DECISIONS

COMMISSION DECISION

of 20 July 2010

on the parafiscal charge for the promotion of wine applied by Portugal C 43/04 (ex NN 38/03)

(notified under document C(2010) 4891)

(Only the Portuguese text is authentic)

(2011/6/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union (TFEU) [1], and in particular the first subparagraph of Article 108(2) thereof,

Having called on interested parties to submit their comments pursuant to the provision cited above [2],

Whereas:

I. PROCEDURE

(1) Following a complaint, the European Commission, by letter of 20 January 2003, put a number of questions to the Portuguese authorities concerning a parafiscal charge for the promotion of wine, levied by the Instituto da Vinha e do Vinho (Vine and Wine Institute), and measures funded by the revenue from that charge.

(2) The Permanent Representation of Portugal to the European Union replied to the Commission by letter of 14 March 2003. Additional information was sent by letters of 4 August, 2 September 2003, 24 February and 15 July 2004 in response to the questions asked by the Commission by faxes of 14 May and 22 December 2003.

(3) Since the provision in question was applied from 1995 without any prior authorisation from the Commission, it was entered in the register of unnotified aid. In fact, the measures applied by Portugal is new aid, not notified to the Commission and, accordingly, illegal within the meaning of Article 1(f) 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 [3] (now Article 108 of the TFEU).

(4) By letter of 6 December 2004 (C(2004) 4522), the Commission notified Portugal of its decision to initiate the formal examination procedure provided for in Article 108(2) of the TFEU in relation to this aid. The Commission's decision to initiate the procedure was published in the *Official Journal of the European Union* [4]. The Commission invited interested parties to submit observations concerning the measure in question.

(5) The Portuguese authorities submitted their observations by letters dated 11 and 13 January 2005. They supplemented their reply by letter of 24 May 2006. The Commission did not receive any observations from interested third parties.

II. DESCRIPTION OF THE AID

(6) This section briefly summarises the context and the salient facts with regard to the measures examined in this decision. The details are set out in the decision on initiation of the procedure referred to in recital 4.

1. The Vine and Wine Institute

(7) The IVV is a public body established in 1986 to guarantee the control and general coordination of the vine and wine sector in Portugal. In accordance with the provisions of Decree-Law No 99/97 of 26 April 1997 establishing the 'Organic law of the IVV' [5], its general tasks are the support, study, control, supervision and promotion of the production and marketing of wines and wine products and for these purposes it possesses administrative and financial autonomy.

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[1] As of 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The wording of both sets of provisions is identical. For the purposes of this decision, references to Articles 107 and 108 of the TFEU must be understood, where appropriate, as referring to Articles 87 and 88 respectively of the EC Treaty.

[2] OJ C 92, 16.4.2005, p. 12.

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

[4] See footnote 2.

[5] Decree-Law No 99/97 of 26 April 1997 (DR No 97 I-A of 26.4.1997).

(8) This body carries out activities assigned by domestic and Community legislation relating to the wine sector and, in particular, it is the national authority designated by the Portuguese State ([6]) as responsible for checking compliance with Community provisions concerning the wine sector in terms of Article 72(1) of Council Regulation (EC) No 1493/1999 of 17 May 1999 on the common organisation of the market in wine ([7]).

(9) As part of its functions for the general coordination of the wine sector, the IVV performs two kinds of activity:

— those relating mainly to wines and wine products produced in Portugal, namely assignments relating to the land registry and viticultural assets and also the audit of systems for the control and certification of quality wines produced in specific areas (QWPSR) and regional wines (on average, 2,8 % of the IVV's budget), and

— those intended indifferently for wines and wine products originating from Portugal and from other Member States and/or third countries and marketed in Portugal, namely activities for the management and coordination of the wine market and monitoring and supervision of the wine sector in accordance with domestic and Community legislation (activities absorbing almost the entire budget of the IVV).

(10) The IVV also acts as a provider of certain services to third parties, namely: (i) the organisation and promotion of training activities for economic agents, trade and joint trades organisations in the wine sector and officials of the IVV; (ii) making the storage capacity of the IVV's infrastructures available to economic agents in the sector, and (iii) the provision of services of the IVV's laboratory and the training of its own staff and other operators in the wine sector (largely funded by domestic and Community support programmes).

2. **Wine promotion measures**

(11) The IVV also organises wine promotion. It does so by granting support to organisations of a joint trades nature which are representative of the wine sector and which undertake promotion and advertising activities for wine and wine products. This support is funded by some of the revenue from the promotion charge levied on domestic and imported products, a percentage set annually by the Portuguese authorities, who at the same time lay down the criteria for the selection of the entities which are the beneficiaries of the support ([8]).

(12) Since 1997, the support for the generic promotion of wine and wine products has been allocated by a public and competitive procedure to a Portuguese joint trades association representative of the Portuguese wine sector called Viniportugal. As the only candidate since 1997, Viniportugal has thus been the beneficiary of all of the revenue from the parafiscal charge intended for those purposes.

(13) This percentage of the charge has been earmarked to fund two different types of promotion campaign:

— firstly, generic promotion campaigns for wine and wine products, without reference to their origin, in Portugal,

— secondly, campaigns for the promotion of Portuguese wine and wine products in other Member States and third countries.

2.1. *Generic promotion of wine in Portugal*

(14) As regards generic promotion campaigns for wine in Portugal, the Portuguese authorities state that Viniportugal carries out functions in support of, and implementing, activities for the promotion of wine and wine products, such as the promotion of cultural and scientific activities linked to the wine sector. In this connection, Viniportugal promotes wine culture by organising fairs and exhibitions devoted to this speciality, publications on the subject, presentation and public awareness measures and also via advertising campaigns from the angle that wine promotion in general directly influences wine consumption in Portugal.

(15) The Portuguese authorities point out that, in any event, the promotion and advertising activities conducted by Viniportugal are not aimed at dissuading consumers from buying wine products from other Member States or denigrating those products. Nor do they benefit a trademark of a particular undertaking or individual producer.

([6]) See the 'List of national authorities responsible for verifying compliance with Community provisions in the wine sector' OJ C 46, 19.2.1999, p. 169.

([7]) OJ L 179, 14.7.1999, p. 1.

([8]) This percentage was 25 % in 1997; 25 % for the first half of 1998 and 30 % for the second half of 1998; 35 % for the first half of 1999 and 40 % for the second half of 1999; 45 % in 2000; 45 % in 2001; 25 % in 2002; 27,5 % in 2003; 30 % in 2004; and 30 % in 2005.

(16) The main aim of the advertising campaigns at national level is to win young adult consumers of both sexes over to the healthy consumption of wine as an alternative to beer or other alcoholic drinks.

(17) Viniportugal also promotes the publication of books, prospectuses and practical guides to wine in order to popularise wine culture; it concludes agreements with higher education establishments to promote the training of professionals in the wine and restaurant business; it supports the Portuguese Association of Sommeliers in order to raise the quality of wines served on public premises and to guarantee familiarity with the properties of wine in general; finally, Viniportugal promotes the moderate and responsible consumption of wine through collaboration with health bodies by organising seminars on combating high blood alcohol levels and on road safety and proposing a code of good practices for wine advertising in order to promote wine in a dignified way and prevent the promotion of pre-adolescent alcohol consumption. The Portuguese authorities have also provided samples of their advertising which demonstrate compliance with these principles.

2.2. *Promotion of Portuguese wine on the markets of other Member States and third countries*

(18) As regards campaigns for the promotion of Portuguese wine and wine products on the territory of other Member States and third countries, the Portuguese authorities have indicated that the activities conducted on the markets of other Member States and third countries seek to promote Portuguese wines and take the practical form of the publication of advertisements in specialist magazines, the distribution of newsletters, participation in specialist exhibitions and the promotion of visits by specialist journalists to Portugal. The authorities assure the Commission that these campaigns are not intended to discourage consumers from buying products from other Member States or disparage the abovementioned products and they do not benefit a trademark of a particular undertaking or an individual producer. In this connection, the Portuguese authorities have provided examples and samples of advertising in the specialist foreign press.

3. **Training measures**

(19) The IVV is the organisation responsible for promoting and carrying out activities for the technical training of, and imparting awareness to, economic agents in the wine sector in order to guarantee the quality of wines and wine products. During the period from 1997 to 2002, this service arranged various training schemes for officials of the IVV (1 449 officials), other public officials and, to a lesser extent (135 agents), for operators in the sector.

(20) The Portuguese authorities point out that the cost of the training schemes arranged by the IVV in this period was, with the exception of the general training session 'Sistema de Informaçao e Gestão Vitivinícola 2000', the total cost of which was EUR 367,12, entirely borne by the Support Programmes for the Modernisation of Agriculture and Forestry (PAMAF) 6 and by the Agro/Measure 7 Programme, both co-financed by the European Social Fund. They state that, accordingly, neither the IVV nor the economic agents had to contribute towards the funding of these training schemes.

4. **The wine promotion charge**

(21) The measure at issue relates to the use of revenue from a parafiscal charge levied by the Vine and Wine Institute (hereinafter 'the IVV') on operators in the sector since 1995 ([9]). This charge is intended to confer on that public body sufficient resources for the performance of coordination tasks in the wine sector in Portugal and represents over 62 % of the budget allocated to running the IVV.

(22) According to Article 1(1) of Decree-Law No 119/97, wines and wine products produced on national territory, together with products from outside the country and marketed in Portugal, are subject to the application of a promotion charge by way of compensating IVV for the services it provides in relation to the generic promotion and general coordination of the sector or, in the Autonomous Regions of the Azores and Madeira, by the respective regional services.

(23) This promotion charge is levied not only on wine products which are produced and marketed in Portugal but also on those produced in Portugal and marketed in other Member States or in third countries (exports), and also on wine products originating from other Member States or third countries which are marketed in Portugal (imports).

(24) The amount to be paid is laid down yearly by the competent authorities of the Ministry of Agriculture. This amount varies according to whether the product is packaged and the capacity of the container ([10]).

([9]) Charge established by Decree-Law No 137/95 of 14 June 1995 (DR No 136 I-A of 14.6.95), amended by Decree-Law No 119/97 of 15 May 1997 (DR No 112 I-A of 15.5.97).

([10]) For the year 2002, Order No 1428/2001 of 15 December 2001 lays down the following amounts: in the case of products packaged in containers with a capacity of 60 litres or less: between EUR 0,0034/unit if the capacity is 0,25 of a litre or less and EUR 0,0135/litre if the capacity is 2 litres or more; for products sold to the retailer, to the consumer, for export or direct sale by the producer which are packaged differently, between EUR 0,0034/unit if the capacity is 0,25 of a litre or less and EUR 0,0135/litre if the capacity is over 1 litre.

(25) The revenue from the promotion charge is intended, despite its name, firstly to fund services for the general coordination of the wine sector performed by the IVV and secondly for activities for the promotion of wine and wine products.

ARGUMENTS PUT FORWARD BY THE COMMISSION ON THE INITIATION OF THE FORMAL EXAMINATION PROCEDURE

(26) On the initiation of the procedure, the Commission considered that, in the exercise of the activities for the general coordination of the wine sector conferred by Community and domestic legislation and also when it organises the allocation of aid for the promotion of wine, the IVV is acting not as a private operator but as a public authority and that there is therefore no State aid in regard to it (see point 66 of the procedure initiation decision).

(27) As regards the activities of the IVV as a provider of certain services to third parties according to the conditions of the market (see recital 15 above), no economic advantage existed for the IVV on account of its position on the market and therefore no State aid existed in regard to it (see point 70 of the procedure initiation decision).

(28) On the basis of the information at its disposal, the Commission also considered that there was no economic advantage and therefore no aid in favour of Viniportugal. The joint trades association is merely a provider of services which was selected according to objective criteria and by means of a public, transparent and non-discriminatory procedure to supply such services (see point 87 of the procedure initiation decision).

(29) However, when the Commission initiated the examination procedure, it considered there was State aid within the meaning of Article 107(1) of the TFEU in favour of economic operators in the wine sector as regards the funding of campaigns for the promotion and advertising of wine and wine products (see point 80 of the procedure initiation decision).

(30) As regards training activities, the Commission also considered there was State aid within the meaning of Article 107(1) of the TFEU (see points 79 and 80 of the procedure initiation decision).

(31) The Commission initiated the procedure provided for in Article 108(2) of the TFEU because it entertained doubts as regards the compatibility of these two types of aid with the internal market.

(32) Thus as regards the support for Portuguese wine advertising on the market of other Member States and third countries, the Commission did not, at the initiation stage, have sufficient information enabling it to conclude that these campaigns, although mentioning the origin of the wines, only conveyed information on the objective characteristics of the products concerned and did not contain subjective claims regarding the quality of the products based simply on their origin (see point 119 of the procedure initiation decision).

(33) As regards the funding of aid for promotion and training, the Commission considered, in accordance with the case law of the Court of Justice, that aid for domestic producers could only be funded by parafiscal charges applicable also to imports from producers of the same product in other Member States when there are assurances that these can benefit from these advantages in the same way as domestic producers. The Commission did not, at the procedure initiation stage, have sufficient information enabling it to conclude that in the present case there had not been any discrimination between domestic and imported products. Accordingly, it is unable to conclude that the products from other Member States, on which the charge also had to be paid, benefited in the same way and to the same extent as domestic products from all the advantages arising from the charge (see point 135 of the procedure initiation decision).

(34) The Commission thus asked the Portuguese authorities to provide any information it could which might be useful for the evaluation of the measures in question, particularly as regards the non-discriminatory nature of the method of funding the aid in question (i.e. the aid for the promotion and advertising of wine and wine products, both in Portugal and on the territory of other Member States and third countries and also training aid), and with regard to the objective nature of the advertising campaigns conducted on the markets of Member States and third countries.

(35) This decision is limited to examining the application of the parafiscal charge from its entry into force until 31 December 2006, the date of the entry into force of the Community's new Guidelines on State aid in the agricultural and forestry sector 2007-2013, without prejudice to the position which the Commission will take in relation to application of the promotion charge beyond that date.

III. OBSERVATIONS SUBMITTED BY PORTUGAL

(36) Following the decision to initiate the procedure under Article 108(2) of the TFEU, the Portuguese authorities sent their observations by letters dated 11 and 13 January 2005. They supplemented their reply by a letter of 24 May 2006.

1. Training aid

(37) As regards aid for training, the Portuguese authorities stated the following.

(38) Between 1997 and 2000, the IVV undertook training activities relating to essential questions in the wine sector in Portugal which were directed mainly at employees of the IVV and other public bodies and, to a lesser extent, operators in the wine sector.

(39) The cost of all these activities promoted and organised by the IVV in the period in question was entirely supported by the 'Support Programmes for the Modernisation of Agriculture and Forestry' (PAMAF 6) and the programme 'Agro/Medida 7', which is co-financed by the Community by means of the European Social Fund (ESF) – and the 'Programme of Investment and Development Expenditure of Central Government' (PIDDAC).

(40) The only activity in the period in question whose cost was actually covered by the IVV's budget was the general training 'Sistema de Informação e Gestão Vitivinícola 2000', which took place in 2000 at a total cost of EUR 367,12; it was aimed at staff of the Regional Agriculture Departments (the regional services of the Ministry of Agriculture itself) and of the Regional Viticulture and Wine Committees, which are the competent bodies for guaranteeing the authenticity and quality of wines from specific regions.

(41) Finally, they point out that the negligible cost of this activity – only EUR 367,12 – makes its impact on competition in the common market non-existent, or at most minimal.

2. **Aid for the promotion and advertising of Portuguese wine on markets of other Member States and third countries**

(42) As regards the doubts entertained by the Commission concerning the support granted to the advertising of Portuguese wine on the market of other Member States and third countries, the Portuguese authorities have provided the following information.

(43) Viniportugal's promotion and advertising activities in Portugal and in the territory of other Member States and third countries are of a general nature, do not relate to specific trademarks and are not aimed at the promotion of particular undertakings or individual producers.

(44) These campaigns are not intended to disparage the wine products of other Member States or discourage consumers from buying wine products from other Member States, moreover they conform to applicable Community legislation (namely the legislation on the labelling, presentation and advertising of foodstuffs). Accordingly, Viniportugal's advertising activities in other Member States of the European Union and in third countries respect the negative criteria laid down in paragraphs 18 to 30 of the Community guidelines for State aid for advertising of products listed in Annex I to the EC Treaty and of certain non-Annex I products [11] (hereinafter 'Guidelines for State aid for advertising'), which were in force during the application of the aid in question.

(45) Similarly, these activities fulfil the positive criteria set out in paragraphs 31 et seq. of the Guidelines for State aid for advertising. These activities are intended to familiarise the consumers of other Member States with Portuguese wines, thereby facilitating the development of activities of the Portuguese wine sector within the meaning of 107(3)(c) of the TFEU.

(46) Viniportugal's campaigns outside Portugal are intended to publicise the basic characteristics of Portuguese wine, inviting consumers in other Member States and third countries to taste these unfamiliar products. The campaigns contain no subjective statement as to the quality of the products based solely on their origin; this is in accordance with the Guidelines for State aid for advertising.

(47) Consequently, the Portuguese authorities state that Viniportugal's advertising activities in other Member States of the European Union and also those conducted in third countries ought to be regarded as compatible with the common market in the light of Article 107(3)(c) of the TFEU and of the Guidelines for State aid for advertising.

(48) In support of their observations, the Portuguese authorities have provided examples and samples of advertising campaigns in the specialist foreign press.

3. **Funding of promotion and advertising campaigns for Portuguese wine in other Member States and third countries**

(49) As regards the doubts raised by the Commission in relation to the funding of campaigns for the promotion and advertising of wine in other Member States and third countries, the Portuguese authorities point out that, in the period between 1997 and 2005, the revenue from the levying of the charge on products originating from other Member States represented only 15 % of the total revenue from that charge.

Annual revenue from levying the wine promotion charge (Annual average for the years 1998-2005) [12]

Origin	Amount (EUR)	%
Domestic wines and wine products	7 327 957	85 %
Wines and wine products from other Member States and third countries	1 293 169	15 %
Total of average annual revenue (1998 to 2005)	8 621 126	100 %

[11] OJ C 252, 12.9.2001, p. 5.

[12] Although the system of aid instituted by Decree-Law No 119/97 only entered into force in the second half of 1997, Viniportugal only really began conducting promotion and advertising activities in 1998. Accordingly, only the revenue obtained by the IVV from 1998 will be taken into account for the purposes of this decision.

(50) In this connection, the Portuguese authorities consider that imported products contribute only to the payment of a portion of the generic promotion of wine and wine products conducted in Portugal, which equally benefits domestic products and those from other Member States. Again, according to the Portuguese authorities, the remaining funding of generic promotions is provided by the portion of the levy payable on domestic products, which benefit to the same degree from the resulting advantages. Moreover, the Portuguese authorities stated that the average costs of the generic promotion of wine and wine products are far higher than the portion of the amount granted to Viniportugal from the charge on promotion levied on products from other Member States. According to the Portuguese authorities, the support granted annually to Viniportugal in the period in question represented between 25 % and 45 % of the revenue from the charge on the promotion of wine (see recital 15 above). Of this amount, only 15 % derived from the collection of the charge on products imported from other Member States. The remaining 85 % came from revenue from the charge on domestic products ([13]). Accordingly, Viniportugal's activity is funded primarily by revenue from the charge levied on domestic products.

(51) The Portuguese authorities add that, during that same period, Viniportugal's expenditure on measures for the generic promotion of wine in Portugal represented on average 32 % of that association's total expenditure.

Viniportugal's expenditure (annual average of the years 1998-2005) ([14])

Measures	Amount (EUR)	%
Measures for promotion and advertising in other Member States and third countries	1 119 293	68 %
Measures for generic promotion in Portugal	525 698	32 %
Total average expenditure per year (1998 to 2005)	1 644 991	100 %

(52) Bearing in mind that the contribution of products from other Member States to Viniportugal's activities represented only 15 % of the total revenue of that association from the charge on promotion, the Portuguese authorities conclude that the contribution of those products was therefore limited to funding only part of the generic promotion measures which Viniportugal conducted in Portugal.

(53) These measures which, according to the Portuguese authorities, are likely to benefit domestic products and those imported from other Member States in equal measure, were funded on the one hand by the contribution of products of other Member States and on the other by the contribution of domestic products.

(54) The remainder of the contribution levied on domestic products for Viniportugal's activity was intended to fund all the measures for the promotion and advertising of Portuguese wines in other Member States and in third countries, thus being the only source of funding of these activities.

(55) The Portuguese authorities therefore conclude that there is no discriminatory treatment between domestic wines and wine products and those originating from other Member States, insofar as (i) both contribute towards the funding of activities for the generic promotion of wine and wine products and these activities equally benefit domestic products and those imported from other Member States; (ii) the promotion and advertising campaigns conducted by Viniportugal in other Member States and third countries and which exclusively benefit Portuguese wine are solely funded with the proportion of revenue from the charge levied on domestic wines and wine products.

(56) According to the Portuguese authorities, the mechanism for funding the aid measures in question must, therefore, be deemed compatible with Articles 107 and 110 of the TFEU.

IV. **ASSESSMENT**

1. **Existence of aid within the meaning of Article 107(1) of the TFEU**

(57) Articles 107 to 109 of the TFEU are applicable to the production of, and trade in, products in the wine sector by virtue of Article 71 of Regulation (EC) No 1493/99 ([15]) on the common organisation of the wine market.

([13]) By way of example, although 25 % of the revenue from the charge was assigned to promotion during 2002 and, on average, only 15 % of the revenue came from the levying of the charge on products from other Member States, the contribution of such products to the funding of promotion and advertising measures in that year represented only about 3,75 % of the total revenue from the charge.

([14]) Since the system of aid instituted by Decree-Law No 119/97 did not enter into force until the second half of 1997, Viniportugal only really began conducting promotion and advertising activities in 1998.

([15]) Repealed by Council Regulation (EC) No 479/2008 of 29 April 2008 on the common organisation of the market in wine (OJ L 148, 6.6.2008, p. 1).

(58) According to Article 107(1) of the TFEU, subject to any derogations provided for by that 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 shall, insofar as it affects trade between Member States, be incompatible with the common market.

(59) For a measure to fall within the scope of Article 107(1) of the TFEU, the following four conditions must therefore all be met: 1. the measure must be funded by the State or through State resources, 2. it must relate selectively to certain undertakings or production sectors, 3. it must entail an economic benefit for beneficiary undertakings, and 4. it must affect intra-Community trade and distort, or threaten to distort, competition.

(60) In the decision to initiate the formal examination procedure, the Commission raised doubts as regards the following questions: first, as regards the compatibility with Article 107 of the TFEU of the promotion measures on markets of other Member States and third countries; secondly, as regards compatibility with Article 107 of the TFEU of the training measures organised by the IVV, and thirdly, as regards the compatibility with Article 110 of the TFEU of the funding, by means of the parafiscal charge, of promotion measures on markets of other Member States and third countries. The Commission is accordingly restricting its examination to these questions.

1.1. *State resources*

(61) The aid which is the subject of this examination procedure have been funded by means of the parafiscal charge for the promotion of wine.

(62) As regards the question whether the revenue from the parafiscal charges can be regarded as State resources, it should be pointed out that no distinction must be made, in the case of State resources, between cases where aid is granted directly by the State and those where aid is granted via public or private bodies designated or created by the State ([16]).

(63) On 15 July 2004, the Court of Justice of the European Communities, in its judgment in Pearle ([17]) (Case C-345/02), held that obligatory contributions collected by an intermediary body from all the undertakings of a certain business sector can only be regarded as not being State resources if the following four conditions have all been met:

(a) The measure in question is established by the professional body that represents the undertakings and the employees of a business sector and does not serve as an instrument for the implementation of policies established by the State;

(b) The goals of the measure in question are fully financed by the contributions of the undertakings of the sector;

(c) The method of financing and the percentage/amount of the contributions are established in the professional body of the business sector by representatives of employers and employees, without any State interference;

(d) The contributions are obligatorily used for the financing of the measure, without the possibility for the State to intervene.

(64) The measure notified does not seem to meet all these conditions. The wine promotion charge was established by the Portuguese authority by means of a Decree-Law (see recital (11) as an instrument for the implementation of a policy established by the Portuguese Government, namely the promotion of wine. Moreover, the Portuguese authorities, in its legislative capacity, has the possibility of intervening in the determination of the financial arrangements of the measure and the use of the contributions. In the present case, the Portuguese State's intervention in this sense emerges clearly from the provisions of Decree-Laws No 137/95 of 14 June 1995 and No 119/97 of 15 May 1997.

(65) Since conditions (a), (c) and (d) of the Pearle judgment are not met, the revenue from the wine promotion charge must therefore regarded as 'State resources'.

1.2. *Existence of a selective advantage*

(66) It ought thus to be checked whether the mechanism being analysed 'distorts or threatens to distort competition by favouring certain undertakings or certain products'. The existence of aid must be established at the level of potential beneficiaries of the promotion of wine and its funding.

(67) Thus to constitute an aid within the meaning of Article 107, the compensation granted using State resources must secure an economic advantage which it would not have obtained under normal market conditions and this advantage must be selective. The criterion of selectivity is met where the abovementioned advantage is reserved for some undertakings or a business sector. This condition is therefore met in the present case, where the wine and wine products sector is clearly identified.

([16]) See the judgments of 13 March 2001 in Case C-379/98 *Preussen Elektra AG* [2001] ECR I-02099, paragraph 58, and of 20 November 2003 in Case C-126/01 *GEMO* [2003] ECR I-13769, paragraph 23.

([17]) Judgment of the Court of Justice in Case C-345/02 *Pearle BV, Hans Prijs Optiek Franchise BV and Rinck Opticiëns BV* v *Hoofdbedrijfschap Ambachten* [2004] ECR I-07139.

(68) On the initiation of the formal examination procedure, the Commission identified as beneficiaries economic operators which are recipients of the services provided by the IVV and Viniportugal. Irrespective of whether the funding of the IVV's activities represents a State aid in favour of that body, the question also arises of the possible qualification of the services provided by that body to the wine sector as 'State aid' within the meaning of Article 107(1) of the TFEU. There is no doubt that the operators in the sector in question (producers, processors, wholesalers, retailers, etc.) are undertakings conducting an economic activity.

(69) According to the case law of the Court of Justice, interventions which, in various ways, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict sense of the word, are of the same character and have the same effect ([18]).

(70) Accordingly, the question whether and, if appropriate, to what extent the activities funded by these 'State resources', namely the services offered to the sector by the IVV and the promotion campaigns organised by Viniportugal, constitute an economic advantage for the operators in the sector ought secondly to be answered.

(71) As regards the services of the IVV, it should be ascertained, on the one hand, whether and, if appropriate, to what extent, the economic operators in the wine sector in Portugal should have had to bear the costs of the abovementioned services in the absence of services provided by the IVV, and whether they constitute normal charges on the budget of an undertaking. To that end, a distinction should be made between three different groups of services:

1.2.1. Services of the IVV as a general coordinator of the sector

(72) The Commission is of the view that the services and activities of the IVV as a general coordinator of the wine sector, and particularly those of supervision, monitoring, certification, audit and management of the mechanisms of the market, are a consequence of the application of the requirements laid down by Community and domestic legislation and, as such, do not constitute activities normally a charge included in the budget of an undertaking but rather activities arising from the essential functions of the State.

1.2.2. Training services

(73) However, as regards the funding of the organisation of training schemes from which economic operators in the sector have been able to benefit, it seems clear that an advantage in their favour is involved here, since training is an activity whose cost is normally included in the budget of undertakings.

(74) According to the information provided by the Portuguese authorities when the procedure was initiated, all the training organised by the IVV, with the exception of the general training 'Sistema de Informação e Gestão Vitivinícola – 2000', whose cost was EUR 367,12, was co-financed by the European Social Fund and not, therefore, financed by revenue from the parafiscal charge. For that reason, this training does not come within the scope of the present investigation procedure.

(75) As regards the only training financed by revenue from the charge on the promotion of wine, namely the general training 'Sistema de Informação e Gestão Vitivinícola – 2000', the Commission notes that new information changed its designation and described it as State aid. According to the new information provided, this training was solely intended for staff of the Regional Agriculture Directorates and the Regional Viticulture and Wine Committees, which are the competent authorities for the control and verification of the authenticity and quality of wines in the regions concerned. It is clear from this information that this is not an aid measure intended for beneficiaries of the services provided by the IVV but an internal Government training measure.

(76) Accordingly, this training measure does not constitute State aid within the meaning of Article 107(1) of the TFEU.

1.2.3. Services for conducting promotion campaigns

(77) As regards the conduct of promotion campaigns for wine and wine products via Viniportugal, there is an actual economic advantage in favour of economic operators in the sector and in particular in the wine sector in Portugal. The organisation of the promotion of these products is normally a charge included in an undertaking's budget.

(78) Accordingly, the Commission concludes that the provision of services consisting of conducting promotion campaigns does constitute a selective advantage through State resources for economic operators in Portugal's wine sector.

1.3. *Affecting of trade and distortions of competition*

(79) Lastly, in order to establish whether the aid in question falls within the scope of Article 107(1) of the TFEU, it must be established whether it is liable to affect trade among Member States and distort, or threaten to distort, competition by favouring certain undertakings or certain products.

([18]) See Judgments of 1 December 1998 in Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 34, and of 17 June 1999 in Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraph 23.

(80) The Court of Justice has held that, where an advantage granted by a Member State strengthens the position of one category of undertakings in relation to other competing undertakings in intra-Community trade, the latter must be regarded as affected by that advantage ([19]).

(81) The measures in question are liable to affect trade among Member States insofar as they promote domestic production to the detriment of the production of other Member States. In fact, the wine sector is extremely open to competition at Community level and, therefore, highly sensitive to any measure in favour of production in any Member State.

(82) The fact that there is trade among Member States in the wine and wine products sector seems to be demonstrated by the existence of a common organisation of the market in the sector.

(83) The following table shows, by way of example, the level of intra-Community trade in these products between the years 1999 and 2004 ([20]).

	1 000 Hl	
Year	EU imports	EU exports
1999 (EU-15)	35 595	40 921
2000 (EU-15)	—	—
2001 (EU-15)	32 699	35 558,4
2002 (EU-15)	31 810,3	35 002,9
2003 (EU-15)	33 024,7	35 343
2004 (EU-25)	35 513,3	38 696,4

(84) Accordingly, so far as concerns the funding of the campaigns for the promotion and advertising of wine and wine products with part of the revenue from the wine promotion charge, the Commission confirms its position concerning the existence of State aid in favour of economic operators in the wine and wine products sector within the meaning of Article 107(1) of the TFEU.

1.4. *Conclusions on the nature of 'aid' for the purposes of Article 107(1) of the TFEU*

(85) In light of the foregoing, the Commission takes the view that the measures in favour of economic operators in the wine and wine products sector confer an advantage on them which is funded through State resources and from which other operators cannot benefit. This advantage distorts, or threatens to distort, competition by favouring certain undertakings and certain products, since it is liable to affect trade among Member States. Accordingly, the Commission concludes that these measures are covered by Article 107(1) of the TFEU.

2. **Legality of aid for promotion and advertising**

(86) The Portuguese authorities did not notify the Commission, as required by Article 108(3) of the TFEU, of the mechanisms establishing the abovementioned parafiscal charge or of the funding of measures in favour of the wine sector.

3. **Examination of the compatibility of the aid for promotion and advertising**

(87) There are, however, exceptions to the principle of incompatibility set out in Article 107(1) of the TFEU.

(88) In particular, Article 107(3)(c) of the TFEU provides that aid to facilitate the development of certain economic activities or of certain economic areas may, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, be considered to be compatible with the common market.

(89) According to the Commission's communication on the determination of the rules applicable to the assessment of illegal State aid, any illegal aid within the meaning of Article 1(f) of Regulation (EC) No 659/1999 must be evaluated in accordance with the rules in force at the time the aid was granted.

(90) Hence the compatibility of aid granted before 1 January 2002 must be checked in light of the framework for domestic aid for advertising agricultural products and certain products not covered by Annex II to the EEC Treaty ([21]) and, in the case of aid granted after that date, in light of the Guidelines applicable to State aid to advertising, cited above, without prejudice to particular temporal implementation rules laid down in those Guidelines.

(91) The 1987 framework and the Guidelines do, however, essentially share the same principles. They provide for negative and positive criteria which must be complied with by all national aid systems. Thus the measures in question must not be advertising measures contrary to Article 28 of the Treaty (now Article 34 of the TFEU) or to secondary Community law and must not be geared to certain undertakings.

([19]) Judgment of the Court of Justice in Case 730/79 *Philip Morris* [1980] ECR 2671, paragraph 11.

([20]) Source: Eurostat. There are no data for 2000.

([21]) OJ C 302, 12.11.1987.

3.1. *Generic promotion campaigns in Portugal*

(92) According to the information sent by the Portuguese authorities, it may be concluded that these measures have objectives which fall within the scope of a number of the positive criteria adopted in the above instruments, since they are part of the development objective of small and medium-sized undertakings, of certain areas or even of the objective of development of high-quality products and healthy food.

(93) The Portuguese authorities have, furthermore, explained that the messages conveyed by the promotion and advertising measures are of a general nature and consist mainly of putting on exhibitions, participating in fairs and publishing catalogues and other media and are not intended to discourage consumers from buying products from other Member States or disparage those products, and they do not benefit a trademark of a particular undertaking or individual producer.

(94) In the decision initiating the formal examination procedure (point 108), the Commission took the view that the public aid paid to finance promotion measures in the present case up to 1 January 2002 complied with the criteria laid down in the relevant Community provisions.

(95) From 1 January 2002, point 8 of the Community guidelines for State aid for advertising of products listed in Annex I to the EC Treaty and of certain non-Annex I products provides that promotion measures, such as the dissemination to the general public of scientific knowledge, the organisation of trade fairs or exhibitions, participation in these and similar public relations exercises, including surveys and market research, are not regarded as advertising. State aid for such promotion in the broad sense is subject to points 13 and 14 of the Community guidelines for State aid in the agriculture sector.

(96) Point 13.2 of the Community guidelines concerning State aid in the agricultural sector provides that aid can be granted for recourse to consultancy and similar services, including technical studies, feasibility and design studies and market research, to be given for activities related to the development of quality agricultural products. Moreover, point 14 allows the granting of aid relating to technical assistance in the agricultural sector. In particular, aid intended to disseminate new techniques is authorised.

(97) The aid described above can fall within one or other of these categories, given that they ultimately relate to providing technical support to the production in question by means of support for the marketing of quality agricultural products and the generic creation of public awareness of their characteristics.

(98) Aid covering up to 100 % of the costs is therefore permitted in those cases. In order to prevent the possibility of large amounts of aid being granted to large companies, the total amount of aid which may be granted under this section should not exceed EUR 100 000 per beneficiary over any three-year period, or, in the case of aid granted to undertakings falling within the scope of the Commission definition of SMEs, 50 % of the eligible costs, whichever is greater. For the purpose of calculating the amount of aid, the beneficiary is considered to be the recipient of the services.

(99) The Portuguese authorities have explained that, since the measures in question are generic and general in scope and their actual benefit is totally dispersed among all the players in the wine sector, the level of aid per beneficiary therefore remains below the threshold of EUR 100 000 in 3 years.

(100) In the initiation decision for the formal investigation procedure (point 114), the Commission considered that State aid paid to fund the promotion measures in question after 1 January 2002 seem to have complied with the criteria laid down in the relevant Community provisions.

(101) In view of the information provided by the Portuguese authorities throughout the preliminary examination of this dossier and in the absence of any comments to the contrary by third parties following the initiation of the formal investigation procedure, the Commission confirms the position expressed on the initiation of the procedure [22], concerning the compatibility with the applicable Community provisions of the generic promotion campaigns for wine conducted by Viniportugal in Portugal.

— In this regard, the Commission takes particular note of the assurances provided by the Portuguese authorities regarding the objectives of the measure: the development of small and medium-sized undertakings, development of certain regions and the development of products of high-quality products and healthy food (point 32 of the Guidelines for State aid for advertising);

— the nature of the campaigns: the messages conveyed by the promotion and advertising measures are of a general nature, consisting mainly of the holding of exhibitions, participation in fairs, the publication of catalogues and other media and are not intended to discourage consumers from buying the products of other Member States or to disparage those products, nor do they benefit a trademark of a particular undertaking or individual producer (point 20 of the Guidelines applicable to State aid for advertising);

[22] See points 108 to 114 of the decision to initiate the formal investigation procedure.

— the limits of the support: the measures are entirely funded by parafiscal charges and the financial efforts of traders in these campaigns reach, by definition, 50 % of their cost. Moreover, since generic measures are involved which are general in scope and whose real benefit is totally dispersed among all the players in the wine sector, the level of aid per beneficiary will remain below the threshold of EUR 100 000 in 3 years.

3.2. *Campaigns for the promotion and advertising of Portuguese wine in markets of other Member States and third countries*

(102) As regards the campaigns for the promotion and advertising of Portuguese wine in markets of other Member States and third countries conducted by Viniportugal, in particular after 1 January 2002, the Commission raised doubts as to the compatibility of these campaigns with the provisions of the Guidelines for State aid for advertising.

(103) According to point 4.1 of those Guidelines, advertising campaigns undertaken directly or indirectly by a Member State in the market of other Member States with a view to familiarising consumers with agricultural products of a particular Member State or area, or even with an entire category of the products of a Member State, are acceptable. Nevertheless, these campaigns need to convey information on the objective characteristics of the products concerned and must not contain subjective claims about the quality of the products based solely on their origin.

(104) However, when it initiated the procedure, the Commission did not have sufficient information to conclude that these campaigns, although mentioning the origin of the wines, only conveyed information on the objective characteristics of the products concerned and did not contain subjective claims as to the quality of the products based solely on their origin. The Portuguese authorities had thus been invited to show that any reference to the origin of the products did indeed comply with those conditions.

(105) The Commission takes note of the assurances provided by the Portuguese authorities as regards (i) the general nature of Viniportugal's promotion campaigns (see recital 37 above); (ii) the fact that Viniportugal's promotion and advertising activities in Portugal and in the territory of the other Member States and third countries did not relate to specific trademarks, nor were they aimed at promoting certain undertakings or individual producers (see recital 37); (iii) the fact that the campaigns did not seek to disparage the wine products of other Member States or to discourage consumers from buying them, and they conformed to the applicable Community legislation (namely labelling, presentation and food advertising legislation) (see recital 38 above); (iv) the fact that the activities in question were aimed at familiarising the consumers of other Member States with Portuguese wines, thereby facilitating the conduct of activities in the Portuguese wine sector, within the meaning of Article 107(3)(c) of the TFEU (see recital 39); and finally (v) the fact that Viniportugal's campaigns outside Portugal were intended to publicise the basic characteristics of Portuguese wine, inviting consumers in other Member States and third countries to taste these products, with which they are unfamiliar, and also the fact that they did not include any subjective declaration regarding the quality of the products based solely on their origin (see recital 40).

(106) On the basis of the additional information supplied by the Portuguese authorities and in the absence of any comments to the contrary by third parties following the initiation of the formal investigation procedure, the Commission is thus able to conclude that the doubts it expressed, on the initiation of the procedure, regarding the objective nature of the promotion and advertising campaigns conducted in the markets of Member States and third countries, are dispelled.

(107) In light of the foregoing, the Commission considers that the aid for the generic promotion of wine in Portugal, and also the aid for the promotion and advertising of Portuguese wine in the markets of other Member States and third countries, is compatible with the positive and negative criteria laid down in the Guidelines applicable to State aid to advertising.

4. **Funding of the aid**

(108) Since at issue is State aid funded by means of a parafiscal charge, the measures funded by the aid, and also the funding of the aid itself, must be examined by the Commission. In fact, any incompatibility of the funding of a State aid with the common market would make the aid incompatible, even where the granting of the aid has complied with the applicable rules on competition.

(109) The Court has consistently held that taxes do not fall within the scope of the Treaty's provisions concerning State aid unless they constitute the method of financing an aid measure, so that they form an integral part of that measure ([23]). For a tax or part of a tax to be regarded as forming an integral part of an aid measure, it must be hypothecated to the aid measure under the relevant national rules ([24]), in the sense that the revenue from

([23]) Judgment of 13 January 2005 in Case C 174/02 *Streekgewest* [2005] ECR I-85, paragraph 25.

([24]) Judgments in *Streekgewest*, cited above, paragraph 26, and in Joined Cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04 *Nazairdis SAS* [2005] ECR I-9481, paragraphs 46-49.

the tax is necessarily allocated for the financing of the aid. In the event of such hypothecation, the revenue from the tax has a direct impact on the amount of the aid ([25]) and, consequently, on the assessment of the compatibility of the aid with the common market ([26]).

(110) It should therefore be examined whether the charge for the promotion of wine meets the conditions set out above.

4.1. *The wine promotion charge as an integral part of promotion aid*

(111) First, it must be examined whether the revenue from the charge is necessarily assigned to the funding of the aid. In this connection, it should be pointed out that both Decree-Law No 137/95 and Decree-Law No 119/97, which derogates from it, provide that 'a percentage of the revenue from the promotion charge, which must be set annually by the Minister of Agriculture, Rural Development and Fisheries but which is nevertheless never below 25 %, shall be earmarked for measures for the generic promotion of wine and wine products' (Article 11(2) of Decree-Law No 119/97). In this sense, the relevant national rules necessarily assign part of the revenue from the charge to funding the promotion measures which constitute the object of the aid.

(112) Moreover, Article 1(1) of Decree-Law No 119/97, which defines the scope of the charge, provides that 'wine and wine products […] are subject to the application of a promotion charge, which constitutes the compensation for the services provided by the Instituto da Vinha e do Vinho (IVV) in relation to the generic promotion and general coordination of the sector'. Secondly, it should be examined whether the revenue from the charge directly influences the amount of the aid. In this connection, it should be pointed out that the promotion charge constitutes the only source of funding of the promotion and advertising aid presently being examined, so that a decrease in the revenue from the charge would entail a decrease in the resources for funding the promotion measures.

(113) Accordingly, the Commission considers that, in the present case, the revenue from the charge is necessarily assigned to the funding of the aid and the revenue from the charge does directly influence the amount of the aid. Finally, the conclusion must be, in line with the Court of Justice's case law, that the charge is hypothecated to the aid measure under the relevant national legislation and that the charge for the promotion of wine forms an integral part of the aid measure being examined. Consequently, the funding of the measures with the charge must also be examined by the Commission.

([25]) Judgments in Joined Cases C-393/04 and C 41/05 *Air Liquide* [2006] ECR I-5293, paragraph 46, and *Streekgewest*, cited above, paragraph 28.

([26]) Judgment of 25 June 1970 in Case 47/69 *France* v *Commission* [1970] ECR 487, paragraphs 17, 20 and 21.

4.2. *Imposition of the charge on exported products*

(114) As mentioned at recital 9 above, the charge is imposed both on Portuguese products intended for consumption in Portugal and on products intended for export.

(115) Nevertheless, in the decision to initiate the formal examination procedure (point 143), the Commission states that there does not seem to be any discrimination between domestic products intended for the domestic market and those intended to be exported in the context of promotion and advertising campaigns conducted outwith Portuguese territory.

(116) As regards the question to what extent products intended for export benefit to the same extent from the generic promotion measures in Portugal, the Commission concludes, in view of the information provided by the Portuguese authorities throughout the preliminary examination of this dossier and in the absence of comments to the contrary by third parties following the initiation of the formal investigation procedure, that products in the latter category do benefit to a great extent from all the advantages arising from the charge and, moreover, greatly benefit from promotion activities in the territory of other Member States and third countries.

4.3. *Imposition of the charge on imported products*

(117) The Commission normally considers, in accordance with the case law of the Court of Justice ([27]), that the funding of an aid by means of compulsory charges can affect the aid by having a protective effect extending beyond aid properly so-called. The charge in question does in fact constitute a compulsory charge. On the basis of the same case law, the Commission considers that an aid to domestic producers may be funded by a parafiscal charges which is also charged on imports from producers of the same product from other Member States only where there are assurances that these can benefit from all these advantages in the same way as domestic producers.

(118) Thus, on the initiation of the formal examination procedure, the Commission noted that, insofar as the charge also had to be paid on products from other Member States, the Portuguese authorities still had to prove there was no discrimination between domestic products and imported ones and that therefore products from other Member States, on which the charge also had to be paid, benefited in the same way and to the same extent as domestic products from all the advantages arising from it ([28]).

(119) It has already been established that the campaigns for the promotion and advertising of wine and wine products conducted by Viniportugal are funded by part of the revenue from the charge for the promotion of wine.

([27]) Judgment of the Court of Justice in Case 47/69 *France* v *Commission*, cited above.

([28]) See point 135 of the decision on the formal initiation of examination (C(2004) 4522 of 1 December 2004).

(120) In their observations and additional information, the Portuguese authorities give an assurance that the contribution of revenue from the charge levied on imported products was limited exclusively to funding part of the costs of the generic promotion measures which Viniportugal conducted in Portugal. They state that the promotion and advertising campaigns conducted on the markets of other Member States and third countries in favour of Portuguese wine and wine products are funded solely by the revenue from the charge levied on domestic products.

(121) The information provided by the Portuguese authorities shows that the generic promotion campaigns in Portugal proportionally benefit imported products. As described in recitals 16 and 17, the main aim of the advertising campaigns at national level is indeed to win young adult consumers of both sexes over to a healthy consumption of wine as an alternative to beer or other alcoholic drinks. The Portuguese authorities have also provided samples of the advertising campaigns and public awareness projects funded by the charge. Insofar as the promotion campaigns are intended to promote the consumption of wine in general, imported products benefit to the same extent from the abovementioned measures.

(122) However, the information provided is not sufficient to prove that the revenue from the charge on imported products have not contributed to the funding of the promotion and advertising campaigns conducted on the markets of other Member States and third countries which, by contrast, solely benefit Portuguese wine. In particular, according to the figures provided by the Portuguese authorities, average revenue from the collection of the charge on imported products during the period between 1998 and 2005 were EUR 1 293 169, whereas, in the same period, Viniportugal dedicated an average of EUR 525 698 yearly to generic promotion measures in Portugal (see recitals 36 and 38).

(123) Furthermore, even if domestic legislation lays down the obligation to earmark a percentage – never less than 25 % – of the revenue from the charge to measures for the generic promotion of wine and wine products, there is no separate accounting of these two parts of the revenue from the charge. The Portuguese authorities were only able to submit estimates as to the part of the revenue from the charge which was collected on imported products and earmarked for generic promotion.

(124) In light of the case law cited in recital 116 above, the Commission takes the view, given that the measures funded by the charge constitute State aid within the meaning of Article 107 of the TFEU and that the charge is of a discriminatory nature contrary to Article 110 of the TFEU, inasmuch as the charge also had to be paid on products from other Member States without, however, those products benefiting from all the advantages arising from it, that the yield of the charge obtained by charging products imported from other Member States in order to fund the promotion measures conducted by Viniportugal on the markets of other Member States and third countries does constitute funding of the aid which is incompatible with the rules on the free movement of goods and, accordingly, that the State aid thus funded is incompatible with the Treaty to an identical degree.

(125) The Commission may validly conclude, on the basis of the information and assurances provided by the Portuguese authorities (see recital 104 of this decision) that producers and businessmen from other Member States have benefited to the same extent as Portuguese producers from the measures supporting generic promotion which were applied in Portugal.

(126) On the other hand, it is not disputed by the Portuguese authorities that producers and businessmen from other Member States cannot benefit from the measures to aid promotion and advertising abroad which are conducted exclusively in favour of Portuguese wines.

(127) According to the established case law of the Court of Justice, if the revenue from a charge levied on both domestic and imported products according to the same criteria are intended to fund activities for the special advantage of the taxed domestic product, it may follow that a charge imposed on the same criteria nevertheless constitutes discriminatory taxation, insofar as the fiscal burden on domestic products is neutralised by the advantages which it serves to finance, whereas that on imported products constitutes a net burden ([29]).

(128) In the present case, therefore, it cannot be ruled out that there has been discrimination against imported products. On the other hand, it emerges from the information provided by the Portuguese authorities that imported products have been subjected to the charge to the same extent as domestic products but they have not benefited from the advantages financed by it to the same extent as domestic products. As mentioned in recital 122 above, according to the figures provided by the Portuguese authorities, average revenue from the collection of the charge on imported products during the period between 1998 and 2005 were EUR 1 293 169 whereas, in the same period, Viniportugal annually dedicated an average of EUR 525 698 to generic promotion measures in Portugal. There is no separate accounting enabling it to be ascertained that the revenue from the charge from imported products is dedicated solely to generic promotion in Portugal. Accordingly, the parafiscal charges and the revenue therefrom are contrary to Article 110 of the TFEU.

([29]) Judgments of the Court of Justice in Case C-234/99 *Nygard* [2002] ECR I-3657, paragraph 22; Case C-28/96 *Fricarnes SA* [1997] ECR I-4939, paragraph 23; Case 73/79 *Commission* v *Italy* [1980] ECR 1533, paragraph 15, and Case C-78/90 to C-83/90 *Compagnie commerciale de l'Ouest and Others* [1992] ECR I-1847, paragraph 26.

(129) On the basis of information supplied to it following the initiation of the formal examination procedure, the Commission cannot conclude that the aid for the promotion of Portuguese wine and wine products on the markets of other Member States and third countries have not been even partially funded by revenue from imported products from the wine promotion charge. In fact, it is not for the Commission automatically to examine what information could have been submitted to it but it must, on the one hand, seek all the necessary points of view and, on the other, base itself on the information available to it at the time the decision is adopted ([30]). The Commission considers, and accordingly concludes, that the funding of these aid measures must be regarded as incompatible with the common market.

(130) In conclusion, if the funding of a State aid is regarded as incompatible with the applicable Treaty rules, the aid thus funded must also be regarded as incompatible by the Commission for as long as the irregular funding continued, since the regularity of the funding of a State aid is an essential condition for it to be declared compatible ([31]).

V. **CONCLUSIONS**

(131) The Commission regrets that Portugal should have implemented the abovementioned aid contrary to Article 108(3) of the TFEU.

(132) The Commission concludes that:

— Portugal has illegally funded campaigns for the generic promotion of wine financed by means of a charge on domestic products and on products imported from other Member States, contrary to Article 108(3) of the TFEU,

— The only training measure funded by revenue from the parafiscal charge does not constitute an aid,

— Aid in favour of the promotion and generic advertising of wine and wine products conducted by Viniportugal on Portugal's territory can be declared compatible with the common market,

— Aid for the promotion and advertising of wine and wine products of Portuguese origin on the territory of other Member States and third countries which are funded by means of a charge on the production of wine and wine products affecting also products from other Member States have complied with the applicable Community provisions so far as those beneficiaries are concerned. The Commission also notes the existence of a breach of Article 110 of the TFEU as regards funding of the aid. For this reason, the Commission cannot declare the arrangements in question as compatible since they created discrimination between imported and domestic products.

(133) This decision is limited to examining the application of the parafiscal charge from its entry into force until 31 December 2006, the date of the entry into force of the Community's new Guidelines on State aid in the agricultural and forestry sector 2007-2013, without prejudice to the position which the Commission will take in relation to application of the promotion charge beyond that date.

(134) The Commission considers it appropriate in the present case to adopt a conditional decision using the possibility offered by Article 7(4) of Regulation (EC) No 659/1999, according to which the Commission may attach to a positive decision conditions subject to which an aid may be considered compatible with the common market and may lay down obligations to enable compliance with the decision to be monitored.

(135) In order to make good the breach of Article 110 and thus retrospectively remove the discrimination, Portugal must repay part of the charge imposed on products from other Member States within a time limit and under conditions set by the Commission. Making good this breach will make the aid concerned compatible with Article 107 of the TFEU.

(136) The conditions to be met for the abovementioned repayment shall be laid down by the Commission. Portugal must thus reimburse to the persons who paid the charge that part of the charge imposed on products from other Member States between the date when the charge first entered into force and 31 December 2006 in full compliance with the following conditions:

— if they can provide evidence that the promotion charge was imposed on imported products, the persons who paid the charge can claim the repayment of a proportion of the revenue from the charge intended to fund promotion services exclusively benefiting domestic products within a time limit set in accordance with domestic law and in no case less than 6 months from the notification of this decision,

([30]) Judgment of the Court of Justice in Case T-369/06 *Holland Malt* v *Commission* (not yet published), paragraphs 195 et seq.

([31]) Judgments in Joined Cases C-261/01 and C-262/01 *Van Calster and Others* [2003] ECR I-12249, paragraph 48, and Case 73/79 *Commission* v *Italy* [1980] ECR 1533, paragraph 11.

— Portugal will establish the extent of any discrimination affecting imported products. To that end, Portugal must check, during a reference period, the financial equivalence between the amounts levied overall on domestic products by way of the charge concerned and the advantages from which these products exclusively benefit,

— repayment must be made within a maximum time limit of 6 months from the submission of the request,

— the amounts repaid must include interest calculated as from the date on which they were levied up until the date of actual repayment. This interest shall be calculated on the basis of the Commission's reference rate laid down by the method for setting the reference and discount rates ([32]),

— the Portuguese authorities shall accept any reasonable evidence from the payers of the charge paid in respect of products from other Member States,

— the right to repayment cannot be subjected to other conditions, particularly that of the charge not having been passed on,

— where the charge has not yet been paid, the Portuguese authorities shall formally waive payment thereof, including any interest on late payment,

— where the Commission so requests, Portugal shall undertake to submit a full report proving the proper implementation of the repayment measure,

— if a charge has been imposed in another Member State on the same products which have been subjected to the wine promotion charge in Portugal, the Portuguese authorities shall undertake to reimburse those persons who have paid the charge for that part of it which affected products from that other Member State,

— Portugal undertakes to make this decision known to all potential payers of the charge.

HAS ADOPTED THIS DECISION:

Article 1

Only the training measure financed by revenue from the parafiscal charge, in the sum of EUR 367,12 does not constitute an aid.

([32]) Commission notice on the method for setting the reference and discount rates (OJ C 273, 9.9.1997, p. 3).

Article 2

The State aid for the generic promotion of wine and wine products on Portuguese territory illegally implemented by Portugal contrary to Article 108(3) of the TFEU by means of a parafiscal charge established by Decree-Law No 137/95 of 14 June 1995 is State aid compatible with the common market within the meaning of Article 107(3)(c) of the TFEU as regards the period between its entry into force and 31 December 2006.

Article 3

1. State aid for the promotion and advertising of wine and wine products of Portuguese origin on the territory of other Member States and third countries illegally implemented by Portugal contrary to Article 108(3) of the TFEU by means of a parafiscal charge established by Decree-Law No 137/95 of 14 June 1995 is, without prejudice to the application of Article 2, State aid compatible with the common market under Article 107(3)(c) of the TFEU as regards the period between its entry into force and 31 December 2006, provided Portugal complies with the conditions in paragraph 2 of this Article.

2. Portugal must repay to the persons who paid the charge that part of the charge imposed on products from other Member States between the date the charge was first applied and 31 December 2006 in full compliance with the following conditions:

— if they can provide evidence that the promotion charge was imposed on imported products, the persons who paid the charge can claim repayment of a proportion of the revenue from the charge intended to fund promotion services exclusively benefiting domestic products within a time limit to be set in accordance with domestic law and in no case less than 6 months from the notification of this decision,

— Portugal will establish the extent of any discrimination affecting imported products. To this end, Portugal must check, during a reference period, the financial equivalence between the amounts levied overall on domestic products by way of the charge concerned and the advantages from which these products exclusively benefit,

— repayment must be made within a maximum time limit of 6 months from the submission of the request,

— the amounts repaid must include interest calculated as from the date on which they were levied up until the date of actual repayment. Such interest is to be calculated on the basis of the Commission's reference rate laid down by the method for setting the reference and discount rates ([33]),

([33]) See footnote 32.

— the Portuguese authorities shall accept any reasonable evidence from the payers of the charge paid in respect of products from other Member States,

— the right to repayment cannot be subjected to other conditions, particularly that of the charge not having been passed on,

— where the charge has not yet been paid, the Portuguese authorities shall formally waive payment thereof, including any interest on late payment,

— where the Commission so requests, Portugal shall undertake to submit a full report proving the proper implementation of the repayment measure,

— if a charge has been imposed in another Member State on the same products which have been subjected to the wine promotion charge in Portugal, the Portuguese authorities shall undertake to reimburse those persons who have paid the charge for that part of it which affected products from that other Member State,

— Portugal undertakes to make this decision known to all potential payers of the charge.

Article 4

Portugal shall inform the Commission, within a time limit of 2 months from notification of this decision, of the measures it has taken to comply with it.

Article 5

This decision is addressed to the Portuguese Republic.

Done at Brussels, 20 July 2010.

For the Commission

Dacian CIOLOȘ

Member of the Commission