does not allow the Member States to adopt measures which might undermine or create exceptions to it (See the judgment of the Court of Justice in Case 177/78 Pigs and Bacon Commission v McCarren and Company Limited ([27])).

Conclusion

(196) In the light of the reasoning set out above and the Community rules applicable, the Commission considers that, with regard to the exceptions provided for in Article 87(2)(b) in the case of aid to make good the damage caused by natural disasters or exceptional occurrences, and in Article 87(3)(a) and (c) in the case of aid to promote or facilitate the economic development of certain regions or activities, the aid measures at issue can be deemed to adversely affect trading conditions to an extent contrary to the common interest and infringe Community rules and are not eligible for any of the exemptions provided for in Article 87(2) and (3) of the EC Treaty.

VI. **CONCLUSIONS**

(197) The Commission concludes that Spain has granted the aid at issue illegally, in breach of Article 88(3) of the Treaty. The aid was illegal because it was granted before the Commission had pronounced on its compatibility with the common market.

(198) Furthermore, for the reasons set out above, those aid measures are incompatible with the common market because they fall within the scope of Article 87(1), without being eligible for any of the exceptions provided for in Article 87(2) and (3).

(199) When aid is incompatible with the common market, the Commission must require the Member State to recover the aid granted illegally. The requirement to recover aid, which is also laid down in Article14(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying

([25]) OJ L 160, 26.6.1999, p. 80.
([26]) ECR 1995, p. II-1675.
([27]) ECR 1979, p. 2161.

down detailed rules for the application of Article 93 of the EC Treaty ([28]), is necessary in order to re-establish the previous situation by removing all the financial advantages enjoyed unduly by the beneficiaries since the aid was granted.

(200) The aid granted must be repaid in full.

(201) Repayment must be made in accordance with Spanish law. The amounts to be repaid must include interest from the date the aid was granted to its actual recovery. The interest must be calculated on the basis of the commercial rate, taking as a reference the rate used to calculate the grant equivalent of regional aid, in accordance with the Guidelines on national regional aid ([29]).

(202) This Decision does not prejudge any conclusions the Commission might draw for the financing of the common agriculture policy by the European Agricultural Guidance and Guarantee Fund (EAGGF).

HAS ADOPTED THIS DECISION:

Article 1

The measures implemented by Spain, namely the amendment to Law No 37/1992 provided for in Royal Decree-Law No 10/2000, the measures to support agricultural cooperatives provided for in Royal Decree-Law No 10/2000 and the tax measures provided for in the Order of 29 November 2000 of the Ministry of Finance, which involve applying a corrective index to feed purchased from third parties in the case of certain stockfarming activities subject to the objective assessment scheme, reducing the net yield under the scheme for the objective assessment of personal income tax for farming activities, reducing the percentage for calculating quarterly VAT payments under the simplified arrangements for certain agricultural activities, and the tax measure increasing the percentage of expenditure which is difficult to substantiate in the context of tax on personal income tax, do not constitute State aid within the meaning of Article 87(1) of the EC Treaty.

Article 2

The State aid granted by Spain to farmers in the form of subsidies on loans and guarantees provided for in a Ministry of Agriculture resolution 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 are incompatible with the common market.

Article 3

Spain shall abolish the schemes referred to in Article 2.

Article 4

1. Spain shall adopt all measures necessary to recover from the beneficiaries all aid referred to in Article 2 which has been granted illegally.

2. Recovery shall be immediate and in accordance with the procedures laid down in Spanish law, provided that these permit the immediate and effective implementation of this Decision. The amounts to be repaid must include interest from the date the aid was made available to the beneficiaries to its actual recovery. The interest must be calculated on the basis of the reference rate used to calculate the grant equivalent of regional aid.

Article 5

Spain shall inform the Commission within two months from the date of notification of this Decision of the measures it has taken to comply with this Decision.

Article 6

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 11 December 2002.

For the Commission

Franz FISCHLER

Member of the Commission

([28]) OJ L 83, 27.3.1999, p. 1.
([29]) OJ C 74, 10.3.1998, p. 9.