COMMISSION DECISION

of 27 July 2011

concerning the State aid for financing screening of transmissible spongiform encephalopathies (TSE) in bovine animals implemented by Belgium (State aid C 44/08 (ex NN 45/04))

(notified under document C(2011) 5457)

(Only the French and Dutch texts are authentic)

(2011/678/EU)

THE EUROPEAN COMMISSION,

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

Having invited interested parties to submit their comments in accordance with that Article [2],

Whereas:

1. PROCEDURE

(1) Following complaints received in January and February 2004, the Commission undertook a preliminary examination of the aid granted by Belgium to cover the costs of screening tests for BSE in bovine animals.

(2) Following those complaints, the Commission sent a letter to the Belgian authorities on 27 January 2004, asking for information on the measure in question. At the same time, an aid measure to finance screening for TSE in animals was notified by the Belgian authorities in accordance with Article 108(3) of the Treaty on the Functioning of the European Union (TFEU) (by letter of 23 January 2004, registered on 28 January 2004) and entered under the number N 54/04.

(3) The Belgian authorities provided written information to the Commission by letters of 6 February 2004 and 14 May 2004, registered on 11 February 2004 and 19 May 2004 respectively.

(4) By letter of 19 July 2004 the Commission informed Belgium that the measure had been transferred to the register of non-notified aid under the number NN 45/04, since it had become apparent that part of the funds had already been paid out.

(5) An informal meeting between the Belgian authorities and the Commission took place on 1 September 2004.

(6) Additional information was provided by the Belgian authorities by letters of 16 September 2004 and 22 February 2007, registered on 20 September 2004 and 22 February 2007 respectively.

(7) By letter of 26 November 2008 the Commission informed Belgium of its decision to initiate the procedure provided for in Article 108(2) of the TFEU in respect of that measure. The decision was published in the *Official Journal of the European Union* [3]. The Commission invited interested parties to submit their comments on the measure in question.

(8) By letter of 19 December 2008, registered on 26 December 2008, Belgium asked for an extension to the deadline for reply. That extension was granted by letter of 13 January 2009. Belgium provided comments by letter of 25 February 2009, registered on 6 March 2009.

(9) The Commission did not receive any comments from interested parties.

(10) By letter of 17 July 2009 the Commission asked Belgium additional questions relating to the comments submitted by Belgium. By letter of 4 September 2009, registered on 8 September 2009, Belgium asked for an extension to the deadline for reply. Belgium's reply reached the Commission by letter of 16 October 2009, registered on 20 October 2009.

(11) Two meetings took place between the Belgian authorities and the Commission, on 2 October 2009 and 30 October 2009.

(12) Following those meetings, additional information was sent by Belgium on 14 December 2009, registered on 16 December 2009. Following the simultaneous enquiry by the Belgian competition authorities concerning possible agreements between the laboratories, reply deadline extension requests were submitted by Belgium on 21 January 2010, 29 September 2010 and 17 January 2011. Those extensions were granted by the Commission.

[1] From 1 December 2009 Articles 87 and 88 of the EC Treaty have respectively become Articles 107 and 108 of the Treaty on the Functioning of the European Union (TFEU). In both cases the provisions are identical in substance. For the purposes of this Decision, references to Articles 107 and 108 TFEU shall be understood as being to Articles 87 and 88 of the EC Treaty.

[2] OJ C 11, 16.1.2009, p. 8.

[3] See footnote 2.

(13) A last request for information was sent by the Commission on 22 February 2011, to which the Belgian authorities responded by letter of 6 April 2011. The Commission granted an additional extension to enable Belgium to answer the questions pending the outcome of the enquiry by the Belgian competition authorities.

(14) The Belgian authorities replied by letter of 19 May 2011, registered on 25 May 2011.

2. DESCRIPTION

2.1. Background ([4])

(15) In January 2004 the Commission received a complaint concerning a draft royal decree which would have introduced a parafiscal charge to finance BSE tests.

(16) Following that complaint, the Commission asked the Belgian authorities for explanations. In response the Belgian authorities stated that, since 1 January 2001, BSE tests had been compulsory for bovine animals aged more than 30 months and for those aged more than 24 months undergoing emergency slaughter ([5]). They also notified a draft royal decree relating to the financing of screening for TSE in animals (hereinafter the TSE royal decree). That draft royal decree was registered under the number N 54/04. The Belgian authorities stated that this new draft royal decree was an amendment to the draft royal decree notified in 2001 by Belgium and approved by the Commission by Decision N 21/02 of 13 February 2002 ([6]), as well as to another draft discussed informally with the Commission in 2003. Neither of those two drafts had been implemented, however, and the decree notified in 2004 constituted their recasting.

(17) It is clear from the information submitted by Belgium that the public purse had accepted, since 1 January 2001 ([7]), the costs of BSE tests (i.e. the costs of sampling and analysis). From 1 January 2002 onwards the costs of these tests have been prefinanced by the Belgian Intervention and Refund Bureau (BIRB), pending a political decision on the system of financing to be chosen.

(18) Following certain comments made by the Commission regarding the notified draft royal decree (N 54/04), in May 2004 the Belgian authorities submitted a new draft royal decree which attempted to respond to the comments made by the Commission and which provided for a system of fees of EUR 10,70 per bovine presented for slaughter from 1 January 2003 onwards and having to undergo a rapid BSE test. The Belgian authorities referred to the fact that the tests carried out and prefinanced during 2002 had been entirely financed by indirect State aid, i.e. by parafiscal charges. The Belgian authorities also stated that a maximum amount of EUR 40 per test had been financed from 1 January 2003 onwards through parafiscal charges. The Belgian authorities provided detailed tables showing the cost of the BSE tests from 2003 onwards and a forecast of financing those tests by parafiscal charges and fees. The Belgian authorities stated that the dates scheduled for implementing the financing scheme were 1 July 2004 for the fees and 1 January 2005 for the parafiscal charges.

(19) As the notified draft royal decree states that aid had already been granted and taxes levied since 1 January 2002, the measure was registered as non-notified on 19 July 2004 under number NN 45/04. The notification registered under the number N 54/04 was withdrawn by Belgium.

(20) It follows from the information submitted by Belgium in 2004 that the general intention was to prefinance the tests, the amount being refunded subsequently, the idea being to allocate part of the amount of the contributions to refunding the costs of the prefinanced tests.

(21) In their letter of 16 September 2004 the Belgian authorities referred to a new draft royal decree in which the idea of a fee of EUR 10,70 per bovine tested was maintained for the future. The whole amount stated in that new draft royal decree would serve to finance BSE tests on bovine animals which would be slaughtered from the entry into force of that draft. The reimbursement of the amounts exceeding the EUR 40 authorised by the Community guidelines for State aid concerning TSE tests, fallen stock and slaughterhouse waste ([8]) of 24 December 2002 (the TSE guidelines), and which were prefinanced after 1 January 2003, would be the subject of another draft which would be submitted to the Commission and which would address the reimbursement of that prefinancing. That royal decree was adopted on 15 October 2004 ([9]) and entered into force on 1 December 2004.

([4]) Only the aspects relevant to the final decision will be included here — the other aspects are included in the decision initiating the formal investigation procedure.

([5]) Regarding the compulsory tests, the Belgian authorities refer to Regulation (EC) No 999/2001 of the European Parliament and of the Council of 22 May 2001 laying down rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies (OJ L 147, 31.5.2001, p. 1).

([6]) State aid No N 21/02 — Belgium — Acceptance of costs of compulsory BSE tests.

([7]) In accordance with Regulation (EC) No 999/2001, Belgium is undertaking rapid tests for BSE on all bovines over 30 months old presented for slaughter and on all bovines over 24 months old slaughtered by necessity. Since 1 July 2001 all carcases of bovines over 24 months old have also been subject to a BSE test.

([8]) OJ C 324, 24.12.2002, p. 2.

([9]) Belgian Official Gazette of 8.11.2004, p. 75290.

(22) According to the information provided by the Belgian authorities, the total amount of prefinanced costs beyond the maximum amount of EUR 40 for the period from 1 January 2003 ([10]) to 30 June 2004 comprises EUR 15 237 646. According to the Belgian authorities, from 30 June 2004 the maximum amount of EUR 40 has been complied with ([11]).

(23) In the same letter of 16 September 2004 the Belgian authorities provided two information sheets in accordance with Article 19 of Commission Regulation (EC) No 1/2004 of 23 December 2003 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises active in the production, processing and marketing of agricultural products ([12]).

(24) These two measures were the subject of two exemptions, under numbers XA 53/04 and XA 54/04. As stated in points 19 et seq. of the decision initiating the formal investigation procedure, the measure exempted under number XA 53/04 covers the prefinancing of the BSE tests ([13]) with a maximum aid intensity of EUR 40 per test, and was implemented on 1 January 2003. The legal basis for this measure is the Law of 27 December 2002 on the general budget of expenditure for 2003. The measure exempted under number XA 54/04 provides for a maximum aid intensity of EUR 33,38 per test, and was implemented on 15 October 2004. This aid measure is of indeterminate duration. Its legal basis is the Law of 27 December 2003 on the general budget of expenditure for 2004.

(25) In the same letter of 16 September 2004, and in response to questions raised by the Commission, the Belgian authorities stated that the laboratories chosen to carry out the tests had to comply with very strict conditions in order to conduct the analyses in question.

(26) Shortly after the letters of 14 May 2004 and 16 September 2004 the Belgian authorities notified two draft royal decrees concerning the financing of the activities of the Federal Agency for the Safety of the Food Chain (FASFC). The purpose of these measures was to introduce a contribution and a fee covering the activities of the FASFC. They were the subject of decision C(2005)4203 of 9 November 2005 on State aid N 9/05 and N 10/05 (the N 9/05 and N 10/05 decision) referred to in the decision initiating the formal investigation procedure. These measures were adopted by the Royal Decree of 10 November 2005 fixing the contributions referred to in Article 4 of the Law of 9 December 2004 on the financing of the FASFC ([14]), and by the Royal Decree of 10 November 2005 on the fees referred to in Article 5 of the Law of 9 December 2004 on financing the FASFC ([15]). Both these Royal Decrees entered into force on 1 January 2006. The Royal Decree on contributions provides for the repeal of the Royal Decree of 15 October 2004 referred to in recital 21.

(27) More specifically, the Royal Decree on fees provides for slaughterhouses to have to pay a fee of EUR 10,70 for each bovine animal or soliped tested. The Royal Decree on contributions provides for financing part of the BSE tests and is charged to different sectors. The total cost of the BSE test is EUR 44,08, comprising EUR 12 for sampling (financed at EUR 10,70 by the slaughterhouse under the Royal Decree on fees, and EUR 1,30 by the contribution), and EUR 32,08 financed by the contribution, and is paid directly to the laboratories by the FASFC. In the N 9/05 and N 10/05 decision the Commission concluded that the financing of the FASFC by fees did not constitute State aid, that the financing of overall random controls by flat-rate contributions did not constitute State aid, that financing part of the costs of the BSE tests by contributions was compatible State aid, and that the financing of the costs of other tests/controls relating to production/marketing was compatible State aid.

(28) In December 2006 the Commission sent Belgium new questions concerning case NN 45/04. Those questions related in particular to the reimbursement of the amounts paid under prefinancing since 1 January 2003.

(29) In their reply, dated 22 February 2007, the Belgian authorities stated that they wished to effect an overall reimbursement of all the expenditure related to the BSE analyses over a period of 15 years. In practice, a solidarity-based recovery system was introduced through the new system of financing the FASFC. Since 1 January 2006 each operator pays a contribution to the FASFC and part of that contribution goes to recovering past costs related to the prefinancing of the BSE tests. All active operators who kept bovine animals during the period in question contribute equally to this system.

2.2. **Content of the complaints lodged against the draft royal decree on TSE**

(30) According to the complaints concerning the draft royal decree on TSE, the contribution is applied to all types of animal slaughtered in Belgian slaughterhouses, including imported products. One complainant asserted that a

([10]) In accordance with the TSE guidelines, total public aid must not exceed EUR 40 from 1 January 2003.
([11]) See table at recital 25 of the Decision to initiate the formal investigation procedure.
([12]) OJ L 1, 3.1.2004, p. 1.
([13]) OJ C 105, 30.4.2005, p. 3.
([14]) Belgian Official Gazette, 21.11.2005 p. 49941.
([15]) Belgian Official Gazette, 21.11.2005 p. 49918.

substantial percentage of animals slaughtered in Belgian slaughterhouses came from other Member States. According to the complainants, the contribution was discriminatory with regard to imported animals since the revenue from it was used to recover the costs of BSE tests carried out on Belgian bovine animals.

2.3. **Doubts raised by the Commission within the framework of initiating the formal investigation procedure**

(31) Firstly, it must be pointed out that the initiation of the formal investigation procedure concerns the aid for financing TSE screening for animals in Belgium since 1 January 2001 and the mechanisms for financing that aid, with the exception of the aid approved by Commission decision because of its compatibility with the internal market. Specifically, this means that the aid approved by decisions N 9/05 and N 10/05 (which relate to the contributions and fees financing the FASFC) will not be assessed as regards compatibility with the rules on State aid applicable when the aid was granted. This decision therefore relates solely to the aid financing the BSE tests for the period 2001-06 and to their system of financing given that the aid for the BSE tests during that period was prefinanced and that that prefinancing is the subject of reimbursement spread over several years.

(32) In the interests of clarity it is necessary to bear in mind the terminological distinction between a fee and a contribution: on the one hand there are duties or fees which cover the costs of a service provided. In the case at issue, these come to EUR 10,70 and have been levied since 1 December 2004 on the basis of the Royal Decree on TSE and subsequently on the basis of the Royal Decree on fees financing the FASFC. On the other hand there are levies or contributions which are levied on the basis of the Royal Decree of 10 November 2005, are charged by the FASFC, due by entities on Belgian territory and broken down among 7 sectors (see recital 29 of decision N 9/05 and N 10/05).

(33) The Commission noted, in its decision initiating the formal investigation procedure, that the aid measures for financing BSE tests are and were financed in Belgium by subsidies and a system of parafiscal charges comprising both fees and contributions. Part of the revenue from those fees and contributions reimbursed the prefinancing of the tests.

(34) The Commission had raised several problems and stated that it lacked information for reaching a final assessment of the measures in question: firstly, questions arose as to the existence of an advantage for beneficiaries of the services. It was not clear whether the fees for the BSE tests covered the part of the cost of the tests which was not covered by compatible State aid. The exact cost of the tests was not known, nor was the source of additional financing in the event that the fees were not sufficient to cover the total costs of the BSE tests. Nor had it been established whether the conditions under which the FASFC provided the services corresponded to market prices, in particular because the Belgian authorities had not stated clearly that the choice of laboratories had been made by means of an open and transparent procedure.

(35) Secondly, the mechanism of levies was not clear: in particular, the beneficiaries and the contributors were not clearly established and the mechanism for reimbursement of the prefinancing of the costs of the BSE tests was not clear. There were also questions about the conditions which the parafiscal charges had to meet in order to be considered as complying with the rules on State aid, in particular as regards the exclusion of imported products from the parafiscal charges, as regards whether exported products profited from the aid measure financed by the charges, and whether the charges influenced the price of the final products given that this was determined by changes in supply and demand on the free market.

3. **COMMENTS BY BELGIUM**

(36) On 27 February 2009 Belgium commented in reply to the Commission's doubts expressed in its decision to initiate the formal investigation procedure. These comments can be summarised as follows:

3.1. **Classification of the financing of ESB tests as State aid**

(37) By definition, Belgium contests the Commission's classification of the financing of BSE tests as State aid due to the obligatory nature of these tests. Belgium claims that the obligation to carry out the BSE tests is imposed by Regulation (EC) No 999/2001 of the European Parliament and of the Council of 22 May 2001 laying down rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies ([16]) to protect public health. In support of its claim Belgium quotes two judgments ([17]) in which the Court of Justice held that the costs of controls carried out to protect public health cannot be considered as compensation for a service and that the authority itself must bear these costs. While Belgium recognises that the judgments in question involve the free circulation of goods rather than State aid, it feels that this rationale can be applied to State aid.

([16]) OJ L 147, 31.5.2001, p. 1.

([17]) Judgments of the Court of 5 February 1976, Case 87-75, *Bresciani v Amministrazione Italiana delle Finanze* [1976] p. 129 point 10, and of 15 December 1993, Joined cases C-277-91, C-318/91 and C-319/91, *Ligur Carni Srl e.a. v Unità Sanitaria Locale n. XV di Genova e.a.* [1993] I-06621 points 29-31.

(38) Moreover, Belgium states that as Regulation (EC) No 999/2001 does not oblige enterprises to bear the costs of controls, a Member State may decide to use the 'normal' system of financing BSE tests. Therefore, according to Belgium, the selectivity criterion for State aid must be seen in relation to this normal system ([18]). This could only be State aid in that certain sectors or enterprises might enjoy special treatment compared to the normal Belgian system. Belgium states that the Commission appears to think that normally the costs had to be borne by the farmers; this does not, however, fall under the applicable texts. If different systems of financing BSE tests can lead to distortions of competition this problem can in Belgium's view be solved through harmonisation of legislation ([19]); this is in no way a State aid issue. Belgium also quotes the GEMO judgment ([20]), but does not consider that this changes its line in this particular case. In its letter of 16 October 2009 Belgium reiterates that it does not agree with the Commission's classification of the financing as State aid in its decision to initiate the formal investigation procedure. Nonetheless, in a spirit of cooperation, Belgium applied the Commission's arguments in order to clarify the issues raised in that decision.

3.2. **Classification of the fee**

(39) In Belgium's view the fee of EUR 10,70 per tested bovine animal cannot be considered as State aid.

(40) According to Belgium State aid can only be present if an advantage is given to one or several enterprises. As a result, a received fee can only represent an advantage if it is greater than the amount paid. If part of the BSE tests is financed by the authorities, the final advantage to the farmer corresponds to the cost of the test minus the fee paid.

(41) Belgium takes this argument further by stating that, if the costs were recovered, this would mean demanding a higher global payment from the farmer. In other words, if the total cost of the test has to be repaid, this would mean that in the end this cost is added to the fee already paid.

(42) Belgium stresses that in the Court's judgments State aid is present only when the revenue from fees is used to favour a specific group and does not equally benefit all those who paid a fee ([21]). In this case the fee of EUR 10,70 per tested bovine animal is paid to economic actors in the bovine meat production sector. The EUR 10,70 used for the test does not represent any economic advantage to these actors and therefore cannot be considered as State aid within the meaning of Article 107 of the TFEU.

(43) According to Belgium the Commission used a similar argument in decision N 9/05 and N 10/05. Belgium states that in this decision the fee of EUR 10,70 was not qualified as State aid (see recital 98 of the decision). A similar rationale was used in decision N 21/02, where part of the costs of BSE tests partially financed out of fees paid by the sector was not considered to be State aid.

(44) In its letter of 16 October 2009 Belgium indicates that the fee was charged to the farmer and that it concerned part of the economic costs of the BSE tests. Replying to the Commission's question, i.e. whether the fee corresponded to the true economic cost of the laboratories' services, Belgium states that the fee only related to part of the costs of the BSE tests, as indicated in decision N 9/05 and N 10/05. The Commission's reasoning in recitals 61-66 of that decision, that the costs of the services and the amount of the fees were equal, related to services other than the BSE tests. Belgium reiterates that, regarding the BSE tests, decision N 9/05 and N 10/05 concluded that while the service in the form of BSE tests was State aid, the amount of the fee (EUR 10,70) was not aid and should be subtracted from the cost of the tests.

3.3. **Absence of overcompensation and test prices' conformity with market prices**

(45) Belgium refers to point 132 of the Community guidelines for State aid in the agriculture and forestry sector 2007 to 2013 ([22]) (agriculture guidelines 2007-13) which states that EUR 40 per test is 'the best price currently available in the Community'. Since July 2005 the FASFC's proposed prices have been less than EUR 40.

([18]) General Court judgment of 18 December 2008, *Government of Gibraltar* (T-211/04) *and United Kingdom of Great Britain and Northern Ireland* (T-215/04) *v Commission of the European Communities* [2008] II-3745, points 143-146.

([19]) To illustrate this Belgium quotes Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules, where Article 27 and Annexes IV and V oblige Member States to organise the collection of fees to finance certain controls.

([20]) Court judgment of 20 November 2003 Case C-126/01 *Ministère de l'Économie, des Finances et de l'Industrie v GEMO SA* [2003] I-13769.

([21]) Court judgments of 11 March 1992, Joined Cases C-78/90, C-79/90, C-80/90, C-81/90, C-82/90 and C-83/90 *Compagnie commerciale de l'Ouest e.a. v Receveur principal des douanes de La Pallice Port* [1992] I-1847, point 35; of 2 August 1993, Case C-266/91 *Celulose Beira Industrial SA v Fazenda Pública* [1993] I-4337, point 21; of 11 June 1992, Joined Cases C-149/91 and C-150/91 *Sanders Adour e.a. v Directeur des services fiscaux des Pyrenées-Atlantiques* [1992] I-3899, point 27, and of 16 December 1992, Case C-17/91 *Lornoy v État belge* [1992] I-6523, point 32.

([22]) OJ C 319, 27.12.2006, p. 1.

In the opinion of the Belgian authorities this shows that the prices charged in Belgium are in line with market prices. In decision N 9/05 and N 10/05 the Commission recognised that the laboratories were selected using open, transparent and non-discriminatory procedures, and that the service providers (i.e. the laboratories) could not be seen as receiving State aid. The situation has not changed in the meantime. In addition, the Belgian competition authorities are currently carrying out a survey of price-fixing between the laboratories regarding BSE tests. This clearly shows, according to Belgium, that there was no wish whatsoever to pay a supplementary price to the laboratories. In its letter of 16 October 2009 Belgium stated that the investigation of possible price-fixing between the laboratories would be carried out and should in principle be completed during the first quarter of 2010.

3.4. **Levy on imports and exports**

(46) The Belgian authorities state that the contributions and fee were never applied to imports and exports. Only enterprises based in Belgium have to pay a contribution and only bovine animals slaughtered in Belgium and over 30 months old are subject to a fee of EUR 10,70.

(47) Belgium stresses that the Commission already looked at these measures in decision N 9/05 and N 10/05 and concluded that the contributions were not discriminatory towards imported or exported products and were not contrary to the provisions of the Treaty.

3.5. **Absence of a mechanism through which the slaughterhouses pass on the fee to producers or other market actors**

(48) The Belgian authorities indicate that the slaughterhouses pass on the cost of fees to their clients just as any normal enterprise passes on costs incurred to its clients. Normal market mechanisms therefore apply to this passing on of costs. Moreover, itemising the cost of fees separately on the invoices submitted to producers is normal practice. In this connection Belgium quotes recitals 93 and 95 of decision N 9/05 and N 10/05, where the criteria in point 25 of the TSE guidelines are considered to be met.

3.6. **Classification of the beneficiaries as small and medium-sized enterprises (SME)**

(49) Belgium states that all Belgian farmers are SMEs, based on the following criteria: they employ less than 250 people, their annual turnover does not exceed EUR 40 million or their annual balance sheet total is less than EUR 27 million, and 25 % or more of the enterprise is not owned by another company or companies which are not SMEs.

3.7. **Comments on the compatibility of aid during the three periods identified in the decision to initiate the formal investigation procedure (2001-2003; 2003-2007; after 2007)**

(50) Belgium has no particular comment to make regarding the period from 1 January 2001 to 1 January 2003, given that the Commission itself assumes, in recital 80 of the decision to initiate the formal investigation procedure, that the aid was probably compatible. Belgium does, however, state that the aid was not more than 100 % of the costs incurred and that it agrees to provide further information in this regard if necessary.

(51) However, Belgium insists that this information is only given in passing, since its initial point of view is that State aid is not an issue in this case, because it is up to Belgium to choose how it finances BSE tests.

(52) During the period 1 January 2003 to 1 January 2007, Belgium indicates that no aid in excess of 100 % of the test costs was paid. It refers to decision N 9/05 and N 10/05 which already dealt with this issue.

(53) Regarding the period from 1 January 2007, Belgium never granted aid exceeding EUR 40, as the cost of the tests was less than that amount.

(54) Belgium, as an enclosure to its comments, submits a detailed sequence of the measures taken with regard to the financing of BSE tests. As this information is largely repeated in the descriptive part of this decision, the sequence in this section is not exhaustive. Some elements are, however, repeated below.

(55) The sequence of BSE test financing is as follows:

— 1 January 2001 to 31 December 2001: tests entirely financed by the Exchequer,

— 1 January 2002 to 30 June 2004: tests prefinanced by the BIRB. The total amount prefinanced is EUR 67 156 527,65,

— 1 July 2004 to 30 November 2004: tests prefinanced by FASFC,

— 1 December 2004 to 31 December 2005: a fee of EUR 10,70 for each bovine animal tested pursuant to the Royal Decree of 15 October 2004, as well as financing by the FASFC out of its reserves and the reimbursable advance provided by the Exchequer,

— from 1 January 2006: financing via a fee of EUR 10,70 for each bovine animal tested and from contributions imposed on seven different sectors ([23]). These contributions are also designed to reimburse the costs of the BSE tests prefinanced since 1 January 2002. The fee was then indexed at EUR 11,07 from 1 January 2008.

(56) The prices of the BSE tests are as follows:

(EUR)

Period	Total cost of tests (*)	Amount of fee
01.01.2001-31.01.2001	111,81	/
01.02.2001-31.03.2001	89,50	/
01.04.2001-31.12.2001	64,71	/
01.01.2002-15.03.2002	64,74	/
16.03.2002-31.12.2003	63,45	/
01.01.2004-15.01.2004	63,42	/
16.01.2004-30.06.2004	53,88	/
01.07.2004-30.11.2004	43,44	/
01.12.2004-31.12.2004	43,44	10,70
01.01.2005-30.06.2005	43,47	10,70
01.07.2005-31.12.2005	38,62	10,70
01.01.2006-30.09.2006	40,35	10,70
01.10.2006-31.12.2006	39,32	10,70
01.01.2007-31.12.2007	39,35	10,70
01.01.2008-31.12.2008	39,38	11,07

(*) These costs include laboratory costs, the costs of veterinarians carrying out the analyses on behalf of the public authority, and the sampling kits.

3.8. **Replies to additional questions asked by the Commission**

(57) In its letter of 16 October 2009 Belgium makes several clarifications in reply to the questions asked by the Commission on 24 July 2009 after receiving Belgium's comments. Belgium begins by reiterating its position that a Member State is not obliged to make economic actors bear the costs of the BSE tests. Since these are linked to public health protection, the costs of controls imposed by public authorities cannot be seen as compensation for a service and passed on to the economic actors. However, in a spirit of cooperation, Belgium has decided to reply to the Commission's questions by using the logic expressed in the decision to initiate the formal investigation procedure.

(58) Concerning the share of Community funding, Belgium confirms that this had been included in the previously communicated figures.

(59) Belgium then indicated that, with regard to funding during the period from 30 June 2004 to 31 December 2005, this had been carried out by FASFC based on sources of funding available to it and taken from the former bodies from which it had been created. No para-fiscal charges had been levied during this period.

(60) The Commission had asked about the link between the amount of EUR 15 237 646 and that of EUR 67 156 527,65 mentioned in Belgium's comments (see recital 55). Belgium replied that the first sum was an integral part of the second amount. The Belgian authorities also indicated their willingness to perform calculations to verify the correctness of the amount mentioned.

(61) Regarding fees, Belgium states that these were borne by the farmers and therefore could not be State aid. Here Belgium refers to decision N 9/05 and N 10/05 which indicated that only EUR 33,38 of the EUR 44,08 total cost represented State aid. The other EUR 10,70 was not State aid and was therefore subtracted from the price of the test during the evaluation of its conformity with the maximum aid intensity of EUR 40 per test.

(62) For reference, Belgium states that the only difference between its system and that approved by the Commission in decision N 9/05 and N 10/05 was the indexation of the fee which increased from EUR 10,70 to EUR 11,07.

(63) In its letter of 1 December 2009, Belgium corrects its previous figures regarding the number of tests carried out. It indicated that these figures replaced those previously given in the letters preceding and following the decision to initiate the formal investigation procedure.

(64) These changes were due to the fact that the number of samples taken into consideration before was incorrect. The original calculations had been based on a theoretical rate of 3 samples per hour, while in reality 12 samples had been taken per hour on the ground. This increase in the number of tests meant a lower price for each sample, also affecting the total price per test, as the cost of the tests included a cost per hour, which decreased due to the larger number of samples taken per hour. In addition, the number of animals slaughtered in 2003 and 2004 was revised downwards compared to the previous figures. The figures mentioned in the Belgian letter of 1 December 2009 are those for bovine animals slaughtered for human consumption, reported to the Commission for 2003 and 2004.

([23]) These contributions and fees were approved by decision N 9/05 and N 10/05.

(EUR)

2003	Laboratory costs	Hourly fee: veterinary surgeon	Cost of sampling	Cost of test kit	Total cost	Intervention > EUR 40 per test
January	52,06	32,02	2,67	0,69	55,42	15,42
February	52,06	32,02	2,67	0,69	55,42	15,42
March	52,06	32,02	2,67	0,69	55,42	15,42
April	52,06	32,02	2,67	0,69	55,42	15,42
May	52,06	32,02	2,67	0,69	55,42	15,42
June	52,06	32,02	2,67	0,69	55,42	15,42
July	52,06	32,02	2,67	0,69	55,42	15,42
August	52,06	32,02	2,67	0,69	55,42	15,42
September	52,06	32,02	2,67	0,69	55,42	15,42
October	52,06	32,02	2,67	0,69	55,42	15,42
November	52,06	32,02	2,67	0,69	55,42	15,42
December	52,06	32,02	2,67	0,69	55,42	15,42

(EUR)

2004	Laboratory costs	Hourly fee: veterinary surgeon	Cost of sampling	Cost of test kit	Total cost	Intervention > EUR 40 per test
1-15 January	52,06	32,02	2,67	0,69	55,42	15,42
16-31 January	42	32,02	2,67	0,69	45,36	5,36
February	42	32,02	2,67	0,69	45,36	5,36
March	42	32,02	2,67	0,69	45,36	5,36
April	42	32,02	2,67	0,69	45,36	5,36
May	42	32,02	2,67	0,69	45,36	5,36
June	42	32,02	2,67	0,69	45,36	5,36
July	31,90	32,02	2,67	0,69	35,26	– 4,74
August	31,90	32,02	2,67	0,69	35,26	– 4,74
September	31,90	32,02	2,67	0,69	35,26	– 4,74
October	31,90	32,02	2,67	0,69	35,26	– 4,74
November	31,90	32,02	2,67	0,69	35,26	– 4,74
December	31,90	32,02	2,67	0,69	35,26	– 4,74

(65) Based on the table in recital 64, Belgium concludes that the total cost of BSE tests has been less than EUR 40 since 1 July 2004.

(66) On this basis the Belgian authorities also correct the table provided prior to the initiation of the formal investigation procedure and mentioned in recital 25 of the decision to initiate that procedure. These latest figures are real rather than estimates as previously provided. It can be derived from this data that the total prefinanced amount was not EUR 15 237 789,90 as previously estimated but EUR 6 619 810,74.

Period		Test price (EUR)	Number of tests	Total (EUR)
1.1.2003 15.1.2004	Indirect State aid	40,00	373 550	**14 942 015,90**
	Cost of test > EUR 40	31,08	373 550	**5 759 524,54**
	Total	71,08	373 550	**20 701 540,44**
16.1.2004 30.6.2004	Indirect State aid	40,00	160 551	**6 422 043,10**
	Duty	22,02	160 551	**860 286,19**
	Total	62,02	160 551	**7 282 329,29**
1.1.2003 30.6.2004	**Total pre-financed budget above maximum of EUR 40**			**6 619 810,74**

(67) Belgium also states that, if the competition authority's inquiry reveals that the prices for laboratory BSE tests were increased due to possible illegal price fixing, it would do all it could to recover the surplus, if necessary by taking the laboratories to court.

(68) In their letter of 6 April 2011 the Belgian authorities confirm that the fee of EUR 10,70 was solely for the payment of the BSE test by the beneficiary at that moment, rather than as reimbursement of the prefinancing of previous BSE tests.

(69) In that same letter Belgium indicates that the total amount prefinanced by the BIRB was EUR 67 156 527,65. FASFC reimbursed part of that amount as follows:

Reimbursed by FASFC	
2005	EUR 4 477 102
2006	EUR 4 477 102
2007	No reimbursement (a request for extension was made and granted subject to the payment of interest)
2008	EUR 194 901 (interest on the reported reimbursement)
From 2008	No more reimbursements to the BIRB — programme act of 22 December 2008
Still to be reimbursed	EUR 58 202 323

(70) Belgium states that the government had decided to suspend the prefinancing reimbursement to the BIRB, and that the recovered amounts would therefore be included in FASFC's positive balance. This surplus must be seen as the reimbursement of the BSE tests.

(71) Concerning the payment of the cost of BSE tests by the producer, Belgium reiterates that there was no specific system obliging the slaughterhouses to bill the fee for the BSE test to the producer, but this took place in a spontaneous way. Belgium submitted several invoices clearly showing that the fee was billed as a separate item. One is the slaughterhouse's bill to the producer, where the fee is deducted from the total amount payable by the slaughterhouse to the producer for the animal. In Belgium's opinion this is evidence that the producer is the person finally liable for payment of the BSE test to FASFC.

(72) In its final letter of 25 May 2011 Belgium states that the aid amounts could be the subject of a cumulative application for *de minimis* aid pursuant to 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 ([24]) and of the EUR 40 of compatible aid per test, for the Regulation's period of application.

4. THIRD-PARTY COMMENTS

(73) During this procedure the Commission did not receive any comments from interested third parties.

5. ASSESSMENT

5.1. Evaluation of whether there is aid

(74) First of all, Belgium indicated in its comments on the decision initiating the formal investigation procedure that it considered that the costs of the BSE tests were financed by the Member States because of their compulsory nature and that no Community rules required enterprises to bear the costs of controls. The agricultural guidelines for 2007-13 and the Commission's practice clearly indicate that the different levels of test costs may distort competition, and that most States grant aid to cover the costs of these tests, whence the need the regulate its intensity in order to limit the distortions of competition caused by this aid. In particular, the TSE guidelines clearly state that the aid awarded by the States risks distorting competition. Point 24 of the TSE guidelines, for example, states that 'from 1 January 2003, as far as compulsory BSE testing of bovine animals slaughtered for human consumption is concerned, direct and indirect State aid, including Community payments, may not be more than EUR 40 per test. The obligation for testing may be based on

([24]) OJ L 325, 28.10.2004, p. 4.

national or Community legislation.' These guidelines were presented to the Member States, who were asked to take the appropriate measures and bring their schemes into line with these guidelines. Likewise, as far as the agricultural guidelines for 2007-13 are concerned, what qualifies as State aid with regard to the BSE tests is set out in points 132(f) and subsequent. Furthermore, it is important to emphasise that Decision N 9/05 and N 10/05, where a part of the financing of the BSE tests was classified as aid, was not the subject of an appeal by the Belgian authorities, which implicitly means that the Belgian authorities accepted this classification of the aid for financing BSE tests as State aid.

(75) From these elements, we can deduce that Belgium's calling into question of the classification of the aid for financing BSE tests as State aid by virtue of the obligatory nature of these tests has no basis given the texts that apply and that have applied for many years.

(76) Consequently, the Commission is examining the measures in question on the basis of Article 107 of the TFEU. Article 107(1) of the TFEU provides: 'Save as otherwise provided in this 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 enterprises or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.

(77) For a measure to be covered by Article 107(1) of the TFEU, each of the following four conditions must be cumulatively met: 1) the measure must be financed by the State or through State resources and be attributable to the State; 2) it must selectively concern certain enterprises or sectors of production; 3) it must involve an economic advantage for the recipient enterprises; 4) it must affect trade within the EU and distort or threaten to distort competition.

(78) In the following recitals, these four criteria will be applied to the measures which may constitute State aid.

(79) As indicated in recital 55, several financing systems were used to finance the costs of the BSE tests. As part of the examination of the criterion of the presence of State resources, this Decision makes a distinction between the different means of financing the BSE tests.

5.1.1. *Presence of State resources*

5.1.1.1. From 1 January 2001 to 31 December 2001

(80) During the period from 1 January 2001 to 31 December 2001, the BSE tests were financed entirely by the national exchequer. There is no doubt that this was a case of financing through State resources.

5.1.1.2. From 1 January 2002 to 30 June 2004

(81) During the following period, that is from 1 January 2002 to 30 June 2004, the tests were pre-financed by the BIRB, pending a structural solution for financing the tests. The BIRB is a federal public institution with a legal personality, resulting from the merger of the former *Office Belge de l'Économie et de l'Agriculture (OBEA)* and the agriculture division of the former *Office Central des Contingents et Licences (OCCL)*. It is a category B para-state organisation reporting to the Minister for agriculture, SMEs and the self-employed. The BIRB is an accredited paying agency in the context of the Common Agricultural Policy, and financed by the EAGGF ([25]). It may also be entrusted with tasks arising from the federal or regional governments' agricultural policy. To balance its administrative budget, the BIRB has a government endowment entered in the budget for its supervisory role at federal level (the Federal Public Service Economy) and some revenue of its own (revenue from some fees and limited assets). In view of the above, financing through the BIRB constitutes financing through State resources.

5.1.1.3. From 1 July 2004 to 30 November 2004

(82) From 1 July 2004 to 30 November 2004, the tests were prepaid by the FASFC (Federal Agency for the Safety of the Food Chain). The legislation in force at the time (that is, chiefly the Law of 4 February 2000 on the creation of the FASFC ([26])) indicated that the FASFC was financed mainly by revenue sources such as the product of duties, charges and fees, the products of administrative fines, occasional revenue, gifts and legacies, etc. ([27]). The FASFC is a public institution with legal status, classed as Category A under the Law of 16 March 1954 on the supervision of certain bodies of public interest ([28]). Consequently, it follows from these considerations that the funds provided by the FASFC constitute State resources and that their allocation is decided by public authority, the FASFC being subject to the hierarchical authority of the Minister responsible for public health.

5.1.1.4. From 1 December 2004 to 31 December 2005

(83) As far as the period between 1 December 2004 (date on which Royal Decree of 15 October 2004 entered into force) and 31 December 2005 (date on which the Royal Decrees of 10 November 2005 entered into force) is concerned, the BSE tests were financed by a fee of EUR 10,70 per bovine tested in addition to financing by the FASFC from its reserves and from the repayable advance made available to it by the national exchequer.

(84) The partial financing from the FASFC provided from its own funds constitutes a State resource (see recital 82).

([25]) Source: www.birb.be
([26]) MB of 18.2.2000, p. 5053.
([27]) See Article 10 of the Law of 4 February 2000.
([28]) MB of 24.3.1954, p. 2210.

(85) With regard to the question of whether the fees constitute State resources, they may be State resources if they do not cover the real full costs of the services they are intended to pay for. Indeed, if the fee and the cost of the service provided are not the same, the surplus constitutes a State resource at the disposal of the State body to whom the fee is paid. This is why it is important to verify whether the fees paid to the FASFC for the BSE tests represent payments for the FASFC's services effectively provided to the enterprises and whether or not they were based on market prices (see recital 54 of the decision initiating the formal investigation procedure). This question is dealt with below, during the examination of the concept of advantage.

5.1.1.5. From 1 January 2006 on

(86) As far as the period following the entry into force of the Royal Decrees of 10 November 2005, i.e. the period starting on 1 January 2006, is concerned, it is necessary to examine whether the fees and the contributions set by these Decrees constitute State resources. This question was already examined in the context of Decision N 9/05 and N 10/05. In recital 44 there was a general indication that the contributions constituted State resources and that the fees could constitute State resources if those fees did not cover the real full costs of the services they were intended to pay for. The BSE tests were part-financed by the fees and part-financed by the contributions. Decision N 9/05 and N 10/05 concluded that the part-financing of the costs of the BSE tests by the fees did not constitute State aid and that the financing by the contributions was a compatible form of State aid. As indicated in recital 34 of the decision initiating the formal investigation procedure, the aid approved by Commission Decision is not the subject of this decision and will not be re-examined here.

(87) However, in light of the information provided by Belgium following the initiation of the formal investigation procedure, it emerged that the revenue from the contributions was used in part in 2005 and 2006 to reimburse the pre-financing of the BSE tests exceeding EUR 40 during the period from 1 January 2003 to 1 December 2004. However, this had not been mentioned in Decision N 9/05 and N 10/05. Consequently, a part of the contributions was used to finance the BSE tests conducted during the period between 1 January 2003 and 1 December 2004, the aim being to recover from the farmers in a non-individual fashion the pre-financed costs of the compulsory BSE tests that exceeded the maximum amount of EUR 40.

(88) Allocating part of the receipts of these contributions to the reimbursement of the pre-financing of the tests does not in any way change the classification as State resources as per Decision N 9/05 and N 10/05.

5.1.2. *Selective advantage for an enterprise*

(89) In examining the existence of an advantage, it is necessary to distinguish, on the one hand, the measures financed by State resources, including contributions, and the measures financed by fees.

(90) With regard to the measures financed through State resources, including the contributions, the Commission has constantly held the opinion [29] that if the State finances the costs of the obligatory controls that concern the production or the marketing of products, this has to be considered as a selective advantage for the enterprises [30]. Indeed, the State reduced the charges that are normally included in the budget of an enterprise. It can be deduced from the above that the farmers, the slaughterhouses and other entities which process, handle, sell or market products from bovine animals for whom BSE tests are obligatory by virtue of the legislation in force during the period in question, are conducting an economic activity and have benefited from State aid for the financing of the BSE tests by the State, and this since 1 January 2001.

(91) The arguments put forward by Belgium (see recitals 37 et seq.) according to which the financing of the BSE tests was compulsory with a view to protecting public health and that it is up to the Member State to decide on the normal system of financing BSE tests may not be accepted for the reasons set out in recital 74. In the more specific context of the selectivity assessment, Belgium argued that one could not speak of selectivity except where certain sectors or enterprises would benefit from preferential treatment in comparison with the normal system. The fact of there being differences between the various Member States as regards the financing of the BSE tests and that this could lead to distortions of competition is not, in Belgium's view, a question of State aid but of harmonisation of legislations.

(92) However, this argument cannot be accepted. As indicated in Decision N 9/05 and N 10/05, the selectivity criterion is met when the advantage is reserved for some enterprises or one sector. In this case, at national level, the financing of the BSE tests by the State only benefited one given sector, namely the sector involved in breeding animals subject to BSE tests. At Community level, the fact that the BSE tests were financed by the State or through State resources favoured Belgian enterprises and gave those enterprises an advantage over their

[29] See in particular recital 73 of Decision N 9/05 and N 10/2005 which states that 'the Commission has always considered that the financing by the State of the costs of the obligatory controls directly linked to production or to the placing on the market of a product constitutes a selective advantage benefiting those enterprises'.

[30] See the TSE guidelines, e.g. points 7 and 12.

foreign competitors for whom the mandatory BSE tests were not financed by the State or through State resources. In the preamble to the TSE guidelines (points 8 and 9), it was clearly indicated that the ongoing harmonisation obliging the sector to support the costs was slow, and that the Commission had thus decided to clarify and modify its policy on State aids with regard to the costs generated by the BSE tests. Point 24 of the TSE guidelines, for its part, indicates that the examination requirement could be based on Community or national legislation. This point clearly indicates that there is no Community harmonisation with regard to the obligation to perform the tests, which implies that this could also lead to an aid selectively benefiting the enterprises of a given Member State. In conclusion, the measures financed through State resources, including the contributions, give a selective advantage to farmers, slaughterhouses and other entities that process, handle, sell or trade in bovine animal products that are subject to compulsory BSE testing under the applicable legislation, by reducing the costs they must pay. These advantages are not conferred by direct payments, but by the public authorities covering the costs of the BSE tests by directly paying the laboratories which perform the tests on request from the slaughterhouses and invoice the costs to the FASFC.

(93) As far as the aid measures financed by the fees are concerned, whether an advantage is conferred through these fees must be verified. As indicated in the decision to initiate the formal investigation procedure (in recitals 61 and 62), there would be no question of an advantage if those fees were less than the real costs to the economic operators of the services effectively provided by the FASFC. Whether the charges represent payments for the FASFC services effectively provided to the enterprises must be verified. More specifically, the question arises of whether an advantage was conferred on the slaughterhouses and producers who paid the fee of EUR 10,70 per bovine tested during the period between 1 December 2004 and 31 December 2005, and whether they effectively benefited from the services provided by the FASFC.

(94) The Belgian authorities indicated in the response to the decision to initiate the formal investigation procedure that the fee of EUR 10,70 per bovine tested was the only source of financing for the FASFC to support the costs of the BSE tests, with the exception of the FASFC reserves and the recoverable advances from the national exchequer. The fee was paid by the slaughterhouses. The Belgian authorities mentioned that there was no legal obligation for the slaughterhouses to invoice the amount of the fee to their clients, but that the slaughterhouses' practice was to separately invoice the cost of the fee to the producers. This was proved by Belgium by means of the invoices provided by way of example, where it is clearly visible that the slaughterhouses separately invoice the cost of the fee to the producers. Belgium considers that there is no need to formally regulate the way in which the slaughterhouses repay the fee to the producers or other potential beneficiaries of the services, given that this cost is invoiced to producers in a similar way to the other costs incurred during slaughtering and invoiced to producers.

(95) Consequently, from the above we can deduce that the doubt expressed during the opening of the formal investigation procedure, in recital 44, which indicates that the charge for the slaughterhouses was a lot higher than for other beneficiaries of the service, had arisen from the information Belgium submitted on how the amount of this fee was invoiced to the producers.

(96) As for whether the price for the BSE tests was the market price, Belgium firstly indicated to the Commission that since July 2005 the prices proposed by the FASFC were less than EUR 40, while the agricultural guidelines for 2007-13 cite EUR 40 as the lowest price available in the Community at that time. This is an indication that the prices were in line with prices elsewhere in Europe during the period in question. Secondly, Belgium responded to the decision to initiate the formal investigation procedure by saying that the situation was identical to the one examined in Decision N 9/05 and N 10/05, which concluded that the service providers were designated in accordance with open and non-discriminatory procedures (see recital 82 of Decision N 9/05 and N 10/05). Thirdly, the Commission noted the commitment made by Belgium to take all possible legal measures to recover payments made in excess of the price of the tests, in the event of the Belgium competition authority's enquiries concluding that there was an illegal agreement between the laboratories, the effect of which was to increase the price of the tests. On the basis of these considerations, the Commission concludes that the fees may not be considered as State resources, in that these fees paid to the FASFC for the BSE tests represent payments for the FASFC services effectively provided to the enterprises and were based on market prices.

(97) It can be concluded, in accordance with Decision N 9/05 and N 10/05, that this fee did not give any advantage to the slaughterhouses or the producers, because the fee covers a payment for a service from which the person who paid the fee benefited, and that the test price was based on the market price. This conclusion also permits the conclusion that there was no financing through State resources, given that the test price was in line with the market price.

5.1.3. *Distortion of competition and effect on trade within the EU*

(98) As far as the other conditions governing the application of Article 107(1) of the TFEU are concerned, the measure may have an effect on Belgium's position in this

sector ([31]). As the Belgian undertakings are active in a highly competitive international market, the measure distorts or threatens to distort competition ([32]) and affects trade between Member States.

5.1.4. *Conclusions on the nature of aid within the meaning of Article 107(1) of the TFEU*

(99) In light of the above, the Commission considers that the financing of the BSE tests through contributions and other State resources as indicated above is an advantage, financed through State resources. This advantage distorts or threatens to distort competition by favouring certain enterprises and certain productions and is thereby likely to affect trade between Member States. The advantage is conferred to farmers, slaughterhouses and other entities which process, handle, sell or market products from bovine animals subject to a mandatory BSE test by virtue of the applicable legislation. Consequently, the Commission concludes that these measures fall within the scope of Article 107(1) of the TFEU. However, the part of the BSE tests that is financed by the fees does not constitute aid, given that those who pay the fee benefit from the services provided at the market price.

5.2. **Unlawfulness of the aid**

(100) Since 1 January 2001 the Belgian authorities have not notified the Commission, within the meaning of Article 108(3) of the TFEU, of the aid measures involved in the financing of the BSE tests. Aid measures that fall under Regulation (EC) No 1/2004 are exempt from the reporting obligation, provided that they meet the conditions set out in that Regulation. Consequently, they are unlawful if they do not meet those conditions.

5.3. **Financing the aid**

(101) With regard to State aid part-financed by a para-fiscal tax, i.e. the contribution, the measures financed by the aid and the financing of the aid itself must be assessed by the Commission. Indeed, the possible incompatibility of the financing of a State aid measure with the internal market would also make the aid itself incompatible, even where the awarding of the aid had respected the relevant competition rules.

(102) According to established case-law, taxes do not fall within the scope of the provisions of the TFEU concerning State aid unless they constitute the means of financing an aid measure, such that they form an integral part of that measure ([33]). For a tax or part of a tax to be considered as forming an integral part of an aid measure, it must be hypothecated to the aid measure under the relevant national rules, in the sense that the revenue from the tax must be allocated for the financing of the aid measure ([34]). If such a hypothecation exists, the revenue from the tax directly influences the amount of the aid ([35]) and, consequently, the assessment of the compatibility of this aid with the internal market. ([36])

(103) Therefore, consideration has to be given to whether the contribution levied since 1 July 2004 meets the criteria set out in recital 102, and distinctions must be made by the legal instruments applicable during the different periods. The aid financed was the subject of an exemption, but this exemption does not cover the system for financing the aid, so consequently the lawfulness of the financing system throughout the entire period in question must be examined.

5.3.1. *From 1 July 2004 to 31 December 2005*

(104) During this period the aid was pre-financed by the FASFC and by the fees in virtue of the Royal Decree of 15 October 2004 (although the latter are not covered by this section, given that they are not considered as aid — see recital 97). It is necessary to determine whether the financing system is an integral part of the aid measure. The legislation in force does not suggest that the means of financing of the FASFC be hypothecated to the financing of the BSE tests, nor that the revenue from the tax must be allocated to financing the aid. In fact, the Law of 4 February 2000 creating the FASFC provides for different sources of financing for the FASFC (see recital 82). Furthermore, it cannot be concluded that the revenue from the tax directly influences the amount of the aid, given that the tests are financed by both fees and by the FASFC for the remainder. Consequently, the amount of aid paid by the FASFC varies on the basis of the price of the tests and not on the basis of the contributions paid to the FASFC. In conclusion, there is no hypothecation between the revenue from the contributions and the reimbursement of the pre-financing.

([31]) Belgium has a share of 2,1 % in agricultural production in EU in 2004 (source: Agriculture in the EU — Statistical and economic information 2005).

([32]) According to the case law of the Court of Justice, improvement in the competitive position of an undertaking resulting from a State aid generally points to a distortion of competition compared with other competing undertakings not receiving such assistance, (Judgment of the Court of 17 September 1980, *Philip Morris Holland BV/Commission* (Case C-730/79, ECR 1980, p. 2671, paragraphs 11 and 12).

([33]) Judgment of the Court of 13 January 2005, *Streekgewest Westelijk Noord-Brabant/Staatssecretaris van Financiën* (C-174/02, ECR 2005, p. I 85), paragraph 25.

([34]) Streekgewest Judgment, cited above in the footnote on page 36, paragraph 26, Judgment of the Court of 27 October 2005, *Nazairdis SAS e.a./Caisse nationale de l'organisation autonome d'assurance vieillesse des travailleurs non salariés des professions industrielles et commerciales (Organic)* (Joined Cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04, ECR 2005, p. I-9481), paragraphs 46 to 49.

([35]) Judgments of the Court of 15 June 2006, *Air Liquide/Ville de Seraing et Province de Liège* (Joined Cases C-393/04 and C 41/05, ECR. 2006, p. I-5293), paragraph 46, and *Streekgewest*, cited above in the footnote on page 36, paragraph 28.

([36]) Judgment of the Court of 25 June 1970, *France v Commission* (47/69, ECR 1970, p. 487), paragraph 17, 20 and 21.

5.3.2. *From 1 January 2006 on*

(105) Since that date, the question of the contributions is regulated by the Royal Decree on the contributions for financing the FASFC. Decision N 9/05 and N 10/05 examined the system of financing through contributions and concluded that the part-financing of the costs connected with the BSE tests did not involve discrimination against imported or exported products and was not contrary to the provisions of the Treaty ([37]). As indicated in recital 31, this Decision does not have any bearing on previously approved measures. However, given that Belgium indicated that a part of the contributions were used, from 1 January 2006, to reimburse the pre-financing of earlier BSE tests, the Commission is entitled to examine the financing system with regard to the contributions financing the reimbursement of the pre-financing of the BSE tests.

(106) Belgium has indicated that the financing system was unchanged, apart from the indexation of the fee. The only element that was changed is the use of revenue from the contributions to reimburse the pre-financing of the BSE costs in 2006.

(107) As for the question of whether this financing is an integral part of the aid measure, the answer is no. The allocation of the contributions after 2006 for reimbursing the pre-financing of the tests did not affect the amount of aid awarded. Furthermore, the Belgian authorities indicated that the recovery system was a solidarity-based recovery system whereby each operator paid a contribution to the FSCA and a part of that contribution went to recovering past costs linked to pre-financing the BSE tests. All active operators that had bovine animals in the period in question contributed equally to that system, but they were not the only contributors. Consequently, the Commission concludes that the financing of the aid was not an integral part of the aid measure in question.

5.4. **Appraisal of the compatibility of the aid measures**

(108) Where the aid constitutes State aid and falls under Article 107(1) of the TFEU, it is necessary to examine whether it can be considered compatible with the internal market by virtue of Article 107(2) and (3) of the TFEU.

(109) In the light of the measure in question, only Article 107(3)(c) of the TFEU, which stipulates that aid to facilitate the development of certain economic activities or of certain economic areas may be considered to be compatible with the internal market where such aid does not adversely affect trading conditions to an extent contrary to the common interest, could apply.

([37]) See recitals 100 et seq. of Decision N 9/05 and N 10/05.

(110) Pursuant to point 23.3 of the Community Guidelines for State aid in the agricultural sector ([38]) for the period 2000-06 (hereinafter 'the 2000-06 agricultural guidelines') and the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid ([39]), all unlawful aid 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 ([40]) must be assessed in accordance with the rules and guidelines in force at the time the aid was granted. In 2002, the Commission adopted the TSE guidelines. They applied between 1 January 2003 and 31 December 2006 ([41]). Point 44 of the TSE guidelines provides that, except for cases relating in particular to BSE tests, unlawful aid within the meaning of Article 1(f) of Regulation (EC) No 659/1999 is to be examined in accordance with the rules and guidelines applicable at the time the aid was granted. Given that the aid was granted between 1 January 2001 and 31 December 2005, the TSE guidelines are the appropriate framework for examining this aid.

(111) In accordance with point 194(c) of the 2007-13 agricultural guidelines, the Commission will cease to apply the TSE guidelines from 1 January 2007, except for unlawful aid as set out in point 43 et seq. of those guidelines.

(112) Two periods can be distinguished on the basis of the different legal provisions that apply.

5.4.1. *Period from 1 January 2001 to 31 December 2002: application of point 11.4 of the 2000-06 agricultural guidelines as referred to in point 45 of the TSE guidelines*

(113) Point 45 of the TSE guidelines provides that, as regards unlawful State aid towards the costs of BSE tests granted before the date of application of the TSE guidelines (i.e. 1 January 2003), the Commission is to evaluate the compatibility of such aid in line with point 11.4 of the 2000-06 agriculture guidelines and its practice since 2001 of accepting such aid of up to 100 %.

(114) In order to be considered compatible, in accordance with point 11.4 of the 2000-06 agricultural guidelines:

— the measure must be part of an appropriate programme at Community, national or regional level for the prevention, control or eradication of the disease concerned (point 11.4.2),

— the objective of the measure should be either preventive or compensatory, or a combination of the two (point 11.4.3),

([38]) OJ C 28, 1.2.2000, p. 2.
([39]) OJ C 119, 22.5.2002, p. 22.
([40]) OJ L 83, 27.3.1999, p. 1.
([41]) See point 194(c) of the 2007-13 agricultural guidelines.

— the measure should be compatible both with the objectives and the specific provisions laid down in Community veterinary and phytosanitary legislation (point 11.4.4),

— the aid intensity should not exceed 100 % of the eligible costs (point 11.4.5).

If the aid is provided under Community and/or national and/or regional aid schemes, the Commission is to require evidence that there is no possibility of overcompensation through the cumulation of measures under different schemes. Where Community aid has been approved, the date and references of the relevant Commission decision should be provided.

(115) As regards the first three conditions, the decision initiating the formal investigation procedure already concluded that they had been met (see recital 80 of that decision). Furthermore, the Belgian authorities confirmed this approach in their comments on the decision initiating the formal investigation procedure. BSE is a transmissible disease and poses a threat to human health. It is an animal disease of which a primary outbreak must be notified directly to the Commission and other Member States ([42]). The objective of the aid measure is to control BSE by testing slaughtered animals and fallen stock. Compensating the costs of farmers should ensure that the measures are actually implemented. All the measures arise under, or are recommended by, Community law ([43]).

(116) As regards the fourth condition, the information provided by Belgium refers to financing of BSE tests with a cost varying between EUR 111,81 and EUR 63,45 during this period (see recital 56). This covers the cost of the laboratory analysis, the cost of having a sample taken by a vet and the cost of the test kit. The Commission is of the opinion that these costs are in line with those mentioned in point 11.4.5 of the 2000-06 agricultural guidelines, which include health checks, tests and other screening measures among the actual costs incurred.

(117) In conclusion, the aid granted in the period from 1 January 2001 to 31 December 2002 is compatible.

5.4.2. *Period from 1 January 2003 to 31 December 2005: application of point 21 et seq. of the TSE guidelines*

(118) In accordance with point 23 of the TSE guidelines, the Commission decided to continue to approve aid of up to 100 % of the costs of BSE tests meeting the principles set out in point 11.4 of the 2000-06 agriculture guidelines (see recital 114).

(119) In addition, the following conditions must also be met in line with the TSE guidelines:

— from 1 January 2003, as far as compulsory BSE testing of bovine animals slaughtered for human consumption is concerned, support, including Community payments, may not be more than EUR 40 per test (see point 24 of the TSE guidelines),

— State aid towards the costs of BSE tests must be paid to the operator where the samples for the tests have to be taken. If the aid is paid to laboratories, it must be demonstrated that the full amount of State aid paid is passed on to the operator (point 25 of the TSE guidelines).

(120) As indicated in recitals 115 and 116, the four conditions set in the 2000-06 agricultural guidelines have been met.

(121) As regards the condition concerning the maximum amount of EUR 40 per test, the Commission notes that this limit was exceeded between 1 January 2003 and 30 June 2004. According to the information provided by Belgium, the total amount of the excess payments during this period was EUR 6 619 810,74. From 1 July 2004, the total cost of the test was below EUR 40 (see recital 64). The Belgian authorities have indicated that these amounts covered both national and Community payments (see recital 58).

(122) As regards the requirement that the aid must be paid to the operator where the samples for the test are taken or that, if the aid is paid to laboratories, it must be demonstrated that the full amount of State aid is passed on to the operator (point 25 of the TSE guidelines), the Commission concludes that this requirement has been met.

(123) As indicated in the decision initiating the formal investigation procedure, the Belgian authorities stated that the costs of BSE tests are paid directly to the laboratories. Operators do not have to pay any laboratory costs for BSE tests on bovine animals. This appraisal is in line with what was decided for the similar system in recital 95 of decision N 9/05 and N 10/05. As already stated, the only cost passed on to producers is the fee (see recital 93 et seq.), but this part of the financing of the BSE test does not constitute aid. Consequently, the full amount of the aid is passed on to the operator.

5.4.3. *From 1 January 2006*

(124) For the period after 1 January 2006, the Commission refers to decision N 9/05 and N 10/05, as it is not the purpose of this Decision to go back over the aid approved there.

([42]) Council Directive 82/894/EEC of 21 December 1982 on the notification of animal diseases within the Community (OJ L 378, 31.12.1982, p. 58).

([43]) See Regulation (EC) No 999/2001.

5.4.4. *Conclusion*

(125) To conclude, the aid granted to finance BSE tests in excess of EUR 40 per test during the period from 1 January 2003 to 30 June 2004, which amounts to EUR 6 619 810,74 in total, is incompatible with the internal market.

5.5. **Repayment of prefinanced budget**

(126) As mentioned above, the tests were financed from State resources over and above the limit of EUR 40 per test during the period from 1 January 2003 to 30 June 2004.

(127) Belgium decided to start repaying this excess from the contributions levied to finance the FASFC from 1 January 2006, initially spread over a period of 15 years, but this was subsequently abandoned. According to the Belgian authorities, the reason for this global approach is that, in practice, it was difficult to enforce recovery on an individual basis, as some operators had died or ceased operating.

(128) In a subsequent letter dated 6 April 2011, the Belgian authorities indicated that the FASFC had started repayment using FASFC resources in 2005-06.

(129) However, the recovery system proposed does not meet the requirements for the recovery of unlawful and incompatible aid. Under case law, the purpose of recovery is to re-establish the situation that existed on the market prior to the granting of the aid. The objective of re-establishing the previously existing situation is achieved once the unlawful and incompatible aid is repaid by the recipient, who thereby forfeits the advantage which he enjoyed over his competitors in the market, and the situation as it existed prior to the granting of the aid is restored ([44]). The aid to be recovered includes interest, at an appropriate rate fixed by the Commission, from the date on which the unlawful aid was placed at the disposal of the beneficiary until the date of its recovery ([45]). Under Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([46]), interest must be calculated on a compound basis, which is not the case here. Furthermore, Article 14 of Regulation (EC) No 659/1999 stipulates that Member States must take all necessary measures to ensure the immediate and effective execution of the Commission's decision. Recovery as proposed and partially implemented by Belgium does not meet the above requirements and cannot be considered recovery as provided for in Article 14 of Regulation (EC) No 659/1999.

([44]) Judgment of the Court of 4 April 1995 in Case C-348/93 *Commission* v *Italy* [1995] ECR I-673, paragraph 27.
([45]) Article 14 of Regulation (EC) No 659/1999.
([46]) OJ L 140, 30.4.2004, p. 1.

6. **CONCLUSIONS**

(130) The Commission concludes that financing BSE tests through fees does not constitute aid.

(131) The Commission concludes that financing BSE tests from State resources constitutes aid for farmers, slaughterhouses and other entities that process, handle, sell or trade in bovine animal products that are subject to compulsory BSE testing under the applicable legislation. This aid is compatible for the period from 1 January 2001 to 31 December 2002 and from 1 July 2004 to 31 December 2005. It is incompatible for the period from 1 January 2003 to 30 June 2004. The incompatible portion of the aid consists of the amount in excess of EUR 40 per test and has been assessed by Belgium as EUR 6 619 810,74.

(132) The Commission notes that Belgium unlawfully implemented aid to finance BSE tests in breach of Article 108(3) of the TFEU during the period from 1 January 2001 to 30 June 2004. From 1 January 2003, the aid was covered by an exemption regulation, but as the conditions of the exemption regulation were not complied with, the aid is unlawful.

(133) The unlawful and incompatible aid exceeding the maximum amount of EUR 40 per test must be recovered, with the exception of aid granted to specific projects which, at the time the aid was granted, met all the conditions set in the applicable *de minimis* Regulation,

HAS ADOPTED THIS DECISION:

Article 1

1. The measures financed through fees do not constitute aid.

2. For the period from 1 January 2001 to 31 December 2002 and for the period from 1 July 2004 to 31 December 2005, financing of BSE tests from State resources constitutes aid compatible with the internal market for farmers, slaughterhouses and other entities that process, handle, sell or trade in bovine animal products that are subject to compulsory BSE testing.

3. For the period from 1 January 2003 to 30 June 2004, financing of BSE tests from State resources constitutes aid compatible with the internal market for farmers, slaughterhouses and other entities that process, handle, sell or trade in bovine animal products that are subject to compulsory BSE testing for amounts of up to EUR 40 per test. Amounts in excess of EUR 40 per test are incompatible with the internal market and must be recovered, with the exception of aid granted to specific projects which, at the time the aid was granted, met all the conditions set in the applicable *de minimis* Regulation.

4. Belgium unlawfully implemented aid to finance BSE tests in breach of Article 108(3) of the TFEU during the period from 1 January 2001 to 30 June 2004.

Article 2

1. Belgium shall take all necessary measures to recover the unlawful and incompatible aid referred to in Article 1(3) and (4) from its beneficiaries.

2. The aid to be recovered shall include interest calculated from the date on which it was placed at the disposal of the beneficiaries until the date of its recovery.

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

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

Article 3

Recovery of the aid referred to in Article 1(3) and (4) shall be immediate and effective.

Belgium shall ensure that this Decision is implemented within 4 months of the date of its notification.

Article 4

1. Within 2 months of notification of this Decision, Belgium shall submit the following information to the Commission:

(a) a list of beneficiaries who received the aid referred to in Article 1(3) and (4) and the total amount of aid received by each one;

(b) the total amount (principal and recovery interest) to be recovered from the beneficiaries;

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

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

2. Belgium shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1(3) and (4) has been completed.

3. After the 2-month period referred to in paragraph 1, Belgium shall submit, at the Commission's request, a report on the measures already taken and those planned to comply with this Decision. That report shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.

Article 5

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 27 July 2011.

For the Commission

Dacian CIOLOȘ

Member of the Commission