EUROPEAN COMMISSION

Brussels,
C (2013)

Subject: **State Aid / Germany**
- Aid No SA.36321 (2013-N)
- Tax relaxation for agricultural diesel

Sir,

The Commission wishes to inform Germany that, having examined the information supplied by your authorities on the aid referred to above, it has decided to raise no objections to the relevant aid as it is compatible with the Treaty on the Functioning of the European Union (hereinafter: "TFEU").

In taking this decision the Commission has relied on the following considerations:

1. PROCEDURE

(1) The present aid scheme was notified in accordance with Article 108(3) of the TFEU[1] by letter from the Permanent Representation of Germany to the European Union of 11 March 2013, registered on 12 March 2013. Additional information was provided on 28 March 2013, registered on 2 April 2013.

2. DESCRIPTION

2.1. Title

(2) Tax relaxation for agricultural diesel

2.2. Budget

(3) Planned annual revenue loss: € 400 million.

Planned overall amount of revenue loss: € 1200 million.

[1] With effect from 1 December 2009, articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are, in substance, identical. For the purposes of this decision, reference to Articles 107 and 108 of the TFEU should be understood as references to Article 87 and 88, respectively, of the EC Treaty where appropriate.

H.E. Dr Guido Westerwelle
Federal Minister for Foreign Affairs
Werderscher Markt 1
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2.3. Duration

(4) From 1.1.2014 to 31.12.2016. The amended scheme will be put in place following the approval decision by the European Commission. The German authorities confirmed compliance with the incentive effect requirements of point 16 of the Community Guidelines for State aid in the agriculture and forestry sector 2007 to 2013[2] (hereinafter: "the Guidelines").

2.4. Beneficiaries

(5) Undertakings of the agricultural sector active in primary agricultural production and of the forestry sector in Germany. The estimated number of beneficiaries is over 1000.

(6) The German authorities confirmed that the notified scheme is open to all producers of primary agricultural products without any differentiation.

2.5. Legal basis

(7) Energy Tax Law of 15 July 2006, as last amended on 5 December 2012 *(Energiesteuergesetz)*;

Regulation implementing the Energy Tax Law of 31 July 2006, as last amended on 24 February 2012 *(Energiesteuer-Durchführungsverordnung)*.

2.6. Aid Scheme

(8) Article 57 paragraph 1 of the *Energiesteuergesetz* provides for tax relief for gas oil[3] which has already been taxed and is to be used to operate agricultural vehicles and machinery for crop and livestock production through cultivation of the soil and land-based livestock farming upon submission of an application. The level of the excise tax is reduced by the means of an annual refund of the tax. The refund is paid upon application for the amounts of eligible gas oil the beneficiaries have used for production purposes during the past tax year. The tax relief was set at € 214.80 per 1 000 litres of gas oil. This corresponds to an applied tax rate of € 255.60 per 1 000 litres. The eligible quantity was limited to 10 000 litres per calendar year and the refund was only granted for consumptions equivalent to more than € 350 of refund (contribution to be paid by the beneficiary [*Selbstbehalt*]). With letter C(2008)1779 of 30 April 2008 in the state aid case NN 74/2006 the Commission approved the scheme that had been put into force without Commission approval.

(9) Subsequently, Germany notified an amendment of the *Energiesteuergesetz* in the State Aid case N 366/2009. This amendment consisted in the suspension of the limitation of the eligible quantity per calendar year and the € 350 threshold for the refund per beneficiary for the years 2008 and 2009. With letter C(2009)5502 of 13 July 2009 the Commission approved this amendment. Later, Germany notified an amendment to the scheme consisting of the extension of the previous amendments. With letter C(2011)4890 of 13 July 2011 the Commission approved this amendment. The measure was prolonged until 31.12.2013.

(10) The currently notified amendment of the approved scheme consists of the extension of the duration from 1 January 2014 until 31 December 2016 and of a new budget for the given period.

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[2] Official Journal of the European Union C 319 of 27.12.2006, p.1.
[3] Including its equivalents (biodiesel, plant oil).

(11) The tax relief of €214.80 per 1 000 litres of gas oil corresponding to (a) an applied tax rate of €255.60 per 1 000 litres (54.3 % of the regular tax rate) for gas oil with sulphur content of less than 10mg/kg and to (b) an applied tax rate of €270.90 per 1 000 litres (55.8 % of the regular tax rate) for gas oil with sulphur content of more than 10mg/kg remain unchanged.[4]

(12) As previously, the tax refund will be granted to all undertakings in the agriculture and forestry sector in Germany without distinction.

(13) Furthermore the German authorities committed to suspend the payment of the aid if the beneficiary still has at its disposal an earlier unlawful aid that was declared incompatible by a Commission Decision (either concerning an individual aid or an aid scheme), until that beneficiary has reimbursed or paid into a blocked account the total amount of the unlawful and incompatible aid including the corresponding recovery interest. They have confirmed that enterprises in difficulties will not be eligible for aid under the notified measure.

3. ASSESSMENT

3.1. Presence of aid within the meaning of Article 107(1) TFEU

(14) For Article 107(1) of the TFEU to apply, the measures must provide an economic benefit to an undertaking which it would not have received in its normal course of business, the aid must be granted to certain undertakings, the benefit must be granted by a Member State or through state resources and the aid must be capable of affecting trade perceptibly between Member States.

(15) These conditions are met.

(16) The aid measure causes the State to lose tax revenue. Therefore the measure is financed out of State resources. Since the reduced tax rate will benefit only undertakings in the agriculture and forestry sector and not all undertakings in Germany, the measure benefits certain undertakings and therefore provides a selective advantage. As the agriculture and forestry sector in the EU is highly competitive, the measure has the potential to distort competition[5] and affect trade[6] between Member States.

(17) Therefore the Commission concludes that the measure constitutes aid and Article 107 (1) of the TFEU applies.

3.2. Compatibility with the aid scheme pursuant to Article 107(3)(c) TFEU

(18) As a result the aid may be regarded as compatible with the internal market only if one of the exemptions provided for in the TFEU applies.

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[4] As of 1 January 2011 the applied tax rate of €270.90 per 1 000 litres (55.8 % of the regular tax rate of €480,70) for gas oil with sulphur content of more than 10mg/kg became obsolete as the use of this type of gas oil was prohibited in the agricultural sector.

[5] According to the case law of the Court of Justice of the European Communities, using State aid to improve the competitive position of an undertaking generally results in a distortion of competition vis-à-vis competing undertakings not receiving such support (Case C-730/79 [1980] ECR 2671, paragraphs 11 and 12).

[6] See Court judgment in Case 102/87, *French Republic* v *Commission* [1988] ECR 4067.

(19) The only possible exemption in this case is that provided for in Article 107(3)(c) of the TFEU, which states 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.

(20) Regulation (EC) No 1857/2006[7] of the Commission of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) No 70/2001 is not applicable as the aid will not only be granted to small and medium-sized enterprises.

(21) The Commission assesses aid linked to tax exemptions under directive 2003/96/EC on the basis of point 16 and points 162 to 172 of chapter VI.F. of the Guidelines.

(22) Pursuant to point 16 of the Guidelines, any aid measure must contain some incentive or require some counterpart on the part of the beneficiary. The German authorities have indicated that the tax refunds would be granted only on energy amounts used after the Commission has given its decision on the notified aid scheme (see para (4)). The refund is paid upon application for the amounts of eligible gas oil the beneficiaries have used for production purposes during the past tax year (see para (8)). Therefore, the incentive requirement appears to be met.

(23) When a tax measure provided for in Articles 8 and 15(3) of Directive 2003/96/EC is applied equally to the whole agricultural sector, the Commission considers that this measure may contribute to the development of the sector (cf. point 167 of the Guidelines). The Commission also considers that this type of measure, which applies to fuel used in primary agricultural production, does not unduly affect competition, because of the small-scale nature of agricultural holdings in the EU (more than 60% of agricultural holdings have less than 5 ha of agricultural land).

(24) Point 169 of the Guidelines states that the application of lower minimum levels of taxation, as set out in Table B of Annex I to Directive 2003/96/EC, on products used as motor fuel for the purposes of primary agricultural production will be declared compatible with Article 107(3)(c) of the TFEU, provided that *no* differentiation is made *within* agriculture.

(25) The aid scheme, as amended by the present notification, continues fulfilling these conditions. The measure is based on Article 8 of Directive 2003/96/EC. All agricultural and forestry producers using gas oil in their primary agricultural and forestry production benefit from the reduced level of tax in the same way.

(26) The Commission notes that the German authorities continue to apply the tax relaxation to gas oil (falling within the CN codes 2710 1941 to 2710 1949) applicable to motor fuels used for the purposes of primary agricultural production. The reduced level of taxation applied in the present case to gas oil used as motor fuel for agricultural works (see para (11)), respects the minimum level set out in Article 8 in connection with Annex I Table B of the Directive 2003/96/EC.

(27) The Commission takes note that according to settled case law[8], the German authorities commit to suspend the payment of the notified aid if the beneficiary still

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7 Official Journal of the European Union L 358 of 16.12.2006, p.3.

8 See Judgment of the General Court of 13 September 1996, joined cases T-244/93 and T-486/93, Textilwerke Deggendorf GmbH v Commission, p. II-2288, paras 51 and 56 et seq.; confirmed by the judgment of the Court of Justice of 15 May 1997, case C-355/95 P, p. I-2575, paras 22 and 26 et seq.

has at its disposal an earlier unlawful aid that was declared incompatible by a Commission Decision (either concerning an individual aid or an aid scheme), until that beneficiary has reimbursed or paid into a blocked account the total amount of unlawful and incompatible aid including the corresponding recovery interest (see para (13)).

(28) Further, the German authorities confirmed that the scheme would not apply to enterprises in difficulty within the meaning of the Community guidelines on state aid for rescuing and restructuring firms in difficulty (para (13)).[9]

(29) Regarding the tax relief to the forestry sector, Germany has assured the Commission to grant this aid exclusively within the limits of the applicable *de minimis* Regulation (EC) n° 1998/2006, as before.

(30) Consequently, the Commission has concluded that the amendment of the approved measure is compatible with Chapter VI.F of the Community guidelines for State aid in the agriculture and forestry sector 2007 to 2013. However, since the present aid scheme is proposed to be in place from 1 January 2014 until 31 December 2016, the Commission would like to remind the German authorities that the current Guidelines are due to expire at the end of 2013 and the Commission may, if necessary, propose appropriate measures to ensure that the existing schemes are adapted to the new applicable rules.

4. CONCLUSION

(31) As the amended measure in the form of tax relief for gas oil used for primary agricultural production conforms to Chapter VI.F of the Community guidelines for State aid in the agriculture and forestry sector 2007 to 2013, the Commission has decided to regard this aid as compatible with the internal market in accordance with Article 107(3)(c) of the TFEU. The Commission takes note of the commitment of the German authorities that the same tax relief to the forestry sector will be exclusively granted within the limits of the applicable *de minimis* Regulation (EC) n° 1998/2006.

(32) If this letter contains confidential information, which should not be published, please inform the Commission within fifteen working days from the receipt of the present letter. If the Commission does not receive a reasoned request by this deadline, you will be deemed to have agreed to the publication of the full text of this letter in the authentic language on the following webpage:

http://ec.europa.eu/competition/elojade/isef/index.cfm

Any such request specifying the relevant confidential information should be sent by registered letter or fax to:

European Commission
Directorate-General for Agriculture and Rural Development
Directorate M
Office: Loi 130 5/68
B-1049 Brussels
Fax No: 0032 2 2967672

Yours faithfully,

9 OJ C 244, 1.10.2004, p. 2.

For the Commission

Dacian CIOLOS
Member of the Commission