Commission Decision (EU) 2018/884 of 16 October 2017 on aid measure SA.32874 (2012/C) (ex SA.32874 (2011/NN)) implemented by Denmark (notified under document C(2017) 4461) (Only the Danish text is authentic) (Text with EEA relevance)

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THE EUROPEAN COMMISSION,

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

Having given interested parties notice to submit their comments pursuant to that Article, and having regard to those comments,

Whereas:

I. PROCEDURE

(1) The Permanent Representation of Denmark to the European Union sent the Commission, by email dated 17 March 2011, a pre-notification of this measure (a reduction of and exemption from the tax relating to on the protection of drinking water).

(2) In the course of examining this pre-notification, on 27 April 2011 the Commission asked the Danish authorities for additional information.

(3) The Danish authorities submitted, by email dated 16 September 2011, the additional information that the Commission had requested on 27 April 2011.

(4) After this information was received, two technical meetings were held between the Danish authorities and the Commission on 3 October and 10 November 2011. Further to the meeting held on 10 November 2011, the Danish authorities submitted some new additional information to the Commission.

(5) After the meeting on 10 November 2011, the Permanent Representation of Denmark to the European Union communicated by email dated 17 November 2011 that the pre-notification of the measure had been withdrawn.

(6) The Commission informed the Danish authorities by fax dated 14 December 2011 that it had registered the aid as non-notified State aid under case SA.32874 (2011/NN), as the tax had already been introduced prior to the pre-notification and without the Commission's approval.

(7) The Permanent Representation of Denmark to the European Union forwarded to the Commission, by email dated 27 December 2011, a letter from the Danish authorities stating that the tax scheme would cease on 31 December 2011 and would be replaced by an increase in the general water rates, which had already been examined by the Commission in the context of aid case NN 1/2005[(2)].

(8) The Commission informed Denmark by letter dated 22 March 2012[(3)] of its decision dated 21 March 2012 to initiate the procedure laid down in Article 108(2) TFEU in respect of the measure (hereinafter referred to as the 'examination procedure'). This gave the Danish authorities a deadline of one month to make comments.

(9) The Commission's decision to initiate the examination procedure (hereinafter referred to as the 'opening decision') was published in the *Official Journal of the European Union*[(4)]. The Commission invited interested parties to submit their comments on the measure.

(10) The Commission received comments from one interested party (the Danish Agriculture and Food Council, hereinafter referred to as the 'interested party'). The Commission forwarded these comments to the Danish authorities, who were given the opportunity to respond.

(11) The Permanent Representation of Denmark to the European Union forwarded to the Commission, by email dated 16 May 2012, a letter from the Danish authorities in which they requested that the deadline for submitting comments be extended to 11 June 2012. The deadline extension was granted in a message sent by fax dated 24 May 2012.

(12) The Permanent Representation of Denmark to the European Union sent the Commission, by email dated 12 June 2012, the Danish authorities' comments on the opening decision.

(13) The Permanent Representation of Denmark to the European Union forwarded, by email dated 2 July 2012, the Danish authorities' remarks on the comments submitted by the interested party.

(14) The Commission asked the Danish authorities, in a letter dated 10 September 2013, for further information regarding their comments on the opening decision.

(15) The Danish authorities submitted the relevant information by email dated 7 November 2013. In reply to a letter from the Commission dated

10 November 2015, the authorities sent new additional information by email dated 19 April 2016.

II. DESCRIPTION

(16) On 27 December 2008 Folketinget (the Danish Parliament) passed a law implementing a tax on permits to extract groundwater with an eye to using the proceeds to fund surveys of and management planning for areas that are particularly important to the drinking water supply. The law was incorporated as Chapter 4a (Section 24) in Consolidating Act No 935 of 24 September 2009.

(17) The tax, which was calculated on the basis of the volume of water that could be extracted annually under the permit, amounted to DKK 0,305 (approximately EUR 0,04) per m^3 in 2009, DKK 0,315 in 2010 and DKK 0,310 in 2011.

(18) The tax scheme was originally intended to last until 2017, and in accordance with Section 24a of the Consolidating Act the entirety of the tax was to be collected from owners of public utilities[(5)]. Holders of permits for extraction from their own facilities would only pay one third of the tax, calculated on the basis of the annual permissible extraction volume. If the permit concerned a volume above 25 000 m^3, in accordance with Section 24b the owner paid one third of the tax on 25 000 m^3. In accordance with Section 24c, holders of extraction permits for a maximum of 6 000 m^3 per year were entirely exempted from the tax.

(19) According to the available information, 85 000 private extraction permits have been issued in Denmark. The vast majority of these concern the agricultural sector. The number of permits for a maximum of 6 000 m^3 is estimated at 75 000. The Danish authorities cannot guarantee that all agricultural enterprises hold private extraction permits and are therefore not dependent on public utilities, but point out that those farms that are able to connect to a public utility generally hold an extraction permit and only use the public supply for household needs.

(20) According to the Danish authorities' figures for 2009, 12 275 permit holders obtained a tax reduction equivalent to an average of EUR 1 080 annually for extraction permits on an average of 35 500 m^3 of water. The figures for 2009-2011 show that 1 091 agricultural enterprises obtained tax reductions, which exceeds the *de minimis* ceiling. The Danish authorities have indicated that 106 permit holders are registered as food-processing enterprises.

III. GROUNDS FOR INITIATING THE EXAMINATION PROCEDURE

(21) The Commission initiated the examination procedure for the following reasons:

— in reviewing the case, the Commission noted that the relevant measure appeared to directly constitute State aid, seeing that it was granted by the State (which forwent revenue by conceding a reduction of or exemption from

the tax), favoured certain undertakings (in this case, primarily agricultural undertakings with permits for private extraction that were granted a relief from their financial burden, including in particular those that had the advantage of an exemption rather than a reduction), had the potential to affect trade and threatened to distort competition,

— it could not be concluded on the basis of the Danish authorities' statement that the *de minimis* regulations on the primary production (Commission Regulation (EC) No 1535/2007[6]) or the processing/marketing (Commission Regulation (EC) No 1998/2006[7]), respectively, of agricultural products were applicable or that the various tax levels were justified by the inherent logic of the tax system,

— the aid element was not in accordance with either the relevant provisions of the Guidelines on State aid for environmental protection[8] (hereinafter referred to as the 'Environmental Guidelines') referred to in the Community guidelines for State aid in the agriculture and forestry sector 2007 to 2013[9] or the provisions of the Temporary framework for State aid measures to support access to finance in the current financial and economic crisis[10] (hereinafter referred to as the 'Temporary Crisis Framework') referred to by the Danish authorities.

IV. COMMENTS OF THE DANISH AUTHORITIES

(22) In their email of 12 June 2012 the Danish authorities sent a new detailed description of the measure and its context, along with their own analysis of the measure. The main argument of the analysis set out below is that the measure does not constitute State aid under Article 107(1) TFEU, partly because it is not selective and partly because it can be justified by the nature and general scheme of the Danish tax system. It is also stated that even if the measure were to constitute State aid, it is compatible with the internal market. Finally, it is argued that even if the Commission were to find that any State aid were incompatible with the inner market, there are several factors to suggest that the aid does not need to be recovered.

No State aid

(23) The Danish authorities do not agree with the Commission that the measure fulfils all the criteria for State aid under Article 107(1) TFEU. Specifically, they are of the opinion that the tax collected in accordance with Section 24b of the Consolidating Act (see recital 18) did not favour certain undertakings or the production of certain goods. Regarding the tax exemption in Section 24c, the authorities state that even if it were to constitute a selective advantage, this advantage would be so limited that it would be unable to distort competition or affect trade between Member States.

(24) In support of the first argument that the tax does not favour certain undertakings or the production of certain goods, the Danish authorities refer to the case-law of the Court of Justice of the European Union, from which it follows, firstly, that it is to be examined 'whether, within the context of

a particular legal system, that [State] measure constitutes an advantage for certain undertakings in comparison with others which are in a comparable legal and factual situation'[(11)], and secondly, that taxes and deductions that differentiate between undertakings, and which are therefore prima facie selective, do not fit the definition of State aid if this differentiation is due to the nature and overall structure of the tax system[(12)]. The Danish authorities argue, also on the basis of the case-law of the Court of Justice, that it should first be determined which system of norms or reference system should form the basis for examining the selective character of a measure, and that afterwards it should be examined whether some undertakings covered by the reference system gain an advantage over other undertakings covered by the same system.

(25) Taking this case-law as a basis, the Danish authorities thus argue that the Commission did not provide detailed reasoning in recital 15 of the opening decision but merely stated that the measure favoured certain undertakings (agricultural enterprises with private extraction permits for which the financial burden that would otherwise be applied was eased, including those enterprises that obtained an exemption instead of a reduction). They argue further that the Commission therefore seems to assume that the tax in Section 24a — the tax imposed on owners of public water utilities — forms the reference system for all other owners of water extraction systems, and that the latter are in a factual and legal situation comparable to that of the former and of the enterprises connected to a public utility, meaning that the exemptions and reductions in Section 24b constitute a selective advantage.

(26) The Danish authorities do not agree with the Commission on this point. They state that the tax under Section 24a cannot be seen as the reference system simply because it is higher than the taxes in Sections 24b and 24c. Moreover, the number of owners of public water utilities that are subject to the tax in Section 24a is much smaller than the number of owners of water extraction systems that are subject to the tax in Section 24b. According to the Danish authorities, two reference systems were created upon the introduction of the tax scheme in 2009: a *sui generis* system for owners of public water utilities (and indirectly for enterprises that are entitled to use water from these utilities) and a system that applies to all the other owners of systems for extracting groundwater.

(27) According to the Danish authorities, the coexistence of two reference systems means that the legal situation of the enterprises that pay tax under Section 24a is not comparable to the legal situation of the enterprises that pay tax under Section 24b or that benefit from the tax exemption under Section 24c, for the following reasons:

— owners of public water utilities, unlike the others, are required to supply drinking water and can pass the tax on to the price that users pay,

— the users and enterprises located in the public utility's supply area cannot change providers,

— owners of public water utilities are not undertakings, given that the Court of Justice defines an undertaking as any entity engaged in an economic activity (i.e. offering goods or services), regardless of its form or legal status. Since the utility companies cannot expand their customer base, because users cannot change suppliers, there is no competitive market,

— in that context, taxable persons under Sections 24b and 24c cannot be considered to have obtained an advantage in comparison to those who are taxable persons under Section 24a, since the latter are not undertakings,

— those enterprises that receive water from the public water utilities pay taxes indirectly (see the first paragraph) and are taxed on the basis of their actual water consumption, unlike those enterprises that extract water themselves and are taxed on the basis of the permissible extraction volume without taking their actual consumption into account,

— owners of private water extraction systems must regularly request extraction permits, since the permit is valid for 10-15 years (15 years in the case of water for irrigation), which can result in excessive taxation, given that the tax is calculated using as a starting point the volume of water that can be extracted rather than the volume that is actually consumed,

— because the basis for taxation is different for public water utilities and for private water extraction systems, the lower tax paid by enterprises that extract water privately does not necessarily give them an economic advantage, for instance if the volume of precipitation in the course of a year reduces the need for irrigation, meaning that water consumption is less than the volume stated in the permit and on which taxes have been paid. According to data from the Jupiter database, which is administered by GEUS (Geological Survey of Denmark and Greenland), in the period 2009-2011 agricultural holdings used only 34 % of the volume for which extraction permits had been granted, while food processing enterprises used 48 % (however, this number is subject to a certain degree of uncertainty, given that primary producers are not required to measure the precise volume of water they extract),

— while enterprises located in an area supplied by a public utility are entitled to connect to it, enterprises located outside such an area are entitled to establish their own water extraction system. However, the costs of establishing and operating the system as well as any water treatment are their own responsibility, and the same is true of the costs of the quality control which the municipality can require.

(28) The Danish authorities also stress that the factual situation of the enterprises that are taxable under Section 24a is not comparable to the factual situation of the enterprises that are taxable under Section 24b or that benefit from the tax exemption under Section 24c, for the following reasons:

— agricultural holdings that extract their own water do not directly compete with the enterprises that are connected to a public water utility. Their location means that nearly all of them own their own water extraction system, and even if some of them may be connected to a public water utility, those enterprises that use large volumes of water have a supplementary private extraction permit, ensuring that drinking water from the public water supply is used only for the household,

— many holdings and enterprises hold a permit for extracting surface water and as such are not subject to the tax on extracting groundwater[13]. Introducing a lower tax for agricultural holdings that extract groundwater evens out the differences between enterprises that extract groundwater and those that extract surface water and are therefore not subject to the tax,

— the water quality also varies depending on whether an enterprise is connected to a public water utility or has a permit for private extraction. The public system is required to supply clean drinking water, whereas the amounts of pesticides, nitrates and bacteria in the water from private systems often exceeds the maximum limits, and holders of private permits therefore often have to invest DKK 10 000-50 000 to meet the legal requirements for drinking water.

(29) The Danish authorities argue that the Danish tax scheme does not distinguish between enterprises in different sectors that are in the same situation, but does distinguish between enterprises that own a water extraction system and those that do not. The Danish tax scheme does not distinguish between potentially substitutable processes or products placed on a competitive market, given that the extracted water is not subsequently placed on the market. The fact that primary producers, because of their location, cannot freely choose between private extraction and connection to a public utility also means that there is no potentially competitive environment or possibility of substitution between groundwater extracted for irrigation and drinking water supplied by the public utility to enterprises and citizens.

(30) In the view of the Danish authorities, it can therefore be concluded that the tax imposed on owners of public utilities did not confer a selective advantage on the enterprises entitled to extract their own water inasmuch as, in consideration of the tax's intended objective (protecting drinking water), there were no other enterprises or holdings that were in a comparable factual or legal situation or that were discriminated against.

(31) As regards the relationship between the enterprises that are taxable under Section 24b and those that are exempted from the tax under Section 24c, the Danish authorities recognise that those enterprises that are engaged in an economic activity and that have benefited from a tax exemption have enjoyed a competitive advantage as compared to their competitors that paid tax under Section 24b. However, they argue that this selectivity only applies with regard to those competitors and not with regard to enterprises that were directly taxed

under Section 24a nor with regard to enterprises that were indirectly taxed via their water bills from a public utility and that were not in a comparable situation.

Justification by the nature and inherent logic of the tax system

(32) If the Commission continues to maintain that the tax as it was applied favours certain undertakings despite the legal and factual differences, the Danish authorities are of the opinion that the derogations in the tax system can be justified by the tax system's nature and general scheme, and that the tax scheme therefore does not constitute State aid, even though they again recognise that there was discrimination between the enterprises that were taxed under Section 24b and those that were exempted under Section 24c. If the Commission maintains that the provisions of Section 24a are to be seen as the normal tax scheme, and that the measures laid down in Sections 24b and 24c constitute selective derogations, these derogations can be justified by the tax system's nature or inherent logic.

(33) In that context the Danish authorities state that the reduced tax paid by those other than owners of public water utilities can be justified not least by the fact that farmers and other owners of private water extraction systems must cover the costs connected to water extraction themselves and are not entitled to connect to a public utility if they are located outside the utility's supply area. They add that the objective of the tax is to fund efforts to protect and preserve drinking water resources and not to allow farmers to water their crops with drinking water. In the Danish authorities' view, this is sufficient to justify the discrimination that follows from the tax scheme and which rests on a series of factual and legal differences that comply with the scheme's objective.

(34) With regard to the tax reduction and the ceiling of 25 000 m^3 on the calculation base in Section 24b, the Danish authorities state the following:

— this measure applied to all enterprises, regardless of size, location or sector,

— the tax was reduced by two thirds on the basis of assumptions made at the time of introducing the scheme that effectively one third of the volume that was permitted to be extracted would be used. These assumptions have since been supported by data collected after the tax was introduced and showing that in the period 2009-2011 agricultural holdings in the primary sector had a utilisation rate of 34 % (enterprises engaged in the processing and marketing of agricultural products had a utilisation rate of 48 % in the same period, but since agricultural holdings in the primary sector account for more than 90 % of the permits issued, it was decided to apply the rate of 34 % for all beneficiaries in the interests of good administrative management of the system),

— if the ceiling had not been introduced, the tax in Section 24b would have yielded DKK 60 million — more than double the amount that the tax in this paragraph was intended to generate in order to fund management planning — and the tax would have been less well distributed among farmers (ranging from EUR 80 to EUR 335 with the ceiling and from EUR 40 to EUR 35 000

without the ceiling). If the agricultural holdings had had to pay the full tax, instead of one third, the total amount collected just from primary agricultural production would have been DKK 138 million,

— the ceiling makes it possible to maintain a certain degree of equal treatment between those enterprises that use surface water (free of tax) and those that use groundwater,

— given that the tax is calculated on the basis of the volume that is permitted to be extracted, and not on effective consumption, some enterprises would have paid a disproportionately high amount without the ceiling,

— the ceiling makes it possible to impose a fixed amount to be paid by enterprises with permits for extracting more than 25 000 m^3 (61 % of agricultural holdings). This means that the advantage affects only the 39 % of enterprises holding permits for extracting less than 25 000 m^3 that have only paid part of the standard tax, and for which the advantage amounts to no more than EUR 250 per year — much less than the *de minimis* threshold,

— the ceiling makes it possible to reduce the effect that natural conditions have on enterprises that produce the same products (for instance, weather conditions that have a different effect on the need for irrigation from one area to the next),

— in the present case, water constitutes a production factor and is not itself a product. The Commission concluded in case N 472/2002[(14)] on a permanent ceiling on land taxes that the ceiling was justified by the tax system's inherent logic — specifically on the basis of the land's key significance as a production factor in the agricultural sector,

— the ceiling is neither materially nor regionally selective, given that it was applied to all undertakings in all sectors regardless of their size or water consumption, it did not depend on specific criteria (such as geographic criteria) that could exclude certain undertakings, and the authorities did not have discretionary powers to derogate from the rules for calculating the tax (see in this context the Commission's decisions in cases N 159/2009 and N 480/2007),

— if the Commission should still be of the opinion that the ceiling is selective, this is justified by the tax system's inherent logic, given that 61 % of holders of permits for private water extraction paid the highest tax under Section 24b, and as such this amount should be considered to be the norm. The objective of the tax was to earn revenue for funding joint actions for protecting water, and the ceiling was introduced in order to avoid placing an undue economic burden on the sector and at the same time to ensure that the burden is fairly shared among producers of the same types of products whose need for water is affected by natural conditions (soil characteristics, precipitation),

— the ceiling can be justified on the basis of the provisions in the Commission notice on the application of the State aid rules to measures relating to direct business taxation[(15)], given that it serves a redistributive purpose (point 24 of the Commission notice), does not contain any discretionary elements

and is related to a particularly important production factor (point 27 of the Commission notice), all of which are circumstances that can justify the tax on the basis of the tax system's nature or inherent logic. In this context the Danish authorities again refer to the Commission's decision in case N 472/2002 and stress the importance of water as a production factor.

(35) As regards the tax exemption in Section 24c and the differential treatment of enterprises in the same sector referred to in the opening decision, the Danish authorities argue that, on the basis of the tax system's structure, it was logical to grant an exemption from the tax to the many holders of permits for extracting smaller volumes of water, considering the insignificant yields the tax would contribute and the limited impact on water resources. Given that the tax was calculated on the basis of the volume that could theoretically be extracted according to the permit, the enterprises only had to pay EUR 81 in 2009, EUR 84 in 2010 and EUR 83 in 2011. Moreover, because the vast majority of the extraction permits only concern an average volume of 1 000 m^3 per year, the amount of the exemption was only EUR 40 for the entire period. In addition, holders of small extraction permits (maximum 6 000 m^3) differ in that they are not subject to reporting obligations, with the result that there is no comprehensive register of permits that the tax administration can use.

(36) With regard to the question on selectivity, the Danish authorities state in conclusion that it is exclusively the exemption in Segment 24c that can be considered to be selective, because it favours certain undertakings, but that in any case it is justified by the tax system's nature and inherent logic. They add that even if the Commission continues to consider the tax scheme in Section 24a as the reference system, this is not a case of discrimination considering the differences in factual and legal circumstances set out above.

Distortion of competition and effect on trade

(37) In their emails dated 12 June 2012 and 7 November 2013 the Danish authorities address this issue from two angles: firstly, the tax scheme in Section 24a is compared to the schemes in Sections 24b and 24c; and secondly; the tax scheme in Section 24b is compared to the scheme in Section 24c.

(38) With regard to the first comparison, the Danish authorities stress that if a national measure does not confer a selective advantage, it cannot distort competition or affect trade between Member States. Having, demonstrated, as they see it, that the tax reduction or exemption does not favour the recipients in relation to other enterprises which can be presumed to be in a comparable factual or legal situation, they consider that there can be no distortion of competition within the meaning of Article 107(1) TFEU.

(39) With regard to the second comparison, the Danish authorities recognise that the enterprises that are exempted from the tax have received an advantage in comparison to other enterprises, but they argue that the value of the exemption

is so insignificant that it does not affect competition on the internal market. This is substantiated, in their view, by the fact that no enterprise has submitted any complaint. In addition, the Danish authorities are of the opinion that it is for the Commission to prove that an aid measure distorts competition. In that context they refer to the Judgment of the Court of 24 October 1996 in case C-329/93, *Federal Republic of Germany, Hanseatische Industrie-Beteiligungen GmbH and Bremer Vulkan Verbund AG* v *Commission of the European Communities*[16], and in particular paragraph 52, in which it is stated that 'while in certain cases the very circumstances in which the aid has been granted may show that it is liable to affect trade between Member States and to distort competition, the Commission must at least set out those circumstances in the statement of the reasons for its decision'. According to the Danish authorities, in its opening decision the Commission simply stated the extent of Denmark's trade in agricultural products and it has therefore not sufficiently justified its view that the tax scheme threatens to distort competition and trade on the internal market. To illustrate the exemption's limited value, the Danish authorities point out that an enterprise that was granted a tax exemption for the maximum volume (6 000 m^3) received aid in the amount of DKK 610 (approximately EUR 81) in 2009, DKK 630 (approximately EUR 84) in 2010 and DKK 620 (approximately EUR 83) in 2011 as compared to enterprises that received a reduction under Section 24b. Moreover, the majority of the exempted holdings only have extraction permits for 1 000 m^3, which makes the value of the exemption even more insignificant. Given that the tax was repealed on 1 January 2012, the beneficiary holdings could receive a maximum of EUR 250 in aid compared to those that exclusively had the advantage of a reduction. All amounts are below the threshold laid down in the *de minimis* regulations for both primary agricultural production and food processing and therefore do not distort competition.

Compatibility

(a) *Primary production*

(40) The Danish authorities state in its analysis that any aid in relation to the tax schemes in Sections 24b and 24c is in any case compatible with the internal market.

(41) With regard to the tax reduction in Section 24b, the Danish authorities are of the opinion that points 151 to 159 of the Environmental Guidelines have been complied with, insofar as the tax is an environmental tax a reduction of which is necessary and proportionate in all scenarios (i.e. regardless of whether the reference system for the analysis is constituted by the tax scheme in Section 24a or by the tax scheme in Section 24b, in which case the ceiling of 25 000 m^3 can be considered to favour holders of an extraction permit for more than 25 000 m^3.

Environmental tax (point 151 of the Environmental Guidelines)

(42) To show that the tax has the characteristics of an environmental tax, the Danish authorities refer to the tax scheme's overall objective, namely protecting drinking water. They stress that the Danish measure goes further than the obligations under the Water Framework Directive and might not have an equivalent in any other Member State. They add that the scheme was set up in such a way that the largest contributors (owners of water utilities) could pass the tax on to users on the basis of their consumption, thereby giving them an incentive to consume less. By introducing tax reductions and exemptions for those who extract their own water, the Danish authorities believe that they have been able to tax more effectively the largest consumers of drinking water.

Necessity of the aid (point 158 of the Environmental Guidelines)

(43) Regarding the criterion in point 158(a) of the Environmental Guidelines (according to which the choice of beneficiaries must be based on clear and objective criteria, and the aid must be granted in principle in the same way for all competitors in the same sector/relevant market if they are in a similar factual situation), the Danish authorities dispute the Commission's argument that they should have made a distinction between economic operators outside the agricultural sector with water extraction permits and economic operators within the agricultural sector. The aim of the tax scheme is not to distinguish between enterprises within or outside certain sectors; but for the tax in Section 24b to apply to all owners of non-public water supply systems with permits to extract more than 6 000 m^3 of groundwater per year, regardless of their economic sector. If the ceiling of 25 000 m^3 is considered to favour holders of extraction permits for more than 25 000 m^3, the criterion of objectivity and clarity in the selection of beneficiaries is clearly met, given that the tax reduction is applied in the same way for all enterprises in the same sector that are in the same factual situation (holders of an extraction permit for more than 25 000 m^3 of water).

(44) With reference to the criterion of objectivity and clarity prior to the selection of beneficiaries, the Danish authorities query why the Commission is looking at enterprises in other Member States that do not have the same advantage as the Danish enterprises receiving a reduction or exemption, given that those foreign enterprises are not subject to the Danish tax scheme. They refer to the Commission's decision in case C-30/2009[17], in which the Commission found the criteria to be objective and clear.

(45) Regarding the criterion in point 158(b) of the Environmental Guidelines (which provides that the environmental tax without reduction must lead to a substantial increase in production costs for each sector or category of individual beneficiaries), the Danish authorities quote tax administration figures showing that enterprises in the primary sector paid a total of DKK 26 million in tax per year under Section 24b in the period 2009-2010; they argue that these enterprises would have paid approximately DKK 138 million per year if they had been subject to the same tax as owners of public water utilities,

i.e. 430 % more for the sector as a whole. The Danish authorities provide a numerical example of production costs, which shows that the additional costs per hectare amount to approximately DKK 347, i.e. an increase in production costs of between 4,3 % and 7,7 % depending on the crop. This calculation is based on a hypothetical agricultural holding of 100 hectares with an extraction permit for 1 200 m^3 per hectare and that pays a tax of DKK 0,31 per hectare, which, assuming the full tax is paid, would result in a total tax of DKK 37 200 (100 × 1 200 × 0,31), i.e. additional costs of DKK 34 700, or DKK 347 per hectare, as the holding would have to pay DKK 2 500 with a ceiling of 25 000 m^3 (see Section 24b). They are of the opinion that an increase in production costs of up to 8 % is substantial (here they refer to Commission Decision on State aid N 327/2008[18], in which an increase in production costs of 3 % was considered substantial) and gives reason to conclude that the criterion in point 158(b) of the Environmental Guidelines has been met. Moreover, the Danish authorities are of the opinion that the same logic can be followed in the context of the 25 000 m^3 ceiling. Without this ceiling, the tax would have resulted in an increase in production costs of between 1,25 % and 2,20 %. While it is true that this is a smaller increase than the one discussed in the Decision in case N 327/2008, it must be seen in light of the fact that it is impossible to pass it on to consumers (see the following recital).

(46) Finally, as regards point 158(c) of the Environmental Guidelines (according to which the aid is considered necessary if the substantial increase in production costs cannot be passed on to customers without leading to important sales reductions), the Danish authorities are of the opinion that regardless of which reference scenario is used as a basis (see recital 41), the primary producers cannot pass the increase in production costs on to the consumers but must cover the loss themselves: firstly, because water used for irrigation in soil needing a great deal of water will be used for widely varying types of crops without improving their quality compared to crops not grown in soil needing irrigation; and secondly, because the relevant products are also imported into Denmark in high volumes and the prices are therefore set on the global market, in which Danish farmers have a very small market share due to the size of their holdings, and as such it is difficult for them to pass on the additional costs via the sales price. According to the Danish authorities, the farmers would have been forced to extract less water if they had had to pay the full tax, resulting in a smaller crop yield and lost income. Together with the fallout from the financial crisis, which made farmers even more vulnerable to increasing production costs, this would have distorted competition between farmers with a high need for irrigation and those with a lower or no need for irrigation.

Proportionality of the aid (section 159 RFG)

(47) The Danish authorities refer to point 159 of the Environmental Guidelines, which contains three conditions, at least one of which must be met in order to comply with the proportionality requirement. They rely particularly on point

159(b), given that it is not possible to carry out an *ex post* inquiry into whether the conditions in sub-points (a) and (c) have been met. According to point 159(b), aid beneficiaries have to pay at least 20 % of the national tax, unless a lower rate can be justified in view of a limited distortion of competition.

(48) The Danish authorities argue that since the tax in Section 24b constitutes one third of the tax in Section 24a and enterprises were exempted from paying tax on volumes exceeding the ceiling of 25 000 m^3, enterprises with an extraction permit for at least 41 666 m^3 paid at least 20 % of the tax in Section 24a. However, they also take the view that the water supply companies cannot be considered undertakings under the State aid rules, and that agricultural holdings do not compete either with food processing enterprises or with owners of public water utilities. A comparisons can only be made between enterprises with a permit for water extraction and enterprises that, lacking such a permit, must connect to public utilities. The former were taxed on the basis of the volume they were permitted to extract, while the latter were taxed on the basis of their actual consumption, which makes it difficult to check whether 20 % of the tax was paid. However, if the utilisation rate of permits held by agricultural holdings (34 %) and by processing enterprises (48 %) are looked at together, along with the average volume for which they were issued (respectively 37 000 m^3 and 243 000 m^3) and the utilisation rate for public utilities (80 %), it emerges that a primary producer (based on actual consumption) has on average paid approximately 45 % of the tax paid by enterprises without an extraction permit, while the figure for processing enterprises is 6 %. If the tax scheme in Section 24b is used as a reference scenario, and a comparison is made between holders of an extraction permit for at least 25 000 m^3 of water and holders of an extraction permit for more than 25 000 m^3, it emerges that 97,5 % of beneficiaries have paid at least 20 % of the normal tax. The Danish authorities acknowledge that the criterion of 20 % applies to individual enterprises, but are still of the opinion that the Commission ought to take the average into account in its assessment of the proportionality requirement and to consider that prior to 2009 there was no tax on water extraction. According to the Danish authorities, if the tax scheme had had no ceiling it would have created a much greater distortion of competition in the agricultural sector, given that the enterprises that had received a permit for extracting large volumes before the tax was introduced would have paid the full tax for that volume, regardless of their actual consumption. Finally, agricultural holdings in the other Member States are not subject to the same tax as the Danish enterprises, and it is therefore difficult to determine how the latter could have gained a competitive advantage.

(49) The Danish authorities state as their general conclusion that the tax is proportionate, even if not all enterprises paid at least 20 % of the tax.

(b) *Processing of farm products*

(50) The Danish authorities acknowledge that they cannot prove that the criterion of necessity in point 158 of the Environmental Guidelines was met in all cases where food processing enterprises with extraction permits received aid as a result of the tax reduction in Section 24b. However, they are able to prove that by virtue of the tax reduction, the five enterprises with the largest extraction permits received average annual aid with a grant equivalent of between DKK 245 417 (approximately EUR 32 700) and DKK 456 217 (approximately EUR 60 000) as compared to the enterprises that were connected to a public water utility. They stress, however, that these figures do not give a realistic picture of the beneficiaries' advantage, and that they ought to be considered against the processing enterprises' actual water consumption (the permit utilisation rate was 48 %). By considering them in this way, the grant equivalent is between DKK 143 337 (approximately EUR 19 100) and DKK 267 369 (approximately EUR 35 650) per year, and it is even lower if the tax in Section 24b is applied as a reference scenario.

(51) The Danish authorities point out that all these figures are under the *de minimis* threshold of EUR 200 000 for aid for the processing of agricultural products. They acknowledge that there may be enterprises that exceed the threshold if all other *de minimis* aid granted over three financial years is taken into account, but they are of the opinion that in that case the Commission ought to consider the aid as compatible with the internal market on the basis of the Temporary Crisis Framework. This framework makes it possible to grant aid of up to EUR 500 000 to enterprises that process agricultural products, but the Danish authorities have not applied it. According to the Danish authorities, an enterprise that has already received EUR 200 000 in *de minimis* aid can still receive EUR 300 000 within the context of the Temporary Crisis Framework.

Exemption

(52) The Danish authorities state that the tax exemption in Section 24c is a derogation from the provisions of Section 24b, which can be considered to constitute the reference system. However, if the Commission considers that Section 24c is a derogation from Section 24a, the exemption does not in any case constitute State aid under Article 107(1) TFEU, and if the Commission considers that the exemption constitutes State aid, it should be considered compatible with the internal market.

(53) The Danish authorities argue that enterprises entitled to extract at least 6 000 m^3 did not receive more than EUR 250 in aid if the exemption is considered a derogation from the provisions of Section 24b, or more than EUR 750 in aid if it is considered a derogation from the provisions of Section 24a (the tax in Section 24b is only one third of the tax in Section 24a). They also point out that the measure is to be assessed on the basis of the applicable *de minimis* rules, and that the compatibility of any unlawful aid is to be assessed on the basis of the provisions that were applicable at the time the aid was granted. In this context, they again refer to the Temporary Crisis Framework and stress

that the Commission cannot refuse to apply those guidelines in this case in view of the fact that the aid was not granted within the context of an approved aid scheme, and that the Danish authorities had not collected statements from beneficiaries of other *de minimis* aid as they would have been required to do before applying the relevant measure. Should the Commission maintain that these formal conditions must be fulfilled, the principles for assessing unlawful aid would become meaningless, since the defining characteristic of non-notified State aid is precisely that the formal conditions for the aid's lawfulness have not been fulfilled. In that case, non-notified aid would never be able to be declared compatible with the internal market, nor would aid exempted from the reporting obligation as a result of a block exemption regulation.

(54) Therefore the Danish authorities are of the opinion that the exemption ought to be declared compatible with the internal market — provided that the aid thresholds under the Temporary Crisis Framework (EUR 500 000 for food processing enterprises and EUR 15 000 for primary producers, including *de minimis* aid) are not exceeded — and that the Commission de facto ought to raise the *de minimis* ceiling when assessing the exemption's compatibility. Considering that the aid amounted to between EUR 250 and EUR 750, the aid thresholds under the Temporary Crisis Framework could not possibly have been exceeded in the period 2009-2011, not even for food processing enterprises and primary producers that had already received the maximum *de minimis* aid for the same period. The Danish authorities acknowledge that the formal conditions for granting *de minimis* aid or compatible aid under the Temporary Crisis Framework were not fulfilled, but because Denmark did not apply the Framework at that time, and given that the aid amounts did not exceed EUR 750, there is no risk of exceeding the ceilings in the case of subsequent application of the Framework.

Recovery

(55) The Danish authorities argue that even if the Commission were not to accept the arguments claiming that the tax scheme did not involve unlawful and incompatible State aid, it ought not to require recovery of the aid from the beneficiaries, because the aid has a minimal effect on competition, recovery would not restore a normal situation, the beneficiaries had legitimate expectations and it is utterly impossible to carry out a recovery that ensures equal treatment of all enterprises.

(56) As far as the first argument is concerned, the Danish authorities state that all enterprises that were in the same factual and legal situation were treated equally, and therefore the risk of distorting competition is minimal and purely theoretical. Moreover, the tax ceiling for holders of extraction permits has contributed to maintaining a level playing field in e.g. the primary production sector, inasmuch as it prevented a disproportionate increase in production costs for those producers that had a greater need for irrigation.

(57) With regard to the second argument, the Danish authorities stress that a recovery would not restore the competitive situation prior to 2009, given that the primary producers did not enjoy a competitive advantage as compared to their domestic competitors or competitors in other Member States, but only compared to enterprises in other sectors that are supplied with water from a public utility. Recovery would have the biggest impact on those with the greatest need for irrigation due to random weather conditions and soil conditions, and it would therefore not be the aid's potential effects on competition but rather purely external factors that would determine the size of the amount recovered. Moreover, recovery would have resulted in distortion of competition to the benefit of those able to extract surface water (free of tax) instead of groundwater for the same production, which would be in contravention of the provisions of Article 14(2) of Council Regulation (EC) No 659/1999[19]. Finally, a recovery would cause irreparable and disproportionate harm in relation to the measure's limited effect on competition.

(58) With regard to the beneficiaries' legitimate expectations, the Danish authorities stress that the vast majority of the potential beneficiaries could not possibly have anticipated that the scheme could give them an advantage according to State aid rules, in particular because there are no comparable taxes in other Member States. Moreover, no Danish or foreign enterprises have ever submitted a complaint about the tax scheme. Furthermore, given that water extraction permits are normally issued for a period of 10 to 15 years, most beneficiaries had not had a chance to take the tax into account when they applied for a permit, and a recovery on the basis of the permit's size would not take such unpredictable circumstances into account.

Infeasible to carry out an effective recovery that treats all enterprises equally

(59) Finally, the Danish authorities argue that it would be difficult to carry out an effective recovery, seeing that it is not possible to calculate the grant equivalent for every single beneficiary. This is because it is impossible to determine their actual consumption during the period 2009-2011 *ex post*. Moreover, in Denmark there is no common reference framework for calculating the grant equivalent for all enterprises, and the tax that the enterprises using public utilities have paid indirectly varies depending on the utilisation rate of the individual utility, meaning that enterprises in the same category may have been charged different taxes. An effective equalisation would require recalculating the tax on water extraction for all enterprises on the basis of their actual consumption in the period 2009-2011 and on the basis of an arbitrary but uniform rate, with the result that any excess tax would have to be repaid and that enterprises that had not paid enough would have to pay arrears. However, this is not a feasible model, seeing that in most cases it is impossible to determine the exact consumption for enterprises with private extraction.

V. COMMENTS FROM THE INTERESTED PARTY

(60) The interested party is of the opinion that this tax scheme does not constitute State aid to those enterprises, given that the tax reductions or exemptions are not selective and do not affect competition. Even if the Commission were to consider that the scheme constitutes State aid, it is in compliance with the provisions of the Environmental Guidelines. Furthermore, if the State aid should be declared unlawful and incompatible, recovering it would be in contravention of the general principles of law. The farmers could not have anticipated that they received unlawful State aid, and a recovery would be disproportionate, seeing that most producers do not use the entire volume they are permitted to extract. Moreover, no enterprise or organisation in Denmark or abroad has submitted a complaint stating that the tax differentiation would distort competition.

VI. THE DANISH AUTHORITIES' ANSWER TO THE INTERESTED PARTY'S COMMENTS

(61) The Danish authorities stated, by email dated 2 July 2012, that the interested party agreed with them and stressed that the fact that no other enterprise or organisation had sent comments showed that the scheme did not affect competition on the internal market.

VII. ASSESSMENT

VII.1. Existence of State aid

(62) Under Article 107(1) TFEU, 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 is, in so far as it affects trade between Member States, incompatible with the internal market.

(63) In the context of the examination procedure, the Commission found, on the basis of the available information, that the relevant measure could constitute State aid, given that it was granted by the State (which forwent revenue by conceding a reduction of or exemption from the tax), favoured certain undertakings (primarily agricultural holdings with permits for private extraction that were granted a relief from their financial burden, including in particular those that had the advantage of an exemption rather than a reduction), had the potential to affect trade[(20)] and threatened to distort competition[(21)]. The Commission also stated that there was no guarantee that the measure could be considered compatible with a *de minimis* aid scheme (see recital 21). The information submitted by the Danish authorities still does not enable the Commission to conclude that the relevant measure could be considered compatible with a *de minimis* aid scheme. The Danish authorities themselves have stated that for the agricultural product processing sector, the provisions relating to *de minimis* aid might not have not been

complied with (see recital 51). Regarding the sector for primary production, the Danish authorities have not provided any evidence that the aid granted in the form of reductions or exemptions could not possibly have resulted in the relevant ceilings being exceeded over three financial years. In light of this the Commission cannot conclude that the measure can be considered compatible with a *de minimis* aid scheme. Therefore it should be definitively established whether the relevant measure constitutes State aid on the basis of the other applicable State aid rules.

Existence of a selective advantage

(64) To be considered State aid, a measure must be selective and confer an advantage by favouring certain undertakings or the production of certain goods.

(65) In the context of tax measures, the selectivity is constituted by a derogation from a reference system. In the case at hand, the Danish Consolidating Act constitutes special tax treatment (a tax reduction or exemption) for holdings with extraction permits for volumes above or below specific levels.

Prima facie selectivity in the case of tax reduction by one third for holders of an extraction permit (Sections 24a and 24b)

(66) It follows from recital 64 that in order to be considered State aid, a measure must be selective and favour certain undertakings or the production of certain goods.

(67) Point 128 of the Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union[(22)], which replaces the Commission Notice on the application of the State aid rules to measures relating to direct business taxation, establishes the principles following from the case-law of the Court of Justice which state that in order to determine whether a measure constitutes State aid or not under Article 107(1) TFEU, it is necessary to determine the common scheme (the reference system), that afterwards it should be examined whether the measure concerned constitutes a derogation from that scheme by distinguishing among different economic operators which are in a comparable factual and legal situation in light of the scheme's intrinsic objective, and finally that it should be determined whether the derogation is justified by the common scheme's nature and overall structure.

(68) Furthermore, it follows from the case-law of the Court of Justice[(23)] that 'As regards the assessment of the condition of selectivity, which is a constituent factor in the concept of State aid, it is clear from settled case-law that Article 87(1) EC requires assessment of whether, under a particular statutory scheme, a State measure is such as to 'favour certain undertakings or the production of certain goods' in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question'[(24)]. In this case, therefore, it must be determined whether

the enterprises with extraction permits (primarily active in the agricultural sector) that had the advantage of a tax reduction under Section 24b were in a factual or legal situation comparable to that of enterprises that were connected to a public utility and paid an indirect tax passed on to them by the owners of the public utility which, according to Section 24a, were required to pay the full tax under Section 24. In the context of the examination procedure the Danish authorities referred specifically to the factual and legal situation by invoking a judgment of the Court of Justice (see recital 24 and the footnote on page 11) that was not mentioned in footnote 23 but which still refers to the same principles as those in the recital named. Moreover, the Danish authorities argue that the various rates and the tax base (tax on the volume actually consumed which is collected indirectly from the economic operators as regards Section 24a and collected as direct tax on the volume for which a permit was issued, regardless of actual consumption, as regards Section 24b and adjusted by Section 24c), mean that the economic operators that are indirectly taxed under Section 24a are not in a comparable factual and legal situation to those that are directly taxable under Section 24b. This would imply that there are two distinct tax schemes (one under Section 24a and another under Sections 24b and 24c), and that the relevant reference system for determining whether they entail State aid should be the tax scheme under Section 24b.

(69) The Commission notes that the objective of the tax was to collect sufficient revenue for surveys in preparation of management planning for areas that are particularly important to the drinking water supply in Denmark. All enterprises that consume water ought therefore in principle to be subject to the same payment obligation. It is therefore the introduction as such of the tax in Section 24 that, in combination with the obligation under Section 24a for enterprises connected to a public utility to pay the full tax, should form the primary reference point for determining whether the scenarios under Sections 24b and 24c entail State aid, regardless of what conclusions are drawn relating to the necessity of applying further reference points for examining any State aid associated with a given scenario.

(70) Regarding Section 24b, any selectivity needs to be assessed at two levels: firstly in the context of payment of a third of the tax under Section 24b, and secondly in the context of the tax reduction that follows from the ceiling set on a volume of 25 000 m^3 together with the exemption for permits for a maximum of 6 000 m^3.

(71) As already mentioned, in order to qualify as State aid a measure must be selective and favour certain undertakings or the production of certain goods (see recital 64). As the Danish authorities have stated (see recital 24), it also needs to be considered whether, in light of the measure's objective, the relevant measure entails discrimination between enterprises that are in a comparable factual and legal situation based on the case-law of the Court of Justice[25].

(72) In that context the Commission particularly points out that according to the information from the Danish authorities, the scheme in Section 24a constitutes taxation of effective consumption, whereas the tax in Section 24b is based on the volume permitted to be extracted (however, the volume of water permitted to be extracted is seldom entirely consumed — see the information in the seventh paragraph of recital 27). Likewise, the last paragraph of recital 27 and the second and third paragraphs of recital 28 state that the differences in location (inside or outside the area supplied by a public utility) can necessitate different supply methods, and that the water quality varies depending on the scenario, given that the water that is taxed in the first scenario (Section 24a) is drinking water, whereas the enterprises in the second scenario, which have to pay tax on groundwater with an eye to funding the protection of drinking water (Section 24b), are located side by side with many holdings that are not subject to the tax because they extract surface water and must pay the costs themselves for checking water quality and maintaining water extraction systems, costs which are included in the invoices for the enterprises in the first scenario.

(73) A measure's selective character should, however, be assessed in light of the objective to be achieved (see recital 68 and footnote 24), which in the present case is to carry out surveys in preparation of management planning for areas that are particularly important to the drinking water supply. It can therefore be determined that, in consideration of the established objective, all enterprises ought to be subject to the same taxation in order for the measure not to be considered as selective (see recital 69). The Commission can therefore only conclude that reducing the tax by two thirds under Section 24b is selective.

(74) The Danish authorities' other arguments do not call this conclusion into question: specifically, the argument in recital 26 relating to the difference in the number of owners of public water utilities and owners of private water supply systems is not sufficient in and of itself to justify the differences in the legal and factual situation covered by the two tax systems, given that in both cases it is the consumers who pay the tax, either indirectly in the first case because it is passed on in the price, or indirectly [*sic*] in the other case. The argument that owners of public water utilities are not undertakings because they do not exercise an economic activity (see the third and fourth paragraphs of recital 27) is not applicable either, given that the Danish authorities themselves stress that an economic activity is defined as offering goods or services, and that water extraction and supply are indeed constituted by offering a service, i.e. they constitute an economic activity. The Danish authorities argue, therefore, that it is not the differences in the factual and legal situation between owners of public water extraction systems and owners of private extraction systems that need to be considered, but rather the differences between enterprises that are connected to a public utility and enterprises active in the same sector that own their own extraction system.

(75) It should therefore be examined whether the measure, despite the selectivity that follows from its application to specific enterprises, confers an economic advantage on those enterprises. Regarding this, the Commission notes that the enterprises that pay only one third of the tax are taxed on theoretical consumption as indicated in the extraction permit, whereas the enterprises that pay the full tax are taxed on the basis of actual water consumption. It also points out that according to the Danish authorities, the owners of private systems have only consumed one third (34 % — see recital 34) of the water volumes that are covered by the extraction permit. In consideration of this fact, the Commission finds that the reduction by two thirds of the tax serves to compensate for the effects of the difference between taxation of actual consumption and taxation on the basis of the volume listed in the extraction permit. Without this reduction, moreover, the amount collected would have far exceeded the funding needs in connection with surveys of and management planning for areas that are particularly important to the drinking water supply. In consideration of this, the Commission concludes that the reduction by two thirds of the tax under Section 24b does not constitute an economic advantage for the enterprises concerned and therefore does not constitute State aid under Article 107(1) TFEU.

(76) It must therefore be determined whether the scenario under Section 24b contains an element of aid in the context of the ceiling for the reduced tax set at a volume of 25 000 m^3, and in the context of the exemption for permits for a maximum of 6 000 m^3.

Tax ceiling set at 25 000 m^3

(77) Regarding the existence of State aid in the context of the tax ceiling set at 25 000 m^3, the Danish authorities cannot invoke the differences in the enterprises' legal and factual situation, given that enterprises with a permit for extracting more than 25 000 m^2, which have the advantage of the ceiling, are subject to the same reference system as enterprises with a permit for extracting a maximum of 25 000 m^3 (payment of one third of the tax in Section 24) which are located in the same area. Furthermore, the Danish authorities' argument, that the analysis of the degree to which there is an advantage must take as its basis the enterprises that pay taxes on a volume of no more than 25 000 m^3, rather than those that hold an extraction permit for more than 25 000 m^3 but which exclusively pay tax above 25 000 m^3, cannot be accepted, because recital 18 clearly states that, according to Section 24b, everyone pays one third of the tax in Section 24 as a norm. Moreover, setting a ceiling at 25 000 m^3 constitutes a *lex specialis*, which de facto derogates from the principle of paying one third of the tax (inasmuch as the higher the volume of water permitted to be extracted, the lower the tax will be in relative terms). This derogation therefore directly gives rise to selectivity in the scheme, and it confers on enterprises with an extraction permit for more than 25 000 m^3 an advantage compared to enterprises with an extraction permit for a maximum

of 25 000 m^3 even if all the enterprises subject to Section 24b are in the same factual and legal situation, given that they all have permits to use a private water extraction system and are subject to the same tax before the ceiling is applied.

(78) Therefore, more careful consideration should be given to the Danish authorities' argument that the ceiling is justified by the tax scheme's inherent logic. Currently the relevant case-law is included in the Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, but at the time that the aid was granted, the relevant provisions were found in the Commission Notice on the application of the State aid rules to measures relating to direct business taxation (hereinafter referred to as the 'former Notice').

(79) According to point 23 of the former Notice, the differential nature of some measures does not necessarily mean that they must be considered to be State aid. This is explained in more detail in point 24, which states that the progressive nature of an income tax scale or profit tax scale is justified by the redistributive purpose of the tax. The Danish authorities state that establishing the ceiling at 25 000 m^3 follows this logic.

(80) The Commission does not agree with this view. Introducing a tax ceiling for the largest volumes certainly does not bring about a higher tax rate for those holding permits to extract the largest volumes of water. On the contrary, due to the ceiling they can pay an amount that is lower (even significantly lower) than what they would have paid without the ceiling. The redistributive purpose is more or less turned on its head, even if it is interpreted *mutatis mutandis*, because it is ultimately those holding extraction permits for more than 6 000 m^3 and less than 25 000 m^3 that pay the most proportionately. Therefore, in this case there is no progressive tax scale.

(81) Nor can the Commission accept the Danish authorities' reference to point 27 in the Notice on the application of the State aid rules to measures relating to direct business taxation (according to which specific provisions that do not contain discretionary elements may be justified by the nature and general scheme of the system where, for example, they take account of specific accounting requirements or of the importance of land in assets which are specific to certain sectors, and therefore they do not constitute State aid); for the same reason it cannot accept the reference to State aid case N 472/2002 (see the last paragraph of recital 34). Firstly, the absence of a discretionary element does not automatically mean that there is no selectivity. Furthermore, the Commission points out that the objective of the land tax ceiling, which case N 472/2002 concerned, was to limit the consequences of the general increase in land values in Denmark, which would affect the tax level for all economic operators in the agricultural sector, while in the present case only some of the economic operators in the agricultural sector (those that hold extraction permits for more than 25 000 m^3 of water) have benefited from the measure.

In the light of the above information, the Commission does not consider the conditions in points 24 and 27 of the former Notice to have been sufficiently met. Therefore the Commission concludes that the tax ceiling in Section 24b is not justified as a consequence of the system's nature or inherent logic, and that it is therefore selective.

Tax exemptions for permits for a maximum of 6 000 m^3

(82) As regards the full tax exemption for holders of an extraction permit for a maximum of 6 000 m^3 per year, the Danish authorities themselves acknowledge that the measure is selective in the sense that it confers an advantage on certain enterprises. The Danish authorities emphasise, however, the insignificant size of the amount that would have to be paid in the absence of this exemption (see recital 35) and therefore they justify the exemption on the grounds of the scheme's administrative management. The Commission notes that the unpaid amounts are very modest, and also acknowledges that collecting insignificant amounts, such as the amounts in this case, would have resulted in a significant administrative burden with disproportionately high costs (administrative measures would have to be taken in connection with approximately 75 000 permits in order to collect individual amounts of approximately EUR 40 per year (see recitals 19 and 35). The very objective of a tax scheme, however, is to give a State the opportunity to create revenue, and not to squander resources only to end up not collecting any or even registering a loss. At the same time, the absence of a reporting obligation for smaller permits would have made it necessary to carry out full administrative checks, which, again, would have resulted in significant costs. On that basis, the Commission can conclude that the full tax exemption on extraction permits for a maximum of 6 000 m^3 is justified by the Danish tax system's nature and inherent logic, and that it therefore does not entail selectivity nor does it constitute State aid under Article 107(1) TFEU.

State resources, imputability to the State and effect on trade and competition between Member States in the context of the tax ceiling set at 25 000 m^3

(83) The other characteristics of State aid referred to in the opening decision are still present in the context of the tax ceiling set at 25 000 m^3. The aid is funded with State resources, given that the State forgoes revenue by establishing a tax ceiling which favours certain undertakings (those with extraction permits for more than 25 000 m^3) and which can affect trade in consideration of their large number (see footnote 20) and distort competition (see footnote 21), in particular because beneficiaries were able to use the unpaid amounts for other purposes related to their economic activity.

(84) These observations, and in particular the case-law listed in footnote 21, therefore undermine the substance of the Danish authorities' comments (see recital 39).

(85) Finally, the Commission cannot agree with the Danish authorities' argument that enterprises in the other Member States are not subject to the same taxes as

Danish enterprises and that it is therefore difficult to determine how the latter could have gained a competitive advantage (see recital 48). According to the case-law of the Court of Justice, 'it should be observed that, in the application of Article 92(1)[(26)], the point of departure must necessarily be the competitive position existing within the common market[(27)] before the adoption of the measure in issue'[(28)]. Therefore it is the situation as it was prior to the tax, and thus also before the ceiling was introduced, that needs to be considered. In that context it can be determined that the introduction as such of the tax and of the ceiling (which de facto corresponds to a reduction of the tax and did not exist before the tax was introduced) favoured certain beneficiaries which were exempted from paying an amount that they have instead been able to use to fund their activities in competition with other economic operators on the market. According to established case-law, the Treaty contains detailed rules for removing distortions that typically result from discrepancies among the Member States' tax systems. Changing a specific cost factor within an economic sector in a Member State risks upsetting the balance (in this case in particular, by favouring certain undertakings over others). The Court of Justice has stated that the fact that a Member State seeks to approximate, by unilateral measures, the conditions of competition in a particular sector of the economy to those prevailing in other Member States cannot deprive the measures in question of their character as aid.

(86) Given that it has been shown that the tax ceiling constitutes State aid, it needs to be examined whether that aid can be declared compatible with the internal market.

VII.2 **Internal market compatibility of the aid comprised by the tax ceiling set at 25 000 m^3**

(87) According to Article 107(2) and (3) TFEU, certain measures can be exceptionally considered to be compatible with the internal market.

(88) The only derogation that can be invoked in this case is Article 107(3)(c), which specifies that aid to facilitate the development of certain economic activities or of certain economic areas may be considered to be compatible, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

(89) In order to apply this derogation, the non-notified aid, which in this case concerns environmental aid in the agricultural sector, must be examined on the basis of the rules that applied at the time the aid was granted[(29)], in this case on the basis of the Community guidelines for State aid in the agriculture and forestry sector 2007 to 2013[(30)].

(90) According to point 62 of these guidelines, the Commission must examine aid measures that do not fall under the guidelines on the basis of the Community guidelines on State aid for environmental protection[(31)] (the Environmental Guidelines).

(91) Aid in the form of reductions of or exemptions from environmental tax, such as those under discussion in this case, are subject to the provisions of points 151, 154 and 155 to 159 of the Environmental Guidelines. Environmental taxes are defined in paragraph 70(14) of the 2008 Environmental Guidelines as 'a tax whose specific tax base has a clear negative effect on the environment or which seeks to tax certain activities, goods or services so that the environmental costs may be included in their price and/or so that producers and consumers are oriented towards activities which better respect the environment.' The tax in this case is in agreement with this definition, seeing that the consumption of water resources can harm the environment if that consumption is not correctly managed (which, incidentally, is the reason why the revenue from the tax is to be used to survey water resources). Furthermore, the tax ceiling is considered as resulting in a reduction of the amount that normally ought to have been paid.

(92) According to point 151 of the Environmental Guidelines, aid in the form of reductions of or exemptions from environmental taxes will be considered compatible with the internal market provided that the aid contributes at least indirectly to an improvement in the level of environmental protection and that it does not undermine the general objective pursued by the tax.

(93) The Commission can accept the Danish authorities' argument in recital 42 that the objective of the general tax scheme was to improve the level of environmental protection by taxing the largest consumers of drinking water more effectively, thereby giving them an incentive to reduce their consumption. However, it is still of the opinion that the ceiling laid down in Section 24b (which is the relevant section of the scheme, as it contains the aid element to be examined with regard to compatibility with the internal market) risked undermining the general objective of the tax (collecting sufficient revenue to fund surveys of the water resources — see recital 69), given that the tax burden is no longer imposed on the biggest consumers, but rather exempts those who hold the largest extraction permits from paying a significant part of the tax. However, given that the provisions of Section 24b constitute only one element of the tax mechanism and without the ceiling the amount collected would, according to the information provided by the Danish authorities (see the third paragraph of recital 34), have been twice as large as the amount that the tax in Section 24b was intended to generate to fund management planning, the Commission finds that even though the ceiling does contain an element of State aid as shown above, it does not undermine the general objective of the tax, and the provisions of point 151 of the Environmental Guidelines are therefore complied with.

(94) According to point 154, aid in the form of reductions of or exemptions from environmental taxes other than those referred to in Council Directive 2003/96/EC[32] is considered to be compatible with the internal market for a period of 10 years provided that the conditions set out in points 155 to 159 are fulfilled.

(95) As stated in the opening decision, the criterion of the 10-year period is not relevant in this case. The tax was introduced in 2009 and was intended to be collected until 2017, but it was repealed on 31 December 2011.

(96) According to point 155 of the Environmental Guidelines, when analysing tax schemes which include elements of State aid in the form of reductions of or exemptions from such tax, the Commission is to analyse in particular the necessity and proportionality of the aid and its effects at the level of the economic sectors concerned.

(97) Point 156 specifies that for this purpose the Commission is to rely on information provided by Member States. Information should include, on the one hand, the respective sector(s) or categories of beneficiaries covered by the exemptions or reductions and, on the other hand, the situation of the main beneficiaries in each sector concerned and how the taxation may contribute to environmental protection. The exempted sectors should be properly described and a list of the largest beneficiaries for each sector should be provided. For each sector, information should be provided as to the best performing techniques within the EEA regarding the reduction of the environmental harm targeted by the tax.

(98) The Commission notes that most of these provisions are not relevant with respect to the ceiling in this case. The Danish authorities have sent information about the enterprises benefiting from the ceiling on the permitted extraction volumes. It follows from this information that the average volume for which a permit was issued in the primary production sector was approximately 35 600 m^3 in 2009, 36 300 m^3 in 2010 and 39 000 m^3 in 2011. In the agricultural product processing sector the average volumes were approximately 262 000 m^3 in 2009, 250 000 m^3 in 2010 and 217 000 m^3 in 2011. The Danish authorities have also submitted a list of some of the processing enterprises with the largest extraction permits, but nevertheless it cannot automatically be stated that these enterprises can be presumed to have benefited the most from the ceiling, given that the ceiling does not concern the volume that is consumed but the volume that, purely theoretically, can be extracted, which means that an enterprise which has only consumed small volumes over the course of the year is in fact not likely to gain a large advantage from the ceiling if it is taxed on the volume it is permitted to extract. The examination of the best performing techniques within the EEA for reducing environmental harm is likewise irrelevant, because the EEA agreement does not apply to the agricultural sector. Also, this case is not about introducing technologies or reducing pollution, but rather involves surveys of water resources with an eye to better management and water extraction.

(99) The only criterion in point 156 that is relevant is the way in which the tax contributes to environmental protection.

(100) The Commission notes in that context that, generally speaking, the tax can contribute to environmental protection by contributing to funding surveys of water resources with an eye to managing them better.

(101) Moreover, aid in the form of reductions of or exemptions from environmental taxes must be necessary and proportional — see point 157 of the Environmental Guidelines

(102) Point 158 specifies that the Commission considers the aid to be necessary if the following cumulative conditions are met:

(a) the choice of beneficiaries must be based on objective and transparent criteria, and the aid must be granted in principle in the same way for all competitors in the same sector/relevant market if they are in a similar factual situation;

(b) the environmental tax without reduction must lead to a substantial increase in production costs for each sector or category of individual beneficiaries;

(c) the substantial increase in production costs cannot be passed on to customers without leading to important sales reductions. In this respect, Member States may provide estimations of, inter alia, the product price elasticity of the sector concerned in the relevant geographic market as well as estimates of lost sales and/or reduced profits for the companies in the sector/category concerned.

(103) Point 159 specifies that the Commission considers the aid to be proportional if one the following conditions is met:

(a) the scheme lays down criteria ensuring that each individual beneficiary pays a proportion of the national tax level which is broadly equivalent to the environmental performance of each individual beneficiary compared to the performance related to the best performing technique within the EEA. Under the aid scheme any undertaking reaching the best performing technique can benefit, at most, from a reduction corresponding to the increase in production costs from the tax, using the best performing technique, and which cannot be passed on to customers. Any undertaking having a worse environmental performance is to benefit from a lower reduction, proportionate to its environmental performance;

(b) aid beneficiaries pay at least 20 % of the national tax, unless a lower rate can be justified in view of a limited distortion of competition;

(c) the reductions or exemptions are conditional on the conclusion of agreements between the Member State and the recipient undertakings or associations of undertakings whereby the undertakings or associations of undertakings commit themselves to achieve environmental protection objectives which have the same effect as if point (a) or (b) or the Community minimum tax level were applied. Such agreements or commitments may relate, among other

things, to a reduction in energy consumption, a reduction in emissions or any other environmental measure and must satisfy the following conditions:

(i) the substance of the agreements must be negotiated by each Member State and must specify in particular the targets and fix a time schedule for reaching the targets;

(ii) Member States must ensure independent and timely monitoring of the commitments concluded in these agreements;

(iii) these agreements must be revised periodically in the light of technological and other developments and stipulate effective penalty arrangements applicable if the commitments are not met.

(104) As regards point 158(a) of the Environmental Guidelines, in answer to the Danish authorities' question of why it is relevant to look at enterprises in other Member States which do not have the same advantage as the Danish enterprises that pay a lower tax or are exempted from it, the Commission points out that establishing a ceiling on a tax on an agricultural production factor (water) allows the beneficiaries to avoid paying an amount that they can then use for producing products which are also produced in other Member States, which can result in distortion of competition. This saving allows them to reduce production costs, which ultimately can affect the substantial trade in agricultural products in the EU and globally. The decision in Case C 30/2009, which the Danish authorities refer to (see recital 44), follows the same logic, as can be seen from paragraph 35, where it is stressed that the tax exemption for the product (cement) distorts or threatens to distort competition on the relevant markets where the product concerned competes with other products and can affect trade between Member States because cement is traded both within the EU and globally. These considerations, which concern identifying State aid rather than assessing its compatibility, still allow the Commission scope for establishing that the choice of beneficiaries is based on an objective and transparent criterion, specifically the possession of an extraction permit for more than 25 000 m^3 of water, given that it applies to all enterprises that hold such a permit and are therefore in a comparable factual situation.

(105) As regards point 158(b) of the Environmental Guidelines, the Commission can accept the Danish authorities' argument that the increase in production costs as a result of paying the full tax (approximately 4-4,7 % — see recital 45) in the primary sector can be considered substantial in light of what has been defined in a previous case as a substantial increase. However, this does not apply to the ceiling of 25 000 m^3, given that the Danish authorities themselves admit that the production costs would only have increased by 1,25-2,20 % without the ceiling, which is much less than what was considered substantial in case N 327/08, to which reference is made. The argument that the condition of a substantial increase in production costs must be seen in relation to the condition of a reduction in sales, because this increase is passed on to

consumers, cannot be accepted. Point 158 of the Environmental Guidelines clearly states that all conditions (the choice of beneficiaries on the basis of objective and transparent criteria, a substantial increase in production costs without the tax, and sales reductions because the increase is passed on to customers) must be met, and the fact that the increase cannot be passed on to consumers (see Denmark's argument in recitals 45 and 102) does not in any way help determine whether an increase in production costs can be seen as substantial.

(106) As regards point 158(c) of the Environmental Guidelines, the Commission notes that the Danish authorities have not submitted the information the Guidelines refers to. However, this information could have made it possible, much more so than the Danish authorities' arguments, to determine whether passing the production costs on to consumers would in actual fact have resulted in a sales reduction, even if the increase is not substantial (see above). The argument that farmers would have been forced to extract less water if they had had to pay the full tax (see recital 46) cannot be accepted, because the tax is calculated on the basis of theoretical consumption (the volume in the permit) and not on the basis of the holding's actual consumption. The Danish authorities themselves point out that the holdings do not set the prices, and it is therefore not a valid argument to claim that because the primary producers do not have the option of passing on the increases in production costs, the condition has been met that a substantial increase in production costs cannot be passed on to consumers without resulting in a substantial sales reduction.

(107) It is therefore clear that as regards primary production, the Danish authorities cannot demonstrate that all the conditions in point 158 of the Environmental Guidelines have been met, which is a condition for considering the aid as necessary. As regards the agricultural product processing sector, the Commission has already stated that reducing the tax by two thirds does not constitute State aid, but has yet to establish whether the tax ceiling meets the relevant conditions in the Environmental Guidelines. Here it must be stressed that recitals 90-100 equally apply to enterprises that process agricultural products. Furthermore, the Danish authorities themselves acknowledge that it is not possible to document that the condition of necessity under point 158 has been met in each individual case (see recital 50), and that their figures (on the grant equivalent of the aid) do not change this conclusion as the figures do not help determine whether the environmental tax without the reduction (i.e. without the ceiling) would lead to a substantial increase in production costs in the agricultural product processing sector.

(108) As regards point 159(a) of the Environmental Guidelines, the Commission finds that the condition of comparing the best performing technique within the EEA is not relevant in this case., given that it was already stated in recital 98 that the EEA agreement does not apply to the agricultural sector, and this case is not about introducing technologies or reducing pollution, but rather

involves surveys of water resources with an eye to better management and water extraction.

(109) With regard to point 159(b), the Commission notes that the Danish authorities themselves acknowledge that some enterprises may have paid less than 20 % of the tax. The Danish authorities' argument that the Commission ought to take the average into account is unacceptable. From the wording of point 159(b) it is clear that the sole exception to the condition that at least 20 % of the tax must be paid is if the aid causes only limited distortion of competition, and applying an average is in no way sufficient to demonstrate that this is the case.

(110) Finally, as regards point 159(c), the Danish authorities have not provided any information documenting that agreements regarding environmental protection objectives have been concluded.

(111) In light of the considerations in recitals 89 to 109, the Commission cannot conclude that all relevant conditions in the Environmental Guidelines have been met, and the doubts it expressed in the opening decision have therefore not been dispelled.

(112) With regard to the Danish authorities' reference to the Temporary Crisis Framework, the Commission found it necessary, in the original version that applied from 17 December 2008, to temporarily authorise limited aid falling under Article 87(1) (because it exceeded the *de minimis* ceiling) and to declare it compatible with the internal market under Article 107(3)(c) TFEU, provided that all the following conditions were met:

(a) the aid does not exceed a cash grant of EUR 500 000 per undertaking; all figures used must be gross, that is, before any deduction of tax or other charge; where aid is awarded in a form other than a grant, the aid's grant equivalent is the basis for the aid amount;

(b) the aid is granted in the form of a scheme;

(c) the aid is granted to firms which were not in difficulty on 1 July 2008 (whereby 'firm in difficulty' for large companies is a firm as defined in point 2.1 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty[33], and for SMEs it is a firm as defined in Article 1(7) of Commission Regulation (EC) No 800/2008[34]; it may be granted to firms that were not in difficulty at that date but entered in difficulty thereafter as a result of the global financial and economic crisis;

(d) the aid scheme does not apply to firms active in the fisheries sector;

(e) the aid is not export aid or aid favouring domestic over imported products;

(f) the aid is granted no later than 31 December 2010;

(g) prior to granting the aid, the Member State obtains a declaration from the undertaking concerned, in written or electronic form, about any other *de*

minimis aid and aid pursuant to this measure received during the current fiscal year and checks that the aid will not raise the total amount of aid received by the undertaking during the period from 1 January 2008 to 31 December 2010, to a level above the ceiling of EUR 500 000;

(h) the aid scheme does not apply to undertakings active in the primary production of agricultural products as defined in Article 2(2) of Commission Regulation (EC) No 1857/2006[35]; it may apply to undertakings active in the processing and marketing of agricultural products as defined in Article 2(3) and (4) of that Regulation unless the amount of the aid is fixed on the basis of the price or quantity of such products purchased from primary producers or put on the market by the undertakings concerned, or the aid is conditional on being partly or entirely passed on to primary producers.

(113) A further condition was attached to these conditions, stating that the temporary aid measures could not be cumulated with *de minimis* aid granted for the same eligible costs. If an enterprise had already received *de minimis* aid prior to the entry into force of the Temporary Crisis Framework, the total of the aid under the Framework and the *de minimis* aid could not exceed EUR 500 000 in the period from 1 January 2008 to 31 December 2010.

(114) On 28 October 2009 the Temporary Crisis Framework was expanded to include primary agricultural production[36]. Before the aid was granted, the Member State was to obtain a declaration from the undertaking concerned, in written or electronic form, about any other *de minimis* aid and aid pursuant to the relevant measure received during the current fiscal year and check that the aid would not raise the total amount of aid the undertaking received during the period from 1 January 2008 to 31 December 2010 to a level above the ceiling of EUR 15 000. Aid to enterprises active in the primary production of agricultural products could not be set on the basis of the price or volume of products put on the market. The temporary aid measures could not be cumulated with the *de minimis* aid granted for the same eligible costs. If an enterprise had already received *de minimis* aid for primary production prior to the entry into force of the Temporary Crisis Framework, the combined amount of the aid under the Framework for primary production and the *de minimis* aid could not exceed EUR 15 000 in the period from 1 January 2008 to 31 December 2010.

(115) The Temporary Crisis Framework, which also covers primary production, was extended until 31 December 2011. In order to be eligible for aid, beneficiaries had to not only meet the conditions in recitals 112 (with the exception of the condition in (h)), 113 and 114, but also have submitted a complete application no later than 31 December 2010 under a national aid scheme approved by the Commission under the Temporary Crisis Framework (no later than 31 March 2011 as regards enterprises active in primary agricultural production). Any national aid scheme under which aid was granted after 31 December 2010 had

to be notified by the Member State and approved by the Commission under Article 108(3) TFEU.

(116) Based on the information which the Danish authorities have submitted in the context of the examination procedure, the Commission cannot conclude that all the conditions in the Temporary Crisis Framework have been met, for the following reasons:

(a) the Temporary Crisis Framework did not apply to primary agricultural production between 17 December 2008 and 28 October 2009. Therefore it cannot form the basis for the compatibility of the tax exemption for the sector;

(b) the information from the Danish authorities still does not make it possible to determine whether the criterion for firms in difficulty has been met;

(c) nothing in this information suggests that the criterion in Article 107 has been met, which requires statements to have been collected on *de minimis* aid already received or aid received under the Temporary Crisis Framework;

(d) as there are no statements, it is impossible to check whether the ceiling laid down in the Temporary Crisis Framework has been complied with in cases where *de minimis* aid has also been granted, regardless of the grant equivalent of the exemption, not least because the check on compliance with the *de minimis* ceiling also needs to be viewed with caution (see recital 63);

(e) in order to receive aid within the context of the Temporary Crisis Framework in 2011, beneficiaries had to have submitted, no later than 31 December 2010 (or 31 March 2011 for the primary agricultural production sector), a complete application under a national aid scheme notified to and approved by the Commission. The Danish authorities themselves acknowledge that at that time they had not made use of the options available under the Temporary Crisis Framework.

(117) The non-notified aid pointed out by the Danish authorities (see recital 53) is therefore not the only condition in the Temporary Crisis Framework which has not been met.

(118) In light of the above, a tax ceiling set at a volume of 25 000 m^3 cannot be considered as eligible for a derogation from the Treaty's provisions (which in any case should have been a derogation under Article 107(3)(b) and not under Article 107(3)(c), on the basis of the Temporary Crisis Framework).

The Danish authorities' other arguments

(119) The question of the beneficiaries' legitimate expectations (see recital 58) does not affect the assessment of the ceiling's compatibility with the internal market. The Danish authorities must obtain the Commission's approval before they introduce an aid scheme. The fact that there is no corresponding tax in the other Member States (see recital 58) does not mean that those affected by the ceiling did not receive an advantage. This ceiling meant that, in absolute

terms, they had at their disposal extra resources to carry out their business on a competitive market. The fact that no complaints about the scheme have been submitted does not in any way mean that the ceiling does not constitute State aid that is incompatible with the internal market.

VIII. CONCLUSION

(120) The Commission finds that reducing the tax by two thirds (see Section 24b) does not constitute State aid under Article 107(1) TFEU, given that the beneficiaries do not receive an advantage in relation to those paying the full tax under the provisions of Section 24a, and that the full exemption under Section 24c does not constitute State aid under Article 107(1) TFEU on grounds relating to the need for good administrative management of the scheme (the amounts are too insignificant to be recovered).

(121) The Commission finds, however, that the tax ceiling set at a volume of 25 000 m^3 (see Section 24b) constitutes State aid under Article 107(1) TFEU and that Denmark has illegally applied this ceiling in contravention of Article 108(3) TFEU. The analysis shows that the aid resulting from the ceiling cannot be declared compatible with the internal market, because the Danish authorities have been unable to demonstrate either the necessity and proportionality of a tax ceiling set at 25 000 m^3 or the fulfilment of all conditions in the Temporary Crisis Framework. As the doubts expressed in the opening decision have not been dispelled, the Commission finds the aid is incompatible with the internal market.

IX. RECOVERY

(122) The contested measure has been implemented without having been notified in advance to the Commission in accordance with Article 108(3) TFEU. It therefore constitutes unlawful aid.

(123) Under Article 16(1) of Regulation (EU) 2015/1589, where negative decisions are taken in cases of unlawful aid, the Commission is to decide that the Member State concerned must take all necessary measures to recover the aid from the beneficiaries (in this case, all beneficiaries of the tax ceiling set at 25 000 m^3).

(124) The Danish authorities have presented a series of arguments against carrying out a recovery (see recitals 55 to 59). The Commission cannot accept these arguments.

(125) The question is not whether the distortion of competition is minimal (see recital 55) but whether it exists. Once this has been established, the distortion must be eliminated in such a way that the competitive situation will be restored to how it was before the aid was granted. The Court of Justice has upheld the principle that the objective of the recovery is specifically to restore the situation that existed on the market before the aid was granted. It has also declared that recovery is the logical consequence of aid having been found to

be unlawful[37], and that recovering the aid is therefore not disproportionate in relation to the Treaty's provisions concerning State aid[38], contrary to the Danish authorities' claim. The argument that no advantage was gained in relation to competitors (see recital 57) is without substance in light of the conclusion concerning the existence of an advantage (recital 64) and the fact that beneficiaries were able to use the unpaid amounts for other purposes (recitals 85 and 119). Finally, the Danish authorities wrongly claim that recovery will create a distortion of competition in relation to enterprises that extract surface water. The tax only applies to the extraction of groundwater, and therefore it does not concern the extraction of surface water.

(126) As regards the question of the beneficiaries' legitimate expectations in recital 58, the Commission has already rejected the Danish authorities' argument that the vast majority of the potential beneficiaries could not possibly have anticipated that the scheme could give them an advantage according to State aid rules because there are no comparable taxes in other Member States (see recital 119). Regarding the principle of legitimate expectations referred to by the Danish authorities, which is closely linked to the aid's lawfulness, the Commission points out that according to established case-law, in principle beneficiaries may only entertain a legitimate expectation that the aid is lawful if it has been granted under the procedure laid down in Article 88 TEU (currently Article 108 TFEU), and a diligent economic operator should normally be able to determine whether that procedure has been followed. If aid is granted without prior notification to the Commission, '... so that it is unlawful under Article 88(3) TEC, the recipient of the aid cannot have at that time a legitimate expectation that its grant is lawful'[39].

(127) Denmark must therefore take all necessary measures to recover the incompatible aid from the beneficiaries, regardless of its comments. This case concerns the difference between the amount that ought to have been paid in tax on the basis of the volume for which a permit was granted and the amount that was paid on a volume of 25 000 m^3.

(128) In accordance with paragraph 42 of the Notice from the Commission titled 'Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid'[40], Denmark has four months from the decision's entry into force to implement it. Interest is to be paid on the amounts to be recovered (see Commission Regulation (EC) No 794/2004[41].

(129) This Decision is to be implemented immediately, except for aid that, at the time it was granted, met all the conditions in the applicable *de minimis* regulation (see Article 2 of Council Regulation (EC) No 994/98[42]),

HAS ADOPTED THIS DECISION:

Article 1

The reduction by two thirds of the tax that was introduced by Section 24 of Consolidating Act No 935 of 24 September 2009 (see Section 24b) does not constitute State aid under Article 107(1) of the Treaty on the Functioning of the European Union.

Article 2

The ceiling on the calculation base for the tax, set at 25 000 m^3 of water (see Section 24b of Consolidating Act No 935 of 24 September 2009), constitutes State aid under Article 107(1) of the Treaty on the Functioning of the European Union.

Article 3

The aid that follows from the tax exemption under Section 24c of Consolidating Act No 935 of 24 September 2009 for extraction permits for a maximum volume of 6 000 m^3 does not constitute State aid under Article 107(1) of the Treaty on the Functioning of the European Union.

Article 4

The aid that follows from the ceiling on the calculation base for the tax, set at 25 000 m^3 of water (see Section 24b of Consolidating Act No 935 of 24 September 2009), was introduced illegally by Denmark in contravention of Article 108(3) of the Treaty on the Functioning of the European Union and constitutes aid that is incompatible with the internal market.

Article 5

The aid that follows from the ceiling on the calculation base for the tax, set at 25 000 m^3 of water (see Section 24b of Consolidating Act No 935 of 24 September 2009) does not constitute State aid if, at the time it was granted, it met the conditions of an ordinance adopted under Article 2 of Regulation (EC) No 994/98 which applied at the time the aid was granted.

Article 6

1 Denmark shall recover the aid referred to in Article 4 from the beneficiaries.

2 The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.

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

Article 7

Recovery of the aid referred to in Article 4 shall be immediate and effective.

Denmark shall ensure that this Decision is implemented within four months following the date of its notification.

Article 8

1 Within two months following notification of this Decision, Denmark shall submit the following information:

a the list of beneficiaries that have received the aid referred to in Article 4 and the total amount of aid received by each of them;

b the total amount (capital and interest) to be recovered from each beneficiary that received aid which cannot be covered by the *de minimis* rule;

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

d documents demonstrating that the beneficiary has been ordered to repay the aid.

2 Denmark shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 4 has been completed. At the Commission's request, it shall immediately submit information on the measures already adopted and planned for the purpose of complying with this Decision. It shall also provide detailed information concerning the amounts of aid and interest already recovered from the beneficiaries.

Article 9

This Decision is addressed to the Kingdom of Denmark.

Done at Brussels, 16 October 2017.

For the Commission

Phil HOGAN

Member of the Commission

(**1**) With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the Treaty on the Functioning of the European Union ('TFEU'). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union', 'common market' by 'internal market' and 'Court of First Instance' by 'General Court'. The terminology of the TFEU will be used throughout this Decision.

(**2**) The Commission's conclusion in this case was that the tax scheme did not constitute State aid.

(**3**) Letter SG-Greffe (2012) D/5011.

(**4**) OJ C 114, 19.4.2012, p. 4.

(**5**) 'Public water utilities' refers to public or private systems that supply drinking water to at least ten properties.

(**6**) Commission Regulation (EC) No 1535/2007 of 20 December 2007 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid in the sector of agricultural production (OJ L 337, 21.12.2007, p. 35).

(**7**) Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ L 379, 28.12.2006, p. 5).

(**8**) OJ C 82, 1.4.2008, p. 1.

(**9**) OJ C 319, 27.12.2006, p. 1.

(**10**) OJ C 16, 22.1.2009, p. 1. In 2009 this framework was extended to apply to primary agricultural production as well (OJ C 261, 31.10.2009, p. 2) and then extended until the end of 2011 for all the sectors where it is applicable (OJ C 6, 11.1.2011, p. 5).

(**11**) Judgment of the Court (Third Chamber) of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, ECLI:EU:C:2008:757, paragraph 82.

(**12**) Judgment of the Court (Fifth Chamber) of 8 November 2001, *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH* v *Finanzlandesdirektion für Kärnten*, C-143/99, ECLI:EU:C:2001:598, paragraph 42; and Judgment of the Court (Third Chamber) of 8 September 2011, *European Commission* v *Kingdom of the Netherlands*, C-279/08, paragraph 62, ECLI:EU:C:2011:551.

(**13**) The maximum volume of surface water that can be extracted annually is approximately 188 million m^3, of which 13 million m^3 can be used for primary production (approximately 500 holdings), which is predominantly used for irrigation. The largest permit in terms of irrigation was for 270 000 m^3 per year in the period 2009-2011 and the largest in terms of livestock farming was for 511 000 m^2 per year.

(**14**) Decision C(2003) 777 final COM amended (see Decision C(2003) 1224 final).

(**15**) OJ C 384, 10.12.1998, p. 3.

(**16**) Judgment of the Court (Sixth Chamber) of 24 October 1996, *Federal Republic of Germany, Hanseatische Industrie-Beteiligungen GmbH and Bremer Vulkan Verbund AG* v *Commission of the European Communities*, joined cases C-329/93, C-62/95 and C-63/95, ECLI:EU:C:1996:394.

(**17**) OJ C 105, 24.4.2010, p. 3.

(**18**) C(2009) 8093 final.

(**19**) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the treaty on the functioning of the European Union (OJ L 83, 27.3.1999, p. 1). This Regulation was repealed by Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

(**20**) The statistics on trade in the EU show that Danish imports of agricultural products in 2011 accounted for EUR 6,886 billion, while exports accounted for EUR 9,223 billion. In 2013 the figures were EUR 7,811 billion and EUR 9,408 billion, respectively. For beverages the figures were EUR 271,9 million and EUR 547,3 million, respectively.

(**21**) According to the case-law of the Court of Justice, the mere fact that an enterprise's competitive position is improved by gaining an advantage which it could not have gained under normal market conditions and which other competing enterprises do not have is sufficient to bring about a distortion of competition (Case 730/79, *Philip Morris Holland BV* v *Commission of the European Communities*, ECLI:EU:C:1980:209).

(**22**) OJ C 262, 19.7.2016, p. 1.

(**23**) See Judgment of the Court (Fifth Chamber) of 8 November 2001, *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH* v *Finanzlandesdirektion für Kärnten*, C-143/99, ECLI:EU:C:2001:598 (footnote 13), paragraph 41; Judgment of the Court (Fifth Chamber) of 29 April 2004, *GIL Insurance Ltd and Others* v *Commissioners of Customs and Excise*, C-308/01, ECLI:EU:C:2004:252, paragraph 68; Judgment of the Court (Second Chamber) of 3 March 2005, *Wolfgang Heiser* v *Finanzamt Innsbruck*, C-172/03, ECLI:EU:C:2005:130, paragraph 40; and Judgment of the Court (Grand Chamber) of 6 September 2006, *Portuguese Republic* v *Commission*, C-88/03, ECLI:EU:C:2006:511, paragraph 54.

(**24**) See in this context the Judgment of the Court (Grand Chamber) of 6 September 2006, *Portuguese Republic* v *Commission*, C-88/03, ECLI:EU:C:2006:511 (footnote 26).

(**25**) See footnote 23.

(**26**) Currently Article 107(1) TFEU.

(**27**) Currently the internal market.

(**28**) Judgement of the Court of Justice of 2 July 1974, *Italy* v *Commission*, C-173/73, ECLI:EU:C:1974:71, paragraph 17.

(**29**) See point 733 of the Guidelines for State aid in the agricultural and forestry sectors and in rural areas 2014 to 2020 (OJ C 204, 1.7.2014, p. 1).

(**30**) OJ C 319, 27.12.2006, p. 1. The guidelines have since been extended until 30 June 2014 by the Commission communication of 20 November 2013 (OJ C 339, 20.11.2013, p. 1).

(**31**) OJ C 82, 1.4.2008, p. 1.

(**32**) Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ L 283, 31.10.2003, p. 51).

(**33**) OJ C 244, 1.10.2004, p. 2.

(**34**) Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation) (OJ L 214, 9.8.2008, p. 3).

(**35**) Commission Regulation (EC) No 1857/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) No 70/2001 (OJ L 358, 16.12.2006, p. 3).

(**36**) The maximum aid amount was set at EUR 15 000 per enterprise.

(**37**) Judgment of the Court of 10 June 1993, *Commission* v *Hellenic Republic*, C-183/91, ECLI:EU:C:1993:233, paragraph 16.

(**38**) Judgment of the Court of 4 April 1995, *Commission* v *Italian Republic*, C-348/93, ECLI:EU:C:1995:95, paragraph 27.

(**39**) Judgment of the General Court (First Chamber, Extended Composition) of 22 April 2016, *Ireland and Aughinish Alumina Ltd* v *Commission*, Joined Cases T-50/06 RENV II and T-69/06 RENV II, ECLI:EU:T:2016:227, paragraph 230 [*sic*].

(**40**) OJ C 272, 15.11.2007, p. 4.

(**41**) Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 140, 30.4.2004, p. 1).

(**42**) Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid (OJ L 142, 14.5.1998, p. 1).

Status:
Point in time view as at 31/01/2020.

Changes to legislation:
There are currently no known outstanding effects for the Commission Decision (EU) 2018/884.