II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COMMISSION

COMMISSION DECISION

of 13 July 2009

on State aid schemes C 6/04 (ex NN 70/01) and C 5/05 (ex NN 71/04) implemented by Italy in favour of glasshouse growers (exemption from excise duty on diesel used to heat glasshouses)

(notified under document C(2009) 5497)

(Only the Italian text is authentic)

(2009/944/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Having called on interested parties to submit their comments pursuant to that Article, and having regard to those comments,

Whereas:

I. PROCEDURE

(1) By letters dated 28 September 2000 and 17 October 2000, and on the basis of the information at its disposal, the Commission asked the Italian authorities for clarifications about the partial exemption from excise duties on diesel used in agriculture provided for by Decree-Law No 268 of 30 September 2000 laying down urgent measures on income tax for natural persons and excise duties.

(2) The Italian authorities sent the Commission the requested clarifications by letters dated 31 October 2000 and 3 November 2000.

(3) After examining these clarifications, the Commission sent a letter dated 20 November 2000 asking the Italian authorities for further information on the excise duty exemption.

(4) As it had not received a reply within the four-week time-limit prescribed in the aforementioned letter, the Commission sent the Italian authorities a reminder by letter dated 26 April 2001, stating that, if they did not react, it reserved the right to propose to the College of Commissioners that an information injunction be sent pursuant to Article 10(3) 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 [1] (now Article 88).

(5) By letter dated 10 May 2001, the Italian Permanent Representation to the European Union sent the Commission the additional information required of the Italian authorities in the letter of 26 April 2001.

(6) On the basis of the above information, the Commission announced by letter dated 2 August 2001 that it was opening a non-notified State aid dossier (ref. NN 70/01) and asked the Italian authorities for further information.

(7) As it had not received a reply by the deadline set, the Commission sent a new reminder to the Italian authorities by letter dated 1 July 2003, once again drawing their attention to the fact that, in the event of failure to comply with the four-week deadline set for reply, it reserved the right to propose to the College of Commissioners that an information injunction be sent pursuant to Article 10(3) of Regulation (EC) No 659/1999. The deadline set for reply expired at the beginning of August 2003.

[1] OJ L 83, 27.3.1999, p. 1.

(8) As it had not received a reply by the aforementioned deadline, the Commission issued a Decision on 10 October 2003 ([2]) enjoining Italy to supply it with all the information requested in the letter of 2 August 2001 and stating that, if the Italian authorities failed to reply, it reserved the right to initiate the procedure under Article 88(2) of the Treaty.

(9) As it had not received a reply to the information injunction, the Commission wrote to the Italian authorities on 19 February 2004 informing them of its decision to initiate the procedure under Article 88(2) of the Treaty against the provisions of Article 5(5) of Decree-Law No 268 of 30 September 2000 (case C 6/04).

(10) The Decision to initiate the procedure was published in the *Official Journal of the European Union* ([3]). The Commission invited interested parties to submit their comments on the aid scheme.

(11) The Commission received comments on the aid scheme from interested third parties and transmitted them to Italy by letter dated 27 April 2004, giving it the opportunity to express its view on them.

(12) Italy did not express its view on these comments but, after requesting and obtaining an extension to the deadline for responding to the initiation of the procedure under Article 88(2) of the Treaty, sent a reply concerning this procedure by letter dated 21 June 2004, registered as received on 25 June 2004.

(13) After it had sent the letter of 19 February 2004 stating that the procedure under Article 88(2) of the Treaty was being initiated against the provisions of Article 5(5) of Decree-Law No 268 of 30 September 2000, the Commission obtained information according to which glasshouse growers were apparently actually benefiting from a total exemption from excise duty on diesel used to heat glasshouses. By fax dated 10 June 2004, it accordingly asked the Italian authorities for information on this additional exemption.

(14) By letter dated 28 July 2004, registered as received on 3 August 2004, the Italian Permanent Representation to the European Union sent the Commission the Italian authorities' reply to the aforementioned letter of 10 June 2004. This reply showed that the abovementioned additional exemption had been established by means of various provisions: Article 24(3) of Law No 388 of 23 December 2000; Article 13(3) of Law No 448 of 21 December 2001; Article 19(4) of Law No 289 of 27 December 2002 and Article 2(4) of Law No 350 of 24 December 2003.

(15) On the basis of this information, the Commission decided to open a new non-notified aid dossier (ref. NN 71/04), so as to examine the compatibility of this additional exemption with the common market. It informed the Italian authorities of this by letter dated 4 November 2004.

(16) By letter dated 24 January 2005, the Commission informed the Italian Government of its decision to initiate the procedure under Article 88(2) of the Treaty in relation to the aforementioned additional exemption established by Article 24(3) of Law No 388 of 23 December 2000; Article 13(3) of Law No 448 of 21 December 2001; Article 19(4) of Law No 289 of 27 December 2002 and Article 2(4) of Law No 350 of 24 December 2003 (case C 5/05).

(17) The Decision to initiate the procedure was published in the *Official Journal of the European Union* ([4]). The Commission invited interested parties to submit their comments on the aid scheme.

(18) The Commission received no comments from interested third parties.

(19) By letter dated 21 February 2005, registered as received on 22 February 2005, the Italian Permanent Representation to the European Union sent the Commission the Italian authorities' reply concerning initiation of the procedure under Article 88(2) of the Treaty against the aforementioned additional exemption.

(20) By letter dated 27 September 2007, the Commission asked the Italian authorities for additional information on the aid in question and on the replies concerning the initiation of the procedure under Article 88(2) of the Treaty. In particular, the Italian authorities were asked to justify the argument that the aid was consistent with the Italian tax system and to analyse whether it could be justified in the light of the provisions of the Community guidelines on State aid for environmental protection that were applicable at the time of granting of the aid ([5]). The Italian authorities had a month to reply to the request for additional information.

(21) In the absence of a reply for the Italian authorities, the Commission sent them a reminder by fax dated 15 October 2008. This stated that, if it did not receive a reply within the new deadline of one month, it reserved the right to propose to the College of Commissioners that an information injunction be sent pursuant to Article 10(3) of Regulation (EC) No 659/1999.

([2]) Decision C(2003) 3802, notified to Italy by means of letter ref. SG(2003) D/232244 of 13 October 2003.
([3]) OJ C 69, 19.3.2004, p. 8.
([4]) OJ C 101, 27.4.2005, p. 17.
([5]) OJ C 37, 3.2.2001, p. 3.

(22) As it did not receive a reply within the deadline set, the Commission sent Italy such an injunction by letter dated 5 December 2008 ([6]).

(23) By e-mail dated 5 February 2009, registered as received on 9 February 2009, the Italian Permanent Representation to the European Union sent the Commission the Italian authorities' reply to the aforementioned injunction.

(24) Following a meeting with Commission representatives on 21 April 2009, the Italian authorities sent them a new letter on 19 May 2009 via the Italian Permanent Representation to the European Union.

II. **DESCRIPTION**

(25) Article 5(5) of Decree-Law No 268 of 30 September 2000 provides that, for the period from 3 October to 31 December 2000, the excise duty applied to diesel used to heat glasshouses be 5 % of that laid down for diesel used as fuel.

(26) Article 6(1) of that Decree-Law provides that, for the same period, the excise duty rates for diesel used in agriculture be 22 % of that applicable to diesel used as fuel and that the excise duty rates for petrol be 49 % of the normal rate.

(27) Article 24(3) of Law No 388 of 23 December 2000; Article 13(3) of Law No 448 of 21 December 2001; Article 19(4) of Law No 289 of 27 December 2002 and Article 2(4) of Law No 350 of 24 December 2003 all established a total exemption from excise duty for diesel used to heat glasshouses in Italy. This exemption covered the following periods respectively: from 1 January to 30 June 2001; all of 2002; all of 2003 and all of 2004.

III. **INITIAL OPENING OF THE PROCEDURE UNDER ARTICLE 88(2) OF THE TREATY (CASE C 6/04)**

(28) The Commission initiated the procedure under Article 88(2) of the Treaty against the provisions of Article 5(5) of Decree-Law No 268 of September 2000, as it had doubts as to the compatibility with the common market of the additional 17 percentage points of exemption from excise duty granted to glasshouse growers using diesel to heat glasshouses as compared to other operators in the agricultural sector. The doubts originated from the fact that, despite an information injunction being sent, the Italian authorities did not send any information demonstrating that the exemptions were eligible under competition rules (indeed, they did not even reply to the injunction). Moreover, the doubts were corroborated by the question of the eligibility of the excise duty exemptions in the light of the provisions of Council Directive 92/81/EEC of 19 October 1992 on the harmonization of the structures of excise duties on mineral oils ([7]) and on the Directive repealing it, i.e. Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity ([8]).

IV. **REACTION OF THE ITALIAN AUTHORITIES TO THE INITIAL OPENING OF THE PROCEDURE UNDER ARTICLE 88(2) OF THE TREATY**

(29) In their letter of 21 June 2004, the Italian authorities stated that the excise duty exemptions could not be considered State aid, but had to be examined in the context of Article 8(2)(f) and Article 15(3) of Directives 92/81/EEC and 2003/96/EC respectively. It was their view that glasshouse growing fell within the category of 'agricultural and horticultural works', for which Community law allows the Member States to apply total or partial exemptions from excise duty, and that the excise duty exemption for glasshouse growing did not introduce any discrimination in the agricultural and horticultural sector linked to differentiation in exemptions, in that all operators were absolutely free to choose between growing outdoors and growing in glasshouses.

(30) According to the Italian authorities, the scheme was of a purely fiscal nature and should be assessed from this viewpoint, so as to allow it to be analysed in an overarching framework covering all the Member States of the European Union, thereby avoiding a situation whereby examining an individual national case outside such a framework could jeopardise the principle of equal treatment of Member States. In this connection, the Italian authorities referred to the political agreement reached by the Council and the Commission at the Ecofin Council on 19 March 2003, under which derogations from a general tax system or differences within it that were justified by the nature or general characteristics of the tax system did not constitute State aid.

(31) To conclude, the Italian authorities added that, according to the estimates and data available to them, the planned scheme '[would] not be detrimental to the proper functioning of the internal market and [would] not result in distortions of competition' (reference to Recital 24 to Directive 2003/96/EC).

([6]) Letter ref. SG-Greffe (2008) D/207739.

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

([8]) OJ L 283, 31.10.2003, p. 51.

V. COMMENTS SUBMITTED BY THIRD PARTIES FOLLOWING INITIAL OPENING OF THE PROCEDURE UNDER ARTICLE 88(2) OF THE TREATY

(32) By letter dated 19 April 2004, registered as received on 21 April 2004, the Commission received comments from an interested third party following opening of the procedure under Article 88(2) of the Treaty.

(33) In that letter, the interested party described the fragility of the market in which it operated and the problems connected with the increase in the price of fuels that can be used to heat glasshouses. In the interested third party's view, if the Commission were to rule against the exemption in question, many undertakings in the sector would be forced to close or to reduce the amount of fuel consumed to heat their glasshouses, with a resulting reduction in the quality of their products. Furthermore, according to the interested third party, the prices of the heating fuels used in Belgium and the Netherlands (methane and fuel oil) were 20 % to 40 % lower than the price of agricultural diesel in Italy and that, therefore, applying the exemption in question would in no way distort competition. Lastly, again in this party's view, the number of farms in its sector using methane gas to heat glasshouses was constantly increasing.

VI. SECOND OPENING OF THE PROCEDURE UNDER ARTICLE 88(2) OF THE TREATY (CASE C 5/05)

(34) The Commission initiated a second procedure under Article 88(2) of the Treaty after obtaining information demonstrating that the excise duty exemption enjoyed by glasshouse growers was actually significantly higher than that analysed when the procedure was first opened. The doubts expressed when the procedure was first opened, the causes of which included the fact that the Italian authorities had not replied to the information injunction sent to them, were corroborated by those authorities' reaction to the initial opening of the procedure. Essentially, the doubts expressed by the Commission when the procedure was opened for the second time were based on the following considerations:

(a) the Italian authorities considered that, regardless of their level, excise duty exemptions on fuels did not constitute State aid but rather tax measures justified by the nature of the system of which they were part. However, they did not supply any information in support of this argument;

(b) the Italian authorities further argued that the excise duty exemption did not distort competition, inasmuch as nursery growers were free to avail themselves of the exemption by practising greenhouse growing. This argument appears doubtful, inasmuch as the exemption was aimed not at encouraging a changeover to glasshouse growing, but rather to provide greenhouse growers who were already in business with relief from a financial burden linked to exercise of their activity;

(c) again as regards the issue of distortion of competition, the Italian authorities asserted that, according to the official data available to them, the total exemption granted to glasshouse growers did not distort competition. In the Commission's view, it is unclear how the Italian authorities can make such an argument since, in their reply sent by telex to the Commission on 10 June 2004 (see recital 14 above), they stated that they could not supply precise data on the sums that glasshouse growers could save as a result of the total exemption;

(d) although the Italian authorities asserted that there were no elements of State aid, they failed to indicate which rule of competition would, in their opinion, support the compatibility with the common market of the total excise duty exemption;

(e) the fact that the exemptions were granted contrary to Directives 92/81/EEC and 2003/96/EC could not be ruled out.

VII. REACTION OF THE ITALIAN AUTHORITIES TO THE SECOND OPENING OF THE PROCEDURE UNDER ARTICLE 88(2) OF THE TREATY

(35) By letter dated 21 February 2005, the Italian authorities asserted that the matters of substance covered by the second procedure were identical to those dealt with when the procedure was first opened and that the comments that had already been made in relation to the first procedure remained valid. They also supplemented their reply by stating the following:

(a) adjustments to excise duties by Member States did not constitute State aid within the meaning of Article 87(1) of the Treaty. The conclusions of the Ecofin Council of 19 March 2003, according to which derogations from a general tax system or differences within it that were justified by the nature or general characteristics of the tax system did not constitute State aid, were a decisive factor confirming the primacy of the powers of the Community's financial authorities. Accordingly, they would send information on the nature or general characteristics of the system to those financial authorities as soon as the latter requested them to do so;

(b) the expression 'without prejudice to other Community provisions' in Article 15(1) of Directive 2003/96/EC could not be interpreted in such a way as to render Articles 87 and 88 of the Treaty applicable to every measure reducing excise duties or creating an exemption therefrom and that, if the Community legislature had wished to make every measure adjusting excise duties subject to compliance with Articles 87 and 88 of the Treaty, it would have expressed this wish by inserting a reference to them in accordance with the fundamental rule of statutory construction that *'lex ubi voluit dixit'* ['that which the law intends, it states']. Moreover, in any other Community act, the legislature's wish for given measures to be subject to the rules on State aid was expressed clearly and not through a generic wording such as 'without prejudice to other Community provisions'. In addition, clear and explicit wording was all the more necessary insofar as stating that a measure 'constituted State aid' or 'did not constitute State aid' had a significant impact on the nature, arrangements and duration of implementation of the measure;

(c) the fact that the measure did not jeopardise the proper functioning of the internal market and did not distort competition was an objective fact and thus rendered irrelevant the savings that the producers had been able to make thanks to the measure.

VIII. REPLY FROM THE ITALIAN AUTHORITIES TO THE INFORMATION INJUNCTION OF 5 DECEMBER 2008

(36) In their letter dated 5 February 2009, the Italian authorities firstly returned to the argument concerning the compatibility of the aid with the provisions of Directive 92/81/EEC which, in their view, did not provide sufficient clarification on the question of the compatibility of excise duty exemptions or reductions with competition rules.

(37) In order to illustrate their position, they referred to Article 8 of the Directive, according to which 'without prejudice to other Community provisions, Member States may apply total or partial exemptions or reductions in the rate of duty to mineral oils used under fiscal control […] exclusively in agricultural and in horticultural works, and in forestry […]'.

(38) In the Italian authorities' opinion, the expression 'without prejudice' used in that Article did not establish an obligation to comply with European competition rules, as was the case, by contrast, with Article 26 of Directive 2003/96/EC. If these two Directives had laid down the same requirement, the Community legislature would have had no reason to be more explicit in Article 26 of Directive 2003/96/EC. Accordingly, the Italian authorities concluded that, taking account of Article 8 of Directive 92/81/EEC, the Member States could legitimately apply excise duty reductions or exemptions in the horticulture sector.

(39) The Italian authorities then stressed that implementing Directive 92/81/EEC and thus Directive 2003/96/EC resulted in de facto distortion of competition within the internal market, since the reductions and exemptions provided for benefited those Member States that had greater financial resources and could thus apply excise duty reductions in a uniform manner throughout the entire agricultural sector. As it had limited resources, Italy had decided to take action only in favour of glasshouse growers, insofar as the excise duty reduction and exemption measures were adopted in the context of a crisis caused by price increases for heating products. In this connection, the Italian authorities stated that it was not the Commission's place to intervene in relation to a Member State's choice of priorities.

(40) As regards the possible applicability of the Community guidelines on State aid for environmental protection (see recital 20 above), the Italian authorities claimed that the excise duty reductions granted were in line with the provisions of these guidelines and could therefore be covered by the derogations laid down therein since, in their opinion, the matter concerned existing taxes within the meaning of point 51.2 of the guidelines. This point provides that, where existing taxes are concerned, operating aid connected to reductions or exemptions may be authorised if the following two conditions are satisfied at the same time:

— the tax in question must have an appreciable positive impact in terms of environmental protection;

— the derogations for the firms concerned must have been decided on when the tax was adopted or must have become necessary as a result of a significant change in economic conditions that placed the firms in a particularly difficult competitive situation. In the latter instance, the amount of the tax reduction may not exceed the increase in costs resulting from the change in economic conditions. Once there is no longer any increase in costs, the reduction must no longer apply.

(41) According to the Italian authorities, the excise duties on fuels used in agriculture, in particular gas for heating, can be considered environmental taxes and have a positive impact on the environment in that they encourage producers to reduce fuel consumption.

(42) As regards in particular point 51.2(b) of the guidelines, on the basis of which derogations for firms must have been decided on when the tax was adopted, the Italian authorities referred to Commission Decision C(2005) 4436 of 7 December 2005. That decision provides that 'the excise taxes concerned may not have had an explicit environmental purpose from the outset and the exemptions were decided on […] 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'. The Italian authorities added that the excise duty reductions were decided on following a change in the economic situation (in particular an exponential rise in the price of oil) that placed glasshouse growers in a particularly difficult competitive situation as compared to farmers growing crops outdoors and led the authorities in other countries to adopt measures in favour of glasshouse growers and the fisheries sector. The authorities indicated that, in the period under consideration, the price of diesel for heating varied as follows: + 37 % in 1999-2000, + 26 % in 1999-2001 and + 26 % in 1999-2002. Meanwhile the price structure was as follows (annual average in EUR per litre):

EUR per litre

	Price net of tax	Tax	Consumer price
1999	0,217	0,524	0,741
2000	0,342	0,523	0,865
2001	0,317	0,504	0,821
2002	0,292	0,542	0,834
2003	0,314	0,547	0,861
2004	0,354	0,555	0,909

(43) The Italian authorities pointed out, on the other hand, that applying point 51 of the guidelines in any event required undertakings to pay part of the tax. In their view, the measure adopted by Italy could be compatible if beneficiaries paid the minimum amount set at Community level (which, according to the authorities, was EUR 13 per 1 000 kg in the 2000-2003 period and EUR 21 per 1 000 kg thereafter).

(44) Lastly, as regards the total amount of aid granted, the Italian authorities indicated that the figures in the various Finance Laws were estimates based on forecasts of consumption of heating fuels and should be viewed as revenue not collected rather than as resources allocated. In their opinion, it was difficult at that stage to quantify the advantage obtained by each producer, since responsibility for administering the tax system lay with the regions, the provinces or even the municipalities. The figures would be sent as soon as they were available.

IX. **LETTER SENT ON 18 MAY 2009**

(45) In this letter, the Italian authorities asserted, firstly, that the excise duties were existing taxes and that, as such, they could be covered by the derogations applicable to them by virtue of the provisions of the guidelines on State aid for environmental protection, for the reasons set out in recital 42 above.

(46) This argument was followed by an updated version of the table given in recital 42 above (the tax column is split between excise duties and VAT). According the new table, the price structure in the period considered was as follows (this time the data are expressed in EUR per 1 000 litres):

EUR per 1 000 litres

	Price net of tax	VAT	Excise duties	Consumer price
1999	219,83	123,5	397,67	741
2000	344,35	144,1	375,92	864,33
2001	313,4	136,7	370,11	820,22
2002	293,31	139,7	405,24	838,26
2003	314,37	143,5	403,21	861,1
2004	355,01	151,6	403,21	909,86

(47) The Italian authorities underlined that, between 1999 and 2004, consumer prices of diesel for heating had constantly been on the rise, except for a slight decrease between 2000 and 2001. The arguments already illustrated in recitals 42 and 43 above were then repeated.

(48) As regards the justification for the measure in the light of the Italian tax system, the Italian authorities clarified that, in Italy, the quantities of exempted fuel were apportioned on the basis of surface area, crop quality and amount of agricultural equipment actually used. Accordingly, it could be stated that the exemption was calculated on the basis of the type of activity carried out and, for glasshouse growing, proportionately since this type of growing was clearly dependent on diesel and marked by completely different conditions of production from open-field crops. Moreover, the exemption did not favour any single product because it applied to all products grown in glasshouses and because glasshouse growing could be considered a widespread practice throughout the agricultural sector.

(49) With regard to the applicability of Article 87(1) of the Treaty in more general terms, the Italian authorities took the view that the conditions referred to in that paragraph had not been met, in that the exemptions were neither selective nor such as to distort competition.

(50) With regard to selectivity, they referred to the judgment of the Court of First Instance in Case T-233/04 [9]. In that judgment (paragraph 86), the Court stated that 'for the application of Article 87 EC, it is irrelevant that the situation of the presumed beneficiary of the measure is better or worse in comparison with the situation under the law as it previously stood, or has not altered over time. The only question to be determined is whether, under a particular statutory scheme, a State measure is such as to favour "certain undertakings or the production of certain goods" within the meaning of Article 87(1) EC in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question'.

(51) In the opinion of the Italian authorities, the exemption applied to diesel used in covered environments for growing agricultural products in no way distinguished between undertakings in the same legal and factual situation or between products, since all undertakings, regardless of the goods produced, could avail themselves of the exemption when supplying themselves with diesel for glasshouse growing.

(52) With regard to the likelihood of the measure distorting competition, the Italian authorities referred to Commission Decision C(2008) 1105, recital 43 of which states that the total and partial exemptions allowed by Article 8(2) of Directive 92/81/EEC pursue the same objectives as the measure provided for in Directive 2003/96/EC and are of rather small scale and that, therefore, it can be said, by analogy, that they should not unduly distort competition.

(53) The Italian authorities also added that, in recital 32 of that Decision, the Commission had considered that measures of this type applied to fuel used in primary agricultural production would not unduly distort competition in the light of the small size of farms in the European Union (more than 60 % of farms have less than 5 hectares of utilised agricultural area). Using this consideration as a starting point, the stressed that, applying the same size criterion, it would be difficult for the exemptions in question to distort competition, since around 80 % of farms in Italy have less than 5 hectares of utilised agricultural area.

(54) The Italian authorities also argued that the quantity of diesel needed to heat 1 m^3 of glasshouse was around only 2 litres. Moreover, on the basis of a study carried out by Enama (*Ente nazionale per la meccanizzazione agricola* – National Agricultural Mechanisation Body) on diesel consumption in 14 of Italy's 20 regions, the diesel used in glasshouses (167 436 001 litres) accounted for only 11,77 % of agricultural diesel consumption in 2002 and 10,67 % in 2003.

(55) After supplying these clarifications in support of their view that the exemptions in question did not include elements of State aid within the meaning of Article 87(1) of the Treaty, the Italian authorities reiterated the cross-cutting nature of the exemptions, stressed the fact that all agricultural producers could avail themselves of it if they practised glasshouse growing and underlined that the criterion of non-discrimination could not be applied retroactively, for reasons of legitimate expectation and legal certainty.

X. **ASSESSMENT**

(56) This Decision concerns the difference between the excise duty exemptions on diesel used for heating glasshouses, on the one hand, and excise duty exemptions on diesel used as fuel, on the other.

(57) Taking account of the arguments put forward by the Italian authorities in their replies to the first and second opening of the procedure, it is necessary first to examine whether the scheme contains elements of State aid within the meaning of Article 87(1) of the Treaty.

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

(59) The scheme under examination meets this definition, not only because it is financed from State resources (by granting excise duty exemptions, the State forgoes specific revenue that it could otherwise have collected), but also because it favours certain undertakings (undertakings in the agricultural sector and, within that sector, those practising glasshouse growing) and could affect trade or distort competition, given Italy's position in the area of agricultural production in glasshouses (for example, in terms of the surface area of glasshouses given over to the production of fresh vegetables, in 2000 and 2003 Italy occupied second place among producer countries in the European Union; in 2000 and 2001 Italy was the largest vegetable producer in the European Union and, lastly, in the period to which the relevant procedures relate, Italy was the second largest European country in terms of the surface area given over to glasshouse growing).

[9] T-233/04 *Netherlands* v *Commission* [2008] ECR II-00591.

(60) While the matter was being examined, the Italian authorities used a series of arguments to defend their position that the scheme did not contain elements of State aid:

— on the basis of the political agreement reached by the Council and the Commission at the Ecofin Council on 19 March 2003, derogations from a general [tax] system or differences within it that were justified by the nature or general characteristics of the tax system did not constitute State aid. Furthermore, in Italy the exemptions were consistent with the Italian tax system because they were applicable to all products grown in glasshouses and because the quantities of fuel exempted from excise duties were apportioned on the basis of the activity carried out,

— on the basis of the estimates and data available, the scheme in question 'was not detrimental to the proper functioning of the internal market and would not result in distortions of competition' (see recitals 30 and 31),

— the exemptions were neither selective nor such as to distort competition.

(61) It must first of all be stressed that no political agreement can change the concept of aid as defined objectively in the Treaty.

(62) As for the argument that the exemptions are justified by the nature or general characteristics of the tax system, the Commission takes the view that specific excise duty exemptions limited to a given type of production (in the present case, glasshouse growing, which received higher exemptions than growing outdoors) cannot be justified by the nature and logic of the tax system when Community law requires, in principle, the Member States to impose excise duties ([10]). The same consideration applies when Community law does not provide for the exemptions in question to be granted. The argument that the exemptions are valid for all products grown in glasshouses is not relevant in this case, since entire branches of the agricultural production sector received lower exemptions than those granted to glasshouse growers and if, as the Italian authorities assert, the quantities of exempted fuel were apportioned on the basis of the activity carried out, the logic of the tax system would have required the exemption to be the same for all activities based on the use of diesel.

(63) The issue of selectivity has already been examined in recital 58 above. As regards the judgment in Case T-233/04, the Commission notes, in the light of recitals 25 and 26 above, that, while it is true that operators in the agricultural sector who use diesel have been able to enjoy exemptions, glasshouse growers have nevertheless received higher exemptions. All operators are in a comparable financial situation, since they use diesel for production and are therefore affected to the same degree by the objective of the measure (alleviation of the effects of the increase in oil prices), regardless of their legal status. The fact that, in a comparable situation, some operators have been able to enjoy higher exemptions than others demonstrates that the scheme includes an element of selectivity.

(64) The Commission rejects the Italian authorities' arguments that the scheme dues not jeopardise the proper functioning of the internal market and does not result in distortions of competition:

— the decision to which the Italian authorities referred (see recital 52 above) concluded that State aid existed but could be approved on the basis of the derogation under Article 87(3)(c) of the Treaty. However, this derogation cannot be used to demonstrate that there are no State aid elements in the scheme under examination (this consideration also applies to the Italian authorities' argument illustrated in recital 53 above),

— the data referred to in recital 54 above are not complete (14 regions out of 20) and there is nothing to say that they are representative: it is not actually possible to deduce whether the regions for which the data were supplied are the regions in which glasshouse growing is most widespread. Moreover, the data concerning consumption in the agricultural sector indicate instead that diesel is a significant agricultural input. In any event, it is sufficient that aid strengthens the competitive position of an undertaking as compared to that of other undertakings competing in intra-Community trade for it to be likely to result in distortions of competition and affect intra-Community trade ([11]). This is true in the matter under examination, since the exemption favours Italian undertakings growing agricultural products in glasshouses over undertakings operating in the same sector in the other Member States.

(65) The Italian authorities also asserted, in reply to the initial opening of the procedure, that the aid in question did not constitute State aid but that it should be examined in the light of the provisions of Directives 92/81/EEC and 2003/96/EC. They reached this conclusion on the basis of the argument that the existence of State aid would be ruled out by the simple fact that an EU Directive establishes the possibility of granting tax exemptions. This argument was reiterated in the reply to the information injunction sent to them.

([10]) See Commission Decision 2006/323/EC (OJ L 119, 4.5.2006, p. 12).

([11]) Judgment of the Court of Justice of the European Communities in Case 730/79 *Philip Morris Holland* v *Commission* [1980] ECR 2671 .

(66) The Commission cannot agree with this argument. Indeed, the sixth recital to Directive 92/81/EEC permits the Member States 'to apply on an optional basis […] other exemptions […], where this does not give rise to distortions of competition'. Furthermore, Article 8(2) of that Directive provides that the Member States may apply total or partial exemptions or reductions 'without prejudice to other Community provisions'. By referring to the existence of a risk of distortions of competition, Directive 92/81/EEC does not rule out the possibility of exemptions constituting State aid. It is worth recalling that the Commission' powers concerning State aid are conferred directly by Treaty and that such powers cannot be restricted by a Directive whose purpose is to harmonise a tax at European level.

(67) In addition, Recitals 15 and 24 of the preamble to Directive 2003/96/EC state that measures aimed at establishing differentiated national rates of taxation must be in line with the rules governing the internal market and competition, so as not to result in distortions of competition. The requirement to apply the rules on competition is confirmed by Article 26 of that Directive, which draws attention to the fact that the measures in question may constitute State aid and, in such cases, must be notified pursuant to Article 88(3) of the Treaty. That Article expressly states that information provided to the Commission on the basis of that Directive does not free Member States from the notification obligation pursuant to Article 88(3) of the Treaty.

(68) Lastly, the Italian authorities themselves asserted (see recital 39 above) that applying exemptions distorted competition, a characteristic element of State aid within the meaning of Article 87(1) of the Treaty.

(69) In view of all these considerations, the Commission concludes that the excise duty exemptions applied under the scheme in question constitute State aid within the meaning of Article 87(1) of the Treaty.

(70) However, in the cases provided for in Article 87(2) and (3) of the Treaty, such measures may, by derogation, be considered compatible with the common market.

(71) The derogations under Article 87(2) of the Treaty concern aid of a social character granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences and aid granted to the economy of certain areas of the Federal Republic of Germany and do not apply in this case, regardless of the beneficiaries of the scheme.

(72) The Commission is of the view that the derogations under Article 87(3)(a) of the Treaty concerning the development of specific regions do not apply to the scheme in question, since this scheme does not involve aid to promote the economic development of specific regions where the standard of living is abnormally low or in which there is serious underemployment.

(73) As for the derogation under Article 87(3)(b) of the Treaty, it is sufficient to note that the tax scheme in question is not an important project of common European interest and does not seek to remedy a serious disturbance in the Italian economy. Nor does it seek to promote culture and heritage conservation within the meaning of the derogation under Article 87(3)(d) of the Treaty.

(74) Accordingly, the only derogation that may be invoked is that laid down in Article 87(3)(c) of the Treaty, according to which aid may be considered compatible with the common market if it is intended to facilitate the development of certain economic activities or of certain economic areas, provided that it does not adversely affect trading conditions to an extent contrary to the common interest.

(75) Since the aid under the scheme in question is non-notified aid, its compatibility with the common market must be analysed in the light of the State aid rules in force when it was granted, as laid down in the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid ([12]).

(76) While it is true that recital 172 of the new Community guidelines for State aid in the agriculture and forestry sector 2007 to 2013 ([13]) deems some unlawful aid granted after the entry into force of Directive 2003/96/EC to be compatible with the common market, this applies only where the conditions of that Directive have been complied with and there has been no differentiation within the agricultural sector. The same applies to aid unlawfully granted on the basis of Directive 92/81/EEC.

(77) Article 1(1) of Directive 92/81/EEC provides that 'Member States shall impose a harmonized excise duty on mineral oils in accordance with this Directive'. Article 1(2) states that the Member States are to fix their rates in accordance with Council Directive 92/82/EEC of 19 October 1992 on the approximation of the rates of excise duty on mineral oils ([14]).

([12]) OJ C 119, 22.5.2002, p. 22.
([13]) OJ C 319, 27.12.2006, p. 1.
([14]) OJ L 316, 31.10.1992, p. 19. The excise duties on diesel used for heating glasshouses are indicated in recital 43 above.

(78) Article 5(2) of Directive 92/82/EEC provides for excise duty on gas oil (diesel) of ECU 18 per 1 000 litres for gas oil used for stationary motors, plant and machinery used in construction, civil engineering or public works or vehicles intended for use off the road network or which have not been granted authorisation for use mainly on the public road network.

(79) Article 2(2) of Directive 92/81/EEC states that 'mineral oils other than those for which a level of duty is specified in the rates Directive 92/82/EEC shall be subject to excise duty if intended for use, offered for sale or used as heating fuel or motor fuel. The rate of duty to be charged shall be fixed, according to use, at the rate for the equivalent heating fuel or motor fuel'. (The EUR 13 indicated by the Italian authorities (see recital 43 above) is the duty applicable to the equivalent heating fuel or motor fuel, i.e. the duty for heavy oil set at EUR 13 per 1 000 kg in Article 6 of the latter Directive.)

(80) However, Article 8(2) of Directive 92/81/EEC provides that 'without prejudice to other Community provisions, Member States may apply total or partial exemptions or reductions in the rate of duty to mineral oils used under fiscal control […] exclusively in agricultural and in horticultural works, and in forestry and inland fisheries'.

(81) In accordance with Directive 2003/96/EC, which has been applicable since 1 January 2004 ([15]), the minimum rate of excise duty on gas oil (diesel) is set at EUR 21 per 1 000 litres (Article 9 of the Directive together with Table C in Annex I to the Directive). This Directive also contains an analogous provision to that in Article 8(2) of Directive 92/81/EEC, namely Article 15(3), according to which 'Member States may apply a level of taxation down to zero to energy products and electricity used for agricultural, horticultural or piscicultural works, and in forestry'.

(82) Under the two aforementioned Directives, therefore, it was possible to grant total excise duty exemptions. However, since the aid scheme in question establishes a differentiation between the excise duty exemptions which benefits certain agricultural undertakings, it cannot be declared compatible with the common market in the light of recital 172 of the Community guidelines for State aid in the agriculture and forestry sector 2007 to 2013 ([16]).

(83) For the whole period covered by the two procedures initiated in relation to the excise duty exemptions (from 3 October 2000 to 31 December 2004 – see recitals 25 and 27 above), the rules applicable to State aid were those set out in the Community guidelines for State aid in the agriculture sector ([17]) (hereinafter 'the 2000 agricultural guidelines').

(84) The Commission considers that, taking account of their nature (total exemptions from excise duty), the aid constitutes unilateral State aid simply intended to improve the financial situation of producers without contributing to development of the sector. This finding is corroborated by the fact that, in the additional information which they supplied, the Italian authorities explained that the reason for granting the aid was the increase in oil prices (see recital 39 above).

(85) In accordance with point 3.5 of the 2000 agricultural guidelines, this aid is operating aid which is incompatible with the common market.

(86) However, point 5.5 of the 2000 agricultural guidelines allows an exception to the provisions of the aforementioned point 3.5 for operating aid for environmental purposes.

(87) In particular, point 5.5.4 of the 2000 agricultural guidelines refers to the specific case of partial or total exemptions from environmental taxes. Here, after expressing certain reservations, the Commission stated that such aid could be accepted if the following conditions are all met:

— if the aid is temporary (maximum duration of five years) and degressive,

— if it can be shown that the aid is necessary to offset a loss of international competitiveness,

— if the aid scheme constitutes a real incentive to reduce use of the inputs concerned.

(88) In the case under examination, the Commission considers that the aid is not degressive because, in the light of the various articles of the Finance Laws that provided for the excise duty exemption, the exemption was partial until 31 December 2000 and then total for each of the periods referred to in recital 27 above. In addition, the aid was not temporary since, in reality, with the exception of the second half of 2001, the exemptions were permanent for the entire period considered. Although the Italian authorities certainly referred to the existence of a difficult competitive situation (see recital 42 above), they did not supply information proving the loss of competitiveness. Lastly, it appears implausible that a system of exemptions which, by definition, makes fuels cheaper, could lead the beneficiaries to reduce their use of the inputs concerned (be it glasshouses or, by extension, the fuels themselves, if they are regarded as inputs).

([15]) Except for certain provisions not relevant to the matter at hand.
([16]) See footnote 13.
([17]) OJ C 28, 1.2.2000, p. 2.

(89) The State aid in question thus cannot be considered to be justified exclusively by the provisions of the 2000 agricultural guidelines which allow pure operating aid to be deemed compatible with the common market.

(90) However, point 5.6.2 of the 2000 agricultural guidelines also provides for the possibility of assessing aid on a case-by-case basis, having regard to the principles set out in the Community guidelines on State aid for environmental purposes.

(91) In view of the period to which the two procedures refer, the State aid rules to be considered for analysing the compatibility of the aid in question are as follows:

— for the period from 3 October 2000 to 2 February 2001, the Community guidelines on State aid for environmental protection ([18]) that had been in force since 1994 (hereinafter 'the 1994 guidelines'),

— for the period from 3 February 2001 to 31 December 2004, the Community guidelines on State aid for environmental protection ([19]) that had been in force since 2001 (hereinafter 'the 2001 guidelines').

(92) According to the 1994 guidelines (point 3.4), the Commission may make an exception to the rule that operating aid is not permitted, provided that such aid only compensates for extra production costs by comparison with traditional production costs, that it is temporary and in principle degressive and that it provides an incentive for reducing pollution or introducing more efficient uses of resources more quickly.

(93) Point 3.4 also states that 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 in order to reduce their pollution. This provision also applies to reliefs from taxes introduced pursuant to EC legislation.

(94) Besides the fact that, as indicated in the analysis carried out in the light of point 5.5.4 of the 2000 agricultural guidelines, the aid is neither temporary nor degressive and does not contain any incentive, the Commission considers that the information available to it in no way demonstrates that the aid is strictly limited to compensating an extra production cost by comparison with traditional production costs. Accordingly, the aid does not satisfy the conditions referred to in recital 92 above that would allow it to be considered compatible with the common market.

(95) In addition, in the present case, the conditions referred to in recital 93 above are not relevant, since the aid does not concern new taxes (the excise duties existed prior to the period to which the two procedures refer: by way of example, Article 24(3) of Law No 388 of 23 December 2000, which introduced the total exemption from excise duty for the period between 1 January and 30 June 2001, refers to Law No 662/1996 which concerned excise duties and, in turn, referred back to Legislative Decree No 504/1995 laying down the Consolidated Text of Legislative Provisions on Taxes on Production and Consumption). In this connection, the Commission notes that the Italian authorities have not challenged the fact that the duties in question are an 'existing tax'. Moreover, they have never asserted that these taxes were introduced recently (see recitals 40 and 45 above).

(96) Accordingly, this aid cannot be declared to be compatible with the common market on the basis of the 1994 guidelines.

(97) The 2001 guidelines draw a distinction between new taxes (point 51.1) and existing taxes (points 51.2 and 52).

(98) The Commission considers that the excise duties covered by the exemption must be considered existing taxes throughout the period under examination, since, in addition to the considerations set out in recital 95 above, the exemptions were decided on each year in the various Finance Laws rather than in any single law adopted with automatic derogations at any single time during the period concerned. Moreover, as the Commission has already observed in recital 95 above, the Italian authorities never challenged the fact that the taxes in question were 'existing taxes' and never asserted that they were introduced recently.

(99) As indicated in recital 40 above, point 51.2 of the 2001 guidelines allows the authorisation conditions applicable to new taxes (set out in point 51.1) to be applied to existing taxes if the following two conditions are satisfied at the same time:

— the tax in question must have an appreciable positive impact in terms of environmental protection,

([18]) OJ C 72, 10.3.1994, p. 3.
([19]) See footnote 5.

— the derogations for the firms concerned must have been decided on when the tax was adopted or must have become necessary as a result of a significant change in economic conditions that placed the firms in a particularly difficult competitive situation. In the latter instance, the amount of the reduction may not exceed the increase in costs resulting from the change in economic conditions. Once there is no longer any increase in costs, the reduction must no longer apply.

(100) The Commission can admit that a tax such as excise duty on diesel for heating, the effect of which is an increase in the price of diesel, can cause users to reduce their consumption of diesel with positive effects as regards environmental protection. However, the exemptions in question were laid down year after year, with even an interruption between 1 July and 31 December 2001 (see recital 27 above), and the Italian authorities have neither demonstrated nor ever asserted that these derogations were decided on when the tax was adopted. On the contrary, they stressed that the derogations were adopted simply to deal with a situation of economic difficulty, namely the increase in motor and heating fuel prices.

(101) It is not possible to accept the argument put forward by the Italian authorities that the Commission should carry out its analysis as if the exemptions had been decided on when the tax was introduced. In effect, the Italian authorities referred to Commission Decision C(2005) 4436 (see recital 42 above). In this Decision (see, in particular, recital 74 thereof), the Commission based its findings on the fact that the exemptions had been decided on well before the 2001 environmental aid guidelines became applicable. However, in the case under examination, it must be noted that the first exemptions date back to October 2000, i.e. shortly before these guidelines became applicable. It must be stressed that at no stage did the Italian authorities rely on exemptions previously granted.

(102) On the other hand, with regard to the second condition in the second sub-paragraph of point 51.2 of the 2001 guidelines, the Italian authorities have not provided evidence demonstrating a significant change in economic conditions that could have placed the firms in a particularly difficult competitive situation (see recital 88 above) nor proved that the value of the exemption did not exceed the increase in costs resulting from the change in economic conditions. With regard, in particular, to the question of the competitive situation, the data in the tables set out in recitals 42 and 46 above do not contain any comparative information. Therefore, they do not make it possible to identify any deterioration whatsoever in the competitive situation of Italian glasshouse growing undertakings. In this connection, it should also be highlighted that the increase in the price of oil products affected the whole of Europe and not only Italy.

(103) Since one of the two conditions referred to in recital 99 above has not been met, the provisions of point 51.2 of the 2001 guidelines cannot be applied, and thus nor can those of point 51.1.

(104) In the alternative, even if the provisions of point 51.2 had been applicable, the exemptions under examination could not have been considered eligible under point 51.1, which provides that:

'When, for environmental reasons, a Member State introduces a new tax in a sector of activity or on products in respect of which no Community tax harmonisation has been carried out or when the tax envisaged by the Member State exceeds that laid down by Community legislation, the Commission takes the view that exemption decisions covering a 10-year period with no degressivity may be justified in two cases:

(a) these exemptions are conditional on the conclusion of agreements between the Member State concerned and the recipient firms whereby the firms or associations of firms undertake to achieve environmental protection objectives during the period for which the exemptions apply or when firms conclude voluntary agreements which have the same effect. Such agreements or undertakings may relate, among other things, to a reduction in energy consumption, a reduction in emissions or any other environmental measure. The substance of the agreements must be negotiated by each Member State and will be assessed by the Commission when the aid projects are notified to it. Member States must ensure strict monitoring of the commitments entered into by the firms or associations of firms. The agreements concluded between a Member State and the firms concerned must stipulate the penalty arrangements applicable if the commitments are not met.

These provisions also apply where a Member State makes a tax reduction subject to conditions that have the same effect as the agreements or commitments referred to above;

(b) these exemptions need not be conditional on the conclusion of agreements between the Member State concerned and the recipient firms if the following alternative conditions are satisfied:

— where the reduction concerns a Community tax, the amount effectively paid by the firms after the reduction must remain higher than the Community minimum in order to provide the firms with an incentive to improve environmental protection,

— where the reduction concerns a domestic tax imposed in the absence of a Community tax, the firms eligible for the reduction must nevertheless pay a significant proportion of the national tax.'

(105) In the present case, the excise duties applied were certainly higher (before exemptions and reductions) than the harmonised level of taxation (see recitals 43 and 46), but it does not appear that agreements such as those provided for by point 51.1(a) were concluded between the Member State and the beneficiaries or that similar agreements were voluntarily entered into by the latter (the Commission has not been notified of any agreement). Moreover, the Italian authorities have underlined that the exemptions in question were granted to deal with a difficult economic situation and have never referred to any environmental measure required of the beneficiaries in return.

(106) The alternative to the conclusion of agreements provided for in point 51.1(b) cannot be applied in the present case since, during the part of the period under consideration that came after the 2001 guidelines became applicable, glasshouse growers enjoyed a total exemption from excise duty and thus did not pay an amount greater than the Community minimum ([20]), at such a level as to encourage them to take action to improve environmental protection, as provided for by the 2001 guidelines in cases where the reduction concerns a Community tax.

(107) However, recital 52 of the 2001 guidelines states that where an existing tax is increased significantly and where the Member State concerned takes the view that derogations are needed for certain firms, the conditions set out in point 51.1 as regards new taxes are applicable by analogy. Therefore, it is first necessary to examine whether the excise duties increased significantly.

(108) The table in point 46 above shows that excise duties did not increase significantly, since their variation was as follows: – 5,4 % between 1999 and 2000, – 6,98 % between 1999 and 2001, + 1,9 % between 1999 and 2002 and + 1,3 % between 1999 and 2003. From one year to the next, the variation was as follows: – 5,4 % from 1999 to 2000, – 1,6 % from 2000 to 2001, + 9,5 % from 2001 to 2002 and – 0,5 % from 2002 to 2003. It can be seen, therefore, that excise duties have been constantly on the decline except between 2001 and 2002. However, the increase seen during that period cannot be considered significant, since, in actual fact, it had practically no effect on trends in the consumer price of diesel for heating (according to the information in the table, the consumer price for diesel for heating increased by only 2,2 % over those two years). Accordingly, the provisions of point 52 of the 2001 guidelines cannot be applied in this case.

(109) Lastly, point 53 of the 2001 guidelines states that when the reductions concern a tax that has been harmonised at Community level and when the domestic tax is lower than or equal to the Community minimum, any exemptions granted must satisfy the conditions laid down in points 45 and 46 and must, in any event, be covered by an express authorisation to derogate from the Community minimum.

(110) Point 45 of the 2001 guidelines states that the duration of the aid must be limited to five years where the aid is degressive and that the aid intensity may reach 100 % of the extra costs ([21]) in the first year, but must have fallen in a linear fashion to zero by the end of the fifth year.

(111) Point 46 of the 2001 guidelines states that the duration of non-degressive aid is limited to five years and that its intensity must not exceed 50 % of the extra costs.

(112) In the case under examination, the Commission has already noted that the aid was not degressive (see recital 88 above). In consequence, only the provisions of point 46 of the guidelines could be applied to it. However, the information supplied by the Italian authorities in no way allows the Commission to conclude that the aid intensity was limited to 50 % of the extra production costs generated by the excise duties by comparison with the market prices of products grown in glasshouses.

(113) Accordingly, the aid cannot be considered eligible on the basis of the provisions of point 46 of the 2001 guidelines or, in consequence, on the basis of the provisions of point 53 thereof.

([20]) EUR 13 per 1 000 kg for the 2000-2003 period and EUR 21 per 1 000 litres – see recital 43.

([21]) Extra costs are defined in point 43 of the guidelines as extra production costs by comparison with the market prices of the products.

(114) The considerations set out in recitals 94-112 above demonstrate that the aid under examination cannot be declared compatible with the common market on the basis of the provisions of the 2001 guidelines.

(115) With regard to the other arguments put forward by the Italian authorities at the various stages of examination of the case, the Commission considers that there is no information allowing it to dispel the doubts expressed in recital 34(b) above. The argument referred to in recital 43 above that the measure adopted by Italy could be compatible with the common market if the beneficiaries paid the minimum amount set at Community level is not relevant, since glasshouse growers enjoyed a total exemption from excise duty for almost the whole period under examination and thus did not pay taxes.

(116) As for the arguments put forward by the interested third party which sent comments after the procedure was initially opened, they do not supply elements supporting the compatibility of the aid with the common market. Indeed, with regard to the difficulty of the situation in which the beneficiary undertakings would find themselves if the aid were declared incompatible and recovered, it should be recalled that recovery of incompatible aid is necessary to restore the previous situation, i.e. the situation without distorted competition that existed before the aid was granted. The fact that certain undertakings are no longer profitable is simply the result of free competition under normal market economy conditions. On the other hand, there is no evidence that reducing diesel consumption necessarily brings about a reduction in the quality of products obtained (at most, such a reduction could slightly delay ripening or growth). Lastly, the reference to the situation in other countries in order to demonstrate that competition is not distorted is not relevant. In this connection, it is sufficient to note that the exemption allows the competitive position of Italian glasshouse growers to be improved as compared to the situation in other countries and that, therefore, the starting point for comparison must be the situation in Italy without the exemptions.

XI. **CONCLUSION**

(117) The Commission finds that Italy has unlawfully implemented the aid in question, contrary to Article 88(3) of the Treaty. The analysis set out above demonstrates that the aid cannot be declared compatible with the common market because it does not comply with the conditions of the 2000 and 2007 agricultural guidelines and the 1994 and 2001 environmental guidelines. Moreover, the analysis has demonstrated that the mere existence of Directives cannot justify the implementation of measures liable to distort competition, and the Italian authorities have not dispelled all the doubts expressed by the Commission when the procedure under Article 88(2) of the Treaty was initiated.

(118) Under Article 14(1) of Regulation (EC) No 659/1999, where negative decisions are taken in relation to unlawful aid, the Commission is to decide that the Member State concerned must take all necessary measures to recover the aid from the beneficiary (in this case glasshouse growers). Italy is thus required to take all necessary measures to recover from the beneficiaries the incompatible aid paid, the value of which corresponds to the difference between the total excise duty exemption granted and the reduced rate of excise duty granted to other operators in the agricultural sector. Under point 42 of the Notice from the Commission 'Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid' ([22]), Italy has four months from the entry into force of this Decision to implement its provisions. The aid to be recovered must bear interest calculated in accordance with Commission Regulation (EC) No 794/2004 ([23]) implementing Council Regulation (EC) No 659/1999.

(119) However, any individual aid granted under the aid scheme under examination which, at the time it was granted, satisfied the conditions laid down in a Commission regulation adopted on the basis of Article 2 of Council Regulation (EC) No 994/98 ([24]) (the *de minimis* Regulation) is not considered to be State aid within the meaning of Article 87(1) of the Treaty.

(120) No Community provisions governing *de minimis* aid in the agricultural sector were in force when the aid under examination was granted.

(121) The first such Community provisions were those of Commission Regulation (EC) No 1860/2004 of 6 October 2004 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid in the agriculture and fisheries sectors ([25]).

(122) In accordance with Regulation (EC) No 1860/2004, aid not exceeding EUR 3 000 per beneficiary over a three-year period (this amount constitutes the *de minimis* aid granted to the undertaking) does not affect trade between Member States and does not distort or threaten to distort competition and therefore is not covered by the prohibition under Article 87(1) of the Treaty.

([22]) OJ C 272, 15.11.2007, p. 4.
([23]) OJ L 140, 30.4.2004, p. 1.
([24]) OJ L 142, 14.5.1998, p. 1.
([25]) OJ L 325, 28.10.2004, p. 4.

(123) Under Article 5 of Regulation (EC) No 1860/2004, the same applies to aid granted before the entry into force of that Regulation provided that all the conditions laid down in Articles 1 and 3 thereof are satisfied.

(124) On 1 January 2008, Regulation (EC) No 1860/2004 was replaced by Commission Regulation (EC) No 1535/2007 of 20 December 2007 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid in the sector of agricultural production ([26]), which increased the amount of *de minimis* aid to EUR 7 500 per beneficiary over three tax years, irrespective of the form of the aid or the objective pursued, within a ceiling per Member State of 0,75 % the value of annual output.

(125) Article 6(1) of that Regulation provides that the Regulation '[applies] to aid granted before 1 January 2008 to undertakings in the sector of agricultural production, provided that such aid fulfils all the conditions laid down in Articles 1 to 4, except for the reference requirement clearly set out in this Regulation in the first subparagraph of Article 4(1)'.

(126) In this context, the Commission does not consider tax reductions not exceeding EUR 3 000 to be State aid provided that, when they were granted, they complied with Regulation (EC) No 1860/2004. The same applies to tax reductions not exceeding EUR 7 500 provided that, when they were granted, they complied with Regulation (EC) No 1535/2007,

HAS ADOPTED THIS DECISION:

Article 1

The aid scheme in the form of an exemption from excise duties on diesel used for heating glasshouses, which was implemented unlawfully by Italy between 3 October 2000 and 30 June 2001 and in the years 2002, 2003 and 2004, is incompatible with the common market.

Article 2

1. Italy is required to recover from the beneficiaries the incompatible aid granted under the scheme referred to in Article 1.

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

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.

Article 3

Recovery of the aid granted under the scheme referred to in Article 1 shall be immediate and effective.

Italy shall ensure that this Decision is implemented within four months following the date of its notification.

Article 4

Within two months of notification of this Decision, Italy shall submit the following information:

(a) a list of beneficiaries that have received aid under the scheme referred to in Article 1 and the total amount of aid received by each of them under the scheme;

(b) the total amount (principal and interest) to be recovered from each beneficiary;

(c) a detailed description of the measures already taken and those planned to comply with this Decision;

(d) documents demonstrating that orders to return the aid have been sent to the beneficiaries.

Italy shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid granted under the scheme referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, any information on the measures already taken and those planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and interest already recovered from the beneficiaries.

Article 5

This decision is addressed to the Italian Republic.

Done at Brussels, 13 July 2009.

For the Commission

Mariann FISCHER BOEL

Member of the Commission

([26]) OJ L 337, 21.12.2007, p. 35.