COMMISSION DECISION

of 9 July 2014

on the aid scheme SA.18042 (2013/C) (ex MX 17/2009) (ex NN 61/2004) implemented by Spain on excise duty exemption for biofuels

(notified under document C(2014) 4530)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2014/766/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,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above [1] and having regard to their comments,

Whereas:

I. PROCEDURE

(1) Since 2006, the Directorate-General for Competition has carried out each year an *ex-post* monitoring exercise of a sample of aid measures implemented by Member States. The Spanish excise duty exemption for biofuels scheme (case No NN 61/2004) was approved by the Commission by decision C(2006) 2293 of 6 June 2006. This scheme was included in the 2009/2010 monitoring exercise under reference MX 17/2009, in the context of which the Commission examined how Member States had implemented a sample of existing schemes in 2009.

(2) The Commission decided to include this scheme again in the 2011/2012 monitoring exercise, in the context of which the Commission examined how Member States had implemented a sample of existing schemes during the period 2009-2010.

(3) In the light of the information provided by Spain during the monitoring exercise, the Commission had doubts about the proper implementation of the scheme by the Spanish authorities. Consequently, it decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU). The Commission informed Spain of its decision by letter dated 17 July 2013.

(4) Spain provided its observations on 20 September 2013.

(5) The Commission decision to initiate the formal investigation procedure was published in the *Official Journal of the European Union* on 7 February 2014 [2]. The Commission invited interested parties to submit their comments.

(6) The Commission received comments from the biofuels section of the Spanish Association of Renewable Energy Producers (APPA Biocarburantes) on 5 March 2014. It forwarded them to Spain, which was given the opportunity to react. On 6 May 2014 the Spanish authorities indicated that they did not wish to comment on the observations received from third parties.

[1] OJ C 37, 7.2.2014, p. 44.
[2] See footnote 1.

II. **DETAILED DESCRIPTION OF THE MEASURE**

(7) The scheme NN 61/2004 Excise duty exemption for biofuels consists of a zero rate of the Spanish tax on hydrocarbons. It applies to ethyl alcohol produced from products of agricultural or vegetable origin (bioethanol) falling within CN Code 2207 20, methyl alcohol obtained from products of agricultural or vegetable origin falling within CN Code 2905 11 00 and products falling within CN Codes 1507, 1508, 1510, 1511, 1512, 1513, 1514, 1515 and 1518.

(8) The zero rate of tax was applied to these products irrespective of whether they were used as such or after chemical modification. In cases were the biofuel was blended with other fuel, the reduced rate applied only to the biofuel part of the mixture. The reduced excise duty was applicable to biofuels of whatever geographical origin.

(9) The scheme was approved by the Commission on 6 June 2006 and expired on 31 December 2012 ([3]).

(10) The assessment of the information provided by the Spanish authorities during the monitoring exercise raised doubts as to whether the scheme had been implemented in compliance with the Commission decision in 2009 and 2010. Moreover, there were doubts that Spain may have overcompensated beneficiaries in 2010. The Commission's concerns were set out in recitals 13 to 29 of its decision of 17 July 2013.

(11) The Commission requested Spain to:

(a) demonstrate that the scheme had been correctly implemented in 2009 and 2010;

(b) demonstrate that there had been no overcompensation for bioethanol in 2010, or, if there had been, to explain what measures were taken to avoid overcompensation in the following years;

(c) submit annual reports for the whole duration of the scheme.

III. **COMMENTS FROM INTERESTED PARTIES**

(12) The Commission received comments from APPA Biocarburantes on 5 March 2014. The comments were very similar to those of the Spanish authorities (see section IV). APPA Biocarburantes argued that the scheme had been correctly implemented.

(13) When the costs of biofuels were compared with the pre-tax price of fossil fuels at the pump, both bioethanol and biodiesel seemed to have been undercompensated for the whole period, with the exception of 2010 for bioethanol and 2012 for biodiesel. APPA Biocarburantes argued that this methodology was incorrect, as the pre-tax price of fossil fuels at the pump included all fuel transport and distribution costs until the product reached the final consumer, while such logistical costs were not included in the cost of biofuels in this comparative analysis. In its view, it would be more appropriate to compare biofuel production costs with the internationally quoted prices of fossil fuels. Use of this methodology clearly showed an increased undercompensation for biofuels during the lifetime of the scheme and no instances of overcompensation.

(14) Finally, APPA Biocarburantes argued that, even when the costs of biofuels were compared with the pre-tax price of fossil fuels at the pump, the two one-off situations of potential overcompensation were purely temporary and were caused by the very nature of the tax aid scheme for biofuels (with absolute quantities set *ex ante* and evaluations carried out *ex post*) and the highly volatile prices of the agricultural raw materials (the main component of biofuel production costs). No adjustment of the scheme was necessary – for bioethanol no sign of potential overcompensation could be seen in the following years (2011 and 2012) and for biodiesel the potential overcompensation occurred in the last year, 2012. Moreover, no adjustments would be possible for the future, as the scheme had expired.

([3]) OJ C 219, 12.9.2006, p. 3.

IV. COMMENTS FROM SPAIN

(15) The Spanish authorities provided their comments on 20 September 2013. On 6 May 2014 they indicated that they did not wish to comment on the observations from third parties that had been forwarded to them.

(16) In their letter of 20 September 2013, the Spanish authorities submitted information on the costs of production of bioethanol and biodiesel, together with data on the prices of fossil fuels during the period between 2004 and 2012. At the same time they provided tables comparing the costs of biofuels with the pre-tax price of fossil fuels at the pump. These tables are set out in the Annex.

(17) The data and the analysis illustrated by the respective tables are based on the following assumptions:

(a) The starting point is the real data for annual production costs of Spanish plants, plus a production profit margin of 5 %. Adjustments are made due to the difference in energy content between the biofuel and the fossil fuel with which it is mixed using the data in Annex III to Directive 2009/28/EC of the European Parliament and of the Council ([4]), namely 1,52 and 1,09 for bioethanol and biodiesel, respectively.

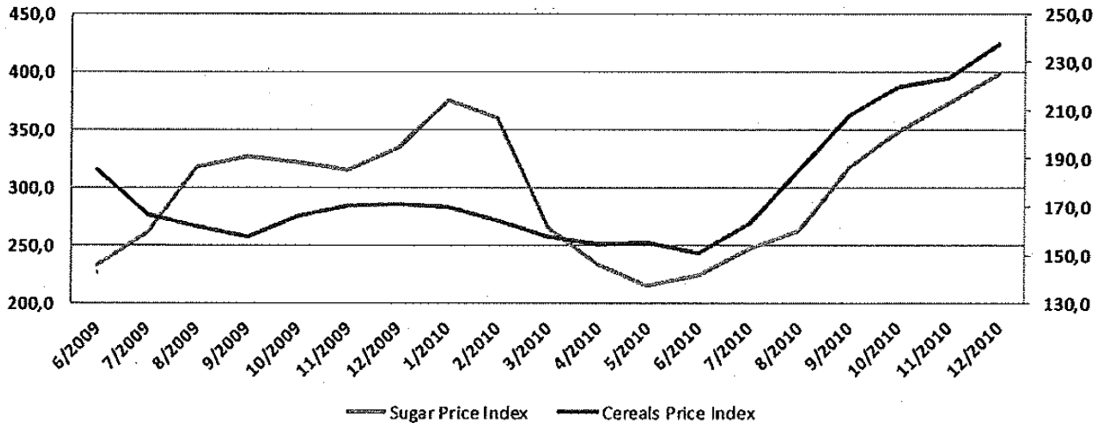
(b) These costs are compared with the price data for the fuel they are replacing, i.e. petrol and diesel. The price is the pre-tax pump price of this fuel and it therefore includes the gross commercial distribution margin. The difference between the production cost of the biofuel and the cost of the substitute fossil fuel is the maximum compensation margin.

(c) The real compensation applied is equivalent to the excise duty on mineral oils that would correspond to bioethanol and biodiesel. Without the exemption, the rate applied to the products in question as excise duty on mineral oils would have been the rate for petrol and diesel, respectively ([5]).

(18) Based on the corresponding data, Spain indicated that during the period 2004-2012 an accumulated undercompensation could be observed for both types of biofuel (EUR 455,96/1 000 l for biodiesel and EUR 897,22/1 000 l for bioethanol). When each year was considered separately, undercompensation could still be observed for all the years with only two exceptions: 2010 for bioethanol, and 2012 for biodiesel.

(19) With regard to bioethanol, Spain explained that the apparent overcompensation observed in 2010 was the result of a one-off drop in commodity prices, in particular agricultural commodities, between January and June 2010. This was therefore a one-off, reversible and unforeseeable situation which furthermore automatically corrected itself the following year through the rise in raw material prices. Therefore there was no reason for the Spanish authorities to take any action. Detailed information about the evolution of raw material prices was provided, as well as a graph illustrating the trend in the sugar and cereals price index (2002-2004 base = 100).

Developments in raw material prices in the period 2009-2011 ([6])



Source: www.fao.org

([4]) Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ L 140, 5.6.2009, p. 16).

([5]) In the case of bioethanol, this amount was EUR 371,69/1 000 litres in the period 2004-2009 and EUR 400,69/1 000 litres in the period 2009-2012. As regards biodiesel, the rates applied were EUR 269,89/1 000 litres in the period 2004-2006, EUR 278/1 000 litres in the period 2007-2009 and EUR 307/1 000 litres in the period 2009-2012.

([6]) The Sugar Price Index starts from the bottom right, and the Cereals Price Index starts from the top right.

(20) As for biodiesel, Spain explained that an instance of overcompensation apparently took place in 2012 but the scheme expired on 31 December of that year.

(21) Spain argued that the price used as reference for substitute fuels in this methodology — the pre-tax pump price — was the most stringent of the options available, and a comparison with a value closer to the world prices for these products would be more appropriate. The Spanish authorities also provided tables comparing the costs of biofuels with the world price of the fossil fuels and underlined that in this case no overcompensation could be observed for biodiesel in any of the years considered, while for bioethanol the potential overcompensation was negligible (EUR 2/1 000 l, compared with EUR 142,13/1 000 l using the pre-tax pump price of fossil fuel as reference). The accumulated undercompensation would be several times higher than as compared with the previous methodology.

(22) The Spanish authorities explained that they had reported on all companies that produced, processed, held, received and dispatched excise goods, in accordance with Council Directive 2008/118/EC ([7]).

(23) In point 1 of Article 4 of that Directive 'authorised warehousekeeper' is defined as a natural or legal person who, in the course of his business, is authorised to produce, process, hold, receive or dispatch excise goods under a duty suspension arrangement in a tax warehouse. Article 8 of the Directive states that the authorised warehousekeeper is liable to pay the excise duty.

(24) The Spanish authorities explained why they had provided tax details on only one of the two companies that had signed an agreement to operate on a subcontracting basis to produce fatty acid methyl esters (FAME) from soya and palm oil. As this contract dealt with products subject to excise duty on the holding, movement and monitoring of such products, it was governed by Directive 2008/118/EC. The Spanish authorities stated that the owner of the product did not fall within the definition of 'authorised warehousekeeper' as set out in point (1) of Article 4 of the Directive.

V. **ASSESSMENT OF THE MEASURE**

(25) The Commission already concluded in its decision in case NN 61/2004 that the measure at issue involved aid within the meaning of Article 107 TFEU. The Commission assessed this aid scheme on the basis of the 2001 Community guidelines on State aid for environmental protection ([8]) and concluded that it was compatible with the internal market.

(26) The Spanish authorities have now provided the Directorate-General for Competition with detailed information, including the relevant data on the production costs of bioethanol and biodiesel for the whole duration of the scheme. When the production costs of biofuels are compared with the pre-tax pump price of fossil fuels, as illustrated in the tables included in the Annex to this decision, there can be observed two situations of over-compensation: for bioethanol in 2010 and for biodiesel in 2012.

(27) With regard to the alternative methodology proposed by Spain, which takes as reference the world prices of fossil fuels, the Commission observes that this methodology is different from that proposed by Spain and used by the Commission to assess the measure NN 61/2004. As the Commission is verifying whether Spain has implemented the aid scheme correctly in compliance with the decision by which it was approved in case NN 61/2004, the alternative methodology proposed cannot be accepted.

(28) None the less, the Commission notes that there can be observed no trend of persistent overcompensation. Also, when the aid is considered for the whole duration of the scheme, there is no indication of overall overcompensation. The Commission takes note of the explanations provided by Spain (see recitals 18, 19, 20 and 22).

(29) In the case of bioethanol, the Commission considers that it was not necessary to make adjustments to remedy the overcompensation. In this case, Spain was able to demonstrate that the overcompensation was remedied, mainly owing to the fact that raw material prices increased significantly after June 2010. Indeed, in 2011 and 2012 no overcompensation can be observed for bioethanol.

([7]) Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (OJ L 9, 14.1.2009, p. 12).
([8]) OJ C 37, 3.2.2001, p. 3.

(30) As for biodiesel, the Commission notes that a small overcompensation of EUR 41,85/1 000 l can be observed for 2012. This overcompensation occurred while the measure and in particular the support level was maintained unchanged. This situation was caused by factors extraneous to the scheme, specifically the big increase in the price of fossil diesel in Spain. The Commission notes that the price of diesel in 2012 was 8 % higher than in 2011, 36 % higher than in 2010 and 71 % higher than in 2009. In comparison, biodiesel production costs in 2012 were at the same level as in 2011, 16 % higher than those registered in 2010 and 25 % higher than in 2009. The Commission also notes that the scheme expired at the end of 2012, and therefore it was not possible to adapt the excise duty exemption to avoid future overcompensation, in accordance with recital 19 of the Commission decision in case NN 61/2004. The Commission notes as well that no aid was granted under the scheme in 2013 or any of the following years. Lastly, as explained in recital 28, if account is also taken of the data for 2012 no overcompensation can be observed for the whole duration of the scheme. This can consequently be considered a sign that Spain could rely on the *ex-ante* calculation method provided for under the scheme.

(31) Having considered the additional information provided by Spain, the Commission is of the opinion that Spain has not failed to fulfil its obligations as set out in recital 19 of the Commission decision in case NN 61/2004.

(32) Based on the explanations provided by Spain on the application of Directive 2008/118/EC, the Commission accepts that the Spanish authorities reported on all the appropriate companies.

VI. **CONCLUSION**

(33) The Commission finds that Spain has implemented the aid scheme NN 61/2004 correctly, in compliance with the Commission decision approving it,

HAS ADOPTED THIS DECISION:

Article 1

The state aid scheme NN 61/2004 implemented by Spain is compatible with the internal market within the meaning of Article 107(3)(c) TFEU and has been correctly implemented, in compliance with the Commission decision in case NN 61/2004.

Article 2

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 9 July 2014.

For the Commission
Joaquín ALMUNIA
Vice-President

ANNEX

Table 1

Bioethanol production costs in Spain

Bioethanol production costs in Spain										
EUR /1 000 litres		2004	2005	2006	2007	2008	2009	2010	2011	2012
Raw materials	(+)	[…] (*)	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Labour	(+)	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Depreciation	(+)									
Variable and financial costs	(+)	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Transport and distribution	(+)	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Revenues from by-products	(–)	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Direct aid	(–)	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Total production costs		**603**	**692**	**672**	**582**	**602**	**581**	**510**	**688**	**763**
Production margin (5 %)	(+)	**30**	**35**	**34**	**29**	**30**	**29**	**26**	**34**	**38**
Diff. energy content adjustment factor	(+)	**329**	**378**	**367**	**318**	**329**	**317**	**278**	**376**	**417**
Total bioethanol costs (before tax)	(B)	**962**	**1 104**	**1 073**	**929**	**961**	**927**	**814**	**1 098**	**1 218**
95 I.O. petrol costs (before tax)	(P)	**351,8**	**427,0**	**483,3**	**497,0**	**560,8**	**436,7**	**555,4**	**674,6**	**741,0**
Maximum compensation margin	(M)=(B)–(P)	610,6	677,4	589,2	431,9	400,0	490,6	258,6	423,4	476,7
Excise duty on mineral oils (IEH)	(IEH)	371,7	371,7	371,7	371,7	371,7	371,7 / 400,7	400,7	400,7	400,7
Under-compensation (I)	(I)=(M)–(IEH)	238,90	305,74	217,52	60,18	28,30	118,89 / 89,89	– 142,13	22,76	76,06

Source: Spanish authorities

(*) Business secret

Table 2

Biodiesel production costs in Spain

Biodiesel production costs in Spain										
EUR /1 000 litres		2004	2005	2006	2007	2008	2009	2010	2011	2012
Raw materials	(+)	[…] (*)	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Labour	(+)	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Depreciation	(+)									
Variable and financial costs	(+)	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Transport and distribution	(+)	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Revenues from by-products	(–)	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Direct aid	(–)	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Total production costs		553	744	710	762	992	733	791	917	918
Production margin (5 %)	(+)	28	37	36	38	50	37	40	46	46
Diff. energy content adjustment factor	(+)	52	70	67	72	94	69	75	87	87
Total biodiesel costs (before tax)	(B)	633	852	813	872	1 135	839	905	1 050	1 051
Gas oil A costs (before tax)	(P)	355,0	476,0	521,7	524,9	672,8	459,0	576,5	727,9	785,5
Maximum compensation margin	(M)=(B)–(P)	277,9	375,5	290,9	347,2	462,5	379,9 / 379,9	328,8	321,6	265,2
Excise duty on mineral oils	(IEH)	269,86	269,86	269,86	278	278	278 / 307	307	307	307
Under-compensation (I)	(I)=(M)-(IEH)	8,05	105,65	21,04	69,21	184,54	101,92 / 72,92	21,80	14,61	– 41,85

Source: Spanish authorities
(*) Business secret