

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 15 May 2002

on the aid scheme implemented by France applying a differentiated rate of excise duty to biofuels*(notified under document number C(2002) 1866)***(Only the French text is authentic)****(Text with EEA relevance)**

(2003/238/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(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 PROVIDED FOR IN ARTICLE 88(2) OF THE TREATY

(1) Following an appeal by BP Chemicals Ltd (BP), in its judgment of 27 September 2000 in case T-184/97 *BP Chemicals v Commission* ⁽²⁾, the Court of First Instance partially annulled the Commission's decision of 9 April 1997 ⁽³⁾ (the decision) in which it had declared an aid scheme for biofuels (methyl esters of vegetable oils and ethyl tertiary butyl ether or ETBE), notified by France by letter dated 29 November 1996, to be compatible with the common market.

(2) By letter dated 28 April 1997, the Commission had notified France of its decision not to raise any objections to the provisions relating to the State aid involved in the exemption from the domestic tax on petroleum products which France intended to grant to certain volumes of ETBE and methyl esters.

(3) By application lodged at the Court of First Instance on 20 June 1997, BP Chemicals Ltd appealed against the Commission's decision.

(4) In its judgment of 27 September 2000, the Court of First Instance gave the following ruling:

'1. Dismisses as inadmissible the action brought against Commission Decision SG(97) D/3266 of 9 April 1997 concerning an aid scheme for biofuels in France in so far as that Decision relates to measures applicable to the esters sector.

2. Annuls the contested decision to the extent to which it relates to measures concerning the ETBE sector.'

(5) The judgment was notified to the Commission on 2 October 2000. ⁽⁴⁾

(6) Pursuant to Article 233 of the Treaty, the Commission is required to take the necessary measures to comply with the judgment of the Court of First Instance.

⁽¹⁾ OJ C 60, 24.2.2001, p. 4.

⁽²⁾ [2000] ECR II-3145.

⁽³⁾ SG(97) D/3266.

⁽⁴⁾ The Commission lodged an appeal against the judgment.

- (7) As far as the measures concerning the ETBE sector are concerned, since the annulment of the decision of 9 April 1997 withdrew the coverage of the authorisation under Article 87(3)(c), the administrative procedure must revert to the preliminary examination stage, which the Commission must conclude by taking an appropriate decision.
- (8) By letter of 27 December 2000, the Commission notified its decision to initiate the procedure under Article 88(2) of the Treaty in respect of the measures under the scheme that related to the ETBE sector.
- (9) By letter registered as received on 30 January 2001, France submitted its comments.
- (10) Following the publication in the *Official Journal of the European Communities* of the notice informing third parties of the initiation of the procedure provided for in Article 88(2) of the Treaty ⁽⁵⁾, 19 third parties, including British Petroleum Chemicals Ltd (BP Chemicals) and the United Kingdom (in support of BP Chemicals), submitted their comments before the end of March ⁽⁶⁾.
- (11) The comments were forwarded to France by letters dated 18 and 30 April 2001 ⁽⁷⁾. By letter registered as received on 11 June 2001, France submitted its comments on the third party comments.
- (12) In parallel with the abovementioned procedure, following the partial annulment by the Court of First Instance of the Commission's decision of 9 April 1997, the French authorities, by letter dated 17 November 2000, acting in accordance with Article 8(4) of Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils ⁽⁸⁾, as last amended by Directive 94/74/EC ⁽⁹⁾, asked the Commission for authorisation to apply an exemption from the domestic consumption tax on vegetable oil esters and ethyl alcohol derivatives where the alcohol component is of agricultural origin.
- (13) Following the Commission's requests for further information, France supplied the details necessary for examination of the matter in letters dated 18 January 2001 and 21 February 2001.
- (14) On 11 December 2001, the Commission adopted a proposal for a Council Decision ⁽¹⁰⁾ authorising France, pursuant to Article 8(4) of Directive 92/81/EEC, to grant, from 1 November 1997 to 31 December 2003, permits for the application of differentiated rates of excise duty to the fuel mixtures 'petrol/ethyl alcohol derivatives whose agricultural component is of agricultural origin' and 'diesel/vegetable oil esters' and to the mixture 'domestic heating fuel/vegetable oil esters'.
- (15) On 25 March 2002, by Decision 2002/266/EC ⁽¹¹⁾, the Council authorised France to apply, from 1 November 1997 to 31 December 2003, a differentiated rate of excise duty to biofuels in accordance with Article 8(4) of Directive 92/81/EEC.

II. THE JUDGMENT OF THE COURT OF FIRST INSTANCE

- (16) In the decision which was partially annulled, the Commission had:
- examined the aid scheme in the light of the rules governing State aid and found it to be compatible,
 - declared that the notified scheme had the characteristics of a pilot project within the meaning of Article 8(2)(d) of Council Directive 92/81/EEC, which allowed the Commission to declare the aid scheme compatible with the common market,
 - decided to raise no objections to the notified scheme.
- (17) In its judgment, the Court of First Instance found that by adopting the contested decision, as it relates to the ETBE sector, the Commission exceeded the powers conferred on it by Article 88(3) of the Treaty, as the scheme does not meet the requirements laid down by Article 8(2)(d) of Directive 92/81/EEC. In particular, the Court found that by deciding that the aid scheme was to be regarded as a pilot project for the technological development of more environmentally-friendly products, the Commission infringed Article 8(2)(d) of Directive 92/81/EEC.

⁽⁵⁾ See footnote 1.

⁽⁶⁾ Apart from BP Chemicals and the United Kingdom, the following parties also submitted comments (by order in which the comments were received): AGPB Céréalières de France, Ethanol Union, Sofiproteol, Ethanol Holding, Union SDA, Agence de l'environnement et de la maîtrise de l'énergie, SAF Agriculteurs de France, Saint Louis Sucre, DRC, Syndicat national des producteurs d'alcool agricole, Association pour le développement des carburants agricoles, Sucrerie de Touri, Sucrerie Bourdon, Confédération générale des planteurs de betteraves, Ouest-ETBE, Total Fina Elf and Nord-ETBE.

⁽⁷⁾ In the second letter, the Commission forwarded translations into French of the comments submitted by BP Chemicals and the United Kingdom.

⁽⁸⁾ OJ L 316, 31.10.1992, p. 12.

⁽⁹⁾ OJ L 365, 31.12.1994, p. 46.

⁽¹⁰⁾ COM(2001) 744 final.

⁽¹¹⁾ OJ L 92, 9.4.2002, p. 22.

(18) The measure proposed by France, as it stands, goes beyond the scope of a pilot project, as interpreted by the Court of First Instance, and, therefore, it appears that the notified measure does not have the characteristics of a pilot project within the meaning of Article 8(2)(d) of Directive 92/81/EEC.

(19) Furthermore, the Court states in its judgment that there is no obstacle to tax-exemption schemes for better market penetration by biofuels being the subject of a Council decision adopted pursuant to Article 8(4) of Directive 92/81/EEC:

'It must be observed, finally, that there is no obstacle to tax-exemption schemes for better market penetration by biofuels, such as the one at issue in this case, being established in accordance with the Altener programme, provided that the requirements of Directive 92/81/EEC are complied with, since such schemes may be the subject of a Council decision adopted pursuant to Article 8(4) of Directive 92/81/EEC. Numerous programmes in the Member States designed to encourage the use of more environmentally-friendly fuels have, moreover, been approved by the Council in accordance with that provision, as is clear from the answers given by the Commission to the written questions put to it by the Court and from the statements of the Commission's representative at the hearing.'

III. DESCRIPTION OF THE MEASURE

(20) On the basis of the scheme notified in 1996, France planned to grant a reduction in the domestic tax on petroleum products (TIPP) for certain products obtained from vegetable raw materials intended to be incorporated into fuels or combustibles. The differentiation in excise duty is granted to these products irrespective of the method of cultivation or of the vegetable raw material used to produce them. The aim of the measure is to introduce a limited quantity of biofuels into motor vehicle fuels and domestic heating oil.

(21) The measure applies to ETBEs where the alcohol component is of vegetable origin (and to methyl esters of vegetable oils).

(22) The marketing of the products in question qualifies for total or partial exemption from the TIPP, subject to an annual appropriation, in order to compensate in part for the excess production cost of such products compared with fossil fuels. The excess cost is assessed on the basis of the average cost prices of biofuels sold in France.

(23) There is one differentiated excise duty rate for ETBEs (and one for methyl esters of vegetable oils). A specific rate is applied to each sector because of the different characteristics, production costs and uses involved. The rate applicable to each sector is set by the annual Finance Acts adopted by the French Parliament. The maximum volume of biofuels which may qualify for the reduction can be determined on the basis of the budgetary appropriation allocated to the scheme.

(24) In the amending Finance Act for 1997 ⁽¹²⁾, France made provision, in Article 25, for partial exemption from the TIPP, which was set at FRF 230 per hectolitre for esters of vegetable oils incorporated into domestic heating oil and FRF 329,50 per hectolitre for the alcohol content of the derivatives of ethyl alcohol (ETBE in particular) of agricultural origin incorporated into high-grade fuels and petrol. That exemption from duty is given to the production units approved by the French authorities following a tendering procedure announced in a notice published in the *Official Journal of the European Communities*.

(25) Furthermore, the rates of reduction in the TIPP must be scaled back in line with the productivity gains achieved by these sectors and with changes in the rules on the incorporation of biofuels into fuels and combustibles.

(26) The benefit of this exemption from the TIPP is granted to biofuel production units approved by the French authorities following a tendering procedure published in the *Official Journal of the European Communities*. Such approval authorises the units to market in France a specific volume of biofuels that will benefit from the tax exemption provided for by the annual Finance Act.

(27) The eligibility criteria for requesting approval are as follows: the production unit must:

— be up-to-date with its social security and tax obligations vis-à-vis the country on whose territory it is established,

— be in compliance with the environmental rules and regulations of the country on whose territory it is established,

⁽¹²⁾ Act 97-1239 of 29 December 1997, Journal officiel de la République française (JORF) of 29 and 30 December 1997, p. 19101.

- provide a technical report describing its biofuel plant and demonstrate its capacity to produce fuel that meets the technical specifications set out in the notice. Samples will be taken to establish proof of such capacity,
 - submit a detailed report on the activities of the unit during the last three financial years, specifying the production of biofuels, the unit's other chemical activities and relating the unit's activities to those of any industrial site to which it may belong,
 - detail the investment carried out specifically for the production of biofuels (technical specifications and financial amounts),
 - undertake to ensure that the biofuels are marketed in French territories in accordance with the provisions of the law,
 - undertake to provide a six-monthly report on the conditions under which the biofuels are produced, the quality controls carried out and their results and to specify in the sales contracts for biofuels that the purchasers must carry out technical monitoring of the marketing and use of the biofuels sold in France,
 - specify the quantity and the type (ETBE or methyl ester of vegetable oil) for which approval is being requested.
- (28) The quantities for which a unit may request approval are determined on the basis of the following criteria:
- in the case of units which are already operating and have regularly marketed biofuels, the criterion will be the production capacities of these sites that allow effective and regular production of biofuels⁽¹³⁾, unless the units are already in operation and have previously obtained approval in a Member State, though without producing up to the level approved. In that case, they may not apply for approval for a quantity greater than their actual production hitherto, unless they can show an increase in
- production capacity as a result of new investment specifically for the production of biofuels. The year with the highest production level amongst the last three years will be taken as the relevant reference year,
- in the case of recent and specifically built units whose capacity is being built up, the technical production capacity of the sites will be taken as the reference. This criterion applies to investments carried out in the last three years,
 - a unit which has been adapted to produce biofuels without any new investment, but which has not yet produced any biofuels can, during an initial 'test' period, be given approval for a maximum quantity of 5 000 tonnes a year. This quantity will be allocated in respect of the first invitation to tender (where the application is admissible); once a second invitation to tender has been published, the relevant production unit may apply for additional quantities if, during the previous financial year(s), it has marketed the approved quantities in France,
 - operators carrying out new investment for the production of biofuels may request approval for the planned technical capacity provided that, on the day of the application for approval, an irreversible start has been made on the projects. The approval will be final only once the relevant unit has been built and has started operating. According to the French authorities, the requirement and operation of the condition regarding the irreversible nature of the investment are similar to those provided for in Council Regulation (EC) No 1868/94 of 27 July 1994 establishing a quota system in relation to the production of potato starch⁽¹⁴⁾.
- (29) Each individual approval will be checked every year, and the approved operators will have to provide evidence each year that:
- they have a supply of vegetable matter consistent with their approval and that the quantities produced the previous year have indeed used only vegetable raw materials,

⁽¹³⁾ This criterion relates to all production units in regular operation, whether or not they have received approval from a Member State.

⁽¹⁴⁾ OJ L 197, 30.7.1994, p. 4. Article 2 of the Regulation provides that 'a reserve of a maximum of 110 000 tonnes shall be created to cover production realised in Germany in the marketing year 1996/1997 provided that such production results from investments irreversibly undertaken before 31 December 1994'. France will also examine the irreversible nature of the relevant project, adopting an approach similar to that which the Commission adopted under this Regulation.

- they have marketed in France a quantity of biofuels complying with the French specifications that is equal to the quantity specified in their approval.
- (30) A notice of invitation to tender for approval of biofuel production units, for maximum quantities of 350 000 tonnes of esters and 270 000 tonnes of ETBE, was published in the *Official Journal of the European Communities* ⁽¹⁵⁾. By letter dated 18 February 1998, the French authorities notified the details of the scheme to the Commission together with the results of the invitation to tender. Four applications for approval were lodged, covering a total quantity of 227 600 tonnes a year for the ETBE sector.
- (31) The national measure ⁽¹⁶⁾, which entered into force on 1 November 1997 and was established on the basis of the Commission's decision of 9 April 1997, may be summarised as follows:

Number of recipients on the basis of the number of applications for approval deemed eligible by the committee responsible for examining applications	Three factories approved
Amount of the benefit per recipient depends on the quantity approved	FRF 329,5 FRF/hl or FRF 1 950,5/t
Expected annual budget expenditure	Quantity of 270 000 t of ETBE proposed in the first invitation to tender in 1997, i.e. a ceiling of FRF 527 million. Quantity actually approved: 219 000 t; maximum annual expenditure FRF 427 million. For 2001 (in line with what was planned), new invitation to tender for additional capacities of 155 000 t/year.
Rate of excise duty actually charged	ETBE incorporated into high-grade lead-free fuel at the level of 15 %: FRF 335,20/hl.

⁽¹⁵⁾ OJ C 350, 19.11.1997, p. 26.

⁽¹⁶⁾ These provisions are based on Article 25 of the amending Finance Act for 1997, on Decree No 98-309 of 22 April 1998 laying down the conditions required for taking part in the invitation to tender for the marketing on French territory of biofuels on which the TIPP is reduced, and the Decree of 22 April 1998 setting up the committee for examining applications for approval of units producing biofuels.

(32) The tax exemption measure is not limited in time. Approval is granted for only three or nine years as from the date on which approval is given (Article 3 of Decree No 98-309 of 22 April 1997).

(33) The tax exemption for the approved quantities of biofuels applies to biofuels which meet the technical specifications laid down by law and which are produced in the units approved by France, up to the approved quantity. Only ETBE ⁽¹⁷⁾ may benefit from the tax exemption, and it must be mixed with fuels and/or combustibles in bonded warehouses for production or storage located in the Community.

(34) No production may be subcontracted. Each unit's production must be monitored by the competent authority designated by the Member State of production in agreement with France, and all production intended for the French market must be covered by a production certificate issued by that authority, which must accompany the biofuels and be presented at the customs office responsible for the bonded warehouse in which the mixing is to take place.

(35) The rate of exemption is specified on the exemption certificate. The exemption certificate allows the same quantity of fuel or combustible to be released for consumption, at a reduced rate of excise duty, as the quantity of biofuel specified on it.

(36) The approved units must not receive any aid, including production aid, that is incompatible under Article 87 of the Treaty as regards their biofuel production activity.

(37) The approval given to the units selected is valid for nine years or three years. The type of approval given depends, firstly, on the volume of physical investment in the biofuel production and its depreciation in relation to the biofuel production capacity of the relevant site and, secondly, on the volume of biofuel production in relation to the total production of the site in the chemical sector.

(38) In order to measure the investment carried out, the ratio 'net assets immobilised ⁽¹⁸⁾/production capacity' applied to the biofuel production workshop is used. For the purposes of this ratio, the French authorities distinguish

⁽¹⁷⁾ Esters of vegetable oils are in fact also eligible, but are not covered by this Decision.

⁽¹⁸⁾ Straight-line depreciation over ten years.

- two categories of unit ⁽¹⁹⁾, those with ratios greater than FRF 2 000/tonne for the ETBE sector (and FRF 700/tonne for the ester sector) and those with ratios of the order of FRF 400/tonne. If the values are greater than the threshold of FRF 2 000/tonne for the ETBE sector (and FRF 700/tonne for the ester sector), a nine-year approval is granted. Below that threshold, approval is for three years.
- (39) In order to gauge the scale of biofuels activity, the ratio 'biofuels activity/chemical activity of the site (biofuels + chemicals)' is used.
- (40) Only one type of approval is granted per production unit. The type of approval is determined by all of the technical characteristics (net assets immobilised, production capacity and scale of biofuels activity in relation to the total activity of the site) on the date the approval was requested.
- (41) At the end of the period of validity of the approval, France can either reduce the volume of biofuels benefiting from the measure or start a new tendering procedure in respect of the volume released. If a producer is not able to supply the quantities for which approval has been given, the approval will be withdrawn.
- (42) The selection of projects is carried out by the Ministry of Agriculture, Fisheries and Foodstuffs and the Ministry of Economic Affairs and Finance, once a committee appointed for this purpose by the Prime Minister has given its opinion. The number of firms selected and the approval quantities allocated to them are decided by those two Ministries, which for this purpose take account of the criteria stipulated and the tax exemption appropriations available.
- (43) If the tax exemption appropriations are not sufficient to cover all of the quantities for the projects selected, approval is given in proportion (quantity) to the applications deemed admissible.
- (44) If a firm considers that its interests have been harmed, an *ex gratia* appeal may be lodged with the relevant Ministries.
- (45) Applications for approval must be submitted by a deadline to be specified, and France reserves the right not to examine applications received after the deadline or incomplete at such time. Applications must be drawn up in French, and any official documents drafted in another language must be accompanied by a French translation.
- (46) All tenderers must be informed of the results of the examination of their application within a given period following the date on which it was submitted.
- (47) As far as the tax mechanism is concerned, when the biofuels enter the oil establishments under customs control (bonded warehouse for storage or production) in which they are to be incorporated into the petroleum products, the operator carrying out the operation is issued with an exemption certificate for the amount corresponding to the quantity received multiplied by the rate of exemption. These certificates are then set against the declarations of release for consumption of petroleum products.
- (48) If the mixing is carried out in a Member State other than France, the document accompanying the product will state that the petroleum product contains a biofuel and will specify its nature. When the excise duty becomes payable in France, an exemption certificate will be issued for an amount corresponding to the quantity of biofuel contained in the petroleum product multiplied by the rate of exemption.

IV. COMMENTS FROM INTERESTED PARTIES

1. General

- (49) A total of 19 third parties, including British Petroleum Chemicals Ltd (BP Chemicals) and the United Kingdom (in support of BP Chemicals), submitted comments ⁽²⁰⁾.

2. Comments from BP Chemicals

2.1. Introduction

- (50) In its comments, BP Chemicals explains why, in its view, the existing State aid arrangements for the French

⁽¹⁹⁾ Since they do not know the figures for a larger number of production units, the French authorities can only refer to the ratios presented by companies approved in France.

⁽²⁰⁾ See footnote 6. BP Chemicals restated its arguments at a meeting held on 29 January 2002 at the Commission in Brussels.

bioethanol scheme distort competition on the traditional ethanol market. On this question, BP Chemicals refers at the outset to a sentence at the end of the explanatory memorandum to the proposal for a Regulation on the common organisation of the market in ethyl alcohol of agricultural origin:

‘the EU alcohol industry can expect challenges on its traditional market outlets from alcohol produced under large-scale biofuel programmes, with tax exemptions as an additional incentive’ ⁽²¹⁾.

(51) BP Chemicals proposes measures which, in its opinion, would remove this distortion of competition. It provides some details on the Spanish bioethanol promotion scheme, which is currently operating in a way which, in its view, minimises the distortion of competition. BP Chemicals states that it is not opposed to the production and voluntary use of biofuels.

(52) BP Chemicals emphasises that it has not raised any issues concerning biodiesel.

(53) BP Chemicals is not convinced that the French scheme is not discriminatory, since, in its view, the scheme provides for different rules for access of new entrants compared to firms which were already members of the previous scheme.

(54) The main points in the comments submitted by BP Chemicals as part of this examination are as follows:

— its concern is that there should be no distortion of competition in the traditional ethanol market,

— the ethanol producers who have contracts under the French bioethanol scheme are also involved in producing ethanol for the traditional market. The effect of the State aid for French fuel ethanol is to improve the economics of these producers and increase their competitiveness in the traditional market,

— BP Chemicals' concern for distortion of competition in the ethanol market therefore arises from the fact that ethanol can currently be made in the same production unit for both the fuel market and the traditional market, allowing various 'cross-subsidies' to benefit the competitive position of the product sold on the traditional market,

— BP Chemicals believes that most of this distortion of competition could be eliminated if fuel ethanol was made on different production sites to those supplying the traditional market for ethanol,

— BP Chemicals therefore suggests the introduction of conditions in the scheme to ensure that bioethanol production plants are physically separate from the non-fuel ethanol production plants,

— in essence, BP Chemicals would like to see that the State aid is approved, but only on condition that production units for fuel ethanol are not used to produce ethanol for the traditional market,

— it is announced that the French Government will support a larger scheme in the future. It would be easy to place this additional fuel ethanol production into those plants which are currently producing for both the fuel and traditional markets. By doing this, these plants would be converted to be fully dedicated to fuel production,

— in view of the above, BP Chemicals can see no reason why a separation of the two types of production would be difficult or onerous to achieve in the near future. It should be particularly easy to achieve this condition for any new distilleries that may be built in future,

— BP Chemicals believes that this condition should apply to fuel ethanol schemes in other Member States,

— if the State aid scheme is to be approved, it must include a specific condition,

⁽²¹⁾ COM(2001) 101.

- this condition would be that fuel ethanol must be produced in separate production sites from the production of ethanol for the traditional market,
 - if this guarantee is set, BP Chemicals' concerns over the French scheme would be fully addressed, and the way would be cleared for expansion of the voluntary use of bioethanol in the Community.
- (55) BP Chemicals then goes on to put forward very detailed arguments against the French tax exemption scheme for biofuels.
- this sector uses agricultural alcohol. The Community rules on spirit drinks allow synthetic alcohol to be used in drinks up to an alcoholic strength of 15 % (but not above that strength), though for reasons of habit and perception, the 'potable' sector uses only agricultural alcohol,
 - the third largest sector currently is fuel ethanol. Although both agricultural alcohol and synthetic alcohol can be used for fuel, the cost of producing ethanol by either route is high compared to convention fuel costs. In consequence, ethanol can only be an economic component of gasoline when some form of aid is provided. Since State aid is provided only for agricultural alcohol under various biofuel programmes, the fuel sector is in effect reserved, by virtue of the economics, for agricultural alcohol.

2.2. BP Chemicals' comments on the ethanol market

- (56) BP Chemicals points out that ethanol is also described as 'ethyl alcohol' and often simply though inaccurately as 'alcohol'. When it is made from agricultural feedstocks by fermentation, it tends to be described as 'agricultural alcohol' and when made for use in the fuel market, it is generally called 'bioethanol'. Ethanol produced by chemical synthesis is generally called 'synthetic alcohol'. BP Chemicals points out that all these products are the same chemical substance and, provided they undergo an appropriate purification process, they are technically equivalent.
- (57) BP Chemicals states that there are three basic sectors within the Community ethanol market:
- the largest is currently the industrial sector. This comprises a very diverse range of solvent applications and chemical feedstock uses. Solvent applications include ink manufacture, cosmetic and aerosol manufacture, certain paints, cleaning agents, car care products (such as windscreen wash) and pharmaceutical purification solvent,
 - the second largest is currently the 'potable' sector, which comprises alcohol as an ingredient for spirit drinks (such as vodka, pastis and gin) and as a raw material for manufacturing vinegar. Traditionally,
- (58) According to BP Chemicals, synthetic ethanol competes with agricultural ethanol in the traditional industrial sector, but it is not allowed to compete with agricultural alcohol in the rest of the ethanol market. Currently, synthetic ethanol supplies about two thirds of the industrial sector and agricultural ethanol supplies the rest.
- (59) According to BP Chemicals, this situation means that any improvement in the competitive position of agricultural alcohol products has an effect in the industrial market. BP Chemicals therefore welcomes the fact that, in the decision to initiate the procedure provided for in Article 88(2) of the Treaty, the Commission has identified the need to examine whether the growth in biofuel production will distort competition with synthetic alcohol on the traditional market.
- (60) BP Chemicals argues that, because the State aid is in the hands of only a few of the many agricultural ethanol producers, there will also be distortion between aided and unaided agricultural ethanol producers and that this will be manifest in all parts of the market.
- (61) BP Chemicals provides the figures given in the following table. EU wine alcohol is not included in the analysis:

EU ETHANOL MARKET

1999 EU ethyl alcohol market

EU supply	'000 hl
EU production	14 245
Opening stock	3 156
Closing stock	2 890
Net sales from EU producers	14 511
Imports duty-free	832
Imports duty-paid	243
Fuel ethanol	1 300
Total supply	16 886

EU demand	'000 hl
Drinks and vinegar	4 327
Drink exports	470
Drink imports	650
Industrial	9 247
Industrial exports	573
Industrial imports	425
Fuel ethanol	1 300
Total sales	16 992

By production type	'000 hl
Synthetic ethanol	6 800
Agricultural ethanol	9 400
Bioethanol	1 300
Total	17 500

By end-use sector	'000 hl
Drinks and vinegar	5 447
Solvents and chemical feedstock	10 245
Fuel	1 300
Total	16 992

(62) BP Chemicals considers that, in evaluating the impact of the French State aid scheme on the traditional ethanol market, it is essential to remember that the traditional market for ethanol is a single market within the European Union and that consequently any distortion in the French market has wider repercussions. Similarly, if bioethanol State aid in other Member States also distorts the market, BP Chemicals considers that it too builds upon the distortion caused by the French scheme. BP Chemicals states that it is also essential to take into account other bioethanol projects in the Community. BP Chemicals therefore wishes to ensure that the Commission is fully aware of various bioethanol units which are already operating or which are planned for the near future.

(63) As far as France is concerned, BP Chemicals notes that in 2000 the French Government approved the construction of two new ETBE units which would produce an extra 155 000 tonnes of ETBE. As with the existing three units, both of these would be built by Total Fina Elf.

(64) In Spain, one ethanol unit is already in production. Construction has already begun on a second ethanol unit. The ETBE units appear to be converted methyl-tertio-butyl-ether (MTBE) units at Repsol and CEPSA refineries.

(65) In Sweden, a relatively small-scale bioethanol project fuelling the buses in Stockholm has been implemented. A new scheme is now being launched, supplied by the company Agroetanol. The plant is already in place and was expected to produce 0,5 million hectolitres in 2001.

(66) In Italy, bioethanol production has not yet commenced. However, a number of Italian producers are involved in very ambitious plans for a large-scale production scheme. According to BP Chemicals, the production of fuel ethanol in Italy should amount to 1 900 000 hectolitres a year in 2002 and 3 000 000 hectolitres in 2003.

(67) Summarising, BP Chemicals provides the following figures:

Member State	Total planned production hectolitres per annum	
	2001 to 2004	2005 onwards
Finland	200 000	350 000
France	2 226 600	2 226 600

Member State	Total planned production hectolitres per annum	
	2001 to 2004	2005 onwards
Italy	1 875 000	3 000 000
Netherlands	300 000	300 000
Spain	4 000 000	4 000 000
Sweden	500 000	500 000
Total	9 101 600	10 376 600

(68) BP Chemicals points out that these planned production figures should be seen in the light of the Commission's own targets for growth in biofuels. BP Chemicals notes that the Altener programme is currently aiming at 5 million tonnes of liquid biofuel production.

2.3. BP Chemicals' comments on bioethanol benefits and disbenefits

(69) BP Chemicals states that it is impossible to know what the environmental balance will be without having details of the ethanol production process being used. While the primary environmental justification of bioethanol is a relative lowering of CO₂ emissions compared to the use of fossil fuels, BP Chemicals considers that there are other aspects of bioethanol production which also need to be considered.

(70) In the view of BP Chemicals, the CO₂ balance from a bioethanol or ETBE scheme depends entirely on the CO₂ balance from the ethanol production chain. This can vary substantially. It is heavily influenced, for example, by what is done with the co-products from the process. Where they are used as animal feed rather than being used as fuel for the ethanol processing, the balance is much less favourable. BP Chemicals suggests in its comments that the beneficiaries of the French State aid scheme all sell their co-products rather than using them as fuel, so the scheme is not as beneficial as regards the CO₂ balance as it might otherwise be. In view of all the possible differences between feedstocks, the method of feedstock production, harvesting, the treatment of waste and between individual fermentation plant and distillation operations, BP Chemicals considers that it will not automatically be true that there is a net CO₂ reduction versus conventional fuel.

(71) BP Chemicals notes that emissions other than CO₂ arise from the production of bioethanol. It also notes that many of these are significant and that there is a high

potential for greater environmental burdens to be generated than in the conventional production of fuel. By way of example, BP Chemicals cites the potential for an increase in water pollution (especially nitrate run-off from intensive agriculture) and nitrous oxide emissions, from the greater use of fertilisers and pesticides.

(72) BP Chemicals considers that the extent of land required to produce liquid biofuels on a large scale would impact significantly on biodiversity. For example, it has been shown that to offset the CO₂ emissions that result from 10 % of United States gasoline consumption would require an area equivalent to 48 % of current United States cropland to be devoted to biofuel crops.

(73) BP Chemicals also points out that liquid biofuels are one of the highest cost routes amongst the various options for reducing greenhouse gas emissions. Other alternatives such as energy forestry can be far more cost-effective (production of renewable electricity by using crops such as miscanthus grass directly as fuel).

(74) BP Chemicals states, however, that, in its comments:

‘We are not seeking to establish whether bioethanol brings benefits to the European Community. We are not seeking to make a case against the use of biofuels, nor are we trying to make a case against the State aid being needed to make such biofuels economically viable. We are seeking only that the State aid for bioethanol production is associated with measures that minimise the distortion of the traditional ethanol market’ (point 4.6 of the comments).

(75) BP Chemicals concludes its comments on the benefits and disbenefits of bioethanol by asking the Commission:

‘to compare two versions of the French scheme:

— one is the scheme as proposed by the French Government;

— the other is an equivalent scheme in which fuel ethanol production is obliged to be in separate production facilities from ethanol production for the traditional market’ (point 4.7 of the comments).

2.4. BP Chemicals' comments on the intensity of the aidintensität

(76) BP Chemicals recognises that State aid for bioethanol is required on a long-term, continual basis for production to be viable. By way of example, it cites the United States federal tax exemption scheme started in the early 1980s, with the latest renewal in 1999 leading out to 2007. BP Chemicals comments that the decline in the intensity of subsidy paid in the United States federal bioethanol aid scheme has been only 4 % over nearly 30 years, whilst the total subsidy has soared due to the growth in the quantities produced.

(77) BP Chemicals notes that, in paragraph 57 of the letter informing the French Government of the initiation of proceedings under Article 88(2) of the Treaty, the Commission points out that, by applying a single tax exemption rate for bioethanol under the French scheme, it is inevitable that, even amongst those benefiting from the aid, some will be more likely to be over-compensated than others. BP Chemicals concludes that the scheme is set up in a way that will increasingly strengthen the competitive position of a small number of producers.

(78) BP Chemicals states that the aid paid under the French scheme is high, at almost EUR 50 per hectolitre. It calculates that the actual level of the TIPP is less than EUR 10 per hectolitre, well below the minimum rate for gasoline in Directive 92/81/EEC (EUR 287 per 1 000 litres, i.e. EUR 28,7 per hectolitre).

(79) BP Chemicals argues that, to appreciate the extent to which the intensity of the aid can increase the competitive position of the firms receiving it, it is necessary to have an estimate of the production costs of bioethanol. BP Chemicals estimates the basic cost of producing bioethanol from sugar beet at around EUR 42 per hectolitre. According to BP Chemicals, the State aid of EUR 50 per hectolitre is intended to allow Total Fina Elf to buy ethanol instead of methanol and to process this into ETBE rather than MTBE (which is the product obtained if methanol were to be used). BP Chemicals adds that the conversion costs for making ETBE and MTBE are similar.

(80) Since it estimates the cost at EUR 42 per hectolitre for bioethanol, BP Chemicals finds the amount of State aid, which it estimates at EUR 50 per hectolitre, surprising.

- (81) BP Chemicals adds that the way is now open for perhaps 1 million hectolitres of wine alcohol to be fed into various EU bioethanol schemes and that this needs to be taken account of in the overall analysis.
- (82) Lastly, BP Chemicals notes that, since the French scheme was notified, the Commission has introduced Community guidelines on State aid for environmental protection ⁽²²⁾. Though it is not clear to BP Chemicals whether the State aid in question counts as an investment to promote renewable sources of energy, it considers that, if such is the case, then section E.1.3.32 of the guidelines would allow the rate of aid to be up to 40 % of the eligible costs.
- 2.5. *BP Chemicals' comments on what it terms 'market distortion mechanisms'*
- (83) BP Chemicals explains that its problem with the scheme is not a fear that ethanol would be produced and State aid claimed for it and that then, instead of going into the biofuel market, that ethanol on which aid had been claimed would be sold into the traditional market (solvents, drinks and chemicals). This, according to BP Chemicals, would be a straightforward fraud. According to BP Chemicals, this is not happening in the French scheme 'so far as we (BP Chemicals) are aware' (point 6.1 of the comments).
- (84) BP Chemicals' concern is, rather, that the scheme gives a range of important competitive advantages to the participating ethanol producers which have a distorting effect on their competitive position in the traditional ethanol market. BP Chemicals states that this emerges very clearly from the explanatory memorandum to the proposal for a Council Regulation (presented by the Commission) on the common organisation of the market in ethyl alcohol of agricultural origin. In it, the Commission is quite explicit about the increased competition on the internal market for ethanol:
- 'Given the close interrelationship between alcohol of agricultural origin and alcohol of non-agricultural origin, the implementation of the proposed Regulation should take account of the global market situation in the alcohol sector and therefore not introduce measures that discriminate between the two types of alcohol on the internal market' (point 10 of the explanatory memorandum).
- (85) BP Chemicals considers that the French State aid scheme confers the following competitive advantages on the producers receiving aid under it:
- capital investment and other fixed costs of production are reduced per tonne of production,
 - coproduct scale is increased, giving an increased competitiveness in other markets such as animal feed,
 - the contracts for fuel ethanol give the assurance of a large contracted volume at an attractive sales price over long periods of time,
 - this situation also opens the way for plant debottlenecks which would not otherwise be credible without the scale offered by the fuel contracts,
 - the biofuel market does not demand very high purity product in comparison to many of the traditional outlets. This means that, for a producer who is serving both the fuel and the traditional markets, the fuel outlet provides a home for material which would be off-specification for the traditional non-fuel applications. This gives a cost saving on re-processing off-specification material,
 - the existence of an undemanding end-use (fuel) actually allows the plant to be deliberately operated in a more efficient way. It is possible to run the purification section to produce only a fraction of high-grade material and all the rest at fuel-grade,
 - having a base load of fuel ethanol allows the fixed costs of the plant to be covered. This means that marginal cost accounting can be applied to the whole of the non-fuel production. This is a cross-subsidy on fixed costs.
- (86) BP Chemicals concludes that, when all these advantages are focused on a production site which is also producing ethanol for the solvents/chemicals or drinks market, they give a substantial boost to the cost structure of that ethanol. BP Chemicals estimates the amount of advantage gained on making marginal sales into the high-quality traditional market at EUR 45 per tonne (EUR 3,5 per hectolitre).
- (87) BP Chemicals states that the scale of the unit plays a significant part in the overall economics for the plant. A

⁽²²⁾ OJ C 37, 3.2.2001, p. 3.

distillery scaled at 1 million hectolitres/year with the latest technology in process control and design can operate with a typical fixed operating cost of EUR 60 per tonne of ethanol (EUR 4,5 per hectolitre). Any increased volume will be produced at a lower cost. In contrast, a site producing at the relatively small level of 100 000 hectolitres a year of potable/industrial ethanol would expect to be producing with a fixed operating cost of EUR 150 per tonne of ethanol (EUR 11,5 per hectolitre).

- (88) BP Chemicals concludes its comments by acknowledging that it is difficult to assess the exact effect of the aid on market prices because of other pressures which are simultaneously putting pressure on the EU alcohol market. BP Chemicals does not specify what these 'other pressures' are, but simply refers to the explanatory memorandum to the proposal for a Council Regulation (presented by the Commission) on the common organisation of the market in ethyl alcohol of agricultural origin.

2.6. *BP Chemicals' comments on options for minimising the distortion of competition*

- (89) The most significant step which BP Chemicals feels can be taken to guarantee that distortion is minimised is to permit the bioethanol for fuel use to come only from ethanol production sites dedicated 100 % to fuel production. BP Chemicals describes this as 'ringfencing' the fuel ethanol production sites. This would mean, in its view, that no sales into the industrial and drinks market should originate in a production facility that is manufacturing ethanol under a State-aided fuel scheme. Physically segregating those sites that wished to take contracts for the production of fuel ethanol would eliminate, or at least minimise, most of the unfair advantages.

- (90) BP Chemicals believes that, for companies with more than one site, some of the advantages on procurement could still be accessed. Some producers 'might engage in swap arrangements, where one site produces only fuel and the other site produces only for the traditional market, then they swap product in order to maintain a presence in both markets (this could be between sites within one company or between different companies each having perhaps only one site)' (point 7.4 of the comments). The introduction of such a system would not be onerous for the relevant producers for the following reasons.

- (91) According to BP Chemicals, the extra fuel ethanol demand that will result from the extension of the French scheme could be placed into plants currently supplying both fuel and traditional outlets. There is a sufficiently large additional demand coming from the new ETBE units, so that it would be easy to fully load those sites to become fuel only. In this way, they would suffer no loss of production. BP Chemicals argues that their traditional market sales would then be available to be competed for. Swap arrangements between producers could then easily be put in place in order to allow a producer who had previously made traditional market sales to continue to do so.

2.7. *BP Chemicals' comments: conclusion*

- (92) BP Chemicals concludes its comments by stating that, in order to be approved, the State aid scheme under examination must include a specific condition. This condition would be that fuel ethanol must be produced in a plant that is physically separated from any plant producing ethanol for the traditional market. At a meeting held on 29 January 2002 at the Commission in Brussels, BP Chemicals reiterated the arguments set out in its comments, requesting that the final decision should include the condition that the production of fuel ethanol should be in separate production sites from the production of ethanol for the traditional market. In the alternative, in the event that such separation were not feasible and that the plant simultaneously produced fuel ethanol and ethanol for the traditional market, BP Chemicals requested that the final decision should authorise the aid scheme subject to the condition that capacity restrictions should be introduced to neutralise the advantages described in recital 85 of this Decision, and in particular the advantage resulting from the economies of scale.

3. **Comments from other interested parties**

3.1. *Comments from the United Kingdom*

- (93) The United Kingdom states that it supports the promotion of renewable energy sources, while at the same time putting forward arguments similar to those put forward by BP Chemicals, namely:

'There could be a risk of aid to promote the use of bioethanol in fuels and combustibles distorting

competition in other markets, for example the production of synthetic ethanol for use in solvents and chemical processes. Distortion of competition might occur, to give two examples, through cross-subsidisation within plants producing both substances or through diversion of bioethanol produced with the benefit of a tax relief linked to a particular use to other markets for other uses.'

3.2. *Comments from the Syndicat National des Producteurs d'Alcool Agricole (SNPAA)*

- (94) The Syndicat national des producteurs d'alcool agricole (SNPAA) represents the interests of French beet- and cereal-based ethyl alcohol producers, part of whose production is geared to the manufacture of ETBE for fuel use. The SNPAA's comments may be summarised as follows.
- (95) Alcohol producers are aware of the many advantages linked to the production of biofuels and embarked on this path as soon as the French authorities showed the political will to create the right conditions.
- (96) The Commission has for some time been setting out the arguments in favour of biofuels, for example in the explanatory memorandum to the proposal for a Directive on the taxation of biofuels in 1992. The Altener programme also takes them into account. More recently, the White Paper on renewable sources of energy and the Green Paper on security of energy supply took these arguments further and set objectives.
- (97) France has not been the only country to introduce a biofuels programme, a number of other Member States have done so as well, though the measures adopted have not been identical due to the lack of any Community harmonisation.
- (98) In its conclusions, the Commission's communication to the Council on the implementation of the Community strategy on renewable energy sources of 16 February 2001 states that: 'at this stage, it is far from sure that the indicative target of the White Paper [...] will be achieved in 2010' and that 'considerable further efforts will be necessary [...] at the Community level and in the national policies of the Member States' .
- (99) In France, the distillers attempted to promote the direct blending of ethanol into petrol, but they came up against the hostility of the oil companies and motor vehicle manufacturers, who preferred ETBE.
- (100) Ethanol is produced in existing units which have spare capacity, i.e. without any increase in capacity and without the building of new plants.
- (101) The production of traditional alcohol and fuel ethanol are carried out in parallel, adapting them to market requirements and without any disturbance to the traditional alcohol market.
- (102) Compared with the situation that existed before the appearance of fuel ethanol, agricultural alcohol production in France has remained relatively stable, whereas synthetic alcohol has seen some increase.
- (103) French alcohol producers, like all their European counterparts, have had to deal with disturbances on the traditional markets as a result of a steady rise in imports from third countries. The SNPAA makes the following points in this respect.
- (104) The Community alcohol market is supplied, in the case of all uses except spirits, where only agricultural alcohol is used, by European-produced alcohol of agricultural and synthetic origin and by imports.
- (105) The substantial growth in imports in recent years has caused serious disruption for European producers.
- (106) A look at the Eurostat figures, which are currently the only complete and reliable figures, shows the following trends in imports.
- (107) Community imports of alcohol from countries enjoying full exemption from customs duties have resulted in a loss of market share of more than 5 % for the Community industry, on the basis of estimated overall Community production of alcohol of agricultural origin (excluding wine alcohols) and synthetic alcohol at around 16 million hectolitres. Furthermore, the number of exporting countries rose from six in 1995 to 16 in 1999. The great majority of the distilleries which currently export to the Community duty-free were set up in the last 10 years, so as to take advantage of the very favourable customs conditions which the Community offers to the countries in which they are situated. As regards the ACP countries, exports to the Community are not limited by a quota system, in contrast to other alcohol-related products, such as sugar, molasses and rum.
- (108) As far as Community imports of alcohol subject to customs duties are concerned, it must firstly be borne in mind that, following the application of the 36 %

reduction decided on in the multilateral trade negotiations, the 'normal' customs duties applicable as from 2000 are: for undenatured alcohol (CN code 2207 10): EUR 19,2 per hectolitre; for denatured alcohol (CN code 2207 20): EUR 10,24 per hectolitre. These amounts are further reduced by 15 % in the case of GSP beneficiary countries.

(109) Overall, imports of undenatured and denatured alcohol, at 254 341 hectolitres in 1999, already represent more than 1 % of the market.

(110) Community imports of mixtures competing with alcohol are declared under CN code 3814 00 90 so as to avoid paying the customs duties applicable to alcohol under CN code 2207 20. Through this classification, the amount of customs duties is in large part avoided, thus allowing imports to take place that would show little or no profit if the customs duties applicable to alcohol were paid. Though they have been classified otherwise, the relevant products possess all the properties of alcohol (which, moreover, remains their essential constituent). Such imports amounted to 1 417 760 hectolitres in 1999, equivalent to some 9 % of the markets for agricultural and synthetic alcohol, showing an increase of 200 % over a period of four years.

(111) In conclusion, under the combined impact of international agreements which substantially cut or actually abolished customs duties, national subsidy programmes which produced surpluses sold at marginal cost, dubious classifications or misclassifications under CN code 3814 in order to avoid the payment of customs duties and currency devaluations that arbitrarily improved the 'competitiveness' of certain countries, imports rose from 824 235 hectolitres in 1995 to 2 540 584 hectolitres in 1999, equivalent to 16 % of the market for agricultural and synthetic alcohol of some 16 million hectolitres a year.

(112) This import pressure has threatened the European alcohol industry, and the situation has become sufficiently worrying for the Commission to propose the introduction of rules in this sector.

(113) The explanatory memorandum to the proposal for a Council Regulation on the common organisation of the market in ethyl alcohol of agricultural origin recognises that 'during the last five years, the sector has been confronted with a series of problems, mainly related to increased competition on the internal market as follows: — imports from third countries have increased since [...] 1995 [...], — in addition, greater quantities are imported as blends of alcohol with denaturants[...]'.
 (114) It is therefore quite clear that disturbances have emerged on the market and that these are not due to the

production of fuel ethanol, as BP Chemicals suggested. In support of these assertions, the SNPAA provides the following table:

FRENCH PRODUCTION ETHYL ALCOHOL OF AGRICULTURAL (BEET AND CEREAL) AND SYNTHETIC ORIGIN

(In hectolitres)

Marketing year	Agricultural alcohol		Synthetic alcohol
	Bioethanol	Traditional alcohol	
1990/1991		3 704 140	1 073 487
1991/1992	42 692	3 561 161	1 438 953
1992/1993	346 359	3 756 911	1 383 422
1993/1994	485 118	3 870 543	1 314 563
1994/1995	477 726	3 791 219	1 574 130
1995/1996	759 949	4 002 011	1 467 984
1996/1997	1 050 052	4 012 140	1 374 973
1997/1998	1 233 091	3 719 541	1 578 670
1998/1999	1 144 000	3 724 901	1 569 545

(115) The SNPAA also states that BP Chemicals has embarked on an investment programme, reported in the press, to increase its synthetic alcohol production capacity. The relevant units appear to have had start-up difficulties, and the resulting market losses cannot of course be attributed to the production of fuel ethanol.

(116) As far as the aid provided through the tax exemption for the ETBE sector is concerned, it should be noted that the aid is not granted to the ethanol producer, but to the distributor of petrol to which ETBE has been added when it is released for consumption.

(117) The value of the ETBE is calculated on the basis of petroleum-related criteria such as the octane value or volatility, the ethanol price being only a resultant. The amount of the exemption also includes the depreciations linked to the substantial investments which have had to be made for the construction of the ETBE units.

(118) The SNPAA also points out that the exemption does not cover the whole of the TIPP applicable to petrol. Ethanol is subject to a TIPP of around 15 % of that

applicable to petrol, a figure which is higher than that provided for in the 'Scrivener' proposal for the taxation of biofuels (10 %).

3.3. Comments from Ethanol Union

- (119) Ethanol Union submitted comments in its capacity as a company marketing the ethanol produced by its distiller shareholders ⁽²³⁾ at the ELF Antar France refinery at Feyzin, this ethanol being used for the production of ETBE, which is itself then blended into the fuels distributed by ELF Antar France.
- (120) Ethanol Union shares the Commission's view that the development of renewable energy sources has been clearly encouraged by the European authorities for many years and has been the subject of numerous studies, recommendations and decisions.
- (121) In France, one of the approaches adopted for this purpose has been to introduce fuel ethanol onto the market through ETBE, a sector strongly backed by the oil industry.
- (122) The measure introduced by France is based on the issuing of approval to ETBE production units, and, as the Commission points out, this does not involve any discrimination in the criteria governing the eligibility of firms or any discretionary elements in the selection of the firms receiving such approval.
- (123) The measure ensures that the tonnages of ETBE benefiting from the tax exemption are limited and monitored, and, in future, the tax scheme applicable to biofuels will no doubt have to evolve, in line with expected developments in this activity.
- (124) Furthermore, the question of whether there is a risk of distortion of competition in favour of the production of agricultural ethanol and to the detriment of synthetic ethanol may be assessed by looking at what has happened in the past: comparison of the trend in the volumes of agricultural ethanol (excluding fuel ethanol) produced in France, on the one hand, and of synthetic ethanol, on the other, over the last 10 years provides enlightening information here.
- (125) On a market whose overall volume is relatively stable, if the hypothesis of a distortion of competition in favour

of agricultural ethanol were correct, there would, once the production of fuel ethanol started, have been an increase in the production of agricultural ethanol (excluding fuel ethanol) and a decrease (at least partial, in line with the location of markets) in the production of synthetic ethanol.

- (126) However, analysis of the production statistics available for France for the period 1991 to 1999 shows that production did not follow this pattern ⁽²⁴⁾:

(⁰⁰⁰ hectolitres)

	1991/1992	1998/1999	Difference
Agricultural ethanol (excluding fuel ethanol)	3 561	3 725	+ 4,6 %
Fuel ethanol (1991 and 1999 calendar years)	43	1 144	Not significant
Synthetic ethanol	1 439	1 570	+ 9,1 %

- (127) Over the relevant period, it can be seen that synthetic ethanol production increased more strongly than agricultural ethanol and that the risk of competition being distorted to the detriment of synthetic ethanol was not at all borne out by the facts.
- (128) On the other hand, it must be emphasised that, during recent years, the ethanol market (excluding fuel ethanol) has been considerably disrupted not by the growth of fuel ethanol of agricultural origin, but by a massive increase in imports of ethanol and ethanol-based blends benefiting from customs arrangements favouring entry into the Community.
- (129) The total volume of Community imports of ethanol and products competing with ethanol has thus tripled in five years, rising from about 800 000 hectolitres in 1995 to more than 2 500 000 hectolitres in 1999. This factor has hit the whole of the ethanol market hard, and these disruptions have moreover prompted the recent adoption by the Commission of a proposal for common organisation of the market for agricultural ethanol.

- (130) Against the background of the desired promotion of renewable sources of energy, it must be borne in mind

⁽²³⁾ Société Cristal Union, Sucrerie cooperative agricole de Bourdon, Sucreries distilleries des Hauts de France, Sucrerie de Toury, Société Vermandoise Industries, Société Saint-Louis Sucre, Société agricole de la Vallée de Loing, Société Dislaub.

⁽²⁴⁾ Source: Journal Officiel de la République Française and Direction générale des douanes et des droits indirects.

that the economics of the cereals and beet-based production sector being established justify the granting of tax aid and, accordingly, Ethanol Union firmly backs the request made by France pursuant to Article 8(4) of Directive 92/81/EEC.

3.4. *Comments from Ethanol Holding*

- (131) Ethanol Holding submitted comments in its capacity as a company whose shareholders are fuel ethanol producers. Ethanol Holding is a shareholder in the company Ouest-ETBE which operates the ETBE production unit situated on the site of the Normandy refinery at Gonfreville-l'Orcher.
- (132) The European authorities have for many years consistently encouraged increased use of renewable energy sources. Many texts have been drafted in recent years setting out guidelines or targets for the promotion of biofuels: a proposal for a Directive on the taxation of biofuels (1992), Altener programmes for the promotion of renewable energy sources, the White Paper 'Energy for the future: renewable sources of energy' (1997), and the Green Paper 'Towards a European strategy for security of energy supply' (2000).
- (133) Several Member States, including France, have introduced programmes to promote biofuels, but, in the absence of harmonised Community rules, the arrangements differ appreciably from Member State to Member State.
- (134) As far as fuel ethanol is concerned, France has since 1992 opted for the ETBE sector. The choice of the ETBE sector, in line with the oil industry's wishes, meant that substantial investment had to be carried out to build new ETBE production units (including the Ouest-ETBE unit at Gonfreville-l'Orcher). The depreciation of such investment was taken into account in determining the duration of the approval granted.

As regards the effect of the aid on the ethanol market, Ethanol Holding shares the Commission's view that, despite certain allegations, the information available does not show that growth in bioethanol production creates a distortion of competition vis-à-vis synthetic ethanol. A look at the trend in the production in France of bioethanol, on the one hand, and of synthetic ethanol, on the other, since the introduction of fuel ethanol on the market confirms this situation⁽²⁵⁾. The figures cited in this respect are identical to those provided by the SNPAA (see recital 114).

(135) Between 1990 and 1999, it may be seen that, far from having been penalised by the appearance of bioethanol, French synthetic ethanol production actually increased more strongly than agricultural ethanol production.

(136) In the light of the figures cited, no sign of any distortion of competition to the detriment of synthetic ethanol can seriously be claimed as a result of fuel ethanol production.

(137) The European ethanol market as a whole (agricultural and synthetic ethanol) has certainly been disrupted in recent years, but the cause must be sought, in particular, in the recent increase in Community imports of alcohol and alcohol-containing mixtures and not in the growth in fuel ethanol production.

(138) Imports of ethanol and competing mixtures have grown steadily in recent years to over 2 500 000 hectolitres in 1999 (three times as much as in 1995) and account for about 16 % of the European alcohol market.

(139) Promoting renewable energy sources means that tax support must be granted to the sectors that are being established for this purpose.

(140) A number of Member States (Spain, Italy, the Netherlands, Sweden, the United Kingdom, Germany and Austria) encourage or plan to encourage initiatives that are in line with the various guidelines and targets drawn up by the Community authorities. The measures planned or already introduced are based on varying systems of tax aid granted to biofuels, and the taxes specific to this sector will have to evolve in line with the foreseeable developments of these activities.

3.5. *Comments from the Union des sucreries et distilleries de l'Aisne (Union SDA)*

(141) The Union des sucreries et distilleries de l'Aisne (Union SDA) is, through its subsidiaries Bio-Ethanol Nord Picardie (BENP) and Brie Champagne Ethanol (BCE), the leading French producer of cereal-based ethanol and one of the producers of beet-based fuel ethanol. Its role is to promote all industrial uses likely to offer markets for agricultural raw materials (beet and wheat) produced by its members.

⁽²⁵⁾ Source: Journal Officiel de la République Française and Direction générale des douanes et droits indirects.

- (142) The BCE wheat distillery at Provins was built as a pilot unit in 1989, i.e. well before the first outlet, the ELF unit at Feyzin, which did not develop until April 1993. The BENP unit at Origny-Sainte-Benoîte was built in 1993 to produce ethanol from wheat and to dehydrate the beet alcohol produced in the group's existing distilleries. These two units use wheat from 20 000 agricultural producers in northern and central France.
- (143) Union SDA participated in the Total group's investments in the two ETBE units at Dunkirk and Gonfreville. The price of the bioethanol supplied to these units depends on the price level of ETBE, determined on the basis of the market prices of Premium, Regular and butane. The bioethanol price also includes amortisation of the ETBE units.
- (144) Union SDA also stresses that bioethanol does not enjoy full tax exemption, since it incurs about 15 % of the TIPP charged on petrol, i.e. a rate higher than the 10 % provided for in a draft directive proposed by Mrs Scrivener. Furthermore, the tax applicable to bioethanol is much higher than that applicable to alternative fuels such as natural gas for vehicles and LPG (liquefied petroleum gas) or electricity.
- (145) Union SDA points out that, in its Green Paper published in November 2000, the Commission noted the key role of biofuels in reducing greenhouse gas emissions and limiting the Community's dependence on energy imports and set ambitious targets for biofuels in the short and medium term.
- (146) Union SDA notes that this position is in line with the analysis it carried out a few years ago on the advantages of bioethanol, which reassures Union SDA on the durability of its markets and justifies the economic risks which it had taken in investing in wheat-based ethanol units.
- (147) Union SDA is also a leading producer of alcohol for traditional uses.
- (148) It cites the French statistics on agricultural alcohol production and synthetic alcohol production published by the Direction générale des douanes et des droits indirects and suggests that a comparison should be made of production trends between 1990/1991 to 1992/1993 (the three years preceding the production of bioethanol) and 1996/1997 to 1998/1999 (the three years following the start-up of the Total group's ETBE units).
- (149) It may be seen that the production of agricultural alcohol (excluding bioethanol) rose from 367 407 m³ to 381 886 m³, i.e. an increase of 3,9 %, whereas, during the same period, the production of synthetic alcohol rose from 129 862 m³ to 150 772 m³, i.e. an increase of 16,1 %.
- (150) Like its French and European counterparts in the alcohol production industry, Union SDA has had to cope with serious disruptions on the traditional alcohol market due to a very significant increase in imports from third countries, which amounted to 16 % of the market in 1999.
- (151) These threats became sufficiently serious for the Commission to propose the introduction of common organisation of the market in ethyl alcohol of agricultural origin. In the explanatory memorandum to its proposal, the Commission makes it clear that market disruption is due to imports, and not to the production of bioethanol in France, as BP Chemicals suggests.
- (152) In conclusion, Union SDA argues that the start-up of the bioethanol sector in France has not prompted agricultural alcohol producers to step up their production to the detriment of synthetic alcohol, BP Chemicals having just invested in increasing capacity at its plants.
- (153) The European market has been disrupted in recent years, this is due to imports from third countries, which prompted the Commission to propose the common organisation of the market.
- (154) BP Chemicals' action has the effect of jeopardising bioethanol production in France, which runs counter to the Commission's objectives.
- (155) The growth of biofuel production in the Community calls for a tax harmonisation directive to prevent distortions between Member States (as in the case of France and Spain, for example) and establish a stable framework without which there cannot be any significant growth in biofuels.
- 3.6. *Comments from the Agence de l'environnement et de la maîtrise de l'énergie (ADEME)*
- (156) The Agence de l'environnement et de la maîtrise de l'énergie (ADEME) submitted comments on the energy and environmental aspects relating to fuel additives and biocomponents in France.

- (157) The ADEME states that the production of biocomponents and additives grew significantly in France between 1992 and 2000. Ethanol consumption grew by a factor of 27, amounting to 92 550 tonnes in 2000, while vegetable oil ester consumption grew by a factor of 448, amounting to 308 600 tonnes in 2000. This total of 401 000 tonnes produced in 2000 is equivalent to 1 % of petrol and diesel consumption and means that France is the leading producer in Europe, followed by Germany, which produces only vegetable oil esters, and by Spain, which produces only ethanol.
- (158) This growth has gone hand in hand with a system of tax incentives introduced by France, as well as by all the other European countries concerned, for the benefit of these biocomponents, in the same way as for other alternative fuels (LPG, natural gas for cars, and aquazole) or for an alternative energy source such as electricity. The resources deployed nationally for research and development work on improving their competitiveness were stepped up in 1994, but fell back towards the end of the period in favour of non-energy utilisations.
- (159) In France, the transport sector is more than 95 % dependent on hydrocarbons, which are non-renewable energy sources and whose use plays a key role in the emission of greenhouse gases. The substantial growth of the transport sector in recent years has had the effect of making it the prime player in energy consumption and the emission of pollutant gases, particularly in urban environments.
- (160) At European level, the Commission's Green Paper published on 29 November 2000 set a 7 % target for biofuels in 2010 and a 20 % target in 2020, for substitute fuels as a whole.
- (161) These biocomponents, whose benefits are recognised, both as fuel additives and for their contribution to reducing harmful emissions and their benefit in terms of reducing the greenhouse effect, are not used in their pure state in France: they are either blended, in the case of ester, as components up to 30 % in diesels, to be used in vehicle fleets (buses, lorries, commercial vehicles); or, principally, they are used in small quantities (a few per cent) in petrol and diesel as formulation or lubrication additives.
- (162) Their use does not require vehicles and engines to be adapted, which gives them an advantage over other alternative fuels.
- (163) Life-cycle analyses have been carried out on the two sectors, providing comparative figures on energy and environmental aspects.
- (164) The energy balances of the two sectors are significant, for example for the year 2000: 337 000 toe/year substituted; 220 000 toe/year economised; 810 000 net tonnes of CO₂ avoided with the production and energy use of the fraction reserved for such use, without taking account of the carbon contained in the rest of the plant; energy efficiency of 2 for the ester sector as against 0,9 for the diesel sector; energy efficiency of 1,2 to 1,6 for the ethanol sector as against 0,8 for the petrol sector; additional production of coproducts, protein-rich in the case of oilcakes and dried grains, and used as animal feed (rapeseed and sunflower cake, dried wheat grains, beet pulp) or in chemicals (glycerol).
- (165) The main technical advantage of ethanol and its derivative ETBE is to improve the octane number of petrol. A quantity of 5 % of ethanol or 10 % of ETBE increases the research octane number (RON) of super-grade petrol by 1,2 points.
- (166) The other quality of ethanol or ETBE as an additive is to add oxygen, which allows better fuel combustion: 2 % oxygen in terms of mass is provided by 5,7 % of ethanol or by 12,7 % of ETBE in terms of volume.
- (167) With a 15 % blend of ETBE in petrol, UTAC tests on light vehicles showed, in addition, reductions in harmful emissions such as aromatic hydrocarbons, and a reduced impact on the potential for photochemical reactions. ETBE's contribution to the greenhouse effect is, moreover, 19 % less than that of MTBE of petroleum origin.
- (168) The growth outlook is linked to the technical benefits provided, but also to the use of biomass-derived components as renewable sources. The oil companies are carrying out research into these elements, which allow some dilution of petroleum formulas and also make it possible to add non-fossil carbon into fuels. In this respect, synthetic ethanol obtained from fossil carbon cannot compare with ethanol obtained from vegetable sources, and in view of the overall energy and environmental aspects, it cannot have the same economic value. Furthermore, ethanol derived from vegetable material could be used in fuel cells and currently offers the best energy balance for this application. All these developments will be linked to the dwindling stock of fossil oil reserves, but also to increasing world oil consumption and, as a corollary, to the oil price, which is subject to periodic surges which no one can control. The drive to reduce the greenhouse effect will also prompt research into substitute energy

solutions. The medium-term energy outlook means that consumption must be brought under control, harmful emissions reduced and alternative energy sources developed.

(169) French bioethanol production was 83 370 tonnes in 1997 and 97 907 tonnes in 1998, deriving from wheat and beet. The agricultural land used is almost equally divided between the two crops. The average ethanol yields are 2 t/ha for wheat and 5,3 t/ha for beet.

(170) According to the 1996 ecobalance, carried out with beet ethanol, the saving in CO₂ equivalent is 0,66 t of CO₂/t of ETBE compared with MTBE. This saving corresponds to 1,404 t of CO₂/t of beet ethanol used in the manufacture of ETBE compared with MTBE. This saving per hectare becomes 8,14 t of CO₂/ha. The gain in terms of 1998 production, which was 98 000 tonnes of ethanol (or 208 300 tonnes of ETBE), is 137 600 t of CO₂/year.

(171) It is possible to recover 60 % to 80 % of this CO₂, i.e. 45 to 60 kg of CO₂/hl of pure alcohol, or 0,567 to 0,755 t of CO₂/t of pure alcohol. The abovementioned saving for the sector of 1,404 t of CO₂/t of ethanol would then be 1,971 to 2,16 t of CO₂/t of ethanol. In this case, the gain in terms of 1998 production (98 000 tonnes of ethanol) would average around 202 400 t of CO₂/year.

(172) The greenhouse-effect balance is expressed in monetary terms in accordance with the principle of negotiable allowances, also known as the principle of emissions trading, assuming a value of FRF 500/t of carbon (monetary cost hypothesis):

Cost/t of carbon	Cost/t of CO ₂ saved
FRF 500/t	FRF 136/t
EUR 76/t	EUR 21/t

(173) The value of the 'saving in terms of greenhouse effect' externality compared with MTBE and per tonne of beet ethanol would then be: FRF 136/t of CO₂ × 1,404 t CO₂/t of ethanol = FRF 191/t of ethanol or EUR 29,1/t of ethanol.

(174) This value per hectare of beet would be: FRF 136/t of CO₂ × 8,14 t CO₂/ha = FRF 1 107/ha or EUR 169/ha.

(175) As regards the carbon balance with the entire plant, such balance does not take account of the carbon contained in the rest of the plant (leaves, marc, etc.). These parts also contribute to a periodic cycle and to permanent fixing of carbon, and the phenomenon is renewable:

	Dry matter obtained (t/ha/year)	Coefficients	Fixed carbon (t/ha)	Fixed CO ₂ (t/ha)
Marc	3,1	0,422	1,308	— 4,8
Leaves	4,25	0,409	1,74	6,38
Total (*)	8,55		3,54	11,18

(*) This balance sheet is presented without extracted sugar, which is also used to obtain bioethanol.

(176) Looking at the result obtained, the annual average value of 30 % of this carbon flux in relation to the plant is immobilised by the plant, then as an organic material in the soil, and then constitutes a stock of carbon in the soil, which would give about 3,3t/ha of fixed CO₂ for the three-year period of crop rotation.

(177) The economic value of this part would be: FRF 136/t of CO₂ × 3,3 t CO₂/ha/year = FRF 449/ha/year = EUR 68/ha/year. The total economic value of the carbon fixing would then be: the saving due to the bioethanol/ETBE in relation to MTBE + the stocking of carbon by the plant = FRF 1 107/ha/year + FRF 449/ha/year = FRF 1 556/ha/year = EUR 237/ha/year.

3.7. Comments from Saint Louis Sucre

(178) In its comments, Saint Louis Sucre states that it is a producer of ethyl alcohol of beet origin. Part of its production is geared to the manufacture of ETBE for carburation through the companies Ethanol Union and Ethanol Holding, in which Saint Louis Sucre holds 6,66 % and 16,24 % respectively.

(179) Saint Louis Sucre also states that it has invested not inconsiderable sums in the ETBE production unit at Gonfreville (Ouest-ETBE). Every year, Saint Louis Sucre buys from its beet suppliers about 100 000 tonnes of beet for the production of ethyl alcohol for carburation.

(180) Saint Louis Sucre reiterates the familiar arguments in favour of biofuels, citing the White Paper on renewable

sources of energy and the Green Paper on security of energy supply.

3.8. *Comments from SAF Agriculteurs de France*

(181) Saint Louis Sucre produces its ethanol in an existing plant which still has spare capacity available. More ethanol for carburation can therefore be produced without increasing capacity or building a new plant. Saint Louis Sucre states that it produces traditional alcohol and fuel ethanol in parallel, adapting its production processes to market requirements and without creating any disruptions on the traditional alcohol market.

(187) In its comments, SAF Agriculteurs de France states that bioethanol consumption in France amounts to 1 150 000 hectolitres, corresponding to 0,6 % of petrol.

(182) It seems clear to it that, compared with the situation prior to the emergence of fuel ethanol, the production of agricultural alcohol has remained relatively stable whereas there has been some increase in synthetic alcohol.

(188) This figure (together with 0,9 % for gasoil) is below the 2 % set by the Commission for 2003.

(183) However, Saint Louis Sucre has been confronted with a shake-up on the traditional market as a result of a steady increase in imports from non-Community countries.

(189) These biofuels are currently used as additives, with the rules allowing them to be added to petrol up to 1,5 % in the case of ETBE. The objective pursued is not to replace fossil fuels entirely by biofuels, but to use them as one of the means of improving the environment under a long-term development policy, particularly as regards reducing the greenhouse effect, restoring balance in agricultural production, innovation, strategic investment in independence in energy supplies and a new source of trace proteins.

(184) In Saint Louis Sucre's view, therefore, it is quite clear that there has been disruption on the traditional market and that this is not due to fuel ethanol production as BP Chemical suggested in its appeal.

3.9. *Comments from the Distillerie de la Région de Châlons en Champagne*

(185) Saint Louis Sucre also states that BP Chemicals has launched an investment programme to increase its synthetic alcohol capacity, as reported in the press. Saint Louis Sucre suggests that the relevant plants have experienced start-up difficulties, and the ensuing market losses quite clearly cannot be blamed on fuel ethanol production.

(190) In its comments, the Distillerie de la région de Châlons-en-Champagne (DRC) stated that it is the Eridania Béghin-Say groups' beet-based ethyl alcohol production plant in France.

(186) Lastly, Saint Louis Sucre draws the Commission's attention to the fact that the Court of First Instance's rejection of the pilot nature of the use of ETBE in France seems linked to ethanol production. In fact, such ethanol is used for only one purpose, namely carburation. France had since 1977 been the only Community country to use it for this purpose, though it had just been joined by Spain. Other Member States such as Italy were taking measures along the same lines, and the United Kingdom's Finance Bill 2001 announced duty reductions or exemptions for pilot projects relating to hydrogen, bioethanol, methanol and biogas.

(191) DRC briefly outlines the context of the French scheme, namely to partly replace fossil fuels by fuels of vegetable origin so as to reduce the cost of oil imports, allow the development of crops for industrial purposes under the CAP and improve the environment, in particular by reducing greenhouse gas emissions. In its approach to this task, France has opted for the ETBE ethanol sector, which it saw as being well suited to taking account of the technical constraints of motorists and the oil companies.

(192) Production of this biofuel could be established only with the help of partial tax exemption so that the sale of ETBE could provide proper remuneration for growers,

ethanol producers and investment in ETBE units, without fluctuations in oil prices intermittently jeopardising this substantial programme. DRC also makes the following comments.

(193) The aid is granted to ETBE plants that have already been authorised by the national authorities; the invitations to tender organised for the purpose of granting these authorisations have been particularly clear and transparent, even if guarantees of reliability were required, which is normal. There does not appear to have been any discrimination, since the volume proposed has not been fully taken up.

(194) Production of agricultural ethyl alcohol (excluding carburation) has not increased since the establishment of the programme. DRC says that it has even had to reduce its sales of traditional alcohol. DRC considers that, contrary to what would have happened in the event of direct blending of ethanol, the approach chosen has in practice limited the volumes used for carburation and has not entailed major distillery investment.

(195) All in all, DRC notes that, on a relatively stable traditional alcohol market, synthetic ethanol has not shown any distortion. DRC cites as evidence the fact that, up to 1997 the Eridania Béghin-Say group owned SODES, the only French producer of synthetic alcohol, and that the two types of alcohol were managed without conflict within one and the same commercial department. Since the sale of SODES, DRC has kept that company for marketing all of its traditional alcohols.

(196) The recent market disruptions have been caused by the increase in preferential imports, as the Commission acknowledges in its proposal for a Regulation on the common organisation of the market in ethyl alcohol of agricultural origin.

3.10. Comments from AGPB Céréaliéristes de France

(197) AGPB Céréaliéristes de France (AGPB) is an association representing suppliers of wheat for the production of bioethanol used for the manufacture of ETBE. Wheat bioethanol is converted in plants belonging to the company Total Fina Elf.

(198) AGPB gives the following figures:

Current agricultural ethanol production	5 million hl
Bioethanol for ETBE	1.2 million hl (of which 1/3 wheat)
ETBE production capacity for petrol	219 000 t
Petrol consumption (France)	14,5 million t
Land given over to ETBE ethanol	18 000 ha wheat and 11 900 ha beet
Land under cereal crops	9,1 million ha, of which 4,9 wheat

(199) AGPB points out that BP Chemicals has not suffered any damage through the introduction of the tax scheme for biofuels in France.

(200) AGPB states that the figures for the French bioethanol market over eight production years show that:

- the production of synthetic alcohol, the product manufactured by BP Chemicals, has increased more than the production of agricultural alcohol excluding fuel bioethanol,
- the increase in bioethanol production has not been accompanied by a similar development in the production of agricultural ethanol excluding bioethanol:

(in hectolitres)

Period	Bioethanol (beet and wheat)	Synthetic alcohol
(a) Average 1990 to 1991 to 1992 to 1993	3 674 071	1 298 621
(b) Average 1996 to 1997 to 1998 to 1999	3 818 861	1 507 729
Variation (b) – (a)	+ 144 790	+ 209 108
Variation in %	+ 3,9 %	16,1 %

Source: Direction générale des douanes et droits indirects, France.

- these figures show that French production of synthetic alcohol has not been affected by the encouragement of bioethanol production. If such

encouragement had been a disruptive factor on the market, French production of synthetic alcohol would immediately have suffered, given its location close to the bioethanol production areas.

(201) AGPB states that the figures on trade in alcohol show that the volumes imported into the Community exempt of customs duties (CN code 2207) and imports of competing blends of alcohol (CN code 3814) have risen considerably (from 0,7 million hectolitres in 1995 to 2,1 million hectolitres in 1999), under the combined influence of several factors linked to international trade, including first and foremost the international agreements that have greatly reduced or indeed abolished customs duties.

(202) According to AGPB, on a stagnating Community market of some 16 million hectolitres, such growth inevitably contributed to a sharp deterioration in alcohol prices and in the profitability of traditional non-food markets. It would seem that synthetic alcohol adapted better to this increased pressure on costs than agricultural alcohol did, judging from the growth in its production.

(203) AGPB also emphasises the following aspects:

- bioethanol is subject to greater tax pressure than alternative fuels of fossil origin,
- the cost of bioethanol reflects a situation which is still at the demonstration stage; cereal producers are making some sacrifice in accepting a remuneration for wheat used for bioethanol that is 10 % to 20 % below the average price for conventional outlets. Since July 2000, the sacrifice is even greater, since the specific compensation for industrial fallow land has disappeared:

Item	FRF/hl
Raw material	171
Transport, handling, receipt	25
Cost of manufacture (including drying)	230
Revenue from draff	-89
Forwarding to distillery	20
Total cost	357

- other Member States have developed measures to promote the use of biofuels. Most recently, the United Kingdom has proposed in the 2001 budget a new rate for biodiesel at 20 pence per litre below the duty rate for ultra-low sulphur diesel, applicable as from 2002 without any quantitative limit,

- energy has a natural connection with agriculture: the ability of vegetable matter to capture solar energy by converting it and storing it in the form of chemical energy suggests that any farmer (or forester) is basically a producer of primary energy,

- developing energy from plants has obvious environmental advantages: the ability of vegetable matter to take in CO₂ in the atmosphere, absorbing the carbon and emitting the oxygen, makes crops an extremely useful means of combating increased CO₂ in the air. Using vegetable carbon instead of fossil carbon is particularly effective. Alternative fuels derived from biomatter have the rare ability to contribute to a positive CO₂ balance,

- securing hydrocarbon supplies has become a political priority: a proportion of 10 % of renewable oxygenates in fuels could have an impact on oil imports and prices,

- the development of renewable sources of energy is now a matter of policy in Europe. AGPB cites the Altener research programme and the White Paper on renewable sources of energy, the communication on the European Union's oil supply COM(2000) 631 and the communication on the implementation of the Community strategy and action plan on renewable energy sources COM(2001) 69.

(204) AGPB points out that the challenge to the scheme by the Court of First Instance relates only to the question relating to the interpretation of the Directive on excise duties and not to the 'State aid' aspects. AGPB therefore presumes that, since the contents are identical, the tax redemption scheme is compatible with the rules governing State aid.

(205) AGPB notes that the production of agricultural alcohol (excluding bioethanol) has increased by 3,9 %, whereas,

during the same period, the production of synthetic alcohol has increased by 16,1 %. The increase in bioethanol has not been accompanied by a similar increase in the production of agricultural ethanol excluding bioethanol.

- (206) AGPB also notes that the figures on trade in alcohol show the serious disturbance on the traditional alcohol market caused by a very significant increase in imports from third countries, which accounted for 16 % of the market in 1999. This increase contributed to the deterioration in alcohol prices and profitability of conventional non-food outlets, a sector in which BP Chemicals is predominant.
- (207) AGPB also points out that other European countries subsidise biofuels and that, pending harmonisation, the French ETBE sector does not wish to be the target of discriminatory treatment.
- (208) AGPB also states that, over and above the problems relating to the energy balance and fossil-fuel CO₂ emissions, the bioethanol and vegetable oil sectors provide high-protein by-products (draff and oilcake) for use as animal feed. The Community has a particular lack of these. It is importing more and more oilcake made from genetically modified soya. This dependence is further increased by the ban on the use of animal meal as a source of protein.

(To avoid repetition, the following summaries include only comments not already covered by the comments summarised so far.)

3.11. *Comments from the Association pour le développement des carburants agricoles (ADECA)*

- (209) The Association pour le développement des carburants agricoles (ADECA) represents producers, collectors and transformers of fuels of agricultural origin, including among others: the AGPB, the Fédération nationale de coopératives agricoles, the Syndicat national des fabricants de sucre, and the SNPAA. Its comments are similar to those presented by the AGPB.

3.12. *Comments from Sucrierie de Touri*

- (210) Sucrierie de Touri is a beet-based ethyl alcohol producer, part of whose production is ETBE intended for carburation.

- (211) Sucrierie de Touri embarked on production in response to incentives introduced by the French public authorities pending European harmonisation.
- (212) Sucrierie de Touri would have preferred direct blending. ETBE was opted for. Since the quantity that can be manufactured is governed by the capacity of the existing plants, output is limited.
- (213) Sucrierie de Touri's production of traditional alcohol remained stable during the period.
- (214) Sucrierie de Touri has faced serious upheaval on the traditional alcohol market as a result of a very significant increase in imports from third countries. Sucrierie de Touri also notes increases in synthetic alcohol production by a number of oil companies.

3.13. *Comments from Sucrierie Bourdon*

- (215) Sucrierie Bourdon is a small independent cooperative which, since 1992, has been producing 80 000 hectolitres of alcohol and 30 000 hectolitres of fuel ethanol.
- (216) Sucrierie Bourdon states that it 'does not understand why the biofuel sector has been put on trial at this late stage' and puts forward similar arguments to those already cited on the reduction of harmful emissions, the White Paper on renewable sources of energy, the fact that the scheme is in the nature of a pilot project and the fact that the synthetic ethanol market is not affected.
- (217) Sucrierie Bourdon also notes the inconsistency in the fact that a tax on petroleum products is levied on a product of agricultural origin.

3.14. *Comments from the Confédération Générale des Planteurs de Betteraves (CGB)*

- (218) The Confédération générale des planteurs de betteraves (CGB) is a trade organisation representing 35 000 French sugar-beet growers. The CGB states that 11 000 hectares of beet produce 70 % of the ethanol that is consumed, which amounted to a volume of 85 600 tonnes for the 1999/2000 marketing year. The CGB puts forward arguments similar to those already cited on the reduction of harmful emissions and reduction of dependence on energy imports.

3.15. *Comments from Ouest-ETBE and Nord-ETBE*

- (219) Ouest-ETBE and Nord-ETBE, which are ETBE producers, present comments which are identical in content. The comments set out arguments similar to those already cited on environmental protection. They also note that the volumes produced or planned represent marginal quantities that have no impact on the market for products having similar characteristics and capable of being incorporated into motor fuels instead of ETBE, such as MTBE, or on the production of synthetic ethanol.
- (220) Ouest-ETBE and Nord-ETBE point out that, in France, current ETBE production is some 200 000 tonnes a year, which corresponds to 100 000 tonnes of vegetable-based ethanol. This figure should be compared, firstly, with the 14 million tonnes of petrol consumed annually in France and, secondly, with the 3,5 million tonnes of MTBE produced in Europe. On this last point, Ouest-ETBE and Nord-ETBE note that ONEXO recently announced the construction of a new MTBE plant (200 000 tonnes) at Antwerp, which shows that ETBE production does not prevent the development of MTBE production.

(221) The ETBE sector uses vegetable-based alcohol, whose production cost is greater than that of equivalent fossil-based products. However, the aid granted has not had the effect of subsidising the production of vegetable-based ethanol used for other purposes and is not therefore in competition with synthetic ethanol production, as the published figures show.

(222) It may be seen that overall production of synthetic alcohol has increased in the last ten years twice as fast as that of vegetable-based alcohol (growth of 9 % as against 4,5 %), while the production of vegetable-based ethanol for carburation rose from 43 000 hectolitres in 1991 to 1 144 000 hectolitres in 1999.

(223) The tax exemption comes under an invitation to tender open to all operators, and Ouest-ETBE and Nord-ETBE note that the ceilings provided for by the French government for the exemption have not been used in full.

3.16. *Comments from Total Fina Elf*

(224) Total Fina Elf has been distributing biofuels since 1987 in the United States and since 1988 in France. It operates an ETBE production unit situated in France at

Feyzin (Rhône Department) and uses production from units situated at Dunkirk and Le Havre.

- (225) Total Fina Elf puts forward environmental arguments similar to those, cited above, put forward by other interested parties.
- (226) Total Fina Elf also refers to a number of physico-chemical properties which make ETBE a particularly appropriate component in the production of motor vehicle fuels.
- (227) Total Fina Elf notes that the proportion of ETBE in petrol in France amounts to no more than 1,4 %, although, under the European rules applicable, up to 15 % of ETBE can be incorporated.
- (228) Total Fina Elf states that the choice of the beneficiaries is neither discriminatory nor discretionary, and that the published figures show that there has not been any distortion of competition as far as synthetic ethanol is concerned.

V. **COMMENTS FROM THE FRENCH AUTHORITIES**

(229) France submitted comments relating both to the development of the synthetic ethanol sector (a point on which the Commission had requested details) and on the tax benefit, the implementation of the scheme and, lastly, BP Chemicals' comments.

(230) France supplied figures published in the *Journal officiel de la République française* (Official Journal of the French Republic) which show clearly that the tax benefit granted to bioethanol used in carburation has not had the effect of increasing the share of bioethanol at the expense of synthetic alcohol in the other user sectors in which the two products are in competition with one another (solvents and chemical products in particular).

(231) The figures show that, from 1991 to 1999, French bioethanol production, including that used for carburation, rose from 3 608 853 hectolitres to 4 868 981 hectolitres, whereas synthetic alcohol production rose from 1 438 953 hectolitres to 1 569 545 hectolitres. During the same period, the production of bioethanol for carburation rose from 42 962 hectolitres to 1 144 242 hectolitres.

(232) It can be seen from the above that, between 1991 and 1999, the production of bioethanol excluding that for carburation rose from 3 565 891 to 3 724 739 hectolitres, an increase of 0,07 %, whereas the production of synthetic ethanol rose by 4,86 %.

- (233) France concludes from this that the tax benefit granted to bioethanol used for carburation has not had any impact on the synthetic ethanol market.
- (234) France also points out that the minimum Community excise duty rate specified in Council Directive 92/82/EEC of 19 October 1992 on the approximation of the rates of excise duties on mineral oils ⁽²⁶⁾, as amended by Directive 94/74/EC, is complied with.
- (235) As far as the operation of the exemption and its effects are concerned, in addition to the very detailed information supplied under the procedure provided for in Article 8(4) of Directive 92/81/EEC, France points out that, if the recipient of the tax aid for the production of biofuels is legally identified as being the authorised warehouse-keeper who carries out the incorporation of ethyl alcohol derivates, whose alcohol component is of agricultural origin, into super-grade fuels and petrol, such tax aid nonetheless constitutes a means of opening up a new outlet for agricultural producers. This consequently is in line with agricultural and environmental policy objectives, since it limits the emission of greenhouse gases, while at the same time having a positive impact on regional development planning and safeguarding business and employment. France points out in this respect that, following reform of the CAP, 1,5 million hectares (cereals, oilseed crops and high-protein crops) have been laid fallow, making it possible for the farmers to grow non-food crops on this land.
- (236) As far as the profit margin of farmers is concerned, France considers that a remuneration giving farmers a gross margin of FRF 1 000 /ha is regarded as a minimum level to encourage them to grow the necessary raw materials.
- (237) The partial exemption from the TIPP, set at FRF 329,50/hl of ethanol, offsets the additional cost involved in producing ETBE ethanol.
- (238) France states that the appreciable increase in oil prices and in the dollar as from the fourth quarter of 1999 compared with the average prices in previous years is prompting the French authorities to consider indexing the tax exemption ceilings to the prices of the petroleum products substituted.
- (239) As far as BP Chemicals' comments are concerned, France notes that no MTBE producers and no synthetic alcohol producers other than BP Chemicals came forward with comments when the proceeding was initiated. In the French authorities' view, the real figures available on trends on the ethanol market show that BP Chemicals' action is not justified by any distortion of competition on the ethanol market.
- (240) According to the French authorities, analysis of the French alcohol market since 1992, when the first tax measures for ETBE ethanol were introduced, shows clearly that the increase in the production of agricultural alcohol for carburation via ETBE was not matched by an increase in the volumes sold on the traditional markets. In addition, as far as the supply of the traditional markets is concerned, the volume of synthetic alcohol increased more than that of agricultural alcohol used for purposes other than carburation.
- (241) In France's view, it is therefore quite clear that the comments put forward by BP Chemicals, and by BP Chemicals alone, are not justified by the existence of duly proven distortion of competition, distortion which is moreover disproved by the abovementioned facts. According to France, BP Chemicals is obliged to justify its action by citing hypothetical risks which the development of fuel bioethanol production backed by a tax advantage could indirectly impose on the synthetic ethanol market.
- (242) France also points out that the 'large-scale' biofuel development programmes referred to by the Commission in connection with competition on the traditional outlets for alcohol mainly involve Brazil and the United States and not the Community countries. The production of ethanol for carburation in those two countries is 120 and 60 million hectolitres respectively, compared with estimated current European production of around 2,35 million hectolitres. It should be noted in this respect that no requirement that plants be dedicated exclusively to the production of fuel ethanol is imposed in Brazil or the United States, despite the existence of plants with very large production capacities.
- (243) As far as the European ethanol market is concerned, France considers that even if, technically speaking, synthetic alcohol can be used in carburation, the option of preferring bioethanol stems not from some 'economic rationale' or other, but from environmental criteria (notably cutting greenhouse gas emissions) and the desire to reduce dependency on energy imports, advantages which products of fossil origin cannot offer.

⁽²⁶⁾ OJ L 316, 31.10.1992, p. 19.

- (244) France states that, contrary to what BP Chemicals claims, most French bioethanol producers participate in the fuel-bioethanol production programme.
- (245) France also states that BP Chemicals is lumping together projects at very different stages of advancement and does not take proper account of the different approaches adopted in the countries concerned. BP Chemicals estimates that, by 2004, 7 000 000 additional hectolitres of fuel bioethanol will be produced. However, although three other Member States have announced a significant increase in their fuel-ethanol production in the years ahead, the inevitable time lag between the announcement of the building of a plant and the actual marketing of its output makes unlikely any increase in production such as suggested by BP Chemicals.
- (246) Consequently, European fuel-bioethanol production in 2004 will probably be at a much lower level than the figures suggested by BP Chemicals. At all events, the increase is all the more modest in view of the fact that the United States plans over the same period to double its output to 120 million hectolitres a year.
- (247) France also states that BP Chemicals is comparing projects involving the direct blending of fuel bioethanol in petrol with projects for the production of ETBE. As far as the ETBE projects are concerned, BP Chemicals does not distinguish between the building of new plants and the conversion of existing MTBE plants, which requires investment. Similarly, BP Chemicals does not make any distinction between projects involving the building of new ethanol plants that are required where there are no available capacities and projects in which the available distillation capacities are still sufficient, as in the case of France.
- (248) As far as the environmental aspects are concerned, France points out that the ecobalances of the fuel-bioethanol sector are known and show the undeniable advantages in terms of CO₂ emissions. BP Chemicals does not make any reference to any ecobalance on the petrol sector that would give any credibility to its argument, including on harmful emissions of other than CO₂.
- (249) With regard to risks to biodiversity, it should be noted that fuel-bioethanol production is not tied to the cultivation of only one crop, but may involve a broad range of crops (wheat, barley, maize, sucrose-containing plants, etc.). As far as land availability is concerned, the estimate for bioethanol production in the Community presented by BP Chemicals is out of all proportion with the scenario described for the United States.
- (250) France also points out that the need to reduce dependence on energy imports was one of the main reasons why the United States decided to support the development of bioethanol, an objective which synthetic ethanol certainly cannot meet. France argues that BP Chemicals is comparing projects which are not comparable. The costs of producing fuel bioethanol from beet depend largely on the price paid to the agricultural producer, which is not specified by BP Chemicals. France is surprised that, at this stage, BP Chemicals did not indicate to the Commission its own production costs, which would have made it possible to assess the risk it is really running.
- (251) At all events, the fuel-bioethanol sector has invested in the construction of new ETBE plants. However, this point is not taken into account at all in the calculations presented by BP Chemicals.
- (252) France has opted for using the distillery capacity available, this solution being less costly in a start-up phase. In calculating the amount of the reduction granted to fuel bioethanol, only the direct distillery costs have been taken into account (Levy report, February 1993).
- (253) Despite the considerable advantages from which, according to BP Chemicals, French bioethanol producers benefit, France notes that the only substantial investment for the construction of a new alcohol distilling plant was carried out by BP Chemicals (Grangemouth plant, capacity 1,3 million hectolitres, started production in 2001).
- (254) As far as quality is concerned, France states that not only does fuel bioethanol require purification (elimination of impurities), it must also go through a water-removing process so as to eliminate all traces of water and meet the specifications required by the oil company. This operation, which requires special equipment, obviously has an impact on the final production cost of fuel bioethanol. France states that the example of a distillery with one million hectolitres a year is totally artificial as regards France, where production is piecemeal, with no plant having a capacity of more than 600 000 hectolitres a year.
- (255) France points out that the scale effect currently operates to the benefit of synthetic ethanol production,

particularly where it is carried out in plants that are integrated with oil refineries, with significant advantages in terms of transfer of ethylene, steam, electricity and distribution of the fixed costs of the installations.

- (256) France adds that, in setting a ceiling for the level of tax reduction taking account of the specific conditions relating to the production of fuel bioethanol in France, the French scheme does not operate against the interests of BP Chemicals. France announces that, in order to take account of the recent trend of oil prices, the level of reduction will be re-examined and index-linked when France announces its forthcoming calls to tender.
- (257) France considers that the system proposed by BP Chemicals (ringfencing) makes for discrimination between operators: a firm having only one site would be obliged to choose one market, whereas firms established on several sites would be able to continue operating on the two markets. Since at present the vast majority of French distilleries (with the exception of wine alcohol) produce fuel bioethanol, the system of swap arrangements between producers is not feasible.

VI. ASSESSMENT OF THE AID MEASURES IN QUESTION

1. Existence of State aid within the meaning of Article 87 of the Treaty

- (258) Article 87(1) of the Treaty provides that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.
- (259) In order for a measure to be considered State aid, four main conditions must be met: (i) the aid must be granted by the State or through State resources; (ii) it must confer an advantage on the recipient undertaking; (iii) it must affect competition; and (iv) it must be at least capable of affecting trade between Member States.
- (260) It is settled case-law that the concept of State aid embraces any advantage granted by public authorities to an undertaking. Such a definition covers therefore the allocation of resources to an undertaking, any mitigation of the charges it normally has to bear, or any advantage enabling it to make a saving having an impact on its production costs ⁽²⁷⁾.
- (261) According to the judgments of the Court of Justice of the European Communities, only advantages granted directly or indirectly through State resources are to be considered aid within the meaning of Article 87(1) of the Treaty.
- (262) The concept of aid is wider than that of subsidy and covers also interventions which, in various forms, mitigate the charges normally included in the budget of an undertaking and which have the same effect as a subsidy. It follows that a measure by which the public authorities grant certain undertakings a tax exemption which, although not involving a direct transfer of State resources, places the persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers constitutes State aid within the meaning of Article 87(1) of the Treaty ⁽²⁸⁾.
- (263) According to settled case-law, the condition of an effect on trade is fulfilled where the recipient undertaking carries on an economic activity which forms the subject matter of trade between Member States. The mere fact that the aid strengthens the position of that undertaking in intra-Community trade compared with that of other, competing undertakings makes it possible to consider that trade has been affected ⁽²⁹⁾.
- (264) Pursuant to Article 6 of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products ⁽³⁰⁾, as last amended by Directive 2000/47/EC ⁽³¹⁾, the TIPP becomes chargeable at the time of release for consumption of the petroleum products into which biofuels are incorporated. The person liable for payment of the TIPP is the person who releases the abovementioned products for consumption, as a rule an authorised warehouse-keeper.

⁽²⁷⁾ See: the judgments of the Court of Justice in Cases 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* [1961] ECR p. 3, *Denkavit italiana* [1980] ECR 1205, and C-387/92 *Banco exterior de España* [1994] ECR I-877.

⁽²⁸⁾ Judgment in Case C 387/92 *Banco Exterior de España*, cited above (see footnote 27).

⁽²⁹⁾ Neither the fact that the aid is relatively small in amount, nor the fact that the recipient is moderate in size or its share of the Community market very small, nor indeed the fact that the recipient exports virtually all its production outside the Community does anything to alter this conclusion.

⁽³⁰⁾ OJ L 76, 23.3.1992, p. 1.

⁽³¹⁾ OJ L 193, 29.7.2000, p. 73.

(265) When biofuels enter the oil establishments under customs control (tax warehouse for storage or production) in which they are to be incorporated into petroleum products, the operator carrying out the operation is issued with an exemption certificate for an amount corresponding to the volume received multiplied by the rate of exemption. These certificates are then set against the declarations of release for consumption of petroleum products.

(266) If the recipient of the tax aid for the production of biofuels is legally identified as being the authorised warehouse-keeper who incorporates ethyl alcohol derivatives the alcohol component of which is of agricultural origin into super grade fuels and petrol, such tax aid nonetheless constitutes a means of opening up a new outlet for agricultural producers.

(267) What is involved here is therefore a conduit through which the effect of the tax aid travels from the nominal recipient of the aid, through the bioethanol producer, to the farmer. The effect of the measure is to reduce the price of the biofuel to the level of that of fossil fuels, the aim being to promote renewable energy while helping to ensure that agricultural producers earn enough to induce them to switch lastingly to this new market.

(268) Since biofuels are in competition with fuels of fossil origin as additives or substitutes and since they form the subject matter of intra-Community trade, the aid in question is capable of affecting such trade and of distorting competition.

(269) The differentiated excise duty rate for ETBEs with which this Decision is concerned falls, therefore, within the scope of Article 87(1) of the Treaty.

2. Assessment of the compatibility of the aid

2.1. Assessment of compatibility with Article 87 of the Treaty

(270) The measures in question do not constitute aid having a social character, granted to individual consumers, or aid

to promote the execution of an important project of common European interest; nor do they constitute aid to remedy a serious disturbance in the economy or to compensate for the economic disadvantages caused by the division of Germany; nor, moreover, do they constitute aid to promote culture and heritage conservation.

(271) Since, furthermore, the measures do not constitute aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, or aid to facilitate the development of certain areas of France, the derogations provided for in Article 87(3)(a) and, (c) first part, of the Treaty for regional aid cannot be considered.

(272) In so far as the beneficiaries of the aid scheme are not the subject of any restructuring or rescue plan, the derogation provided for in Article 87(3)(c) of the Treaty in respect of aid for restructuring or rescuing firms in difficulty can likewise not be considered.

(273) It remains, therefore, to be determined whether the aid in question qualifies for the derogation in Article 87(3)(c) as being intended to facilitate the development of certain activities, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

2.2. Conditions governing eligibility and absence of discrimination

(274) In order that the scheme at issue might be considered compatible with the common market as being aid to facilitate the development of an area of activity that it is sought to promote in the Community, it must first be ascertained that it does not adversely affect trade to an extent contrary to the common interest. The derogation provided for in Article 87(3)(c) may apply only if the arrangement in question provides for objective criteria in the conditions governing the eligibility of the undertakings concerned (that is to say, the possibility of submitting an application for approval) and the absence of any discretionary elements in the choice by the public authorities of the production units that can benefit from the tax exemption.

(275) The points of the scheme in question that the Commission must examine closely so as to be able to exclude the presence of any discrimination are, the obligation on production units applying for approval to

- comply with certain social security and tax requirements, the obligation on such units to provide the French authorities with a precise description of their activities and the criteria governing the granting of approvals of different durations.
- (276) The taking into account in the new system, for purposes of selecting recipient undertakings, of the production capacities of French undertakings which were set up or which expanded as a result of the previous aid scheme, which was declared incompatible with the Treaty by Commission Decision 97/542/EC of 18 December 1996 on tax exemptions for biofuels in France ⁽³²⁾, is a further factor that needs to be examined.
- (277) Production units applying for approval must be both up-to-date with their social security and tax obligations and in compliance with the environmental rules and regulations of the country in whose territory they are established. In this case also, these requirements do not appear to be open to criticism: non-compliance with them generally results in savings for undertakings which undertakings that do comply do not enjoy.
- (278) As to the prohibition on a unit subcontracting all or part of the production for which it has received approval, this requirement meets the need for effective monitoring of compliance with the abovementioned obligations. Such monitoring would be difficult, if not impossible, if the approved quantities were subcontracted to production units that did not participate in the tendering procedure.
- (279) In both instances, France accepts national certificates attesting to compliance with these criteria.
- (280) The requirement as to the giving of a precise description of the activities and investments of production units both in the area of biofuels and in that of other chemical activities might suggest that the French authorities wish thus to obtain information constituting industrial and commercial secrets of non-French undertakings. That is not the case, however, as the information is confined to the technical details needed to calculate the ratios indicating the nature of the biofuel activity of a production site with a view to granting approval.
- (281) As regards the duration of approvals, France has communicated to the Commission the objective ratios that are to be taken into consideration for this purpose. Moreover, Decision 2002/266/EC, by which the Council authorised France to apply a differentiated rate of excise duty to biofuels in accordance with Article 8(4) of Directive 92/81/EEC, states that exemptions unlimited in time cannot be authorised and fixes a period of six years as the appropriate period in economic terms to meet the planning needs of investment projects in the case in question. Consequently, only individual exemptions of a maximum duration of six years starting from the date on which approval is given are capable of satisfying the requirements resulting from the Community provisions on excise duty.
- (282) As regards the description of the volumes for which production units may request approval (5 000 tonnes a year in the case of a unit which has been adapted to produce biofuels without any specific investment, or 1,25 % of the volumes eligible to benefit from the measure), it should be noted that these provisions of the scheme at issue apply without discrimination to all production units, French ones included, which are in the situations described.
- (283) On the other hand, the question arises as to the extent to which the production capacities that developed in France, thanks to the aid scheme which the Commission declared illegal and incompatible with the Treaty by its Decision 97/542/EC, should be taken into account in determining the volumes for which a unit may request approval. It goes without saying that the aim is not to render the eligibility of such undertakings more complicated than that of the other producers potentially concerned. Nevertheless, a situation must be avoided where the only ones to actually benefit from the arrangements are French biofuel producers thanks to their already having on hand production capacities developed on the basis of an aid scheme that does not comply with Community law.
- (284) The Commission dealt with this question in its 1996 Decision, in which it stated that 'the advantage to the (biofuel) manufacturers of the direct aid was temporary, or at least marginal, although not quantifiable. While it did enable them to supply biofuels at a competitive price, the quantities concerned were generally not very large in relation to the market for fuels in general'. Moreover, as regards 'the diester (esters of rapeseed oil and sunflower oil) sector, which is preponderant', the data on which the Commission based this Decision 'show that the aid to the plant-based fuels concerned did not in general overcompensate for the excess production costs'.

⁽³²⁾ OJ L 222, 12.8.1997, p. 26.

- (285) Moreover, in the same Decision the Commission stated that it had found no evidence to suggest that the real effect of the aid was to benefit biofuel manufacturers in terms of higher sales or profits.
- (286) Having recognised the temporary, marginal nature of the aid, the Commission must conclude, in keeping with Decision 97/542/EC, that the aid scheme the incompatibility of which it established was not the main driving force behind investments carried out in recent years. It cannot therefore object to the fact that the proposed measure does not bar undertakings which received such aid from submitting an application for approval under the current arrangements.
- (287) As to the choice of undertakings benefiting from the measure, the selection of projects by France is made on the basis of the criteria set out above and determines the number of undertakings and the quantities concerned. A clause expressly provides that, where the budgetary resources are insufficient to cover all the quantities for the projects selected, approval is given in proportion to the applications deemed admissible. So far, recourse to this clause has not been necessary.
- (288) To conclude, the draft exemption arrangement at issue does not involve any discrimination in the criteria governing the eligibility of undertakings or any discretionary elements in the choice of beneficiaries and the granting of approvals.
- 2.3. *Assessment of the compatibility of the arrangements in the light of the Community's energy policy*
- (289) The French *taxe intérieure sur les produits pétroliers* (TIPP) subjects mineral oils and equivalents to an excise duty. Pursuant to Article 2(3) of Directive 92/81/EEC, the TIPP applies irrespective of the source of the fuel.
- (290) The development of renewable sources of energy to reduce dependence on fossil fuels is a central concern of Community energy policy and in November 1996 France notified the Commission, pursuant to Article 93(3) (now 88(3)) of the Treaty of its intention to reduce the TIPP on two products derived from renewable sources, namely esters of vegetable oils and bioethanol-derived ethyl tertiary butyl ether (bio-ETBE).
- (291) As noted in the Decision of 9 April 1997, which was partly annulled by the Court of First Instance, the policy pursued by the scheme authorised by that Decision is entirely consistent with the Community's policies on renewable energy.
- (292) This policy of developing renewable energies has its basis in the Treaty, and in particular in Article 174 thereof, which provides that Community policy must contribute to 'prudent and rational utilisation of natural resources'. The Commission considers that, in the balancing of interests provided for in the final part of Article 87(3)(c) of the Treaty, account must be taken of the fact that this scheme follows the line drawn at Community level with a view to promoting renewable energies.
- (293) The development of renewable energies, and in particular of biofuels, was first encouraged by the Commission in 1985 when it proposed to the Council that it adopt a directive on crude-oil savings through the use of substitute fuel components in petrol (Council Directive 85/536/EEC⁽³³⁾). The Directive stresses how important biofuels are in reducing Member States' dependence on oil imports and authorises the incorporation of ethanol in petrol up to 5 % by volume and of ETBE up to 15 %.
- (294) By Decision 93/500/EEC⁽³⁴⁾ concerning the Altener programme, the Council for the first time adopted a specific financial instrument for promoting renewable energy sources.
- (295) The Green Paper 'Energy for the future: renewable sources of energy'⁽³⁵⁾ was the first step towards a strategy in favour of renewable energy sources.
- (296) In its communication 'Energy for the future: renewable sources of energy' White Paper for a Community strategy and action plan⁽³⁶⁾, the Commission stated that renewable energy sources are currently unevenly and insufficiently exploited in the Community. Although many of them are abundantly available, and the real economic potential considerable, renewable energy sources make a disappointingly small contribution of less than 6 % to the Community's overall gross inland energy consumption, which is predicted to grow steadily in the future.

⁽³³⁾ OJ L 334, 12.12.1985, p. 20 (as amended by Directive 87/441/EEC (OJ L 238, 21.8.1987, p. 40)).

⁽³⁴⁾ OJ L 235, 18.9.1993, p. 41.

⁽³⁵⁾ COM(96) 576 final.

⁽³⁶⁾ COM(97) 599 final.

- (297) The European Parliament has constantly stressed the role of renewable energy sources. In its resolution of 17 June 1998, it called for a 2 % increase in the market share of biofuels over five years through a package of measures, including tax exemption and the establishment of a compulsory rate of biofuels for oil companies.
- (298) On this aspect of renewable energy the Commission adopted the Green Paper 'Towards a European strategy for the security of energy supply' ⁽³⁷⁾. The Union's external dependence for energy is constantly increasing. Its structural weaknesses regarding energy supply consist basically in Europe's growing dependence on energy, the role of oil as the governing factor in the price of energy and the disappointing results of policies to control consumption.
- (299) The Commission considers that demand should be steered towards consumption that is better controlled and more respectful of the environment. With regard to supply, priority must be given to the fight against global warming. The development of new and renewable energies such as biofuels is the key to change.
- (300) Renewable energy sources are of indigenous origin and can therefore help reduce dependence on imports and increase security of supply.
- (301) The strategy and action plan described in the White Paper are directed towards the goal of achieving at least 12 % penetration of renewable energy sources in the Community by 2010.
- (302) The overall Community target of doubling the share of renewable energy sources to 12 % by 2010 implies that Member States have to encourage the increase of renewables according to their own potential. Targets in each Member State could stimulate the effort towards increased exploitation of the available potential and could be an important instrument for attaining decreasing energy dependence and CO₂ emission reduction.
- (303) The White Paper states that specific measures are needed to help increase the market share for biofuels from the current 0,3 % to a significantly higher percentage, in collaboration with Member States.
- (304) The Commission considers that biomass can make a significant contribution to improving long-term security of supply.
- (305) Ever since the first oil crisis in 1973, biomass has been considered and, in some cases, promoted as an alternative to fossil fuels as a source of energy. Particular attention has been given to the potential for using biomass as the basis for producing alternative motor vehicle fuels (diesel or petrol) because of the transport sector's almost exclusive dependence on oil.
- (306) Of the biological materials that can be used as fuel for road transport, mention may be made of sugar beet, cereals and other crops which can be fermented to produce alcohol (bioethanol). This alcohol can be used as a component in petrol, as motor fuel in neat form, or as a petrol component after being converted to ETBE through reaction with isobutene (a refining by-product). There is reason to believe that future developments will also make it possible to produce economically competitive bioethanol from wood or straw.
- (307) In principle biofuels offer an ideal alternative since, when based on Community-grown crops, they are practically 100 % indigenous and CO₂ neutral since their carbon content is captured from the atmosphere.
- (308) The proportionate share of biofuels in the Community is still small, amounting to 0,15 % of the total consumption of mineral oils as fuel in 1998.
- (309) Liquid biofuels are currently the least competitive product from biomass in the market place, given the low oil prices. It is, however, important to ensure their continuing and growing presence in the fuel market since short/medium-term oil prices are unpredictable, and in the longer term alternatives to the finite oil reserves are needed.
- (310) Biofuels are expensive (EUR 300 or more in additional cost per 1 000 litres conventional fuel replaced). The principal obstacle to their use is the price differential with fossil fuels, which currently varies from 1,5 (biodiesel) to 4 for products before tax.
- (311) In view of this differential, priority should be given to conducting more research and investigating other means of reducing biofuel production costs. At present, the means deemed appropriate with a view to increasing biofuel use are: (i) granting tax relief; and (ii) promoting

⁽³⁷⁾ COM(2000) 769 final.

the consumption of fuels of renewable origin by requiring a minimum percentage of biofuel to be present in all fuels sold (2 % in 2005, then 5,75 % in 2010, according to the proposal for a European Parliament and Council Directive on the promotion of the use of biofuels for transport ⁽³⁸⁾). A differentiation of excise duties may be carried out under Directive 92/81/EEC.

(312) As the Commission acknowledged in its White Paper, biofuels will not be able to play a bigger role unless the gap between their production costs and those of competing products is reduced.

(313) The gap between the prices of biofuels and those of competing products should be reduced by measures which, initially, could be of a fiscal nature. The application of excise duties to a price that is already three times higher than that of European fuels inevitably dooms biofuels to marginalisation on the market.

(314) The additional cost of EUR 300/1 000 litres is based on an oil price of approximately EUR 30/barrel. The price of oil would have to reach about EUR 70/barrel before biofuels could compete with conventional diesel fuel and petrol.

(315) Owing to the spectacular fall in oil prices in the early and mid-1980s and the fact that they have remained low since, biofuels are not competitive. Bioethanol can be produced from a variety of crops, as a rule sugar beet and cereals (wheat, barley). The same considerations apply to biodiesel as to bioethanol. The production cost per 1 000 litres may be lower, but it takes 1 500 litres of ethanol to replace 1 000 litres of petrol.

(316) On 7 November 2001, the Commission adopted two proposals. The first concerns a directive requiring an increasing proportion of all diesel fuel and petrol sold in Member States to be biofuel. The second proposal creates a Community framework allowing Member States to apply under fiscal supervision differentiated tax rates in favour of biofuels.

(317) In this context, the Commission has already pointed out that the implications of a gradual introduction of biofuels are well known, and contrary to the

introduction of natural gas or hydrogen there are no objective reasons for further delay. Biofuels are in the short and medium term the only option, therefore launching the appropriate policy instruments to promote the introduction of biofuels will give a clear signal that the Community is serious about developing alternatives to petroleum products in transportation.

(318) Consequently, several Member States have already taken measures at national level, mainly in the field of taxation, to promote the production and use of biofuels.

(319) Biofuels for transport could be marketed in the form of 'pure' biofuels for dedicated vehicles or in the form of 'blend' fuels in such a proportion that it does not affect the performance of motor vehicle engines. These biofuels are mainly biodiesel, bioethanol and ETBE produced from bioethanol. ETBE is etherised bioethanol and can be used as a blending component in petrol at a rate of up to 15 %.

(320) The situation regarding biofuels varies enormously throughout Europe. A 93 % increase in biofuel production was recorded between 1997 and 1999. Only six Member States make any real contribution to total European biofuel production. Austria and France are the most active countries in this area.

(321) In France, the total biofuels contribution in 1999 amounted to 0,7 % of total oil products consumption, with approximately one third bioethanol and two thirds biodiesel.

(322) Austria was one of the first countries to establish a bio-energy programme. In 1991, one of the world's first industrial biodiesel production plants started operation at Aschach (Province of Upper Austria).

(323) Germany is currently the second biggest biodiesel producer. According to Eurostat official statistics, it produced 130 000 tonnes in 1999, or 15 % of total EU biofuel consumption. In 2001, production was expected to reach 250 000 tonnes, rising to 500 000 tonnes in 2002.

(324) Over the next 20 to 40 years, Sweden intends to replace 25 to 50 % of today's fuel use by fuel based on forest and agricultural residues. The Swedish National Energy Administration believes it is possible to attain a 10 %

⁽³⁸⁾ COM(2001) 547 final.

market share for biofuel in 10 years' time. Production of biofuels in Sweden used to be about 50 000 tonnes. The available surplus of wheat in Sweden could in the future produce, with current yields, 500 000 m³ of bioethanol, or some 5,6 % of the total annual consumption of petrol and diesel in that country. There are around 300 ethanol-fuelled buses in Sweden, most of them in the Stockholm area, and approximately 600 cars and 100 heavy goods vehicles running on biogas.

- (325) Production in Italy was 96 000 tonnes in 1999. The national plan for the use of agricultural and forestry biomass anticipates production of bioethanol, biodiesel and ETBE of around 1 000 000 toe over the next decade.
- (326) Production in Spain was around 50 000 tonnes in 2000. Liquid biofuels are included in the national plan, with a recognised value for rural development and job creation. Approximately 500 000 toe is anticipated in 2010 in the context of fiscal measures.
- (327) In the present Decision the Commission has also assessed the advantages of biofuels in terms of CO₂ emissions, oil substitution for security of supply, environmental policy and employment.
- (328) As regards CO₂ emissions, actual avoidance is less than 3,2 tonnes because of the emissions produced in the process of growing the crops and the conversion of raw material into biofuels. Realistic CO₂ saving for biodiesel is around 2 to 2,5 tonnes CO₂/1 000 litres. According to the ADEME, replacement of diesel by ethanol would result in a reduction of two tonnes of CO₂/1 000 litres. If there were no other benefits, such as, for instance, in the agricultural sector and in the security of supply, this would mean that at current oil prices and biofuel production costs the cost of CO₂ avoidance would be in the range of 100 to 150 EUR/tonne of CO₂, which is above the range for cost-effective measures to meet the Community's commitments during the first Kyoto commitment period. However, though the use of biofuels at this moment cannot yet be justified by the benefits alone of CO₂ avoidance, it should certainly be considered as a strategic choice for future climate change policy.
- (329) The strength of the oil substitution argument is difficult to quantify but nevertheless significant. In its communication of 7 November 2001⁽³⁹⁾ the

Commission stated that a vast number of energy policy measures (energy saving, oil substitution) in oil-consuming countries put an end to rising oil prices in the early 1980s.

- (330) It is difficult to predict the effect of a single marginal reduction in oil demand on world oil prices. However, for example, replacing 2 % of Community diesel consumption with biofuel at an additional cost of EUR 250/1 000 litres would 'cost' around EUR 1 000 million/year. The resulting 2 % lower demand for OPEC oil would have a certain buffering effect on oil prices and the savings on the approximately four billion barrels of oil consumed annually in the Community could (partially) justify these additional costs.
- (331) Moreover, the introduction of biofuels could be expected to have a modest effect in dampening the effect of changes in crude oil prices on prices paid by consumers. For example, if a EUR 10 rise in the price of a barrel of oil results in an increase in the price at the pump of 10 cents per litre, blending in 5 % biofuels could be expected to limit this price rise to 9,5 cents, assuming that the prices of biofuels themselves were not significantly affected by the rise in crude oil prices.
- (332) As regards the environmental impact of the production of biofuels, a number of studies into the energy and environmental efficiency of alternative fuels have been carried out since the early 1980s. Most of these studies gave rise to animated discussions among advocates and opponents, both experts and the general public alike. An analysis of the most important studies shows that the results only differ slightly. The studies confirm a positive energy balance, stating that with one unit of fossil fuel energy, two to three units of renewable fuel can be produced. The reduction of greenhouse gas emissions is also confirmed. The differences in the CO₂ reduction depend on farming practices and the chain of production. Apart from the impact on CO₂ emissions, the production of crops for biofuels, conversion of the raw materials and subsequent use of biofuels have a number of effects on the environment that could be relevant to the attractiveness of replacing conventional motor vehicle fuels with biofuels.
- (333) When assessing these effects it is important to be aware that in principle what matters is the difference between the overall impact of fossil fuel production, refining and use versus biofuel production, conversion and use rather than the impact as such of the biofuel life cycle.

⁽³⁹⁾ COM(2001) 547 final.

- (334) To give some kind of order of magnitude, the total surface area of arable land covered by the CAP capable of producing cereals, oilseeds and vegetable protein is limited to approximately 54 million hectares for the Community of Fifteen. Mandatory set-aside for 2001/2002 accounts for about four million hectares, to which must be added 1,6 million hectares of voluntary set-aside, giving a total of 5,6 million hectares. Given this surface area and considering only primary biomass as a function of the crop grown, between four and 15 million toe of biofuels could be supplied for transport use, making for between 1,2 % and 5 % of total European petroleum products consumption. However, the extent to which producers can use set-aside land for this type of crop will depend on market prices and in any event on the limits imposed by the Blair House Agreement on the use of set-aside land for the production of derivatives of non-food crops, i.e. the equivalent of one million tonnes of soya meal. Moreover, the Blair House Agreement also limits the production of oilseeds benefiting from specific subsidies to a maximum of five million hectares. It is evident, therefore, that the decision taken in the context of Agenda 2000 to align aid for oilseeds on the level of aid for cereals, thereby putting an end to specific subsidies for oilseeds, has created the conditions in which oilseed production in the Community can largely meet demand, irrespective of set-aside given that the possibilities of recourse to such land are extremely limited. Other sources of biofuel production such as cereals, including maize, sugar beet and lignocellulose, are not covered by the Blair House Agreement and therefore remain subject only to the normal rules of competition.
- (335) Although the three crops (rape, cereals and sugar beet) are normally farmed using intensive methods, the Community legislation on pesticides, biodiversity and nitrate leakage requires Member States to install safeguards against any unacceptable negative impact. Should biodiversity be an important factor, growing sugar beet would be a good option as the area needed to produce a given quantity of biofuel is less than half that needed to produce the same quantity from cereals. On the other hand, cereals produce large quantities of additional biomass in the form of straw, which makes for a better CO₂ balance if used for energy generation.
- (336) Conversion of crops into biofuels is not subject to Community environmental legislation, unlike oil refining. Nevertheless, some Member States, generally believed to apply strict environmental legislation, have recently approved plants for the production of both bioethanol and biodiesel. This is a strong indication that it is perfectly possible to convert crops into biofuels in environmentally acceptable production plants.
- (337) Lastly, biofuels are highly labour intensive, especially in rural areas during the exploitation phase. Although precise numbers of jobs created are difficult to evaluate, different studies agree on the scale. The German study performed by the Fraunhofer Institute ⁽⁴⁰⁾ showed the rate of economic impact to be 16 employees per ktOE per year. The Spanish national plan for biofuels puts the figure at 26 employees per ktOE per year of biofuels produced (source: IDAE).
- (338) Extrapolation of these results would lead to the conclusion that a biofuel contribution of around 1 % to total EU fossil consumption would create between 45 000 and 75 000 new jobs. Most of these jobs would be located in rural areas.
- 2.4. Exemption from the TIPP and disturbances on the ethanol market*
- (339) The total amount of aid to an individual beneficiary is a function of two variables: the aid per hectolitre and the number of hectolitres allowed to benefit from the aid. The aid per hectolitre is limited to offsetting part of the additional cost of producing these products compared with those of fossil origin and is likely to diminish rather than increase since the productivity gains that would be obtained would lead to a downward adjustment of the value of the reduction of the TIPP.
- (340) As to the number of hectolitres allowed to benefit, it is precisely in order to avoid discrimination that the amount was left open, the Decision noting that the amount of aid would depend on the development of production capacity of bio-ETBE, since at the time of its adoption only France had bio-ETBE production units.
- (341) BP Chemicals asserts that the Commission has not paid attention to the effects of the current scheme on the ethanol market. The Commission would point out that back in 1997 it found no evidence to suggest that the actual effect of the aid was to increase bioethanol sales in traditional synthetic ethanol segments.
- (342) BP Chemicals has commented at length on the alleged effects of the aid on the ethanol market and has endeavoured to show that the French scheme is likely to

⁽⁴⁰⁾ Volkswirtschaftliche Aspekte einer Herstellung von Biodiesel in Deutschland, IFO-Institut für Wirtschaftsforschung – 2nd EU Motor Biofuels Forum, September 1996.

cause severe disturbances in the established ethanol market. However, the only argument advanced in support of this allegation is that the aid will encourage increases in ethanol production capacity and that this surplus capacity will inevitably be used to supply the industrial, potable and chemical raw material segments of the ethanol market since the Commission has not imposed conditions to prevent this from happening.

(343) The observation that French bioethanol production has increased in recent years does not in itself show that the scheme will cause major distortions on the ethanol market. The Commission has examined trends in synthetic ethanol and bioethanol production over various periods.

(344) The Commission examined a period of no less than four years from the launch of the previous scheme (1992 to 1995) and maintained during the legal proceedings leading up to the judgment of the Court of First Instance of 27 September 2000 that, if BP Chemicals' claims were well founded, it would be able to show injury to synthetic ethanol producers through price depression and reduced profitability. BP Chemicals does not mention this aspect, however, in its comments.

(345) Although BP Chemicals refers to the advantage to producers of bioethanol and bio-ETBE, the Commission considers that, since BP Chemicals produces neither bio-ETBE nor, apparently, MTBE, its only interest in the present proceeding consists in showing that the current scheme will benefit bioethanol producers to its detriment in its capacity as a producer of ethanol from non-renewable sources.

(346) As far as the tax mechanism is concerned, when biofuels enter the oil establishments under customs control (tax warehouse for storage or production) in which they are to be incorporated into petroleum products, the operator carrying out the operation is issued with an exemption certificate for an amount corresponding to the volume received multiplied by the exemption rate. These certificates are then set against the declarations of release for consumption of petroleum products. If the mixing is carried out in a Member State other than France, the document accompanying the product will state that the petroleum product contains a biofuel and will specify its nature. When the excise duty becomes payable in France, an exemption certificate will be issued for an amount corresponding to the volume of biofuel contained in the

petroleum product multiplied by the rate of exemption. Consequently, the scheme at issue grants aid to bio-ETBE only when it is mixed with other fuels and the aid can therefore benefit ethanol producers only indirectly in their capacity as producers of one of the components of bio-ETBE.

(347) There is at least a theoretical possibility that an agricultural ethanol producer might benefit indirectly from the economies of scale he might achieve as a result of the advantages focused on a production site which also produces ethanol for the solvents/chemicals or drinks market. However theoretical this reasoning may be, the Commission's assessment nevertheless takes this factor into consideration when it comes to analysing the distortions to be taken into account in the balancing of interests provided for in the final part of Article 87(3)(c) of the Treaty. However, for the reasons given below, the Commission considers that the differentiated rate of excise duty in question has not produced, in the present case, a distortion of competition likely to cause the said balancing of interests to give a negative result.

(348) In the legal proceedings leading up to the judgment of the Court of First Instance of 27 September 2000, the Commission showed that the increase in Community ethanol output between 1991 and 1992 was attributable to a substantial increase in synthetic ethanol output. It was not until 1993 that synthetic ethanol output fell compared with the previous year, having exceeded that of 1990 every year except 1991. Even in 1995, while synthetic ethanol output greatly exceeded that of 1990, bioethanol output was still lower than in 1990. The Commission supplied the following data on the evolution of French synthetic ethanol output (expressed in thousands of hectolitres) showing that, during the period under review, French ethanol output had almost doubled:

(000' hectolitres)

1991	1992	1993	1994	1995
1 074	1 478	1 383	1 574	1 967

(349) At the same time, the Commission produced data showing that the effect of applying differentiated rates of excise duty to products containing ETBE had been to promote the use of bioethanol exclusively for ETBE production, without its invading the traditional market:

(in tonnes)

	1990	1991	1992	1993	1994	1995	1996
France, bioethanol	268 604	292 542	298 783	324 063	337 099	376 125	376 201
Community, all	1 258 973	1 178 933	1 093 933	1 249 250	1 261 653	1 245 016	[1 251 973]
TIPP exempted	N/A	N/A	3 000	27 000	38 000	38 000	60 000
Non-exempted	268 604	292 542	295 783	297 063	299 099	338 125	316 201
Percentage	21,33 %	24,81 %	27,03 %	23,77 %	23,7 %	27,15 %	[25,25] %

(350) Total Community production figures for 1996 were not yet available, but on the assumption that Community output had remained stable compared with recent years, the average of 1993 to 1995 output was inserted as an indicative figure. The percentage figure relates to the output of French bioethanol not accounted for by TIPP-exempted ETBE production as a proportion of Community output, since the central issue was whether increased French bioethanol output had been used to any significant extent for purposes other than the production of ETBE.

(354) France has supplied data, published in the Journal officiel de la République française, which show clearly that the tax advantage granted to bioethanol used in fuels has not had the effect of otherwise increasing the share of bioethanol to the detriment of synthetic alcohol in the other areas of use where the two products compete (solvents and chemicals, in particular):

(in hectolitres)

(351) French bioethanol output had maintained a fairly constant relationship to overall Community output. The explanation for this situation resides in the fact that the limited fiscal incentive was insufficient to stimulate production of bioethanol to the extent that bioethanol could displace synthetic ethanol on the ethanol market generally. Experience with the previous scheme shows that the complaint that the current scheme contains no mechanism to ensure that the increase in production of bioethanol which is bound to result will be directed exclusively to the ETBE sector is misplaced: no such mechanism is required because no correlation can be observed between the existence of the previous scheme and bioethanol output in France.

(352) The Commission can only repeat that, if bioethanol producers were faced with an increase in input costs, it is inherently improbable that, burdened thereby with an extra cost disadvantage compared with synthetic ethanol producers, they would be in a position to attack market segments which are currently the preserve of synthetic producers.

(353) The present assessment of a scheme which has been in force now for five years enables the observer to assess its real, and not just anticipated or theoretical, effects.

	Non-fuel agricultural ethanol	Fuel ethanol	Ethanol of synthetic origin
1990/1991	3 704 140	—	1 073 487
1991/1992	3 561 161	42 692	1 438 953
1992/1993	3 756 911	346 359	1 383 422
1993/1994	3 870 543	485 118	1 314 563
1994/1995	3 791 219	477 726	1 574 130
1995/1996	4 002 011	759 949	1 467 984
1996/1997	4 012 140	1 050 052	1 374 973
1997/1998	3 719 541	1 233 091	1 578 670
1998/1999	3 724 901	1 144 000	1 569 545

(355) These data show that, between 1991 and 1999, French bioethanol output, including that for use in fuel, increased from 3 608 853 hectolitres to 4 868 981

hectolitres, while synthetic alcohol production grew from 1 438 953 hectolitres to 1 569 545 hectolitres. During the same period, production of bioethanol for use in fuel rose from 42 962 hectolitres to 1 144 242 hectolitres.

- (356) It follows from the above that, between 1991 and 1999, the production of bioethanol for non-fuel uses increased from 3 565 891 hectolitres to 3 724 739 hectolitres, or by 0,07 %, while synthetic ethanol production grew by 4,86 %.
- (357) BP Chemicals considers that, in evaluating the impact of the French State aid on the traditional ethanol market, it must be remembered that the traditional market for ethanol is a single market within the Community and therefore any distortion in the French market has wider repercussions. Likewise, if bioethanol State aid in other Member States also distorts the market, then BP Chemicals considers that it too builds upon the distortion caused by the French scheme. BP Chemicals adds that it is also essential to take into account other bioethanol projects in the Community.
- (358) Inasmuch as the French scheme has not had the effects on the French market that BP Chemicals claims it has, it can scarcely be maintained that it is likely to have a knock-on effect elsewhere.
- (359) BP Chemicals also refers, in support of its argument, to the explanatory memorandum to the proposal for a Council Regulation on the common organisation of the market in ethyl alcohol of agricultural origin, in which the Commission is said to be sufficiently explicit about the increased competition in the single market in ethanol. It omits to say, however, that the Regulation's *raison d'être* is basically to react to imports from third countries and that it is only towards the end that the explanatory memorandum refers, secondarily, to synthetic ethanol.
- (360) The Commission notes in this connection that imports from third countries have increased since the 30 % reduction in tariffs as a result of the implementation of the Uruguay Round Agreements of 1995 (from around 400 000 hectolitres in 1995 to just over 1,1 million hectolitres in 1999). The impact of these imports on the Community market is significant given that a high proportion (80 %) is duty free or often subsidised domestically.
- (361) In addition, greater quantities are imported as blends of alcohol with denaturants at far lower tariffs. Once imported, the alcohol contained in the blend may be extracted and used for traditional purposes.
- (362) Furthermore, since January 2000, a zero tariff rate has made it possible to import alcohol diluted with water under the tariff heading for vodka in bulk. This change makes it possible to extract the water from the imported product and thereby avoid the tariffs applicable to alcohol.
- (363) It is these reasons, and not the existence of tax reductions to promote biofuels, that induced the Commission to propose the establishment of a common market organisation for agricultural alcohol.
- (364) This explains why the 17th recital to the Commission's proposal for a Regulation states that, in applying the Regulation, account should be taken of the fact that, with the exception of the spirit drinks sector, the Community ethyl alcohol market is supplied with ethyl alcohol of both agricultural and non-agricultural origin without any restriction. With that in view, the same recital provides that the measures for applying the Regulation must not lead to any discrimination between the two types of alcohol.
- (365) Lastly, BP Chemicals' request that the final Decision include the condition that fuel ethanol production should be obliged to be in separate production facilities from ethanol production for the traditional market or, alternatively, if such separation is not possible, that capacity limits should be introduced to neutralise the advantages described in recital 85, in particular that resulting from economies of scale, is not justified in the light of the data available. The possible advantage flowing from economies of scale has not materialised: the spectacular, steady increase, thanks to State aid, in fuel ethanol production in France between 1991 and 1999 has not given rise to a similar increase in the production of agricultural bioethanol not intended for fuel. The production of bioethanol for uses other than in fuel has risen from 3 565 891 hectolitres to 3 724 739 hectolitres, or by 0,07 %, while synthetic ethanol production has gone up by 4,86 %. In view of the growth of the sector, and given the temporal limitation of the aid scheme resulting from Decision 2002/266/EC as detailed in recital 385 to this Decision, the Commission considers that a condition such as that suggested by BP Chemicals would be excessive in

relation to the risks of indirect distortions of competition that might result from the approval of new ETBE plants in France before 31 December 2003. This analysis is without prejudice to the position the Commission might adopt with regard to any tax reduction for biofuels granted by France beyond the period covered by Decision 2002/266/EC.

- (366) In the light of the above, the Commission considers that the tax advantage granted to bioethanol intended for use in fuels has no negative impact on the synthetic ethanol market and that, therefore, this situation is not likely to weigh negatively in the balancing of interests provided for in the final part of Article 87(3)(c) of the Treaty having regard to the common interest pursued by the scheme at issue.

2.5. *Compensation for the extra cost of producing a non-fossil fuel*

- (367) ETBE of renewable origin needs to be aided if it is to be commercially viable. The aid is needed to purchase ethanol that would otherwise not be produced. The agricultural products used as raw materials render bioethanol uncompetitive. Farmers are, albeit indirectly, among the beneficiaries of ETBE production. Decision 97/542/EC drew a similar conclusion when it stated that 'from the point of view of the broad structure of the system, the substantive effect of the aid bypassed the manufacturers (...) and benefited the producers of the raw materials, who became the indirect recipients'.

- (368) Given the existence of such a cost handicap, only an ill-advised investor in bioethanol could be under any illusions as to his ability to compete with synthetic ethanol producers.

- (369) The scheme at issue commits approved biofuel plants to producing a fixed quantity of biofuels for a certain period and requires them to guarantee their supplies of source material. The distortion of the market would depend not only on the current scheme stimulating production of sufficient bioethanol over and above the production destined for bio-ETBE to have an impact, but would also depend on that surplus bioethanol being sold at a price low enough to displace synthetic ethanol. BP Chemicals has adduced no evidence to show that this would occur. One estimate puts the cost of a barrel of bioethanol at EUR 60, compared with EUR 20 for

petrol (synthetic ethanol is, like petrol, derived from crude oil), which suggests that bioethanol suffers from a cost disadvantage in relation to petrochemicals.

- (370) The fact that the amount of the tax reduction ⁽⁴¹⁾, namely FRF 3,29/l, can be related to ethanol does not mean that the aid is exclusively attributable to it. The aid is granted only in respect of the production of ETBE, which requires not only the purchase of bioethanol but also that of isobutylene and the processing of these feedstocks into ETBE. The ETBE producer has to bear a cost that is not limited to that of one litre of ethanol in order to obtain FRF 3,29 in aid. According to the information in the Commission's possession, the cost of producing bioethanol, drying included, is about FRF 3 700/t ⁽⁴²⁾. The raw materials used to produce one tonne of ETBE therefore cost around FRF 2 000 for the ethanol, plus FRF 640 for the isobutylene, to which must be added some FRF 650 in production costs, giving a total of approximately FRF 3 300/t. A tonne of ETBE is TIPP-exempted to the tune of FRF 1 960, reducing its price to FRF 1 340, which is still slightly higher than the price of super unleaded petrol (approximately FRF 1 200/t).

- (371) The Commission considers, moreover, that to make a comparison based on the cost differential with MTBE would be to fail to appreciate the fundamental purpose of the scheme, which is not to promote the use of one oxygenate over another, but to promote the use of biofuels. The objective is not merely to persuade those who already use MTBE to switch to ETBE, but to promote the use of ETBE as a partial substitute for petrol, the only way to do this being to make such substitution cost free for the consumer

2.6. *Community guidelines on State aid for environmental protection*

- (372) According to point 82 thereof, the Community guidelines on State aid for environmental protection apply to all notified aid projects in respect of which the Commission is called upon to take a decision after the

⁽⁴¹⁾ Not the 'intensity of the aid', as BP Chemicals wrongly states, since the concept of aid intensity is applicable only to investment aid.

⁽⁴²⁾ The *Curriere Vitivinicolo* of the Italian Wine Traders' Union regularly publishes European prices for ethyl alcohol obtained from molasses and cereals. The bulletin of 6 June 2001 gives a price for molasses alcohol of EUR 59,39/hl and for cereal alcohol of EUR 64,56/hl.

guidelines are published in the *Official Journal of the European Communities*, even where the projects were notified prior to their publication. In the case of non-notified aid, if the aid was granted before the current guidelines were published the Commission will apply the guidelines in force when it was granted.

(373) In the present case, the Commission's initial decision not to raise any objections on the basis of an aid project notified by France having been challenged in due time ⁽⁴³⁾, it follows from the judgment of the Court of First Instance of 27 September 2000 that the Commission is now faced with an aid measure that has been implemented in breach of Article 88 of the Treaty.

(374) Consequently, the Commission is bound to apply, not the current guidelines, but the guidelines that were in force when the scheme at issue was implemented, i.e. those published in March 1994 ⁽⁴⁴⁾. These do not contain any specific rules on operating aid for renewable energy sources, which must be 'judged on its merits' (end of point 2.3). Since it has not made its assessment subject to any prior conditions and must therefore conduct it directly on the basis of the Treaty, the Commission is of the opinion that the particular merits of the present scheme (in the light of the above developments) enable it to consider it compatible with the common market.

(375) At all events, the current guidelines state (section E point 3.3) that aid for the production of renewable energy generally constitutes environmental aid which may be the subject of a favourable Commission decision, notably under the conditions set forth in point 60, which provides that:

'Unlike most other renewable sources of energy, biomass requires relatively less investment but brings higher operating costs. The Commission will, therefore, be amenable to operating aid exceeding the amount of investment where Member States can show that the aggregate costs borne by the firms after plant depreciation are still higher than the market prices of the energy.'

(376) The Commission considers in this connection that France has furnished sufficient evidence to show that the costs of producing ETBE exceed the market prices of fossil energy.

2.7. *Consequences of the judgment of the Court of First Instance of 27 September 2000 as far as the assessment of the compatibility of the tax exemption for ETBE in France is concerned*

(377) In the light of the above and following its assessment of the compatibility of the tax exemption for ETBE in France, the Commission has come to the same conclusion as it did in its annulled Decision of 9 April 1997, namely that it considers that the said exemption qualifies for the derogation provided for in Article 87(3)(c) as being aid to facilitate the development of certain activities where such aid does not adversely affect trading conditions to an extent contrary to the common interest. However, following the judgment of the Court of First Instance of 27 September 2000, the Commission cannot declare the scheme at issue compatible without exceeding the powers conferred on it by Article 88(3) of the Treaty inasmuch as the scheme does not meet the requirements laid down by Article 8(2)(d) of Directive 92/81/EEC, as interpreted by the Court.

(378) In its judgment, the Court states that there is no obstacle to tax exemption schemes for better market penetration by biofuels being the subject of a Council decision adopted pursuant to Article 8(4) of Directive 92/81/EEC.

(379) The French authorities have drawn the necessary consequences from the Court's judgment of 27 September 2000, asking the Commission by letter dated 17 November 2000, in accordance with Article 8(4) of Directive 92/81/EEC, for authorisation to apply an exemption from the domestic consumption tax on vegetable oil esters and ethyl alcohol derivatives whose alcohol component is of agricultural origin.

(380) In accordance with Article 8(4) of Directive 92/81/EEC, the Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce further exemptions from or reductions in excise duties for specific policy considerations.

(381) On 11 December 2001, the Commission adopted the text of a proposal for a Council decision authorising France, in accordance with Article 8(4) of Directive 92/81/EEC, to grant, from 1 November 1997 to 31 December 2003, permits for the application of a differentiated rate of excise duty to the fuel mixtures 'petrol/ethyl alcohol derivatives whose alcohol component is of agricultural origin' and 'diesel/vegetable oil esters'. On 25 March 2002, by Decision

⁽⁴³⁾ See judgment in Case C-169/95 *Spain v Commission (Pyrsa)* [1997] ECR I-135, paragraph 53.

⁽⁴⁴⁾ OJ C 72, 10.3.1994, p. 3.

2002/266/EC, the Council authorised France to apply during the period 1997 to 2003 a differentiated rate of excise duty to these biofuels in accordance with Article 8(4) of Directive 92/81/EEC.

2003 until the expiry of the approval, but may not be extended,

(382) To benefit from a reduction in excise duty on the biofuels in question, biofuel production units must have received approval from the French authorities by 31 December 2003 at the latest. Such approval will be valid for a maximum of six years from the date of issue. The reduction specified in the approval may be applied after 31 December 2003 until the expiry of the approval, but may not be extended.

— the reductions in excise duty may be adjusted to take account of changes in the price of raw materials to avoid over-compensating for the extra costs involved in the manufacture of biofuels.

(383) The reductions in excise duty may be adjusted to take account of changes in the price of raw materials to avoid over-compensating for the extra costs involved in the manufacture of biofuels.

(386) In order to ensure that the present Decision is complied with, a specific obligation must be imposed on France, requiring it to submit annual reports listing the biofuel production units that have received approval from the French authorities by 31 December 2003 at the latest. The French authorities must accordingly be called upon to provide, each year, details of approved production units (name, location, nationality), the total volumes approved, the volumes allocated to approved production units and the volumes for which those units requested approval. The Commission will also be informed, where appropriate, of the main reasons why the French authorities deem certain requests for approval inadmissible or do not grant approvals for the volumes requested.

2.8. Conclusion regarding the assessment of compatibility

VII. CONCLUSION

(384) Following its assessment of the compatibility of the exemption of ETBE in France, the Commission considers that the exemption may be granted the derogation provided for in Article 87(3)(c) as being aid to facilitate the development of certain activities where such aid does not adversely affect trading conditions to an extent contrary to the common interest, having regard to the fact that, by Decision 2002/266/EC, the Council authorised France to apply a differentiated rate of excise duty to biofuels in accordance with Article 8(4) of Directive 92/81/EEC.

(387) In conclusion, the draft scheme applying a differentiated rate of excise duty as notified by the French authorities does not distort competition and does not affect trade to an extent contrary to the common interest since it involves no discrimination as regards the eligibility of undertakings and there is no discretionary element as regards the choice of beneficiaries and the granting of approvals. It therefore qualifies for the derogation provided for in Article 87(3)(c) as being aid to facilitate the development of certain activities in that it forms part of a strategy of reducing dependence on imported oil, developing alternative energy sources and improving the use made of agricultural resources,

(385) In the light of the judgment of the Court of First Instance of 27 September 2000, the Commission considers that the compatibility of the aid with the common market must relate to the aid scheme as authorised by the Council, namely a scheme under which only those biofuel production units which have received approval from the French authorities by 31 December 2003 at the latest may benefit, and this under the conditions laid down in the abovementioned Decision, namely:

HAS ADOPTED THIS DECISION:

Article 1

— such approvals are valid for a maximum of six years from the date of issue. The reduction specified in the approval may be applied after 31 December

The State aid implemented by France in the form of a reduction in the domestic tax on petroleum products (TIPP) for certain products obtained from vegetable raw materials intended to be incorporated in fuels or combustibles is compatible with the common market in so far as it is granted

within the limits and in accordance with the procedures authorised by Decision 2002/266/EC.

Article 3

This Decision is addressed to the French Republic.

Article 2

Done at Brussels, 15 May 2002.

France shall, each year, provide details of approved production units (name, location, nationality), the total volumes approved, the volumes allocated to approved production units and the volumes for which those units requested approval.

For the Commission

Mario MONTI

Member of the Commission
