COMMISSION DECISION

of 7 February 2007

concerning the exemption from excise duty on mineral oils used as fuel for alumina production in Gardanne, in the Shannon region and in Sardinia implemented by France, Ireland and Italy respectively (C 78/2001 (ex NN 22/01), C 79/2001 (ex NN 23/01), C 80/2001 (ex NN 26/01))

(notified under document number C(2007) 286)

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

(Text with EEA relevance)

(2007/375/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 provisions cited above [1] and having regard to their comments,

Whereas:

1 PROCEDURE

(1) Taxation of mineral oils has been subject to harmonisation at Community level since the entry into force of Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils [2]. The use of mineral oils for alumina production was not excluded from the scope of Directive 92/81/EEC, nor was it the object of a compulsory or optional exemption under Article 8 of that Directive. Article 6 of Council Directive 92/82/EEC of 19 October 1992 on the approximation of the rates of excise duties on mineral oils [3] established a minimum rate of excise duty on heavy fuel oil, which Member States had to apply from 1 January 1993. By various decisions, however, the Council authorised France, Ireland and Italy to exempt mineral oils used for alumina production in, respectively, the Gardanne, in the Shannon region and on Sardinia, from the excise duty which would otherwise have been imposed. The most recent decision is 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 [4], which authorises the exemptions until 31 December 2006.

(2) Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity [5] repealed Directive 92/82/EEC as from 31 December 2003.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, including 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. The use of heavy fuel for alumina production falls within this category. Therefore, as from 31 December 2003, the minimum excise duty for heavy fuel no longer applies to fuel used in the production of alumina. The derogations in Decision 2001/224/EC and other similar derogations were incorporated into Annex II of Directive 2003/96/EC.

(3) By Decisions C(2001)3296, C(2001)3300 and C(2001)3295 of 30 October 2001 [6] the Commission initiated the procedure laid down in Article 88(2) of the Treaty with respect to the exemptions. By Commission Decision 2006/323/EC [7] of 7 December 2005 (notified under document number C(2005)4436), the Commission closed that procedure in respect of the aid granted during the period to 31 December 2003, declaring part of the aid to be incompatible with the common market. As regards the period from 1 January 2004, the procedure was extended. Recitals 6 to 15 of Decision 2006/323/EC provide a detailed description of the correspondence between the Commission, the Member States concerned, the beneficiaries of the aid and the European Aluminium Association (hereinafter 'EAA') prior to December 2005.

[1] OJ C 30, 2.2.2002, p. 17, p. 21 and p. 25; and OJ C 109, 9.5.2006, p. 2.

[2] OJ L 316, 31.10.1992, p. 12. Directive as last amended by Directive 94/74/EC (OJ L 365, 31.12.1994, p. 46).

[3] OJ L 316, 31.10.1992, p. 19. Directive amended by Directive 94/74/EC.

[4] OJ L 84, 23.3.2001, p. 23. See the Commission's Decision of 7.12.2005 for a detailed reference to earlier decisions.

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

[6] See footnote 1.

[7] OJ L 119, 4.5.2006, p. 12.

(4) Decision 2006/323/EC was sent to France, Ireland and Italy by letters of 8 December 2005 (D/206670, D/206671, D/206673). It was sent to the beneficiaries concerned and the EAA by letters of 23 January 2006 (D/50525, D/50526, D/50527 and D/50528). The three Member States and two beneficiaries appealed the decision ([8]). The Irish beneficiary, Aughinish Alumina Ltd (hereinafter 'Aughinish') also applied for the suspension of operation of the decision. That application was registered as Case T-69/06R. By order of 2 August 2006 ([9]) the Court of First Instance dismissed the application for interim measures.

(5) Decision 2006/323/EC was published in the *Official Journal of the European Union* on 4 May 2006 and third parties were invited to submit comments by a notice published in the *Official Journal of the European Union* on 9 May 2006 ([10]). The Commission received comments from Aughinish in a letter dated 9 June 2006 (registered the same day under A/34490) and from Eurallumina SpA (hereinafter 'Eurallumina'), the Italian beneficiary, in a letter dated 24 dated 2006 (registered on 25 July 2006 under A/35967). The latter was sent and received only after the delay of one month set out in the invitation for comments published in the *Official Journal of the European Union* and therefore the Commission is in principle not obliged to take the comments into account in the framework of this procedure. The Commission informed Eurallumina to that effect by letter dated 2 August 2006 (D/56648). Eurallumina replied by letter dated 3 August 2006 (registered on 4 August 2006 under A/36269). Nevertheless, the Commission notes that the comments raised by Eurallumina repeat many of the comments the Commission had already received in the context of the previous decision and is similar to the comments received in due time, which are addressed in this decision.

(6) The comments from Aughinish were forwarded to France, Ireland and Italy by letters dated 20 June 2006 (D/55106, D/55107 and D/55109).

(7) France and Ireland requested an extension of the time limit for responding to Decision 2006/323/EC, which was granted by the Commission. The Commission reminded Ireland and Italy of its invitation for comments by letters dated 9 March 2006 (D/52054 and D/52055). France, Ireland and Italy commented on the Commission's decision by letters dated 14 February 2006 (registered on 15 February 2006 under A/31248), 12 April 2006 (registered on 18 April 2006 under A/32940) and 17 May 2006 (registered on 18 May 2006 under A/33852), respectively.

(8) France commented on Aughinish' comments by letter dated 27 July 2006 (registered on 28 July 2006 under A/35952). By e-mail of 24 July 2006, Italy informed the Commission that it did not have any further observations to make.

([8]) Cases T-50/06, T-56/06, T-60/06, T-62/06 and T-69/06.

([9]) OJ C 249 of 14.10.2006, p. 10.

([10]) See footnote 1 and 7.

2 DETAILED DESCRIPTION OF THE MEASURES CONCERNED

(9) The measures consist of full exemptions from the excise duty on industrial heavy oil when used for alumina production. The beneficiaries of the French, Irish and Italian exemption are, respectively, Alcan, Aughinish and Eurallumina ([11]).

(10) The Irish exemption is contained in Section 100(1)(e) of the Irish Finance Act 1999, which grants relief from mineral oil tax on 'fuel oil intended for use in, or in connection with, the manufacture of alumina, or for the maintenance of the manufactory in which the said manufacture is carried on'. The explanatory memorandum of the Finance Act explains that 'section 100 provides for relief from mineral oil tax in respect of oil used for particular purposes or in other particular situations. These include use for purposes other than motor or heating fuel, exports, fuel oil used in alumina production, oil used for sea-navigation, heavy oil used in commercial aviation and recycled oil'. The exemption for mineral oils used for alumina production has been in place in Ireland since 1983. While the original Statutory Instrument providing for the exemption was revoked in 1999, the exemption was preserved under the Finance Act 1999.

(11) The Italian exemption from excise tax applies to all undertakings using mineral oils for the production of alumina within the meaning of point 14 of table A of the Single Text on excises. The exemption was instituted by Law of 12 November 1990, n. 331, implementing Decreto Legge 15 September 1990, n.261, Article 8(5). That text has been reproduced in the successive legal texts concerned, including the national measures transposing Directive 92/81/EEC and the successive 'Single Text on excises'.

(12) The French exemption has its legal base in the 1997 rectifying Finance Law ('Loi de finances rectificative pour 1997'. It stipulates in Article 6 that 'the deliveries of heavy oil with a sulphur content below 2 % included in the identification index 28bis of table B of Article 265(1) of the Customs Code are eligible for exemption from the Internal consumption tax on petrol products when they are destined to be used as a fuel for the production of alumina. Article 265 bis of the customs code concerns products destined for uses other than motor fuel or heating fuel, but it does not, for example, contain similar provisions on uses of mineral oils in other industrial sectors.

(13) Recitals 16 to 23 of Decision 2006/323/EC provide a more detailed description of the measures and beneficiaries concerned. The Member States concerned have not indicated whether they are continuing to apply the exemption beyond 2006 nor have they informed the Commission of any changes to the applicable legislation, in particular changes due to the transposition of Directive 2003/96, that could affect the Commission's assessment.

([11]) See www.alcan.com, www.glencore.com and www.eurallumina.com.

(14) The relevant tax rates have changed since the initiation of the procedure. On 1 July 2006, the applicable rates of excise tax on heavy fuel oil for business use in France and Ireland amounted to EUR 18,50, and EUR 15.00. On the same date the applicable rates in Italy amounted to EUR 63,75 per tonne of heavy fuel oil with a sulphur content above 1 % and EUR 31,39 per tonne of heavy fuel oil with a sulphur content below 1 %.

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

(15) In its decisions of 30 October 2001 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 ([12]) and in particular in the light of the rules on operating aid contained in those guidelines. The Commission also raised doubts as regards the aids' compatibility under the Community guidelines on State aid for environmental protection of 1994 ([13]) and those of 2001 ([14]) (hereinafter the 'Environmental aid guidelines').

(16) In Decision 2006/323/EC, the Commission explained that it maintained similar doubts as regards the period as from 1 January 2004. Given that the Member States and interested parties had not had the opportunity to submit their comments on the legal situation created by Directive 2003/96/EC, the Commission considered it appropriate to extend the formal investigation procedure.

4 COMMENTS FROM FRANCE, IRELAND AND ITALY AND FROM THIRD PARTIES

(17) The Member States and beneficiaries generally maintain the comments they made earlier and which are summarised in recitals 26-56 of Decision 2006/323/EC. Some arguments have been developed in more detail. In addition, they make the following comments.

(18) The measures do not constitute State aid and this is confirmed by Directive 2003/96/EC. They fall within the nature and logic of the respective tax systems. If they were to constitute State aid, Directive 2003/96/EC explicitly allows the aid, at least for the period until 31 December 2006. In any event, that Directive created legitimate expectations for the beneficiaries. Requesting recovery of the aid also breaches the principle of legal certainty and the principle of proper administration, given the contradictions with the Council decisions which were based on Commission proposals, the considerable delay and the manner in which the Commission has dealt with the investigation. The beneficiaries have undertaken long-term capital investments in reliance on the Council Decisions and the Directive. The Commission would therefore be estopped from adopting an act that is manifestly contrary to its conduct over a long period.

(19) The rules in Directive 2003/96/EC override the State aid rules. The Commission could only challenge the validity of the measures under Article 18(1) of Directive 2003/96/EC and not under the State aid rules. Applying the State aid rules would breach the principle of *effet utile*.

(20) Ireland and Aughinish argue that the Irish measure constitutes existing aid and that the Commission's reading of Article 15 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 ([15]) is wrong: after expiry of the 10-year limitation period, the Commission's letter of 17 July 2000 could not have been an act interrupting the limitation period and the measure would constitute existing aid also for the period after 17 July 1990. They also claim that the Commission's assessment of the nature of the agreements between Aughinish and the Irish authorities in 1970 is flawed: binding commitments were entered into before Ireland's accession to the Communities.

(21) Italy argues that the measure is closely linked to the realisation of environmental objectives related to the burden arising from alumina production. Aughinish argues that the exemption falls at least within the spirit of the Environmental aid guidelines and '*it has, notwithstanding the fact that it is not paying "a significant proportion of the tax", been provided with more than sufficient incentives to improve environmental protection*'.

(22) Ireland argues that alternative measures could have been implemented from 1 January 2004 had it been known that the exemption was liable to be found incompatible with the common market. Ireland refers to the possibility to widen the scope of the relief to cover heavy fuel oil for dual use, or more widely to energy products generally for dual use. In this way, according to Ireland, the relief could have been converted into a general measure or into an acceptable State aid, for example under the Environmental aid guidelines. In the view of these possibilities, retrospective recovery would be unconscionable. Ireland stresses, furthermore, that Aughinish made various investments on the reasonable expectation that the exemptions would continue until at least December 2006.

(23) The Commission should allow the aid on the basis of an effects-based economic assessment of the alumina markets and their competitive structure. The Commission should take into account the external aspects of competitiveness in assessing State aid, as proposed in the State aid action plan. Detailed information on the markets has been provided.

(24) The Commission ought to suspend the formal investigation procedure until the Court of Justice has determined the issues which are the subject of the current challenges to

([12]) OJ C 74, 10.3.1998, p. 9.
([13]) OJ C 72, 10.3.1994, p. 3.
([14]) OJ C 37, 3.2.2001, p. 3.
([15]) OJ L 83, 27.3.1999, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

Decision 2006/323/EC. Aughinish submits, in addition, that it was not appropriate for the Commission to take a decision to extend the Article 88(2) procedure by means of a recital to Decision 2006/323/EC. The Commission should have taken a separate decision.

(25) The EAA did not submit any comments in addition to the points raised earlier, which are summarised in recital 50 of Decision 2006/323/EC.

(26) The comments from the Member States and beneficiaries coincide to a large extent with their pleadings before the Court of Justice in the pending challenges to Decision 2006/323/EC ([16]).

5 ASSESSMENT

5.1 The procedural concerns raised by the parties

(27) The parties argue that the Commission ought to suspend the formal investigation procedure until the Court has determined the issues which are the subject of the current challenges to Decision 2006/323/EC ([17]). That decision, however, concerns the period until 31 December 2003, whereas this decision concerns the period as from 1 January 2004. In addition, this decision is presumed valid unless and until annulled by the Court of First Instance. Therefore, and given the continuing distortion of competition that the State aid presents, the Commission does not see a reason to suspend the conclusion of the procedure.

(28) The Commission did not take the decision to extend the Article 88(2) procedure merely by alluding to this in a recital. Specific attention was drawn to the extension in the conclusion in the preamble to Decision 2006/323/EC. The decision to initiate an investigation procedure under Article 88(2) of the Treaty takes the form of a letter to the Member State and therefore does not require the use of the structure of a normative decision, with an operative part and numbered articles. Furthermore, it is clear from the challenges made to Decision 2006/323/EC, and the comments received as regards the extension of the procedure, that interested parties were able to take the fullest cognisance of all aspects of the content of that decision.

5.2 Existence of State aid as from 1 January 2004

(29) 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 ommon market'.

(30) 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.

(31) As set out in recitals 60, 61 and 62 of Decision 2006/323/EC, the measures confer an advantage on the beneficiaries and can be assumed to affect intra-Community trade and to distort or threaten to distort competition. 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. The fact that competitors in the alumina industry in other Member States may not be subject to similar taxes at all and that the beneficiaries have undertaken expenditure to mitigate the environmental impact of their production, does not detract from this assessment.

(32) The measures favour *certain* undertakings as they only apply to companies that use heavy fuel in the production of alumina and in practice, in each Member State there is only one company benefiting from the exemption: Aughinish in the Shannon region, Eurallumina in Sardinia and Alcan in Gardanne. For the reasons set out in recitals 33 to 40, they can not be considered as being justified by the nature and general scheme of the respective energy tax systems.

(33) Dual uses, non-fuel uses of energy and mineralogical processes fall outside the scope of Directive 2003/96/EC and, since 1 January 2004, 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.*'

(34) In addition, when Directive 2003/96/EC was adopted, the Council and the Commission jointly declared ([18]) '*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*

([16]) See footnote 7.
([17]) See footnote 7.
([18]) Addendum au projet de process verbal, 14140/03, of 24.11.2003, http://register.consilium.eu.int/pdf/en/03/st14/st14140-ad01.en03.pdf

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.'

(35) The Council also stated that *'The Council furthermore states that it understands the legal situation arising with the adoption of this Directive in relation to the Treaty rules on State Aid, the same way as it was set out by the Commission at the meeting of the Working Party on Tax Questions on 14 November 2002.'* In the Staff Working Paper, which was discussed in that meeting ([19]), the Commission explained the notion of general measures, that the situation in each individual Member State has to be analysed to define the general excise duty system applicable at national level, and 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) of the preamble 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.

(36) In this specific case, neither France, Ireland and Italy, nor any of the beneficiaries have demonstrated that the exemptions fall within the nature and logic of the domestic systems. None of them has, for example, explained whether dual use of energy products in other production processes has been exempt, and if not, the underlying reasons. Nor have they explained how the exemptions compare to the national taxes on electricity used principally for the purposes of chemical reduction and in electrolytic and metallurgical processes and energy use for mineralogical processes, which are other uses of energy falling outside the scope of Directive 2003/96/EC pursuant to Article 2(4)(b) thereof.

(37) Italy explained that if any other industrial operator had requested the same benefit, it would not have encountered any obstacle to its access to the relevant market. It is, however, not clear what precisely is meant by this statement and whether this means that the same benefit could also be granted to any industry other than alumina. In any event the benefit would not be granted with automatically as in the case of alumina. As regards the reasons for the exemption, Italy, for example, in its letter of 7 December 2000 referred to the 'recognition of the island (Sardinia) as a strongly disadvantaged region, and the possible negative effects on employment' ('reconoscimento dell'isola (Sardegna) quale area fortemente disagiata, ed i possibili effetti negative sull'occupazione'.)

([19]) Commission Staff Working Paper *State-aid aspects in the proposal for a Council directive on energy taxation*, SEC(2002) 1142 of 24.10.2002. The same wording appeared already earlier in the Report to the Ecofin Council and the Council conclusions (note of the presidency to the Coreper/Ecofin Council of 13.12.2001, 14640/01, FISC 255 of 30.11.2001). See also recital 63 of the Decision of 7 November 2005.

(38) As regards the Irish exemption, Article 100 of the Finance Act, 1999 contains some other specific exemptions, but this does not bring the exemption for alumina production within the logic of an overall system. It rather demonstrates that the exemption for alumina is a particular exemption alongside other specific exemptions, as is also confirmed in the preamble to the Law ([20]). In addition, the Irish law also excludes potential new entrants from the tax exemption when dual use of energy concerns other production processes. With respect to the Irish situation, Aughinish accepts that it *'does not believe that there are any other such industries (benefiting from an excise reduction like the alumina industry)'* and *'is also unaware of any allegations of discrimination'*. This rather tends to confirm the selective nature of the measure.

(39) In their letter of 7 August 1998, the French authorities indicate that they asked for the derogation from Directive 92/81 in order to 'put in place an excise regime that does not penalise *the sector*' ('pour pouvoir instaurer un regime d'accise non pénalisant *pour le secteur*') (emphasis added). The exemption would be limited to re-establishing the competitive conditions between Péchiney, which has been taken over by Alcan, and the other producers in the Community. Article 265bis of the customs code, does not contain similar provisions for energy uses in other sectors.

(40) In fact, the Member States and beneficiaries failed to identify any overall logic of their respective tax systems. On the basis of the information available to the Commission, it is clear that the reasons for granting the aid derive rather 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. Therefore, the Commission concludes that the exemptions remain highly selective, favouring the production of a specific product and, de facto, specific undertakings and they cannot be justified within the logic of the domestic tax systems.

(41) In conclusion, the exemptions at stake constitute State aid.

5.3 **New aid, not existing aid**

(42) As explained in recitals (65)-(70) of Decision 2006/323/EC, the aid granted as from 1 January 2004 does not constitute existing aid within the meaning of Article 1(b) of Regulation (EC) No 659/1999.

(43) The claim by Ireland and Aughinish that the exemptions constitute pre-accession aid is in contradiction with the letter of May 1983 by which Ireland accepted that the aid was notifiable within the terms of Article 88(3) of the Treaty. In addition, a commitment to make provision for

([20]) See recital 10.

the exemption is not the same as actually granting the aid before accession. Finally, the legislation concerned was fundamentally altered after accession.

(44) As explained in recital (70) of Decision 2006/323/EC, aid granted by Ireland until 17 July 1990 constitutes existing aid by virtue of the limitation period provided for in Article 15 of Regulation (EC) No 659/1999. The expiry of the 10-year limitation period does not mean that all aid granted after the expiry of this period also constitutes existing aid. The aid was not awarded to Aughinish once and for all in 1983. The Statutory Instrument enacted by Ireland to grant the exemption is expressed in general terms as an exemption for alumina manufacture, so as the legislation stands, the exemption would extend to any other alumina producer that commenced production in Ireland. Furthermore, the exemption in respect of Aughinish was not defined at the time the Statutory Instrument was adopted, nor was its value capable of assessment at that time: neither the evolution of the excise duty rates from which Aughinish was exempted, nor the duration of that exemption was defined by the Statutory Instrument. The exemption therefore falls within the definition of an aid scheme in Article 1(d) of Regulation (EC) No 659/1999, being 'an act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner'. Therefore, the aid consists of a series of grants of aid, made each time Aughinish carried out a customs procedure that would, in the absence of the exemption, have incurred a liability to excise duty. Aid granted as from 17 July 1990 therefore does not constitute existing aid pursuant to Article 15 of Regulation (EC) No 659/1999.

5.4 Compatibility of the aid granted as from 1 January 2004

5.4.1 *Compatibility under the rules for environmental aid*

(45) The Commission has examined whether the aid granted by France, Ireland and Italy as from 1 January 2004 qualifies for an exemption from the prohibition of State aid contained in Article 87(1) of the Treaty. The aid consists in an exemption from energy tax, and such taxes are not only meant to raise financing for the authorities, but also to reduce the consumption of energy and thereby protect the environment. The 2001 Environmental aid guidelines contain rules for exemptions from environmental taxes. For reasons of equal treatment, transparency and legal certainty, these rules are binding upon the Commission.

(46) As regards the period from 1 January 2004, section E.3.2, recitals (47)-(52), of the 2001 Environmental aid guidelines lay down rules applicable to all operating aid in the form of tax reductions or exemptions. As explained in recitals (73) and (74) of Decision 2006/323/EC, the excise duties on mineral oils can be considered as environmental taxes, they must be considered as existing taxes within the meaning of point 51.2 of the guidelines, they have an appreciable positive impact in terms of environmental protection within the meaning of point 51.2(a) and they 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 can be applied.

(47) Under point 51.1 tax exemptions covering a 10-year period may be authorised. After expiry of such a period, and in line with point 23 of the Environmental aid guidelines, the Member States remain free to notify a prolongation of the measures in question to the Commission, which could adopt the same approach in its analysis as the one set out in this point while taking into consideration the positive results obtained in environmental terms through the adoption of taxes. The Irish and Italian exemptions in this case have been granted since 1993 and the French exemption has been granted since 1997, meaning that the measures have been in force for more than 10 years.

(48) None of the Member States confirmed or denied that the exemptions would continue to be applied after 31 December 2006. None of the Member States have indicated the presence of a time constraint for the exemptions which currently apply, other than the date of 31 December 2006, which under Community tax law is not a binding constraint, since the exemptions do not fall within the scope of Directive 2003/96/EC. Nor have any of the Member States notified a prolongation of the measure in question under the Environmental aid guidelines. The provisions in the tax legislation of the respective Member States do not seem to contain such limits either. The Commission considers that in this case, the circumstances referred to in point 23 of the guidelines are still present. Therefore, pursuant to point 51.1 of the guidelines, the Commission could authorise further aid, but only on the condition that it becomes subject to a time limitation of maximum 10 years.

(49) As explained in recital (75) of Decision 2006/323/EC, the conditions for applying point 51.1(a) of the Environmental aid guidelines are not fulfilled and therefore only the provisions of point 51.1(b) can be applied in this case.

(50) As from 1 January 2004, taxation of mineral oils intended for dual uses, non-fuel uses and mineralogical processes falls outside the scope of harmonised Community measures and therefore, since that date, the exemptions concern domestic taxes imposed in the absence of a Community tax within the meaning of point 51.1(b), second indent, of the Environmental aid guidelines. That provision requires companies benefiting from the exemptions 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 ([21]), it has become clear that in general 20 % of the domestic tax or the Community minimum that applies to other energy uses that do fall within the scope of Directive 2003/96/EC (EUR 15 per tonne), can be regarded as a significant proportion, even though the Community minimum does not apply to the energy use at hand. Therefore, the Commission considers that only the exemption above 20 % of the domestic tax or above EUR 15 per tonne, whichever is the lowest of the two, can be considered compatible with the common market; the exemption up to the level of 20 %, or up to EUR 15 per tonne, constitutes incompatible aid.

5.4.2 *Compatibility of the aid pursuant to Article 87(3)(a) of the Treaty and under other provisions*

(51) For the reasons explained in recitals (78)-(81) and (82)-(86) of Decision 2006/323/EC, the aid can not be found compatible with the common market under Article 87(3)(a) of the Treaty, nor is it covered by the exemptions set out in Article 87(2) and (3) of the Treaty.

(52) Basing the assessment on section E.3.2 of the Environmental aid guidelines is appropriate since the rules in that section take into account economic factors, in particular the risk of a loss of international competitiveness due to the absence of tax harmonisation and even allow for full exemptions for certain firms provided they enter into an agreement with the Member State concerned to improve their environmental performance. However, in the current cases no such agreements were entered into and therefore a full tax exemption under point 51.1(a) of the Environmental guidelines cannot be justified. Nevertheless, the information on the alumina markets provided to the Commission confirms that the authorization of a major part of the aid is appropriate and, as concluded above, can be justified under point 51(1)(b) of the Environmental aid guidelines by the overall positive results obtained in environmental terms through the adoption of taxes. This authorisation is, however, subject to the beneficiaries paying more than the Community minimum rates or a significant proportion of the domestic tax, which is considered necessary to provide firms with an incentive to improve environmental protection. There are no grounds for relying on other provisions in other communications of the Commission with respect to the part of the aid that cannot be found compatible on the basis of the Environmental aid guidelines.

([21]) See e.g. Commission Decision of 30.6.2004 in Case C42/2003 (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, p. 10). 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).

(53) 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 complying with the Environmental aid guidelines as specified in recital (50).

6 RECOVERY OF THE INCOMPATIBLE AID

(54) 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.

(55) Recitals (95)-(100) of Decision 2006/323/EC explain why the principles of legitimate expectations and of legal certainty, or any other general principle of Community law, preclude recovery from the beneficiaries of the unlawful and incompatible aid granted until 2 February 2002. However, recitals 101 and 102 of the decision explain why these principles do not preclude the recovery of the unlawful and incompatible aid granted from 3 February 2002 until 31 December 2003. The arguments in these latter recitals are also equally applicable with respect to the aid granted as from 1 January 2004.

(56) In addition, the preparation and adoption of Directive 2003/96/EC cannot have given rise to legitimate expectations on the part of the beneficiaries, nor is recovery precluded by the principle of legal certainty. Recital 32 of the preamble to the Directive refers to the obligation laid down in Article 88(3) of the Treaty upon Member States to notify State aid and it explicitly stipulates that the Directive 'does not prejudice the outcome of any future State aid procedure that may be undertaken in accordance with Article 87 and 88 of the Treaty'. The reference to any *future* State aid procedure in that recital cannot be understood as an authorisation of aid subject of a procedure that had already started when the Directive was adopted. In fact, the same wording was already present in recital 6 of the preamble to Decision 2001/224/EC, which extended the derogations until the end of 2006. The explanatory memorandum that accompanies the Commission's proposal for that decision ([22]) reads *'The Commission proposes to (…) extend for a two-year period the (…) derogations which require a detailed examination, in particular in the light of the State aid rules (…) Nevertheless, nothing in this Decision overrides the requirement for Member States to notify instances of potential State aid to the Commission under Article 88 of the Treaty. Such notifications will be examined under the terms of Article 87 of the Treaty'*. In addition, in summer 2000 the Commission had already asked the Member States to notify the measures in question.

([22]) COM(2000)678.

(57) Recital 22 of 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 products as well as mineralogical processes. (…)'* That recital, although not referring to Articles 87 and 88 of the Treaty, cannot be understood to restrict the concept of State aid as laid down in Article 87(1) of the Treaty. The Commission explained the notion of general measures in a Staff Working Paper which explained: *'In this matter, the situation in each individual Member State has to be analysed, to define the general excise duty system applicable at national level'* ([23]). That paper was discussed in the meeting of the Council Working Party on 14 November 2002. The paper continues with an explanation of the conditions under which 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.

(58) Although 'dual use of energy' does not fall within the scope of Directive 2003/96/EC, Article 18 of the Directive authorises the Member States to continue to apply the exemptions listed in Annex II thereto. That Annex includes the three exemptions to which this Decision relates, for the period foreseen in the last extension in 2001, that is to say, until 31 December 2006. The authorisation is, however, not an authorisation under the State aid rules which the Commission is competent to enforce. To the contrary, this precisely demonstrates the potential relevance of recital 32. The argument put forward by the Member States and beneficiaries that the authorisation by the Council overrides the State aid procedures is incorrect.

(59) When Directive 2003/96/EC was adopted, the Commission and the Council jointly declared that *'the Commission should go to the greatest possible length to ensure that measures taken by Member States in accordance with the exemptions and tax reductions laid down in the Directive will be considered compatible with state aid rules'*. Of course, the Commission must act within the framework of applicable State aid rules, in this case in particular the Environmental aid guidelines. In any event, that statement does not apply to the exemptions to which this decision relates, since they do not fall within the scope of the Directive.

(60) Directive 2003/96/EC, the Staff Working Paper and the joint Commission and Council statement referred to above have never confirmed the absence of incompatible State aid. It should be recalled that the Commission had initiated the procedure laid down in Article 88(2) and any interested party could have asked the Commission to adopt a final decision. The initiation of a procedure under Article 88(2) vitiated the further existence of legitimate expectations (if any) as to the absence of incompatible aid.

(61) Decision 2001/224/EC and earlier Council decisions on the exemptions were not State aid decisions. In fact, the Commission has long expressed doubts about the compatibility of the exemptions with the State aid rules.

(62) As regards the duration of the investigation in this case, the Commission considered it necessary to await the adoption of Directive 2003/96/EC and to extend the procedure by Decision 2006/323/EC, in order to seek the views of the Member States on the situation in each Member State resulting from the transposition of Directive 2003/96/EC which permitted a number of possible outcomes. In any event, a 'prudent businessman' should be aware that once an investigation starts into unlawful aid, then should the investigation find that aid to be incompatible with the Treaty, the almost inevitable consequence is that the Commission will order the recovery of the aid. The Member States and the beneficiaries could have urged the Commission to conclude the procedure sooner, had they wished to consider alternative investments or alternative measures to comply with the Environmental aid guidelines.

(63) For these reasons, the beneficiaries cannot hold any legitimate expectations precluding the recovery of the incompatible State aid after 31 December 2003, nor is recovery precluded on the basis of the principle of legal certainty.

7 SUSPENSION OF PAYMENT OF COMPATIBLE AID

(64) In its judgement in Case C-355/95P, *Textilwerke Deggendorf GmbH (TWD) v. Commission*, the Court of Justice stated that *'when the Commission examines the compatibility of a State aid with the common market it must take all the relevant factors into account, including, where appropriate, the circumstances already considered in a prior decision and the obligations which that decision may have imposed on a Member State'*. According to the Court of Justice, the compatibility of a new aid could depend on the existence of a previous unlawful aid that has not been repaid, since the cumulative effect of the aids could distort competition in the common market to a significant extent. Therefore the Commission, when it examines the compatibility of a State aid with the common market, has the power to take into consideration both the cumulative effect of this aid with an old one and the fact that such old aid has not been repaid ([24]).

(65) Therefore, in application of this case-law, when the Commission assesses a new aid measure it takes into account the fact that the beneficiaries may not have complied with earlier Commission decisions ordering them to reimburse previous unlawful and incompatible aid. In

([23]) See footnote 17 above.

([24]) [1997] ECR I-2549, paragraphs 25 to 27.

such cases, the Commission examines the effects on the beneficiaries of the combination of the new aid with the old incompatible aid which has not yet been reimbursed.

(66) France, Ireland and Italy have not yet effectively recovered the aid that the Commission found incompatible in Decision 2006/323/EC ([25]). The sums to be recovered, as calculated by the Member States and excluding interest, amount to EUR 786 668, EUR 8 095 881,43 and EUR 6 612 489,02 respectively. Moreover, this decision has also identified incompatible aid granted for an additional period, which should also be recovered. The cumulation of these aid amounts with otherwise compatible aid would continue to distort competition to an extent contrary to the common interest and no arguments were found to justify such a distortion. Therefore, any payment of compatible aid as described in point 50 above should be suspended until all incompatible aid has been recovered from the beneficiaries.

8 CONCLUSION

(67) 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 as from 1 January 2004 constitute State aid within the meaning of Article 87(1) of the Treaty. The aid is partially incompatible with the common market as the beneficiaries did not pay a significant part of the tax. The part of the exemption which exceeds the rate of 20 % of the tax level which would otherwise have been payable or EUR 15,00 per 1 000 kg, whichever is the lowest, can be found compatible with the common market on the condition that it is granted for a maximum of 10 years, after which the compatibility of the aid must be reviewed. The remaining aid should be declared incompatible with the common market.

(68) France, Ireland and Italy should be required to take all necessary measures to recover the incompatible aid granted from 1 January 2004 onward from the recipients.

(69) France, Ireland and Italy should be required to suspend the application of the exemptions until they have recovered from the respective beneficiaries the aid held to be incompatible with the common market in Decision 2006/323/EC and in this Decision.

(70) The French, Irish and Italian authorities should forward a copy of this decision to the beneficiaries of the measures immediately,

([25]) The Decision has been appealed before the Court of Justice, but according to art. 242 EC Treaty, the appeal does not have a suspensive effect.

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 as from 1 January 2004 constitute State aid within the meaning of Article 87(1) of the Treaty.

Article 2

The aid referred to in Article 1 is compatible with the common market insofar as the beneficiaries pay at least a rate of 20 % of the excise tax which would otherwise have been payable or the minimum level of taxation as determined by Directive 2003/96 (EUR 15,00 per 1 000 Kg), whichever is the lowest, subject to the condition that the aid is limited to a maximum duration of 10 years.

Article 3

The aid referred to in Article 1 is incompatible with the common market insofar as the beneficiaries do not pay at least a rate of 20 % of the excise tax otherwise payable or the Community minimum (EUR 15,00 per 1 000 Kg), whichever is the lowest.

Article 4

1. France, Ireland and Italy shall take all necessary measures to recover from the beneficiaries the aid referred to in Article 3 and unlawfully made available to the beneficiaries.

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 the decision.

3. The sums to be recovered shall include interest from the date on which it was at the disposal of the beneficiaries until the date of its recovery. The interest shall be calculated in compound basis in conformity with the provisions laid down in Chapter V of Commission Regulation (EC) No 794/2004 ([26]).

4. France, Ireland and Italy shall cancel all payment of outstanding aid referred to in Article 3 with effect from the date of notification of this decision.

5. France, Ireland and Italy shall ensure that this decision is implemented within four months of the date of its notification.

Article 5

France, Ireland and Italy shall suspend the payment of the aid referred to in Article 2, to beneficiaries who have not yet repaid the aid held to be incompatible with the common market by Decision 2006/323/EC and the aid referred to in Article 3 of this decision in so far as it was unlawfully made available to the beneficiaries, with interest.

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

Article 6

1. France, Ireland and Italy shall keep the Commission informed of the progress of the national proceedings to implement this Decision until these proceedings have been completed.

2. Within two months of notification of this Decision, France, Ireland and Italy shall inform the Commission of the total amount to be recovered from the beneficiaries, indicating both principal amount and interest using the table in the Annex and submit a detailed description of the measures already taken and planned to comply with this Decision. Within the same time limit, they shall send to the Commission all the documents demonstrating that the beneficiaries have been ordered to repay the aid.

3. Within two months of notification of this Decision, France, Ireland and Italy shall submit evidence to the Commission showing that they have complied with Article 6.

4. After the expiry of the periods referred to in paragraphs 2 and 3, France, Ireland and Italy shall submit, on simple request by the Commission a report on the measures already taken and planned to comply with this Decision. The report shall also provide detailed information on the amounts of aid and recovery interest already recovered from the beneficiaries.

Article 7

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

Done at Brussels, 7 February 2007.

For the Commission

Neelie KROES

Member of the Commission

ANNEX

Information about the amounts of aid received, to be recovered and already recovered (*)

Identity of the beneficiary	Total amount of aid received under the scheme	Total amount of aid to be recovered (Principal)	Total amount already reimbursed	
			Principle	Recovery interest

(*) Million of national currency.