COMMISSION DECISION

of 30 June 2004

on the aid scheme implemented by Sweden for an exemption from the tax on energy from 1 January 2002 to 30 June 2004

(notified under document number C(2004) 2210)

(Only the Swedish text is authentic)

(Text with EEA relevance)

(2005/468/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 regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provision of the first subparagraph of Article 88(2) cited above [1], and having regard to their comments,

Whereas:

I. PROCEDURE

(1) By letter dated 11 June 2003, the Commission informed Sweden of its decision to initiate the procedure laid down in Article 88(2) of the EC Treaty with respect to the exemption from the energy tax on electricity in favour of the manufacturing industry.

(2) By letter of 9 July 2003, registered by the Commission on the same day (A/34842), Sweden commented on the opening of the procedure.

(3) The Commission's decision to initiate the procedure was published in the *Official Journal of the European Union* on 9 August 2003 [2]. The Commission invited interested parties to submit their comments on the aid.

(4) The Commission received comments from the Confederation of Swedish Enterprises (*Svenskt näringsliv*) on 29 September 2003.

(5) The comments from the Confederation of Swedish Enterprises were received in due time [3] and were forwarded by the Commission to the Swedish Government, which was given the opportunity to react. Sweden made no comments on the submission.

II. DETAILED DESCRIPTION OF THE AID MEASURE

(6) The Act on Tax on Energy (*Lagen om skatt på energi*) was introduced in Sweden in 1957. Under the act, energy tax is levied on fossil fuels and electricity. The tax has positive environmental steering effects in terms of energy saving and energy efficiency.

(7) The tax on electricity is due in full by households, companies in the service sector and also by manufacturing companies as regards electricity used for heating other than in production processes.

(8) According to Chapter 11, Article 3, of the Act on Tax on Energy, electricity used in industrial activities in the manufacturing process (NACE Rev. 1, sections C and D) is fully exempted from the energy tax [4]. The exemption was introduced in its present form on 1 January 1993, i.e. before Sweden's accession to the EEA and the EU. It has remained unchanged since then.

(9) The tax rate on electric power has, for the period under examination, been set to between SEK 0,198 and SEK 0,241 per kWh.

[1] OJ C 189, 9.8.2003, p. 6.
[2] See footnote 1.
[3] In line with Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time-limits (OJ L 124, 8.6.1971, p. 1), and in particular its Article 3, the deadline for comments ended on 10 September 2003. By letter of 15 August 2003, the Confederation of Swedish Enterprises asked for an extension of the deadline until 30 September 2003, which was accepted by the Commission by letter dated 9 September 2003.
[4] The exemption is also applicable for electricity used in greenhouses. That part of the exemption will be subject to a separate Commission decision.

(10) According to the Swedish authorities, the full reduction results in a loss of State revenue amounting to about SEK 11 000 million (about EUR 1 190 million) per year.

(11) The Commission initiated the procedure because of its doubts with regard to the nature of the measure as State aid and to the compatibility of the alleged aid. The Commission considered that the tax exemption system constituted State aid within the meaning of Article 87(1) of the EC Treaty. The Commission had doubts on the compatibility of the alleged aid with the Community guidelines on state aid for environmental protection ([5]) (hereinafter referred to as the Guidelines).

III. COMMENTS FROM INTERESTED PARTIES

Comments made by the Confederation of Swedish Enterprises

(12) The Confederation of Swedish Enterprises argues that the taxes on electricity and on CO_2 emissions should be regarded as two components of the same energy tax system. The reason for that is that there is a close link between the two taxes: in order not to create an over-demand for electricity, an increase in the CO_2 tax has to be balanced by a corresponding increase in the electricity tax.

(13) In total, the energy taxation increased from 1993 to 2004 by SEK 27 000 million (about EUR 3 000 million). That raise would not have been possible without the full exemption for the manufacturing sector from the energy tax. Thus, the full tax exemption from the electricity tax does not result in a loss of State revenue, i.e. the measure is not financed through State resources.

(14) The Confederation of Swedish Enterprises considers that it is in the logic of the system to exempt the Swedish manufacturing industry, as the industry has sufficient reasons for electricity savings because electricity is a large cost component for these companies. In order to maintain the competitiveness of Swedish industry while raising the energy taxation as a whole, the industry has to be exempted from the electricity tax.

(15) For the same reasons as those set out in recital 21 by the Swedish Government, the Confederation of Swedish Enterprises considers the measure does not distort or threaten to distort competition, nor favour certain production.

([5]) OJ C 37, 3.2.2001, p. 3.

(16) For the following reasons, the Confederation of the Swedish Enterprises contests, in any case, that a recovery can be made:

(17) Firstly, according to Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([6]) (hereafter referred to as the procedural Regulation), a recovery can only be made of unlawful aid, which in Article 1(f) of the same regulation is defined as 'new aid put into effect in contravention of Article 93(3) of the Treaty'. As the Commission in paragraph 2.2 of its decision to open the investigation procedure concludes that the measure constitutes existing aid, no recovery can be made *ex tunc*.

(18) Secondly, due to legitimate expectations of the beneficiaries, no recovery can be made. The act in question has been proposed by the Swedish Government and adopted by the Swedish Parliament. Companies should not have to question decisions from their Parliament. Moreover, there are previous Commission decisions ([7]), in which measures to the manufacturing sector have been approved as general measures. Moreover, Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity ([8]) (hereafter referred to as the Energy Tax Directive) makes it possible to maintain the zero tax rate on electricity for the large electricity consumers as from 1 January 2004. The prudent trader should have the right to legitimately expect that to be the case also for the two years before that date.

(19) Thirdly, a recovery would go against the principle of proportionality. The aim of a recovery is to restore alleged distorted competition. As the Confederation of Swedish Enterprises does not consider the measure to distort or threaten to distort competition, there is no legitimate and public interest for a recovery. Moreover, many of the companies concerned would have difficulties repaying the aid and a risk of bankruptcy cannot be excluded for certain companies.

(20) Finally, the Confederation of Swedish Enterprises agrees with the opinion of the Swedish Government (see recital 28) that the Commission has not fulfilled its obligation laid down in Article 17(2) of the procedural Regulation.

([6]) OJ L 83, 27.3.1999, p. 1. Regulation amended by the 2003 Act of accession.

([7]) For example, N 255/96 — Sweden — Act on excise duties on energy (OJ C 71, 7.3.1997, p. 10) and NN 72a/2000 — Sweden — Prolongation of CO_2 scheme (OJ C 117, 21.4.2001, p. 19).

([8]) OJ L 283, 31.10.2003, p. 51. Directive as last amended by Directive 2004/75/EC (OJ L 157, 30.4.2004, p. 100).

IV. **COMMENTS BY THE SWEDISH GOVERNMENT**

The tax exemption does not constitute an advantage for the Swedish manufacturing industry

(21) The Swedish manufacturing industry uses a high proportion of electricity compared to competitors in other countries, who instead use coal or natural gas. As these energy sources in many Member States have been tax-free, Sweden considers it reasonable to exempt the Swedish manufacturing industry from the tax on electricity. In addition, the Swedish tax levels in the energy area are generally high compared to the corresponding level in most other Member States. It would not have been possible to achieve these levels without an exemption from the electricity tax for certain sectors.

(22) The Swedish Government thus, does not agree that the tax exemption grants an advantage for the Swedish industry compared to other Member States.

A reasonable period is required for adjustment of the energy tax system

(23) By letter of 16 March 2001, the Swedish Government accepted the appropriate measures proposed in points 75 to 77 of the Guidelines.

(24) On 8 November 2001, the fact that the exemption of a certain industry from the energy tax constituted State aid was clarified by the Court ruling on the Austrian energy tax rebate (Case C-143/99, Adria-Wien-Pipeline) ([9]).

(25) The Swedish Government states that at the time when Sweden accepted the appropriate measures under the Guidelines, it was not clear whether the measure constituted State aid. Following the Adria-Wien ruling, it became clear for the Swedish Government that the measure contains components which cause problems in the State aid area. However, Sweden argues that, as the energy tax is technically complicated, a reasonable time was required from the government decision until the entering into force of amended rules. It is envisaged to have an energy tax on electricity for the manufacturing industry, which is in line with the minimum levels of the new Energy Directive in place from 1 July 2004.

([9]) Judgment of the Court of Justice of 8 November 2001 in Case C-143/99 *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke* v *Finanzlandesdirektion für Kärnten* [2001] ECR I-8365.

The electricity tax and the energy tax should be seen as one tax system

(26) In Sweden an energy tax is levied on fossil fuels and on electricity and a CO_2 tax is levied on fossil fuels. The taxes are viewed by the Swedish Government as parts of the same tax system, which aims at increasing energy efficiency and CO_2 emissions. Thus, the Swedish Government argues that the Commission in its assessment of compatibility should take into account the tax burden resulting from all components of the tax system together rather than assessing the exemption from the electricity tax in isolation.

The Commission did not respect the procedural steps regarding appropriate measures, which are set out in the procedural Regulation. The aid is not illegal and can thus not be recovered

(27) The Swedish Government has, on several occasions, submitted to the Commission information from which the scheme in question is evident ([10]). Thus, Sweden considers its obligation according to Article 17(1) of the procedural Regulation to submit all necessary information to the Commission's review of existing aid schemes to be fulfilled.

(28) The Swedish Government argues that the Commission has violated Article 17(2) of the procedural Regulation, which requires the Commission to inform the Member State if it considers that a measure has become incompatible with the common market before it proposes appropriate measures. The Commission proposed, without such information, appropriate measures not for individual schemes but for all schemes in force at the time when the new environmental guidelines came into force.

(29) Due to procedural irregularity the aid is not illegal and cannot be recovered.

A recovery would constitute retroactive taxation, which is not allowed according to Swedish constitutional law

(30) According to chapter 2, Article 10, second paragraph, of the Instrument of Government (Regeringsformen), tax can not be levied unless it is based on a provision which was in force at the time when the fact that gave rise to the tax took place.

([10]) For example, in the reply to the Commission's letter of 7 May 1996 (D/50485, the Swedish authorities submitted the full Act on Tax on Energy from which the full energy tax exemption on electricity for the manufacturing sector was clear. In addition, brief descriptions of the measure were included in letters dated 15 April 1998 and 31 May 1999, which were sent by the Swedish authorities to the Commission.

(31) As the Swedish Act on Tax on Energy does not contain rules according to which companies in the manufacturing industry are obliged to pay tax on electricity, an amendment of the act would constitute such retroactive taxation, which is illegal according to Swedish constitutional law.

V. ASSESSMENT OF THE AID

Period to be assessed

(32) In its decision to open the Article 88(2) procedure, the Commission found that the measure constituted existing aid as defined in Article 1(b)(i) of Regulation (EC) No 659/1999 at the time of Sweden's accession to the European Union and until 1 January 2002. Sweden has expressly accepted the appropriate measures proposed by the Commission according to which all existing environmental aid schemes should have been brought into line with the Guidelines (point 77). The Commission found that that had not been done in this case. Sweden was therefore asked to submit all comments which could be relevant for the investigation for the period 1 January 2002 to 31 December 2005.

(33) The comments received from the Swedish Government by letter dated 9 July 2003 cover explicitly the period requested by the Commission. The Swedish Government has exercised its rights of defence with regard to the full period.

(34) Third parties were able to comment on the application of the scheme for the same period. The Confederation of Swedish Enterprises presented its comments on the energy tax exemption by letter dated 29 September 2003. Their right to submit observations has therefore been respected.

(35) By Act on amendment of the Act (1994:1776) on Tax on Energy ([11]), a new electricity tax system will be introduced. That act should enter into force on 1 July 2004 and was notified to the Commission by letter dated 1 April 2004 ([12]). Thus, a separate Commission decision will be taken for that measure.

(36) Consequently, this compatibility assessment concerns the period from 1 January 2002 until such time as the current system is applied.

([11]) See Svensk författningssamling SFS 2003:810.

([12]) See N 156/2004 —Sweden —'Energy tax on electricity used by the manufacturing sector', not yet published in the Official Journal.

Existence of aid

(37) In order for a measure to be considered as State aid within the meaning of Article 87(1) of the EC Treaty, four criteria have to be simultaneously fulfilled. The measure must favour certain undertakings, it must be selective, it must be funded through State resources and it must affect trade between Member States.

(38) In its assessment of whether the measure provides the beneficiaries with an advantage, the Commission has to compare companies in a comparable legal and factual situation ([13]). Thus, the Commission cannot assess the position of the Swedish manufacturing industry vis-à-vis any other European manufacturing industry, but has to assess the advantage of the Swedish manufacturing industry compared to the situation of other companies in Sweden. In this respect, the fact that the measure discharges companies, in the manufacturing sector, of a cost that they would otherwise have to bear, provides the undertakings with an advantage compared to other sectors in the Swedish industry. By granting a tax exemption only to certain undertakings, the measure favours them in comparison to other undertakings, which has the potential to distort competition.

(39) The exemption is restricted to undertakings in the manufacturing sector (NACE Rev. 1 Sections C and D). It has been established by the European Court of Justice ([14]), that 'neither the large number of eligible undertakings nor the diversity and size of the sectors to which those undertakings belong provide any grounds for concluding that a State initiative constitutes a general measure'. The Confederation of Swedish Enterprises refers to the fact the Commission has, in decisions concerning aid N 255/1996 and NN 72/A/2000, approved the Swedish CO_2 tax scheme as being a general measure. This is not correct, in the first-mentioned decision the CO_2 tax scheme is found to constitute compatible State aid. The second decision concerns a prolongation of the same scheme and is approved under the same provisions. On the contrary, it is constant practice of the Commission ([15]), confirmed by the European Courts' case-law ([16]), to regard exemptions for the energy intensive industry or for a given sector of the economy as being selective measures. Thus, the Commission concludes that the tax exemption is selective.

([13]) See for example Judgment in Case C-143/99 (see footnote 9).

([14]) See Adria-Wien Pipeline, in particular paragraph 48.

([15]) Decision 2002/676/EC, ECSC of 3 April 2002 on the dual-use exemption which the United Kingdom is planning to implement under the Climate Change Levy and the extended exemption for certain competing processes (OJ L 229, 27.8.2002, p. 15); N 449/01 — Germany — 'Ecological tax reform' after 31 March 2002, (OJ C 137, 8.6.2002, p. 24), N 74/A/02 — Finland — 'Aid to energy intensive companies', (OJ C 104, 30.4.2003, p. 9), and C 33/03 (ex NN 34/03) — Austria — 'Energy tax refund 2002 and 2003', not yet published in the Official Journal.

([16]) See case C-143/99, Adria-Wien Pipeline, quoted above.

(40) The Commission finds that the selectivity of the measure is not justified by the logic of the system as it is not consistent with the internal logic of the tax. On the contrary, the exemption is a clear deviation from the overall structure and functioning of the tax. The objective of the tax is to steer undertakings to take energy saving measures. Even if the undertakings concerned already take energy reduction measures to a large extent in order to reduce their energy costs, it cannot be said that the energy taxation has no additional steering effect. Energy consumption is in general technology-dependent and, thus, only fixed in the short term. In the long term, *inter alia*, through technological progress and innovation, it is normally possible to achieve further efficiency gains. In this respect, as energy consumption by all sectors is equally damaging to the environment, any exemption from an energy tax for undertakings in the manufacturing industry, which by definition are also polluters, cannot be in the logic of the system.

(41) The measure is imputable to the State and financed by State resources as the State accepts a loss of tax revenue. The Commission does not agree with the Confederation of Swedish Enterprise, in that there is no loss of tax revenue due to the fact that the electricity and CO_2 taxes actually paid have increased. On the contrary, an increase in the tax rate leads to a higher loss of tax revenue caused by the exemption.

(42) At least some beneficiaries are engaged in sectors where trade between Member States takes place. Therefore the measure is liable to affect trade and distort competition.

(43) By way of conclusion, the Commission finds that the measure constitutes State aid under Article 87(1) of the EC Treaty.

Compatibility of the aid

(44) The Commission maintains its position that the tax on electricity cannot be assessed together with the CO_2 tax. As stated in the decision to open the Article 88(2) procedure, there are two reasons for this. Firstly, the CO_2 tax is not levied on the electricity consumption. Secondly, as 90 % of the electricity in Sweden is produced from nuclear and hydropower plants, the electricity tax does not have the same steering effect on CO_2 emissions as the CO_2 tax. Thus, the electricity tax has to be assessed separately.

(45) Until 31 December 2001, the scheme constituted existing State aid within the meaning of Article 1(b)(i) of the procedural Regulation. However, according to point 77 of the Guidelines and because of Sweden's acceptance of the appropriate measures, all existing State aid for environmental protection should have been brought into line with the Guidelines before 1 January 2002.

(46) The Swedish Government argues that a reasonable time was needed to implement a new energy tax system which is compatible with the Guidelines. Firstly, two and a half years have passed between the deadline for bringing the scheme into line with the Guidelines and the entering into force of a revised energy tax system. Although the Commission recognises that energy taxation is of a complex nature, it considers that the period of two and a half years to be unreasonably long. Secondly, the Swedish Government did not make use of the possibility to extend the deadline for implementation of the Guidelines for certain measures, which was made and approved for France and Germany ([17]). On the contrary, by letter of 16 March 2001, the Swedish Government accepted the appropriate measures proposed by the Commission. If the Swedish Government had problems to amend the scheme within the given deadline, it could have accepted the appropriate measures with the exception of their application to the scheme in question.

(47) Consequently, the Commission has assessed the compatibility of the aid under the Guidelines. In the opening decision the Commission expressed the view that no other derogations as provided for by Article 87(2) or (3) of the EC Treaty seem applicable. This conclusion must be confirmed after the Article 88(2) procedure. During this procedure, no new elements were put forward which would alleviate the doubts that the Commission expressed in its decision to open the formal investigation procedure. The Commission therefore concludes the following:

(48) Point 51.2 of the Guidelines allows the application of the provisions in point 51.1 in case a tax has an appreciable positive impact in terms of environmental protection and where the derogation has become necessary as a result of a significant change in economic conditions that placed the firms in a particularly difficult competitive situation. The energy tax aims to steer towards energy savings and energy efficiency. The present Swedish energy tax system has remained unchanged since 1993. In this respect, the measure establishes the derogation from an existing tax which has been decided on when the tax was adopted. It falls therefore under point 51.2 of the Guidelines which refer to the compatibility criteria of point 51.1.

([17]) OJ C 34, 7.2.2002, p. 13.

(49) For the period 1 January 2002 to 31 December 2003, point 51.1(b), second indent, of the Guidelines is applicable, as the exemption concerns a domestic tax imposed in the absence of a Community tax. That provision requires benefiting companies to pay a significant proportion of the national tax. The reason for that is to leave them with an incentive to improve their environmental performance. This follows from the wording in point 51.1.b first subparagraph, which allows for tax reductions from a harmonised tax if the beneficiaries pay more than the Community minimum rates 'in order to provide firms with an incentive to improve environmental protection'. The exemption results in a zero-tax on electricity used in the manufacturing process by the manufacturing sector. The Commission can, thus, conclude that the undertakings did not pay a significant proportion of the national tax. Therefore, the measure as it stands cannot, for the period 1 January 2002 until 31 December 2003, be declared compatible in accordance with the Guidelines. Since no other ground for compatibility applies, this aid must be declared incompatible with the common market.

(50) As mentioned in recital 18, Directive 2003/96/EC entered into force on 1 January 2004. That directive takes the objective of environmental protection explicitly into account (see in particular recitals 3, 6, 7 and 12). The Commission, therefore, considers that the respect of the minimum rates of Directive 2003/96/EC will provide undertakings with an incentive to improve environmental protection. For this reason, the Commission can, in the present case, accept the respect of the minimum rates also as equal to a significant proportion of the national tax as requested under point 51.1(b), second indent, of the Guidelines. Therefore, for the period 1 January 2002 until 31 December 2003 the Swedish measure can be declared compatible to the extent that beneficiaries are required to pay the minimum rates set by Directive 2003/96/EC. Incompatible aid corresponds to the amount resulting from the application of the minimum levels set out in the Energy Tax Directive.

(51) For the period 1 January 2004 until such time as the current system is applied, the tax is harmonised by the Directive 2003/96/EC. Therefore, point 51.1(b), first indent, of the Guidelines is applicable. According to that provision, a reduction can be approved if the amount effectively paid by the beneficiaries after the reduction remains higher than the Community minimum. According to Article 10 of the Directive 2003/96/EC, the minimum tax rate for electricity is fixed to EUR 0,5 per MWh for business use. Thus, the fixed minimum rate was not respected in the present case. According to Article 17(2) and (4) of the same Directive, a tax rate down to zero is allowed for energy-intensive businesses which have concluded agreements, or equivalent, to undertake measures to achieve environmental objectives or increased energy efficiency equivalent to what would have been achieved if the Community minimum levels had been observed. In the present case, the conditions for applying a zero tax rate are not fulfilled. Therefore, similarly for the period since 1 January 2004, the Swedish measure may only be declared compatible to the extent that beneficiaries are required to pay the minimum rates set by Directive 2003/96/EC. Incompatible aid corresponds to the amount resulting from the application of the minimum levels set out in the energy tax Directive.

(52) Consequently, the Commission concludes that the measure is, during the period 1 January 2002 until such time as the current system is applied, not in line with the Guidelines and the energy tax Directive. The incompatible aid corresponds to the amount resulting from the application of the minimum levels set out in the energy tax Directive.

Recovery of incompatible aid

(53) Where unlawfully granted State aid is found to be incompatible with the common market, it must according to Article 14(1) of the procedural Regulation be recovered from the beneficiary. Through recovery of the aid, the competitive position that existed before it was granted is restored as far as is possible. The fact that the aid is provided in accordance with national law — which is generally the case — does not affect a recovery, as Community law overrides national law.

(54) However, Article 14(1) of the procedural Regulation states that 'the Commission shall not require the recovery of the aid if this would be contrary to a general principle of Community law'. The case-law of the Court of Justice ([18]) and the Commission's own decision-making practice have established that, where, as a result of the Commission's actions, legitimate expectations exist on the part of the beneficiary of a measure that the aid has been granted in accordance with Community law, then an order to recover the aid would infringe a general principle of Community law.

([18]) Judgment of the Court of Justice of 24 November 1987 in Case 223/85 *RSV* v *Commission*, [1987] ECR 4617.

(55) It is the responsibility of a Member State to make national measures compatible with Community State aid rules in order to prevent distortion of competition, to notify any State aid measure to the Commission in accordance with Article 88(3) of the EC Treaty and to refrain from implementing it pending its examination. In principle, undertakings cannot claim legitimate expectations in respect of illegal State aid. If undertakings could successfully base themselves on a national law, even adopted in good faith, but which does not comply with State aid rules and therefore has the effect to distort competition, the aim of Community state aid control could not be fulfilled.

(56) In the judgment in Case 265/85 Van den Bergh en Jurgens ([19]), the Court ruled that '[…] any trader in regard to whom an institution has given rise to justified hopes may rely on the principle of protection of legitimate expectation. On the other hand, if a prudent and discriminating trader could have foreseen the adoption of a Community measure likely to affect his interests, he cannot plead that principle if the measure is adopted.'

(57) The Swedish authorities argue that the aid should not be recovered as the Commission did not fulfil its obligations set out in Article 17(2) of the procedural Regulation. In this case, in order to adapt existing aid to the new guidelines, the Commission proposed to the Member States to bring all their existing environmental aid schemes in line with the Guidelines by 1 January 2002. It has been confirmed by case-law that such a proposal made in guidelines constitutes one way of carrying out the regular and periodic cooperation under which the Commission, in conjunction with the Member States, must keep under constant review existing systems of aid and propose to them any appropriate measures ([20]). An agreement on a complete list of all existing aid schemes between the Commission and each Member State would be impractical and it is reasonable to leave the responsibility of the adaptation of the schemes to the Member States. This even more so since they are involved in the drafting of new guidelines and are well aware of the implications of these for existing aid schemes before they enter into force. In this case, the Swedish authorities claim that Sweden has informed the Commission about the scheme by, for example, submitting the complete Swedish taxation act to the Commission. The Commission takes the view that that information was sent and used in other contexts and that these submissions cannot in any case replace a formal notification required by Article 88(3) of the EC Treaty.

(58) The Confederation of Swedish Enterprises claims that the aid constitutes existing aid and that, therefore, no recovery can be required. The Commission finds that the measure constituted existing aid only until 31 December 2001. From 1 January 2002, the aid became new aid as it should have been brought into line with the Guidelines. Therefore, the Commission does not agree with the argument brought forward by the Confederation of Swedish Enterprises.

(59) Thus, the Commission does not find that the arguments made by Sweden provide a ground for a decision without a recovery. However, it transpires from the Court's case-law that the Commission is required to take into consideration, on its own initiative, the exceptional circumstances that provide justification, pursuant to Article 14(1) of the procedural Regulation, for it to refrain from ordering the recovery of unlawfully granted aid where such recovery is contrary to a general principle of Community law, such as respect for the legitimate expectation of beneficiaries.

(60) According to Article 19 of the procedural Regulation, the appropriate measures only become binding for the Member State concerned by the acceptance by the Member State to implement those measures. This has been confirmed in case-law ([21]). Thus, the change in the status of the measure from existing aid to new aid was a consequence of the acceptance of the Swedish Government of the appropriate measures proposed in the Guidelines.

(61) On the basis of Article 26(1) of the procedural Regulation, it is conceivable that the fact that the Commission did not publish the acceptance by the Swedish Government of the Guidelines, may have led some beneficiaries to believe in good faith that the national measure at issue was still to be regarded as existing aid. In Article 26, it is set out that the Commission shall publish 'a

([19]) Judgment of the Court of Justice of 11 March 1987 in Case C-265/85 *Van den Bergh en Jurgens BV* v *Commission* [1987] ECR 1155, in particular paragraph 44.

([20]) Judgment of the Court of Justice of 18 June 2002 in Case C-242/00 *Federal Republic of Germany* v *Commission of the European Communities* [2002] ECR I-5603, in particular paragraph 28.

([21]) Case C-242/00 Federal Republic of *Germany* v *Commission of the European Communities* (see footnote 18), Judgment of 15 October 1996 in Case C-311/94 *IJssel-VlietCombinatie BV* v *Minister van Economische Zaken* [1996] ECR I-5023, in particular paragraphs 36 and 37, and Judgment of 5 October 2000 in Case C-288/96 *Federal Republic of Germany* v *Commission of the European Communities* [2000] ECR I-8237, particularly paragraphs 62 to 65.

summary notice of the decisions taken pursuant to Article 18 in conjunction with Article 19(1)'. Article 18 of the same Regulation states that 'where the Commission […] concludes that the existing aid scheme is not, or is no longer, compatible with the common market, it shall issue a recommendation proposing appropriate measures to the Member State concerned.' Article 19(1) of that Regulation sets out that where the Member State accepts the proposed appropriate measures, the Commission shall 'record that finding' and inform the Member State thereof.

(62) The Commission did not publish the acceptance by each Member State of the appropriate measures proposed by the Commission for the implementation of the Guidelines. It is, therefore, difficult for the Commission to show that the beneficiaries were properly informed of the acceptance given by the Swedish Government and of the consequent change in the status of the aid. However, at the date of the publication of the Commission's decision to open the Article 88(2) procedure, it must have been clear for the beneficiaries that the measure is no longer existing aid and that it may be incompatible with the Guidelines. In this case, such publication took place on 9 August 2003.

(63) Taking all these considerations into account, the Commission concludes that, in the pre-sent case, recovery of aid granted before the date of the publication of the decision to open the investigation procedure would be contrary to the principle of protection of legitimate expectations. Therefore, in accordance with Article 14 of the procedural Regulation, the Commission decides that recovery shall not be required for the period 1 January 2002 to 8 August 2003.

(64) Thus, aid provided under this scheme since 9 August 2003 should be recovered.

VI. **CONCLUSION**

(65) The Commission finds that Sweden has unlawfully kept in force Act (1994:1776) on Tax on Energy and without modification since 1 January 2002 in breach of the obligation arising from its own acceptance of the appropriate measures proposed by the Commission and of Article 88(3) of the EC Treaty.

(66) The scheme constitutes State aid within the meaning of Article 87(1) of the EC Treaty.

(67) The aid is, since 1 January 2002, incompatible with the Guidelines and in particular point 51.1(b) second subparagraph thereof and any other derogation as provided for by Article 87(2) and (3) of the EC Treaty. Since no other reasons of compatibility can be envisaged for the scheme as such, the latter is incompatible with the common market.

(68) In accordance with Article 14(1) of the procedural Regulation, the unlawfully paid aid should be recovered. In this case, the recovery period should start on the date of the publication of the decision by the Commission to open the Article 88(2) procedure regarding the case and end on the date when the new energy tax system enters into force, i.e. aid provided during the period 9 August 2003 to 30 June 2004 should be recovered.

(69) This Decision concerns the aid scheme in question and must be implemented immediately, in particular as regards the recovery of all individual aid granted under the scheme. The Commission also notes that a decision on an aid scheme is without prejudice to the possibility that individual aid may be deemed, wholly or partially, compatible with the common market on its own merits (for instance, because the individual grant of aid is covered by the *de minimis* rules or in the context of a future Commission decision or by virtue of an exemption regulation),

HAS ADOPTED THIS DECISION:

Article 1

The tax exemption granted by Sweden since 1 January 2002 under the Act on Tax on Energy (1994:1776) is a State aid scheme, unlawfully put into effect by Sweden in breach of Article 88(3) of the Treaty. Such aid is incompatible with the common market to the extent that beneficiaries are not required to pay the minimum rates set by Council Directive 2003/96/EC. Since no other ground for compatibility applies, this aid must be declared incompatible with the common market.

Article 2

Sweden shall abolish the aid scheme referred to in Article 1 in so far as it is continuing to produce effects.

Article 3

1. Sweden shall take all necessary measures to recover from the beneficiary the aid referred to in Article 1.

2. Sweden shall cancel all payment of outstanding aid with effect of the date of the present decision.

3. Recovery shall be effected without delay and in accordance with the procedures under national law, provided these allow the immediate and effective implementation of this Decision.

4. The sums to be recovered shall bear interest throughout the period running from the date on which they were put at the disposal of the beneficiaries until their actual recovery.

5. The interest shall be calculated in conformity with the provisions laid down in Commission Regulation (EC) No 794/2004 ([22]).

Article 4

Sweden shall inform the Commission, within two months following notification of this Decision, of the measures planned and already taken to comply with it. It shall provide this information using the questionnaire attached in Annex 1 of this Decision.

Article 5

This decision is addressed to the Kingdom of Sweden.

Done at Brussels, 30 June 2004.

For the Commission

Mario MONTI

Member of the Commission

([22]) OJ L 140, 30.4.2004, p. 1.

ANNEX

Information regarding the implementation of Commission Decision 2005/468/EC

1. **Total number of beneficiaries and total amount of aid to be recovered**

1.1. Please explain in detail how the amount of aid to be recovered from individual beneficiaries will be calculated?

— the principal,

— the interest.

1.2. What is the total amount of unlawful aid granted under this scheme that is to be recovered (gross aid equivalent, prices of …)?

1.3. What is the total number of beneficiaries from which unlawful aid granted under this scheme is to be recovered?

2. **Measures planned and already taken to recover the aid**

2.1. Please describe in detail what measures are planned and what measures have already been taken to effect an immediate and effective recovery of the aid. Please also indicate where relevant the legal basis for the measures taken/planned.

2.2. By what date will the recovery of the aid be completed?

3. **Information by individual beneficiary**

Please provide details for each beneficiary from whom unlawful aid granted under the scheme is to be recovered in the table overleaf.

Identity of the beneficiary	Amount of unlawful aid granted (*) Currency:	Amounts reimbursed (**) Currency:

(*) Amount of aid put at the disposal of the beneficiary (in gross aid equivalents; in prices of …).
(**) Gross amounts reimbursed (including interest).