II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 7 December 2005

concerning the exemption from excise duty on mineral oils used as fuel for alumina production in Gardanne, in the Shannon region and in Sardinia respectively implemented by France, Ireland and Italy

(notified under document number C(2005) 4436)

(Only the French, English and Italian versions are authentic)

(Text with EEA relevance)

(2006/323/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(s) cited above [1] and having regard to their comments,

Whereas:

1. PROCEDURE

Community legislation concerning harmonisation of tax provisions

(1) Ireland exempted heavy fuel used in the production of alumina in the Shannon region from the domestic excise taxes from 1983 onwards. Italy and France granted similar exemptions in respect of fuel used in plants located on Sardinia and in the Gardanne region from 1993 and 1997 respectively. Article 6 of Council Directive 92/82/EEC of 19 October 1992 on the approximation of the rates of excise duties on mineral oils [2] established a minimum rate of excise duty on heavy oil, which Member States had to apply from 1 January 1993. However, the Council authorised Ireland to exempt mineral oils used for alumina production in the Shannon region from the excise duty (hereinafter 'the Irish exemption') by the following decisions:

— Council Decision 92/510/EEC of 19 October 1992 authorizing Member States to continue to apply to certain mineral oils when used for specific purposes, existing reduced rates of excise duty or exemptions from excise duty, in accordance with the procedure provided for in Article 8 (4) of Directive 92/81/EEC [3];

— Council Decision 97/425/EC of 30 June 1997 authorizing Member States to apply and to continue to apply to certain mineral oils, when used for specific purposes, existing reduced rates of excise duty or exemptions from excise duty, in accordance with the procedure provided for in Directive 92/81/EEC [4];

— Council Decision 1999/880/EC of 17 December 1999 authorising Member States to apply and to continue to apply to certain mineral oils, when used for specific purposes, existing reduced rates of excise duty or exemptions from excise duty, in accordance with the procedure provided for in Directive 92/81/EEC [5];

[1] OJ C 30, 2.2.2002, p. 17, p. 21 and p. 25.
[2] OJ L 316, 31.10.1992, p. 19.
[3] OJ L 316, 31.10.1992, p. 16.
[4] OJ L 182, 10.7.1997, p. 22.
[5] OJ L 331, 23.12.1999, p. 73.

— Council Decision 2001/224/EC of 12 March 2001 concerning reduced rates of excise duty and exemptions from such duty on certain mineral oils when used for specific purposes [6];

(2) Decisions 97/425/EC, 1999/880/EC and 2001/224/EC, as well as Council Decision 93/697/EC of 13 December 1993 authorizing certain Member States to apply or to continue to apply to certain mineral oils, when used for specific purposes, reduced rates of excise duty or exemptions from excise duty, in accordance with the procedure provided for in Article 8(4) of Directive 92/81/EEC [7], Council Decision 96/273/EC of 22 April 1996 authorizing certain Member States to apply or to continue to apply to certain mineral oils, when used for specific purposes, reduced rates of excise duty or exemptions from excise duty, in accordance with the procedure provided for in Article 8(4) of Directive 92/81/EEC [8] and Council Decision 1999/255/EC of 30 March 1999 authorising, in accordance with Directive 92/81/EEC, certain Member States to apply and to continue to apply to certain mineral oils, reduced rates of excise duty or exemptions from excise duty, and amending Decision 97/425/EC [9], authorised similar exemptions in respect of mineral oils used as fuel for alumina production in Sardinia, Italy (hereinafter 'the Italian exemption').

(3) Decisions 97/425/EC, 1999/255/EC, 1999/880/EC and 2001/224/EC also authorised exemptions in respect of mineral oil used as fuel for alumina production in the Gardanne region of France (hereinafter 'the French exemption').

(4) The fifth recital in the preamble to Decision 2001/224/EC states that 'this decision shall be without prejudice to the outcome of any procedures relating to distortions of the operation of the single market that may be undertaken, in particular under Articles 87 and 88 of the Treaty. It does not override the requirement for Member States to notify instances of potential State aid to the Commission under Article 88 of the Treaty'. Decision 1999/880/EC authorises the exemptions until 31 December 2000. Decision 2001/224/EC authorises the exemptions until 31 December 2006.

(5) Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity [10] repealed Directive 92/82/EEC as from 31 December 2003. Article 2(4)(b) of Directive 2003/96/EC, states that the Directive does not apply to a number of uses of energy, notably dual use of energy products. The second indent of Article 2(4)(b) states that the use of energy products for chemical reduction and in electrolytic and metallurgical processes is to be regarded as dual use. Hence, as from 31 December 2003, when that Directive became applicable, there has no longer been any minimum excise duty for heavy fuel used in the production of alumina.

Correspondence between the Commission and the Member States concerned

(6) As early as 1970, when no alumina was yet produced in Ireland, the Irish Industrial Development Authority and Aughinish Alumina Ltd (hereinafter 'Aughinish') discussed the possibility of recovering duties paid on raw materials used for the manufacture of goods that were exported in accordance with the legislation in force at the time. It was agreed that such an exemption would become applicable in the event that Aughinish set up a plant in Ireland. A significant change of legislation took effect as from 1975. Aughinish started making its investment in 1978 and operations started in 1982. The Irish exemption came into effect in 1983.

(7) By letter of 28 January 1983, Ireland informed the Commission of the commitment given to Aughinish and of its planned implementation. By letter of 22 March 1983, the Commission replied, explaining that '*if the aid is only now about to be implemented, the Commission could regard the letter of 28.1.1983 as a notification in the terms of Article 93(3) [now Article 87(3)] of the Treaty*'. Ireland confirmed that this was the case by letter of 6 May 1983. No decision was adopted further to that correspondence.

(8) By letters of 29 May 1998 (D/52247) and 2 June 1998 (D/52261), the Commission requested information from Italy and France respectively in order to verify whether the Italian and French exemptions would fall within the scope of Articles 92 and 93 (now Articles 87 and 88) of the Treaty. The Commission reminded Italy of its request by letter of 16 June 1998 (D/52504). Italy answered by letter of 20 July 1998 (registered on 23 July 1998 under A/35747). Having requested an extension of the delay for reply by letter of 10 July 1998 (registered on 13 July 1998 under A/35402), which was granted by letter of 24 July 1998 (D/53163), France replied by letter of 7 August 1998 (registered on 11 August 1998 under A/36167).

[6] OJ L 84, 23.3.2001, p. 23.
[7] OJ L 321, 23.12.1993, p. 29.
[8] OJ L 102, 25.4.1996, p. 40.
[9] OJ L 99, 14.4.1999, p. 26.
[10] OJ L 283, 31.10.2003, p. 51.

(9) Ireland provided the estimated amounts of aid granted under the tax exemption for the period as from 1995 in the context of its annual reporting to the Commission on all granting of State aid and these amounts are included in the corresponding Annual Surveys on State Aid. The Irish exemption was also mentioned in the European Union's notifications to the World Trade Organisation pursuant to Article XVI:1 of the General Agreement on Tariffs and Trade 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures for the years 1997, 1998, 1999, 2000, 2001/2002 and 2003/2004 ([11]).

(10) By letters of 17 July 2000 (D/53854, D/53855 and D/53856), the Commission requested France, Ireland and Italy respectively to notify the exemptions. France replied by letter of 4 September 2000 (registered on 5 September 2000 under A/37220). The Commission reminded Ireland and Italy of its request and asked those Member States, as well as France, for further information by letters of 27 September 2000 (D/54915, D/54911 and D/54914). Ireland answered by letter of 18 October 2000 (registered on 20 October 2000 under A/38674). The Commission reminded Italy and France of its requests by letters of 20 November 2000 (D/55707 and D/55708). Italy answered by letter of 7 December 2000 (registered on 13 December 2000 under A/40512). France answered by letter of 8 December 2000 (registered on 11 December 2000 under A/40419). The cases were registered under NN22/2001 IR, NN 26/2001 IT and NN23/2001 FR respectively.

The procedures pursuant to Article 88(2) of the Treaty

(11) By decisions C(2001) 3296, C(2001) 3300 and C(2001) 3295 of 30 October 2001 the Commission initiated the procedure laid down in Article 88(2) of the Treaty with respect to the exemptions. These decisions were sent to Ireland, Italy and France by letters of 5 November 2001 (D/291995, D/291999 and D/292000). The decisions were published in the *Official Journal of the European Communities* on 2 February 2002 ([12]). The Commission received the following comments from third parties:

(a) From Aughinish: letter of 26 February 2002 (registered on 1 March 2002 under A/31598) which referred to an earlier letter of 24 January 2002 and letters of 1 March 2002 (registered on the same day under A/31617, A/31618 and A/31625);

(b) From Eurallumina SpA (hereinafter 'Eurallumina'), the Italian beneficiary: letters of 28 February 2002 (registered on 28 February 2002 and 4 March 2002 under A/31559, A/31656 and A/31772 respectively);

(c) From Alcan Inc. (hereinafter 'Alcan'), the French beneficiary: letter of 1 March 2002 (registered on 4 March 2002 under A/31657);

(d) From the European Aluminium Association (hereinafter 'EAA'): letter of 26 February 2002 (registered on 1 March 2002 under A/31598) referring to an earlier letter of 24 January 2002;

(12) All third parties, except Alcan, sent their comments in the framework of all three procedures. The comments were forwarded to Ireland, Italy and France by letters of 26 March 2002 (D/51349) and 9 April 2002 (D/51555 and D/51559).

(13) Having requested an extension of the time limit for responding by fax of 1 December 2001 (registered on 3 December 2001 under A/39535), which was granted by letter of 7 December 2001 (D/55104), Ireland commented on the Commission's decision by letter of 8 January 2002 (registered on 11 January 2002 under SG(2002)A/490). The Commission requested further information by letter of 18 February 2002 (D/50686). Having requested an extension of the time limit for responding by fax of 19 March 2002), Ireland answered by letter of 26 April 2002 (registered on 29 April 2002 under A/33141).

(14) Having requested an extension of the time limit for responding by letter of 21 November 2001 (registered on 23 November 2001 under A/39207), which was granted by letter of 29 November 2001 (D/54945), France commented on the Commission's decision by letter of 12 February 2002 (registered on 13 February 2002 under A/31100).

(15) Italy commented on the Commission's decision by letter of 6 February 2002 (registered on 12 February 2002 under A/31091).

([11]) Documents available on www.wto.org The last notification is dated 15 December 2003 with reference number 03-6591 and symbol G/SCM/N/95/EEC/Add.8.

([12]) See footnote 1.

2. DETAILED DESCRIPTION OF THE MEASURES CONCERNED

(16) Alumina is a white powder principally used in smelters to produce aluminium. It is produced out of bauxite ore by a refining process, the last step of which consists in calcination. More than 90 % of the calcinated alumina is used in the smelting of aluminium metal. The remainder is further processed and used in chemical applications. In several merger decisions ([13]), the Commission has found that there are two separate product markets: smelter-grade alumina (hereinafter 'SGA') and chemical-grade alumina (hereinafter 'CGA'). CGA is a much higher value-added product than SGA. While the geographical market for SGA is worldwide, that for CGA is not wider than Europe.

(17) The measures to which this Decision relates consist of full exemptions from the excise duty on industrial heavy oil. The national legislation provides for exemptions for fuel oil used for alumina production throughout the territory of the Member States concerned. However, at least until the moment that Directive 2003/96/EC became applicable, Ireland, France and Italy had to ensure that the advantage was granted only in the regions specified in the Council Decisions referred to in recitals (1), (2) and (3). Decision 2001/224/EC authorised the exemptions until the end of 2006. The Member States concerned have not indicated whether they wish to prolong the exemption beyond 2006. Since Directive 2003/96/EC does not apply to heavy fuel used for the production of alumina, such a prolongation would not require the authorisation of the Council. In 1999, the excise tax rates normally applicable in Ireland, France and Italy amounted to EUR 13.45, EUR 16.78 and EUR 46.48 per tonne of heavy oil respectively, but the latter two rates have since been increased.

(18) There is only one producer of alumina in each of the Member States concerned.

(19) The beneficiary of the Irish exemption is Aughinish. It is located in the Shannon region and now belongs to the Glencore group, a diversified resources group with world-wide activities in mining, smelting, refining, processing and trading of minerals and metals, energy products and agricultural products. Glencore's turnover in the fiscal year 2003 was USD 54 700 million ([14]).

(20) The beneficiary of the Italian exemption is Eurallumina. It is located in Sardinia. Since late 1997, Eurallumina has been a cooperative joint venture between Comalco Ltd (56,2 %) and Glencore (43,8 %). Comalco sells more than 820 000 tonnes of primary aluminium products per annum and its turnover in 2002 was USD 256 millions. One of its four aluminium smelters is located in the Community, namely Anglesey in the United Kingdom. Comalco is a fully owned subsidiary of the Rio Tinto group, which has worldwide activities in finding, mining and processing mineral resources ([15]). The plant in Sardinia produces alumina for the account of the joint venture participants who take the production in proportion to their shares in the consortium. Part of the alumina produced (about 25 %) is used in the nearby Alcoa primary aluminium smelter, for which Eurallumina is the sole supplier.

(21) The beneficiary of the French exemption is Alcan, which, in 2003, took over Pechiney, including its alumina refinery located in the Gardanne region. Alcan is the world's second largest producer of primary aluminium with a turnover of USD 25 700 million in 2003 ([16]).

(22) For the year 1999, the following figures have been provided:

	Aughinish	Eurallumina	Pechiney
Number of employees	450	450	500
Production of SGA in tonnes	1 396 000	897 761	280 000
Production of CGA in tonnes	54 000	75 239	280 000
Sales of alumina in EUR millions	245	135	128
Excise duty on heavy oil in EUR per tonne (*) (VAT which accrues)	13,46 (12,5 %)	46,48 (10 %)	16,78 (**) (19,6 %)
Consumption of heavy fuel oil in tonnes	336 000	262 114	32 047
Aid amount in EUR millions	4,5	16,4	0,6

(*) By comparison, the minimum rate that was established by Directive 92/82/EEC was EUR 13 per tonne.
(**) For heavy oil with sulphur content of less than 2 %.

([13]) See, for instance, Commission Decision 2002/174/EC in Case COMP/M.1693 — Alcoa/Reynolds (OJ L 58, 28.2.2002, p. 25).

([14]) See www.glencore.com

([15]) See www.eurallumina.com, www.comalco.com and www.riotinto.com

([16]) See www.alcan.com

(23) All three companies are located in areas where investments are eligible for regional aid: in the Gardanne and Shannon investments are eligible for aid pursuant to Article 87(3)(c) of the Treaty, whilst in Sardinia investments are eligible for aid pursuant to Article 87(3)(a). Until 31 December 1999 investments in the Shannon region were eligible for aid pursuant to Article 87(3)(a) of the Treaty.

3. REASONS TO INITIATE THE PROCEDURE LAID DOWN IN ARTICLE 88(2) OF THE TREATY

(24) In its decisions to initiate the procedure laid down in Article 88(2) of the Treaty, the Commission expressed its doubts as regards the compatibility of the aid under the Community guidelines on national regional aid ([17]) and in particular in the light of the rules on operating aid contained in those guidelines.

(25) The Commission also raised doubts as regards the aids' compatibility under the Community guidelines on State aid for environmental protection of 1994 ([18]) and those of 2001 ([19]).

4. COMMENTS FROM THIRD PARTIES

Aughinish

(26) Aughinish argues that when the Council adopted Decision 2001/224/EC, it took the State aid aspects fully into account and was properly satisfied that the exemptions did not give rise to distortions of competition or interfere with the working of the internal market.

(27) The continuation of the exemption to 31 December 2006 is both justified and critical to its survival.

(28) The Commission has failed to observe essential requirements laid down in Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([20]).

(29) Aughinish' alumina plant is located in an underdeveloped rural area. The plant's operations represent a significant share of the region's production, employment and tax proceeds. Over half of the tonnage transported through the Shannon Estuary is directly related to Aughinish. It contributes approximately 20 % of all property taxes collected by Limerick County Council. On an annual basis, the plant spends EUR 70 million in Ireland on goods and services, 70 % of which is spent locally. Closure would be catastrophic for the local economy.

(30) Originally, the exemption was considered a critical element in competitive terms given the absence of natural energy sources or alternatives to heavy oil such as natural gas in the region. Aughinish is currently developing its own on-site combined heat and power plant (CHP), which will be fuelled by natural gas. Primarily because of delay in putting in place the required infrastructure for transporting gas and electricity, Aughinish has no alternative energy source to heavy fuel oil until 2006. Without the exemption, the plant would be uneconomic and could be forced to close. Without the original assurances by Ireland, the investment would not have been made in Ireland, nor indeed within the Community.

(31) The exemption was notified as State aid in 1983 and has become existing aid within the meaning of Article 1(b) of Regulation (EC) No 659/1999.

(32) The Council adopted Decision 2001/224/EC by unanimity on the basis of a proposal by the Commission, allowing the exemptions until December 2006.

(33) The Commission must respect the legitimate expectations of the beneficiaries.

(34) In proposing and adopting Decision 2001/224/EC, the Commission and the Council have already made an assessment that the measures are acceptable from the competition point of view. This is clear from the recitals in the preamble to the Decision and the text of Article 8 of Directive 92/81/EEC on which it is based.

(35) There is no distortion of competition. Even with the exemption, Aughinish remains at a competitive disadvantage compared to its counterparts in Europe and the rest of the world. As it produces smelter grade alumina, there is no a distortion of competition as regards plants in Europe producing chemical grade alumina. Furthermore, the German plant uses natural gas which also benefits from an exemption from the excise duty applicable to other industrial consumers of gas in Germany. More fundamentally, Aughinish never considered itself to be in direct competition with other Community alumina producers. Community producers rather compete against producers elsewhere in the world, in particular Australia. Europe does not have low priced gas, which is available in Australia and other countries. Oil is more expensive in the Community because of the requirement to burn low sulphur oil, that is to say, less than 3 %. From 1 January 2003, 1 % sulphur oil has been mandatory, further inflating fuel oil prices and producers costs.

([17]) OJ C 74, 10.3.1998, p. 9.
([18]) OJ C 72, 10.3.1994, p. 3.
([19]) OJ C 37, 3.2.2001, p. 3.
([20]) OJ L 83, 27.3.1999, p. 1.

(36) Aughinish also refers to inconsistency with the Commission's approval of the prolongation of a number of reductions in respect of the tax which would otherwise be payable under the German Ecotax ([21]).

Eurallumina

(37) Eurallumina also invokes legitimate expectations and explains that it made a series of commitments and investments in its alumina plant based on Decision 2001/224/EC. In particular orders have been placed and expenses incurred for the installation of a new alumina charger and a new caustification unit in order to expand the basin for stocks of the process residue, for the improvement of the bauxite digestion unit as well as for other minor works. Various commitments have been made with the local community.

(38) Without the exemption, the plant would not be economical and would have to be closed down. Closure would not change or improve trade between Member States as all other plants in the Community work on full capacity.

(39) When it adopted Decision 2001/224/EC, the Council took due account of the economic and competition aspects. The circumstances have not changed since that decision was adopted. *Lex specialis* based on Article 93 of the Treaty prevails over the procedure *lex generalis* based on Articles 87 and 88 of the Treaty.

(40) If the measure were to be re-examined, it would be considered compatible with the Community interest and the State aid rules. There is no distortion of competition, nor is the functioning of the single market affected. The French and Irish plants benefit from a similar exemption, the German plant uses natural gas that is also exempted from excise duties and the plants in Spain and Greece do not compete with the Sardinian plant to a significant extent, as the major part of their production is used in an adjacent aluminium smelter and the remaining part consists principally of chemical grade alumina which is a separate market. The Greek plant uses locally extracted bauxite and therefore does not have to bear the cost of transport of raw materials. The Spanish plant has recently been sold to Alcoa and it can reasonably be expected that the purchase price reflected the applicable excise rates. The UK plant produces only chemical grade alumina.

(41) The Italian excise duty is very high, much higher than the harmonised level and much higher than the excise duties applicable elsewhere in the Community.

([21]) Commission Decision in Case N 449/2001 — Germany — Ecological Tax Reform (OJ C 137, 8.6.2002, p. 24).

(42) The exemption only partially removes the disadvantages the Sardinian plant has when confronting the world market.

(43) The plant is located in a disadvantaged region where operating aid can be authorised on the basis of point 4.16 of the Guidelines on national regional aid. Due to its location, Eurallumina has no access to methane (which is the major component of natural gas) and therefore is forced to rely on heavy oil. It does not have the possibility to cogenerate heat and power, which would reduce the costs by about EUR 10 million per year. The Italian environmental legislation, furthermore, imposes additional costs amounting to about EUR 8 million per year.

(44) The plant was created on the initiative of the Italian authorities with involvement of the Community. Initially it benefited from loans and aid, all approved, but the operations have subsequently developed without significant State aid from either the national authorities, or from the Community.

(45) Recently significant investments have been made to ensure compliance with the most restrictive norms and regional environmental standards.

(46) As the adjacent Alcoa plant only uses the alumina from Eurallumina, closure of the alumina plant would also result in the closure of the aluminium plant, causing the loss of 1 900 jobs altogether.

Alcan

(47) Alcan refers to the global competitive situation and recalls that the reasoning behind the exemption is essentially based on the energy intensive character of the industry.

(48) The investments have a long term character and are highly capital intensive and risky. Therefore it is necessary to have a stable fiscal and legal context.

(49) Alcan has committed itself for several years to a significant investment programme. The continuous efforts that have been made to modernise the installations and prepare for the future have made it possible to maintain 500 direct jobs in an economically sensitive region. Decision 2001/224/EC strengthens the plant's efforts to maintain its competitive position. Revocation of the exemption would weaken the activity in the view of global competition that is already very present.

The European Aluminium Association

(50) The EAA strongly opposes any steps which would adversely affect the Community aluminium metal market. The alumina plants in the Community are working at full capacity. Although they are among the most energy efficient in the world, the cost of production is higher than in other western world alumina plants. The exemptions only partially compensate for the disadvantages of the European plants compared to their global competitors as regards raw materials, transport, energy and environmental standards. The European alumina producers currently do not meet internal European demand and the revocation of the exemptions would result in increased imports from other parts of the world. The European aluminium producers would have no option but to buy alumina from non-European sources, which would lead to reduced security of supply for the primary industry.

5. COMMENTS FROM FRANCE, IRELAND AND ITALY

France

(51) France claims that the decision to initiate the procedure laid down in Article 88(2) of the Treaty is superfluous and has no legal basis. The nature and legal significance of Council decisions cannot depend on whether they are based on the third subparagraph of Article 88(2) of the Treaty or on Directive 92/81/EEC. In any case, France considers that the exemption does not constitute State aid within the meaning of Article 87(1) of the Treaty.

(52) France considers it is significant that no complaint about distortion of competition has been lodged even though the exemptions have been granted for 4 years.

Ireland

(53) Ireland recalls the history of the exemption and insists that it must be considered existing aid. The Council decisions took due account of the competition aspects, as did the Commission's proposals for those decisions. Moreover, until 1999, the Shannon region formed part of an Objective 1 area. The beneficiaries should be able to rely on legitimate expectations.

(54) The Irish government requested the derogation from the minimum rate for excise duty in 1992 on the grounds that the plant was located in a relatively underdeveloped area and that, since it used heavy oil as an energy source, it could not compete with other countries' industries having lower tax rates on fuel and possibly also using natural gas or other energy sources subject to lower taxes, or no tax at all.

(55) Ireland confirmed that a new infrastructural development in natural gas supply which would cater for the Shannon region would be in place by October 2002 and that in order to change its energy source, Aughinish planned to invest in a CHP plant using this new supply of natural gas.

Italy

(56) Italy explains that Eurallumina pays LIT 300 million (EUR 150 000) annually for the use of the wharf/quays and reefs where it is located. It also pays some LIT 500 million (EUR 250 000) annually in the form of the waste tax (LIT 600 per tonne of red sludge). Furthermore, as from 1974, the regional authorities have prohibited the disposal of residue in the Mediterranean Sea, a practice still allowed in France and Greece. This prohibition resulted in high costs for Eurallumina amounting to LIT 6 000 million (EUR 3 million). Due to the strict emission limits (25 % below the national limit for SOx) the company has had to invest in new de-sulphuring technology at a cost of LIT 44 000 million (EUR 22 million) which entails an additional operating cost of LIT 6 000 million annually (EUR 3 million), including amortisation. Despite these investments, the company will still have to pay 1 100 million LIT (EUR 0.55 million) annually for emission taxes.

6. ASSESSMENT

(57) Since the Community framework applicable to energy taxation was substantially modified after the Commission's decisions to initiate the procedure of Article 88(2) of the Treaty, by Directive 2003/96/EC, the present final decision is limited to the period prior to 1 January 2004 when Directive 2003/96/EC became applicable.

6.1. Existence of State aid until 31 December 2003

(58) Article 87(1) of the Treaty provides that 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, shall, in so far as it affects trade between Member States, be incompatible with the Common Market'.

(59) It is evident that the exemptions are financed through State resources since the State foregoes a certain amount of money that it would otherwise collect.

(60) The exemptions from excise duty reduce the cost of one important input and thus confer an advantage on the beneficiaries which are placed in a more favourable financial position than other undertakings using mineral oils in other industries or regions.

(61) In their comments, the beneficiaries and France expressed the view that the exemptions did not create any distortion of competition nor did they affect the functioning of the single market, in particular because the Community was a net importer of alumina, because Community producers had to compete at a global level and were disadvantaged by high energy prices, and because putting an end to the exemptions would not improve the market situation for alumina at the Community level and would reduce security of supply of primary resources for aluminium production. They claim that the absence of any distortion of competition is confirmed by the fact that no competitors commented on the Commission's decision to initiate the procedure laid down in Article 88(2) of the Treaty. All this, however, does not detract from the assessment in recital 60. To the contrary, it confirms that the excise reductions were explicitly intended to strengthen the competitiveness of the beneficiaries vis-à-vis their competitors by reducing their costs. The Commission notes that alumina is also produced in Greece, Spain, Germany and Hungary (although Hungary has only been a Member State since 1 May 2004).

(62) Alumina, both SGA and CGA, is traded between Member States, as is aluminium, the market of which is closely related to the alumina market. The aid can therefore be assumed to affect intra-Community trade and to distort or threaten to distort competition, even if significant parts of alumina production are consumed at aluminium plants located close by.

(63) Measures that do not favour *certain* undertakings do not fall within the definition of State aid in Article 87(1), but, in the absence of selectivity, must be considered as general measures. According to the jurisprudence of the Court of Justice of the European Communities general measures must be effectively open to all firms on an equal access basis, and they must not *de facto* be reduced in scope through, for example, the discretionary power of the State to grant them, or through other factors that restrict their practical effect. The Commission explained the notion of general measures a.o. in a Staff Working Paper which was discussed in the meeting of the Council Working Party on 14 November 2002. The Working Paper continues with an explanation under which conditions aid in the form of tax measures can be found compatible with the common market. The minutes of the Council meeting of 27 October 2003, when Directive 2003/96/EC was adopted, expressly refer to the explanations given during the meeting of the Council Working Party on 14 November 2002. In the case at hand, however, the exemptions only apply to companies that produce alumina and in practice, in each Member State there is only one company benefiting from the exemption at stake: Aughinish in the Shannon region, Eurallumina in Sardinia and Alcan in Gardanne. As long as the Council Decisions were binding, the exemptions were regionally selective, because these Decisions only authorised exemptions in certain regions and potential investors interested to make investments in alumina production in other regions could not be sure to receive similar treatment. The selection of the regions has no relationship whatsoever with the internal logic of the national tax systems at stake.

(64) Before Directive 2003/96/EC became applicable, Community law required Member States, in principle, to impose excise duties on mineral oils, so that specific exemptions, limited to a given production and to given regions, could not be considered as being justified by the nature and general scheme of the system. The arguments by which Ireland, France and Italy defend the exemption only for the production of alumina derive from the circumstances in the markets and from the circumstances of alumina production in the specific regions concerned. These arguments do not derive from the nature and logic of the respective domestic tax systems, given that the latter were to comply with the requirements laid down by Community law. Consequently, the measures granted before Directive 2003/96/EC became applicable, cannot be found justified by the nature and general scheme of the system and constitute State aid within the meaning of Article 87(1).

6.2. **New aid, not existing aid**

(65) The aid granted by France and Italy, does not constitute existing aid in the meaning of Article 1(b) of Regulation (EC) No 659/1999 and the aid granted by Ireland constitutes existing aid only to a limited extent. First of all, the aid measures did not exist prior to the entry into force of the Treaty in the Member States concerned. This is perfectly clear in the case of France and Italy. As regards Ireland, the aid was not granted before accession. In 1970, the Industrial Development Authority (IDA) wrote to Alcan that the Irish legislation in force at that time provided for '*(a) import of … operating supplies free of duty and (b) freedom from domestic tax for raw materials for processing and exports*'. The letter further explained that (underlining added) '*while I cannot give a formal commitment that there will be no change in the legislation I am satisfied that, in view of the vital importance of exports to the Irish economy, there is no possibility of the legislation being changed, in the foreseeable future, to the detriment of the Alcan project*'. The IDA proceeds by stressing the reputation of the Irish Government in this respect. Such wording should not

be confused with binding commitments. Further assurances were given in a letter dated 14 January 1974, that is to say, after the accession of Ireland. However, the fiscal advantages in force in 1970 were substantially modified or even abolished after accession and by 1980 a minimum of IEP 1,53 per hectolitre was to be paid on heavy oil used for a purpose other than combustion in the engine of a motor vehicle. The current exemption from the excise duty payable on fuel oil used for the manufacture of alumina, which differs substantially in its nature, form and scope from the legislation in force in 1970, was only established by order of 12 May 1983 and is applicable to oil imported or delivered from a refinery or bonded warehouse on or after 13 May 1983. Therefore, it was established well after the date on which the Treaty became applicable in Ireland. In addition, in its letter of 6 May 1983, Ireland accepted the arguments of the Commission that the aid was notifiable.

(66) Secondly, neither the Commission nor the Council ever authorised the measures pursuant to the State aid rules.

(67) Thirdly, the aid cannot be deemed to be authorised pursuant to Article 4(6) of Regulation (EC) No 659/1999. France and Italy never notified the measures. In its letter of 6 May 1983, Ireland confirmed that the aid was only then being implemented and that its letter to the Commission could be regarded as a notification for the purposes of Article 93(3) [now Article 88(3)] of the Treaty. Ireland, however, never sent any formal prior notice to the Commission of its intention to implement the aid measure as provided for in Article 4(6) of Regulation (EC) No 659/1999. On the contrary, it put the measure into effect only one week after the letter of 6 May 1983 that invited the Commission to consider the aid as notified. Therefore, it appears to the Commission that the aid must be considered as unlawful aid within the meaning of Article 1(f) of Regulation (EC) No 659/1999. The French and Italian aids were also put into effect without awaiting approval by the Commission in breach of Article 88(3) of the Treaty. Member States cannot invoke the rules set out in Article 4(6) of Regulation (EC) No 659/1999 in respect of such aid. Even though Regulation (EC) No 659/1999 only entered into force in 1999, similar rules already applied before that date in accordance with the case-law of the Court of Justice ([22]).

(68) Fourthly, the aid can only partially be deemed to be existing aid pursuant to Article 15 of Regulation (EC) No 659/1999. That Article makes the powers of the Commission to recover aid subject to a limitation period of 10 years, beginning on the day on which the unlawful aid is awarded. In the case of Italy and France, this period has been interrupted by the Commission's letters of 29 May 1998 and 2 June 1998 ([23]). In the case of Ireland, this period has been interrupted by the Commission's letter of 17 July 2000. This means that only the Irish exemption in as far as it concerns the period before 17 July 1990, can be considered to be existing aid.

(69) Finally, Article 1(b)(v) of Regulation (EC) No 659/1999 does not apply in this case.

(70) None of the situations provided for in Article 1(b) of Regulation (EC) No 659/1999 therefore apply to the French and Italian exemptions and that aid must be regarded as new aid. The Irish exemption must be regarded as new aid only as from 17 July 1990. The Commission consequently has the obligation and competence to assess the compatibility of the new aid with the common market pursuant to Article 88 of the Treaty. Neither the Council Decisions referred to in recitals (1), (2) and (3), nor Directives 92/81/EEC and 2003/96/EC, which only concern tax harmonisation, detract from this obligation and competence. Those legal acts cannot prejudge the assessment of compatibility on the basis of the criteria set out in Articles 87(2) and (3) of the Treaty.

6.3. **Compatibility of the new aid granted until 31 December 2003**

6.3.1. *Compatibility under the rules for environmental aid*

(71) The Commission has examined whether the new aid granted by Ireland, France and Italy qualifies for an exemption from the prohibition of State aid contained in Article 87(1), in particular in the light of the rules applicable to environmental aid. The aid granted after 3 February 2001 must be assessed under the 2001 guidelines on State aid for environmental protection in accordance with point 82(a) of those guidelines. The aid granted between 10 March 1994 and 3 February 2001 must be assessed under the 1994 guidelines on State aid for environmental protection. In respect of the period prior to 10 March 1994, the Commission practice, that was largely codified in the guidelines, is relevant.

([22]) See Case 120/73 *Lorenz* [1973] ECR 1471 and Case C-99/98 *Austria* v *Commission* [2001] ECR I-1101.

([23]) See Judgment of 6 October 2005 in Case C-276/03 P *Scott* v *Commission, not* yet reported.

(72) Section 3.4 of the 1994 guidelines on State aid for environmental protection explains that operating aid may only be authorised, by way of exception, if it compensates for extra production costs by comparison with traditional costs. In addition, '*temporary relief from new environmental taxes may be authorised where it is necessary to offset losses in competitiveness, particularly at international level. A further factor to be taken into account is what the firms concerned have to do in return, to reduce their pollution*'. First of all, the measures were not limited to extra production costs. Secondly, they did not have a temporary or degressive nature. Moreover, the exemptions were not directly conditional upon other actions by the beneficiaries to reduce their pollution and, in particular, energy consumption. It is therefore concluded that the aid cannot be found compatible with the common market on the ground of the 1994 guidelines, nor of the Commission's practice before 10 March 1994.

(73) As regards the period after 3 February 2001, section E.3.2, points 47-52, of the 2001 guidelines on State aid for environmental protection lays down rules applicable to all operating aid in the form of tax reductions or exemptions. Originally, excise duties on mineral oils were not designed as an instrument of environmental policy. However, one likely feature for a levy to be considered as environmental would be that the taxable base of the levy has a clear negative effect on the environment ([24]). As the use of mineral oils has a clear negative effect on the environment, excise duties on mineral oils can be considered as environmental taxes.

(74) In all three Member States to which this Decision is addressed, the excise duties on mineral oils existed before the introduction of the exemptions in question, and they must therefore be considered as existing taxes within the meaning of point 51.2 of the 2001 guidelines on State aid for environmental protection. The excise duties, however, have an appreciable positive impact in terms of environmental protection within the meaning of point 51.2(a), as they constitute a significant incentive for producers to reduce their consumption of mineral oils. The excise taxes concerned may not have had an explicit environmental purpose from the outset and the exemptions were decided on many years ago, in particular in the case of Ireland and Italy, and in any event in all three Member States well before the 2001 environmental aid guidelines became applicable. Therefore, their situation may be considered as if they had been decided at the time the excise tax was adopted. Consequently, in accordance with point 51.2 of the guidelines, the provisions in point 51.1 may be applied to the exemptions to be assessed in this decision.

([24]) Communication on Environmental Taxes and Charges in the single Market (COM(97) 9 final of 26.3.1997).

(75) In their comments, the beneficiaries submitted that they had undertaken significant environmental investments in return for the exemptions. However, there is no evidence that the beneficiaries concluded any agreements with the Member States concerned whereby they committed to achieve environmental protection objectives during the period for which the exemptions applied. Nor were the tax exemptions subject to conditions that would ensure the same effect as such agreements and commitments. Furthermore it appears that the environmental investments did not go beyond what was necessary to comply with relevant legislation or beyond what was feasible and economical from a commercial point of view. As a consequence, the conditions for applying point 51.1(a) of the 2001 guidelines on State aid for environmental protection are not fulfilled and only the provisions of point 51.1(b) are applicable in this case.

(76) In respect of the period until 31 December 2003, the exemptions concern a Community tax, namely a tax that has been harmonised on the basis of Directive 92/82/EC. Therefore, point 51.1(b), first indent, of the 2001 guidelines on State aid for environmental protection 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. However, all three exemptions were full exemptions. Taking into account the positive environmental impact of the tax referred to in recital (73) of this Decision, the measures in question can only be declared compatible with the common market to the extent that beneficiaries are required to pay a rate higher than the Community minimum rate set by Directive 92/82/EC, which for that period amounted to EUR 13 per 1 000 kg. Therefore, only the exemption from the tax beyond a rate of EUR 13.01 can be considered compatible, while the exemption up to the level of EUR 13.01 constitutes incompatible aid.

(77) Contrary to what Aughinish claims, this assessment is not inconsistent with the Commission's decision in relation to the German Ecotax ([25]), where the Commission applied the same criteria included in the 2001 guidelines on State aid for environmental protection as in this case. The arguments put forward by the Member States, the beneficiaries and the EAA during the formal procedure, in particular the arguments that there is no distortion of competition, disregard the existence of exchanges in the alumina and aluminium sectors and do not undermine this conclusion under the environmental aid guidelines.

([25]) See footnote 21.

6.3.2. *Compatibility of the new aid pursuant to Article 87(3)(a) of the Treaty*

(78) As regards the exemption in Article 87(3)(a) of the Treaty, which refers to promotion of the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, the Commission notes that for the latter part of the period for which the exemptions were granted, the 1998 Community guidelines on national regional aid are applicable. Point 4.15 of those guidelines specifies that operating aid may exceptionally be granted in regions eligible under the derogation in Article 87(3)(a), provided that it is justified in terms of its contribution to regional development and its nature and its level is proportional to the handicaps it seeks to alleviate. It is for the Member State to demonstrate the existence of any handicaps and gauge their importance. In accordance with point 4.17 of the guidelines, operating aid must be both limited in time and progressively reduced. Those conditions have not been fulfilled in this case.

(79) Gardanne is not a region eligible under the derogation in Article 87(3)(a) and that exception therefore does not apply to the French exemption. Sardinia is a region eligible under the derogation in Article 87(3)(a). The Shannon region was a region eligible under the derogation in Article 87(3)(a) only until the review of the regional map in 1999. As a transitional measure, regional operating aid in that region could, exceptionally, be allowed until the end of 2001.

(80) In the decisions by which the Commission initiated the procedure laid down in Article 88(2) of the Treaty ([26]), the Commission raised doubts as to whether the aids could be found compatible with the common market under Article 87(3)(a) of the Treaty. The Italian and Irish authorities did not bring forward any elements in order to alleviate those doubts. They did not demonstrate the existence of particular handicaps nor did they gauge their importance in order to justify the granting of operating aid. High energy prices and competition from third-country imports, in particular, do not have a regional character. Even if the non-availability of natural gas were to be a particular regional handicap of the regions concerned, which has not been proven, Ireland and Italy have not gauged the importance of any such handicap to justify the level of aid. The Italian legislation, which according to Eurallumina results in additional costs, may partly have a regional character as Sardinia has been declared an area of high risk of environmental crisis but, in general, cannot be considered as a particular handicap for the region. In any event, it appears that the exemptions in question in this case are not limited in time nor progressively reduced as the guidelines require. Therefore the aid can not be found to be compatible with the common market on the ground that it facilitates the development of certain regions.

(81) As regards the period before the Community guidelines on national regional aid became applicable, the same holds true. It must be noted, in particular, that Ireland wrote, in 1983, that it would ensure that the limits applicable under the Co-ordination Principles of Regional Aid Systems of 1978 ([27]) would be adhered to fully. It is clear that the rules set out in that document cannot justify the granting of aid continuously until the 1990s and Ireland has not provided any monitoring reports showing that the aid remained below the aid intensities applicable at that time. Those rules confirm, moreover, the Commission's negative position as to the compatibility of operating aid with the common market. Furthermore, when the Commission adopted the Guidelines on national regional aid in 1998, it also proposed appropriate measures to be taken by the Member States to bring their measures into conformity with the new rules and asked Member States to provide a list of all measures that would continue to be applicable. None of the measures to which this Decision relates have been included in such lists.

6.3.3. *Compatibility of the new aid under other provisions*

(82) The Commission has assessed whether the exemptions set out in Article 87(2) and (3) of the Treaty apply to the new aid.

(83) The exemptions in Article 87(2) of the Treaty could serve as a basis to consider the aid compatible with the common market. However, the aid does not have a social character and is not granted to individual consumers, it does not make good the damages caused by natural disasters or exceptional occurrences and it is not required in order to compensate for the economic disadvantages caused by the division of Germany. Article 87(2) therefore does not apply in this case.

(84) The exemptions in Article 87(3)(b) and (d) of the Treaty, which refer to projects of common European interest or to remedy a serious disturbance of the economy of a Member State and to the promotion of culture and conservation, obviously do not apply in this case. Ireland, Italy and France have not attempted to justify the aids on any of those grounds.

([26]) See footnote 1.

([27]) OJ C 31, 3.2.1979.

(85) As far as the first part of the exemption in Article 87(3)(c) of the Treaty is concerned, namely aid to facilitate the development of certain economic activities, the aid does not have purposes such as research and development, investment by small and medium-sized enterprises or rescuing or restructuring the beneficiaries, nor any other purpose that would be relevant for the application of that provision and would allow the Commission to declare the aid compatible. The second part of Article 87(3)(c), namely aid to facilitate the development of certain economic areas, applies to the site of Gardanne, but does not allow the Member States to grant operating aid (see point 4.15 of the guidelines on national regional aid).

(86) As there are no other grounds for finding the aid to be compatible with the common market, the only aid that can be found compatible is the part of the aid that complies with the environmental aid guidelines as specified in recital (76).

6.4. **Preliminary assessment of the measures for the period since 1.1.2004**

(87) Since Directive 2003/96/EC became applicable on 1 January 2004, dual uses, non-fuel uses of energy and mineralogical processes fall outside its scope and Member States have had discretion as to whether or not to tax such uses. Indeed, an exemption of such energy uses *may* constitute a general measure that does not involve State aid if it falls within the nature and the logic of the domestic tax system. Recital 22 in the preamble to Directive 2003/96/EC states that '*energy products should essentially be subject to a Community framework when used as heating fuel or motor fuel. To that extent, it is in the nature and the logic of the tax system to exclude from the scope of the framework dual uses and non-fuel uses of energy as well as mineralogical processes*'.

(88) In addition, when Directive 2003/96/EC was adopted, the Council and the Commission jointly declared ([28]) '*Energy products should essentially be subject to a Community framework when used as heating fuel or motor fuel. It can be considered that it is in the nature and the logic of the tax system to exclude from the scope of the framework dual uses and non-fuel uses of energy as well as mineralogical processes. Member States may then take measures to tax or not to tax or to apply total or partial taxation to each use. Electricity used in similar ways should be treated on an equal footing. Such exceptions to the general system or differentiations within that system, which are justified by the nature or general scheme of the tax system, do not involve State aids*'.

(89) However, in its Staff Working Paper referred to in recital (63) the Commission not only explained the notion of general measures, but also stated that '*the draft directive on energy taxation contains numerous options, making it impossible to determine in advance whether or not the way they will be implemented by Member States will give rise to State aid within the meaning of Article 87*'. Recital (32) in the preamble to and Article 26(2) of Directive 2003/96/EC, accordingly, remind Member States of the obligation laid down in Article 88(3) of the Treaty to notify State aid.

(90) In this specific case, even after Directive 2003/96/EC entered into force, the Commission has doubts as to whether the exemptions in question fall within the nature and logic of the domestic systems. They appear to be highly selective and to apply only in respect of the use of heavy oil for the manufacturing of one single product, namely alumina. In addition, *de facto*, each of them only benefits a specific undertaking in relation to a plant located in a specific region. In this context, it could still be considered that the measures at stake constitute State aid.

(91) In such a case, the new legal situation created by Directive 2003/96/EC is also relevant for the assessment of the compatibility of such measures with the common market. Since taxation of mineral oils used for dual uses, non-fuel uses and mineralogical processes is now outside the scope of harmonised Community measures, the exemptions now concern domestic taxes imposed in the absence of a Community tax within the meaning of point 51.1(b), second indent, of the 2001 Guidelines on State aid for environmental protection. That provision

([28]) Addendum au projet de process verbal, 14140/03, of 24.11.2003, http://register.consilium.eu.int/pdf/fr/03/st14/st14140-ad01.fr03.pdf

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 of point 51.1(b), first indent, of the guidelines, 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*'. This also applies where the national tax is significantly higher than comparable taxes in (some) other Member States, as was the case in Italy. In the practice of the Commission, it has become clear that, in general 20 %, or the Community minimum that applies to energy uses that do fall within the scope of Directive 2003/96/EC (EUR 15 per tonne), which ever is the lowest, can be regarded as a significant proportion ([29]). Therefore, at this stage, the Commission considers that only the exemption beyond a level of 20 % of the domestic tax or beyond EUR 15 per tonne, whichever is the lowest, could be considered compatible; the exemption up to the level of 20 %, or up to EUR 15 per tonne, would then constitute incompatible aid.

(92) Given that Member States and interested parties have not had the opportunity to submit their comments on the legal situation created by Directive 2003/96/EC, the Commission considers it appropriate to extend the formal investigation procedure in respect of the application of the measures since 1 January 2004.

7. **RECOVERY OF THE AID**

(93) Under Article 14(1) of Regulation (EC) No 659/1999, where negative decisions are taken in cases of unlawful aid, the Commission must decide that the Member State concerned is to take all necessary measures to recover the aid from the beneficiary. The Commission must not require recovery of the aid if this would be contrary to a general principle of Community law.

(94) It should be examined whether, in this case, any general principle of Community law, such as the principle of legitimate expectations or of legal certainty, could be applied in order to preclude recovery from the beneficiaries of the unlawful and incompatible aid.

7.1. **Recovery of the incompatible aid granted until 2 February 2002**

(95) As regards the possibility for the beneficiaries to rely on legitimate expectations to avoid recovery of illegal and incompatible aid, it follows from the case-law of the Court that, '*save in exceptional circumstances, a recipient cannot have a legitimate expectation that aid was properly granted unless it has been granted in compliance with the provisions on prior control of State aid. A prudent economic operator should usually be able to ascertain that that procedure was followed*' ([30]).

(96) All the Council decisions referred to in recitals (1), (2) and (3) of this Decision were based on a proposal by the Commission. One would generally not expect the Commission to submit proposals to the Council authorising national measures that may be held incompatible with other provisions of the Treaty without hinting at such a possibility, in particular when the proposals concern a very specific issue and a small number of beneficiaries, as in this case, and when those provisions are intended to avoid distortions of competition within the Community. In addition to such general expectations, one would certainly not expect the Commission to propose that the Council authorise an extension of an existing exemption, if it were to consider that any aid in the existing exemption could be found incompatible with the common market.

(97) With the exception of Decision 2001/224/EC none of the decisions referred to in recitals (1), (2) and (3) mentioned any possible contradiction with the State aid rules nor did they make any reference to the obligation to notify. Furthermore, the preamble to Decision 92/510/EEC states that '*it is accepted by the Commission and by all Member States that these exemptions are well founded in terms of specific policies and do not give rise to distortions of competition or interfere with the working of the internal market*'. The same wording is used in Decisions 93/697/EC and 96/273/EC. Decisions 97/425/EC, 99/255/EC and 99/880/EC refer to the fact that '*the exemptions and reductions will be regularly reviewed by the Commission to ensure that they are compatible with the operation of the internal market and other objectives of the Treaty*' (underlining added). From this wording it appears

([29]) See e.g. Commission Decision of 30.6.2004 in Case C 42/2003 (OJ L 165, 25.6.2005, p. 21), decision of 13.2.2002 in Case N449/01 (OJ C 137, 8.6.2002, p. 24), decision of 11.12.2002 in Case N74/A/2002 (OJ C 104, 30.4.2003, p. 9) and decision of 11.12.2001 in cases NN3A/2001 and NN4A/2001 (OJ C 104, 30.4.2003). These cases are particularly relevant, as they also concerned exemptions from energy taxes. An indication as to what the Commission might consider as too low on the other hand is contained in the Commission Decision on the partial refund of the waste water tax in Denmark, decision of 3.4.2002 in case NN30/A-C/2001 (OJ C 292, 27.11.2002, p. 6).

([30]) Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 14, and Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 51; Case T-55/99 *CETM* v *Commission* [2000] ECR II-3207, paragraph 121.

that one of the elements of the definition of State aid in Article 87 of the Treaty, namely the distortion of competition, is missing. The fifth recital in the preamble to Decision 2001/224/EC made it clear for the first time that, notwithstanding the authorisation given by the Council in the context of Council Directive 92/81EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils ([31]), the national measures at stake were to be notified to the Commission in accordance with Article 88(3) EC, when they constituted State aid. Nevertheless, in view of the series of previous exemptions, and the fact that Decision 2001/224/EC itself was adopted on the basis of a proposal from the Commission, some ambiguity remained for the Member States and beneficiaries in the absence of further Commission's action relative to State aid.

(98) In general, the Commission considers that in the case of individual aid, legitimate expectations come to an end when the Commission decides to initiate the procedure laid down in Article 88(2) of the Treaty. That decision is notified to the Member State concerned, which informs the beneficiary thereof. However, the circumstances of this case were exceptional insofar as the Commission created and maintained some ambiguity by submitting proposals to the Council. In addition, the Commission cannot establish whether and, if so, when, the individual beneficiaries were actually informed by the Member States of its decision to open the formal investigation procedure. Under these circumstances, it cannot be ruled out that beneficiaries were entitled to rely on legitimate expectations until 2 February 2002, when the decisions by the Commission to initiate the procedure laid down Article 88(2) of the Treaty with respect to the exemptions were published in the Official Journal. At the very latest, that publication eliminated any uncertainty as to the fact that the measures in question had to be approved by the Commission in accordance with Article 88 of the Treaty, if they constituted State aid,.

(99) Ordering the recovery of the incompatible aid for the period until 2 February 2002 would also breach the principle of legal certainty under the exceptional circumstances of this specific case. According to the case-law, that principle is breached when the circumstances of uncertainty and lack of clarity led to the creation of an equivocal situation which the Commission should have clarified before it could take any action to order recovery ([32]). The circumstances in this case did lead to an equivocal situation, not only for the beneficiary, but also for the Member States, which were entitled to rely on the wording of Decisions 92/510/EEC, 93/697/EC, 96/273/EC, 97/425/EC, 1999/255/EC, 1999/880/EC and 2001/224/EC.

(100) In conclusion, it would be contrary to general principles of Community law to recover the aid resulting from the exemptions granted until 2 February 2002 from the beneficiaries. Ireland, Italy and France should therefore not be required to recover such aid.

7.2. **Recovery of the incompatible aid granted from 3 February 2002 till 31 December 2003**

(101) As explained in recital 97, the Commission considers that the series of previous exemptions, and the fact that Decision 2001/224/EC itself was adopted on the basis of a proposal from the Commission, created some ambiguity. However, the reference to the State aid rules in Decision 2001/224/EC is clear and reminded the Member States of their duty to notify State aid to the Commission, so that the latter could make its assessment under those rules. In addition, before Decision 2001/224/EC was adopted, the Commission had repeatedly invited Ireland, France and Italy to notify the measures in question. The Commission's decision to initiate the procedure laid down in Article 88(2) of the Treaty finally confirmed the Commission's doubts as regards the existence or compatibility of the aid. Therefore, any legitimate expectations and any situation of legal uncertainty as to the fact that the measures in question had to be approved by the Commission in accordance with Article 88, if they constituted State aid, ceased to exist, at the very latest, on 2 February 2002, when the Commission's decisions to initiate the procedure laid down Article 88(2) of the Treaty with respect to the exemptions were published in the Official Journal.

(102) The fact that Ireland systematically reported on the Irish measure from 1995 and that the aid was included in the Commission's annual surveys on State aid, does not create any legitimate expectations in respect of the period as from 3 February 2002. On the contrary, this confirms that the Irish authorities were aware of the State aid character of the measure, while they also knew that it had never been authorised under State aid rules. Reporting on a measure cannot substitute for a Member State's obligation to notify State aid pursuant to Article 88(3) of the Treaty. Moreover, the surveys report on the amounts of State aid granted irrespective of whether or not it is compatible with the common market or not. In addition, the various annual surveys on State aid discuss aid in the form of tax exemptions in general, but do not refer to the aid for alumina production specifically. The reference to the Irish measure in its notifications to the World Trade Organisation does not raise legitimate expectations as these notifications are made in a different legal context for different purposes.

([31]) OJ L 316, 31.10.1992, p. 12.

([32]) Judgement of 1 July 2004 in Case T-308/00, Salzgitter AG v. Commission, not yet reported, paragraph 180.

(103) In conclusion, the incompatible aid granted from 3 February 2002 until 31 December 2003 should be recovered from its beneficiaries as no general principles of Community law can be invoked to preclude such recovery.

8. **CONCLUSION**

(104) It is concluded that the exemptions from excise duty on heavy fuel oils used in the production of alumina granted by France, Ireland and Italy until 31 December 2003 constitute State aid within the meaning of Article 87(1) of the Treaty. The aid granted by Ireland before 17 July 1990 constitutes existing aid. The aid granted between 17 July 1990 and 2 February 2002 is to a large extent incompatible with the common market. However, it is not appropriate to order the recovery of that incompatible aid as to do so would be contrary to fundamental principles of Community law.

(105) For the period between 3 February 2002 and 31 December 2003, the aid is partially incompatible with the common market as the beneficiaries did not pay a rate higher than the Community minimum. This means that the part of the exemption which exceeds the rate EUR 13,01 per 1 000 kg for that period constitutes compatible aid. The remaining aid constitutes incompatible aid.

(106) Article 14(1) of Regulation (EC) No 659/1999 provides that where negative decisions are taken in cases of unlawful aid, the Commission must decide that the Member State concerned is to take all necessary measures to recover the aid from the beneficiary. France, Ireland and Italy should therefore take all necessary measures to recover the incompatible aid granted from 3 February 2002 onward from the recipients. To that end, France, Ireland and Italy should require the respective beneficiaries to repay the aid within two months of notification of this decision. The aid to be recovered should include interest calculated in accordance with Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 ([33]).

(107) France, Ireland and Italy should send to the Commission an appropriate form reporting progress in recovering the aid, specifying clearly the actual measures taken to effect immediate and effective recovery of the aid. In addition, they should, within two months of the notification of this Decision, send the documents proving that recovery of the unlawful and incompatible aid from the recipients is under way (for example, circulars, recovery orders issued, etc.) to the Commission.

(108) In light of the foregoing considerations, the Commission has doubts as to the compatibility with the common market of the exemptions from excise duty on heavy fuel oils used in the production of alumina granted by France, Ireland and Italy since 1 January 2004.

(109) Therefore, on the basis of Articles 4(4) and Article 6 of Regulation (EC) No 659/1999, the Commission decides to extend the formal investigation procedure on these measures in respect of the period after 31 December 2003 and requests the French, Irish and Italian authorities to submit their comments and to provide all information that may assist it in the assessment of those measures within one month of the date of receipt of notification of this decision. Comments can be submitted with regard to both the State aid nature of the measures, within the meaning of Article 87(1) of the EC Treaty, and its compatibility with the common market.

(110) The Commission requests the French, Irish and Italian authorities to forward a copy of this decision to the beneficiaries of the measures immediately.

(111) The Commission wishes to remind the France, Italy and Ireland that Article 88(3) of the Treaty has suspensive effect, and would draw their attention to Article 14 of Council Regulation (EC) No 659/1999 which provides that all unlawful aid may be recovered from the recipient.

(112) The Commission warns France, Italy and Ireland that it will inform interested parties by publishing this decision in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this decision. All such interested parties will be invited to submit their comments within one month of the date of such publication,

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

HAS ADOPTED THIS DECISION:

Article 1

The exemptions from excise duty granted by France, Ireland and Italy in respect of heavy fuel oils used in the production of alumina until 31 December 2003 constitute State aid within the meaning of Article 87(1) of the Treaty.

Article 2

Aid granted between 17 July 1990 and 2 February 2002, to the extent that it is incompatible with the common market, shall not be recovered as this would be contrary to the general principles of Community law.

Article 3

The aid referred to in Article 1 granted between 3 February 2002 and 31 December 2003 is compatible with the common market within the meaning of Article 87(3) of the Treaty insofar as the beneficiaries pay at least a rate of EUR 13,01 per 1 000 kg of heavy fuel oils.

Article 4

The aid referred to in Article 1 granted between 3 February 2002 and 31 December 2003 is incompatible with the common market within the meaning of Article 87(3) of the Treaty insofar as the beneficiaries did not pay a rate of EUR 13,01 per 1 000 kg of heavy fuel oils.

Article 5

1. France, Ireland and Italy shall take all necessary measures to recover from the beneficiaries the incompatible aid referred to in Article 4.

2. Recovery shall be effected without delay and in accordance with the procedures of national law, provided that they allow the immediate and effective execution of this Decision.

3. The aid 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.

4. The interest shall be calculated in conformity with the provisions laid down in Chapter V of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty.

5. France, Ireland and Italy shall order, within two months of the date of notification of this Decision, the beneficiaries of the incompatible aid referred to in Article 4 to repay, the aid unlawfully granted plus interest.

Article 6

1. France, Ireland and Italy shall inform the Commission, within two months following notification of this Decision, of the measures planned and already taken to comply with it.

2. They shall provide information on the recovery using the questionnaire set out in Annex.

Article 7

This Decision is addressed to the French Republic, the Republic of Ireland and the Italian Republic.

Done at Brussels, 7 December 2005.

For the Commission

Neelie KROES

Member of the Commission

ANNEX

INFORMATION REGARDING THE IMPLEMENTATION OF THE COMMISSION DECISION C(2005) 4436

1. **Calculation of the amount to be recovered**

1.1 Please provide the following details on the amount of unlawful State aid that has been put at the disposal of the beneficiary:

Date(s) of payment (°)	Amount of aid (*)	Currency	Identity of beneficiary

(°) Date(s) on which (individual instalments of) the aid has been put at the disposal of the beneficiary (in so far as a measure consists of several instalments and reimbursements use separate rows).
(*) Amount of aid put at the disposal of the beneficiary (in gross aid equivalents).

Comments:

1.2. Please explain in detail how the interests to be paid on the amount of aid to be recovered will be calculated?

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

2.1. Please describe in detail what measures have already been taken and what measures are planned to effect an immediate and effective recovery of the aid. Please also explain what alternative measures are available under national law to effect recovery? 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. **Recovery already effected**

3.1. Please provide the following details on the amounts of aid that have been recovered from the beneficiary:

Date(s) (°)	Amount of aid repaid	Currency	Identify of beneficiary

(°) Date(s) on which the aid has been repaid.

3.2. Please attach information documenting the repayment of the aid amounts specified in the table under point 3.1 above.