COMMISSION DECISION

of 4 October 2000

on the aid scheme implemented by Portugal in favour of the pigfarming sector

(notified under document number C(2000) 2755)

(Only the Portuguese text is authentic)

(2001/86/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to Council Regulation (EEC) No 2759/75 of 29 October 1975 on the common organisation of the market in pigmeat [1], as last amended by Regulation (EC) No 1365/2000 [2], and in particular Article 21 thereof,

Having called on interested parties to submit their comments pursuant to the provision cited above [3] and having regard to their comments,

Whereas:

I

PROCEDURE

(1) Following articles in the press, on 8 December 1998 the Commission sent the Portuguese authorities a letter requesting information about a possible aid package in favour of the pigfarming sector.

(2) By letter of 16 December 1998, recorded as received on 21 December 1998, the Portuguese Permanent Representation to the European Union notified the Commission of the abovementioned aid measures pursuant to Article 88(3) of the Treaty.

(3) The aid measures notified were adopted by Decree-Law No 4/99 of 4 January 1999 and published in the *Diário da República* [4].

(4) By letter of 17 March 1999, recorded as received on 18 March 1999, the Portuguese Permanent Representation to the European Union sent the Commission the additional information it had requested by letter of 5 February 1999.

(5) By letter SG(99)D/4066 of 4 June 1999, the Commission informed Portugal of its decision to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid measures. The procedure was recorded under Aid No C 31/99.

(6) The Commission's decision to initiate the procedure was published in the *Official Journal of the European Communities* [5]. The Commission called on other interested parties to submit their comments on the measures.

(7) By letters of 4 August 1999, recorded as received on 5 August 1999, 23 September 1999, recorded as received on 28 September 1999, and 22 June 2000, recorded as received on 26 June 2000, the Portuguese authorities submitted their observations to the Commission on the procedure in question.

(8) The Commission has received no comments from other interested parties.

II

DESCRIPTION

(9) Portuguese Decree-Law No 4/99 is applicable to undertakings engaged in the closed-cycle production, fattening and finishing of piglets.

(10) Article 2 of the abovementioned Decree-Law grants a moratorium on short-term loans taken out by the above undertakings under Decree-Laws No 145/94 of 24 May 1994 and No 298/98 of 28 October 1998 and reduces the interest rates applicable. The moratorium provides for a one-year extension of reimbursement plans for the loans taken out and will cover both capital and interest due.

(11) Article 3 of the Decree-Law No 4/99 makes additional short-term credit lines available to the abovementioned undertakings at a subsidised rate of interest. The loans cannot exceed one year in duration.

(12) For both measures, the interest-rate subsidy is to amount to 70 % in general and 100 % for those undertakings with up to 20 breeding sows. The interest will be calculated on the basis of the rational reference rate laid down in Decree-Law No 359/89 of 18 October 1989 [6], except where that rate is higher than the actual rate applied by the banks. In the latter case, the interest rate will be reduced to that actually applied.

(13) When initiating the Article 88(2) procedure, the Commission was of the opinion that the measures fell within the scope of Article 87(1) of the Treaty.

[1] OJ L 282, 1.11.1975, p. 1.
[2] OJ L 156, 29.6.2000, p. 5.
[3] OJ C 220, 31.7.1999, p. 19.
[4] Diário da República No 2 (I Series-A), 4.1.1999.
[5] See footnote 3.
[6] Currently 8 %.

(14) Portugal has traditionally used subsidised short-term loans to offset the handicaps facing the farming sector. Decree-Law No 145/94 of 24 May 1994 refers to the national aid scheme that was in force until 30 June 1998. That scheme was replaced by the scheme that is currently in force, approved by Decree-Law No 298/98 of 28 September 1998, in order to adapt the measures to the new Community guidelines set out in the Commission Communication on State aids: subsidised short-term loans in agriculture (crédits de gestion) [7].

(15) Both those Decree-Laws were notified to the Commission pursuant to Article 88(3) of the Treaty and were approved under the rules on State aid (Aid measures N 382/94 and N 408/98). By letter No SG(99)D/419 of 21 January 1999, the Commission informed Portugal that it had decided to raise no objections to the aid scheme currently in force (Aid N 408/98).

(16) The Commission took the view that the schemes under consideration, which are supplementary to the aid schemes approved, did not comply with the conditions for authorising short-term loans in agriculture. First, the maximum duration of the loans exceeds one year. Secondly, both measures (moratorium and new credit line) are specific to pigfarmers and are not available to all operators in the agricultural sector. Thirdly, the maximum interest-rate reduction seems to exceed the difference between the interest rate paid by a typical agricultural operator and the rate applying in the rest of the economy of the Member State. Consequently, the Commission concluded that the Community guidelines on State aids in the form of short-term loans were not respected.

(17) Furthermore and following claims that the existing scheme for short-term loans (Aid N 408/98) would not be applicable to pigfarmers, the Commission called on Portugal to forward any legislation excluding the pigfarming sector from such support.

(18) The Commission also took the view that the measures referred to could not be considered investments as the rules on investments, currently set out in Council Regulation (EC) No 950/97 of 20 May 1997 on improving the efficiency of agricultural structures [8] in the case of primary production and the Guidelines for State aid in connection with investments in the processing and marketing of agricultural products [9], pertained solely to the acquisition of capital goods. Equally, the Commission considered that the aid measures notified could not be considered aid to companies in financial difficulties within the meaning of the Community Guidelines on State aid for rescuing and restructuring firms in difficulty [10].

(19) In the absence of any other legal basis suggested by the Portuguese authorities for the examination and possible approval of the aid measures, the Commission considered that the aid must be regarded as operating aid, i.e. aid intended to relieve pigfarmers of the expenses which they would normally have to bear themselves in the daily management of their activities, which is deemed incompatible in principle with the common market [11]. The Commission also took the view that the measures constituted an infringement of the relevant common market organisation.

III

COMMENTS FROM PORTUGAL

(20) The Portuguese authorities submitted their comments by letters of 4 August and 23 September 1999 and 22 June 2000.

(21) The Portuguese authorities confirm that there are no national legislative provisions governing the granting of short-term loans in agriculture other than Decree-Law No 298/98 of 28 September 1998 (Aid N 408/98). Consequently, the pigfarming sector is not specifically excluded from the general scheme for subsidised short-term loans.

(22) Portugal argues that the measures were taken in view of the small scale and the difficult financial situation of the Portuguese pigfarming sector, aggravated by the serious crisis affecting it. Portugal adds that pigfarmers are seen as high-risk clients, who can only secure loans at high interest rates. There was therefore a serious risk of a large number of bankruptcies in the sector.

(23) Portugal concludes that the measures should be seen as exceptional measures to ensure the survival of a whole production sector.

IV

ASSESSMENT

(24) In accordance with Article 87(1) of the Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market.

(7) OJ C 44, 16.2.1996, p. 2.
(8) OJ L 142, 2.6.1997, p. 1.
(9) OJ C 29, 2.2.1996, p. 4.
(10) OJ C 283, 19.9.1997, p. 2.
(11) Judgment of the Court of First Instance in Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675 and the case law cited therein.

(25) Under Article 21 of Regulation (EEC) No 2759/75, Articles 87, 88 and 89 of the Treaty apply to the production of, and trade in, the products listed in Article 1(1) of that Regulation.

(26) The Community produces 22,31 million tonnes of meat and other products derived from pigfarming and other intensive livestock production ([12]). Portugal's production is 0,54 million tonnes. There is appreciable trade in these products between Portugal and the rest of the Community: in 1997 Portugal's imports and exports of these products totalled 75 900 tonnes and 4 100 tonnes respectively. The exports were worth EUR 6,0 million and the imports EUR 160,5 million.

(27) The measures in question are therefore likely to affect trade in pigmeat products between Member States since the aid benefits operators in one Member State and not in the others. The measures have a direct and immediate effect on the production costs of pigfarms in Portugal. Consequently, they give these farms an economic advantage denied to farms in other Member States which do not have access to such aid. They accordingly distort, or threaten to distort, competition.

(28) In the light of the foregoing, the measures must be regarded as State aid within the meaning of Article 87(1) of the Treaty.

Possible derogations under Article 87 of the Treaty

(29) There is provision for derogations from the principle of incompatibility laid down in Article 87(1) of the Treaty.

(30) The exceptions to such incompatibility, which are set out in Article 87(2) of the Treaty, are manifestly not applicable in this case, however, and were not invoked by the Portuguese authorities.

(31) The derogations provided for in Article 87(3) of the Treaty must be interpreted strictly when regional or sectoral aid programmes or individual instances of the application of general aid schemes are examined. They can be granted only where the Commission can establish that the aid is necessary for the achievement of one of the objectives concerned. To allow aid not fulfilling that condition to benefit under such derogations would be to permit distortion of competition and of trade between Member States without any justification in terms of the Community interest and, by the same token, to grant undue advantages to operators in certain Member States.

(32) The Commission considers that the aid measures are not intended to promote the execution of an important project of common European interest, to remedy a serious disturbance of the economy of a Member State within the meaning of Article 87(3)(b) of the Treaty, or to promote cultural or heritage conservation within the meaning of Article 87(3)(d). Consideration must therefore be given to whether the application of the measures provided for may qualify for a derogation under Article 87(3)(a) or (c) of the Treaty.

Article 87(3)(c)

(33) In accordance with Article 87(3)(c), aid may be regarded as compatible with the common market if it is intended to facilitate the development of certain economic activities or of certain economic areas and does not adversely affect trading conditions to an extent contrary to the common interest.

(34) Both measures (moratorium and new credit line) can be considered short-term loans in agriculture, to which the relevant Community Guidelines must be applied ([13]). Those Guidelines state that:

— subsidised loans must have a maximum duration of one year,

— subsidised loans should not be used to aid specific sectors or operators in agriculture selectively on grounds not solely related to difficulties in access to such loans,

— the maximum aid element involved in the loans may not exceed the difference between the interest rate paid by a typical agricultural operator and the interest rate paid in the rest of the economy of the Member State concerned for short-term loans of a similar amount per operator, not linked with investments.

(35) When initiating the Article 88(2) procedure in respect of the aid measures, the Commission concluded that none of those conditions was fulfilled in the case in point. The Commission notes that Portugal did not contest the Commission's assessment at the time the Article 88(2) procedure was initiated.

(36) First, the maximum duration of the loans exceeds one year. Decree-Laws No 145/94 and No 298/98 both lay down one year for the maximum duration of the short-term loans. The one-year moratorium granted to pigfarmers under the draft Decree-Law under examination has the practical effect of extending by one year the maximum duration of loans taken out under the previous legislative provisions. The maximum duration of short-term loans would accordingly be two years for pigfarmers.

([12]) Source: Eurostat 1997.

([13]) See footnote 7.

(37) Secondly, both measures (moratorium and new credit line) are specifically for pigfarmers and are not available to all operators in the agricultural sector. Portugal argues, in very general terms, that owing to the pig market crisis, pigfarmers are seen as high-risk clients by the banks and pay higher rates of interest on loans. The Commission accepts that the market crisis in the pigfarming sector in late 1998 may have put Portuguese pigfarmers in a difficult financial situation that may have had an impact on their borrowing capacity. However, subsidised short-term loans are aimed at bridging existing structural shortcomings in access to credit and not at coping with a one-off market crisis. Portugal has failed to demonstrate that the pigfarming sector suffers from an inherent permanent handicap in access to credit as compared with other agricultural sectors such as to justify higher support levels in short-term loans.

(38) Thirdly, the aid element involved in the reduced interest rates is not limited to the difference between the interest rate paid by a typical agricultural operator and that paid in the rest of the economy of the Member State concerned. Indeed, in the worst-case scenario the interest-rate subsidy may rise to 100 %.

(39) The Commission maintains that the measures under examination do not fall within the definition of investment support and that they only cover the acquisition, construction or reconstruction of immovable property or the acquisition of machinery.

(40) In their comments the Portuguese authorities argue that this was an emergency measure to tackle the pigfarmers' difficult financial situation and to forestall a large number of bankruptcies in the sector. Consequently, the Commission should assess to what extent the conditions of the Community Guidelines on State aid for rescuing and restructuring firms in difficulty [14] are fulfilled. According to point 101 of those Guidelines, the Commission is to examine the compatibility with the common market of any aid granted without its authorisation on the basis of the Guidelines in force at the time the aid is granted. At the time of adoption of Decree-Law No 4/99 of 4 January 1999, the guidelines in force were the 1997 Community Guidelines on State aid for rescuing and restructuring firms in difficulty [15]. Consequently, the Commission should assess the aid measures in the light of those Guidelines.

(41) With regard to the definition of companies ‘in difficulty’, the Commission accepts that Portuguese pigfarmers (like all other EC pigfarmers) were affected by a major market crisis in late 1998. However, all pigfarmers may, without exception, benefit under the measures notified and in order to qualify they need not be recognised first as being in a difficult situation on the basis of objective accounting and financial data.

(42) Pursuant to point 2.1 of the applicable Community guidelines, rescue aid enables firms facing a substantial deterioration in their financial position, reflected in an acute liquidity crisis or technical insolvency, to maintain their position temporarily while an analysis of the circumstances of the company's difficulties is performed and a suitable plan devised to remedy the situation. In other words, rescue aid provides a brief respite, generally for not more than six months, from a firm's financial problems, while a long-term solution is being worked out. Restructuring, on the other hand, should be based on a feasible, coherent and far-reaching plan to restore the firm's long-term viability.

(43) In order to be approved by the Commission, rescue aid must:

— consist of liquidity help in the form of loan guarantees or loans at normal commercial interest rates,

— be restricted to the amount needed to keep a firm in business (for example, covering wage and salary costs and routine supplies),

— be paid only for the time needed (generally not exceeding six months) to devise the necessary and feasible recovery plan,

— be warranted on the grounds of serious social difficulties and have no undue adverse effects on the industrial and agricultural sectors in other Member States,

— in principle involve a one-off operation.

(44) The Commission considers that the case under examination fails to meet at least the conditions set out in the first and third indents above. The moratorium and the new loans are granted at rates below the market rates and both the moratorium and the new short-term credit line, the term of which is one year, exceed the limit of six months laid down. Moreover, the aid is not granted subject to any time limit for assessing the prospects of the individual pigfarmers in terms of viability. Consequently, the measures cannot be considered rescue aid within the meaning of the relevant Community guidelines.

(45) Equally, the measures cannot be considered restructuring aid. Access to the scheme does not depend on the presentation and implementation of a feasible, coherent and far-reaching restructuring plan to restore the firm's long term viability. Consequently, there is no need to assess the specific conditions required to evaluate restructuring schemes.

(14) OJ C 288, 9.10.1999, p. 2.
(15) See footnote 10.

(46) Since no other legal basis has been put forward by the Portuguese authorities for the examination and possible approval of the aid measures, the aid must be considered operating aid, i.e. aid intended to relieve pigfarmers of the expenses which they would normally have to bear themselves in the daily management of their activities. In principle, operating aid is deemed incompatible with the common market because it does not contribute to the development of economic activities in accordance with Article 87(3)(c) of the Treaty. Having regard to the principles laid down in the case law referred to in point 19, the Commission is therefore bound to conclude that the measures under consideration cannot qualify under the derogation provided for in Article 87(3)(c) of the Treaty.

Article 87(3)(a)

(47) The applicability of Article 87(3)(a) has not been invoked explicitly by the Portuguese authorities. Indeed, Portugal introduced these schemes as sectoral aid. Moreover, in the agriculture sector, which covers the production, processing and marketing of Annex I products, it has been constant Commission policy for many years to prohibit the payment of operating aid in all regions, including those which fall within the scope of Article 87(3)(a) of the Treaty. By its very nature, such aid is likely to interfere with the mechanisms of the common organisation of the markets, which take precedence over the competition rules laid down in the Treaty in accordance with Community case law, and in particular the judgment of the Court of Justice in Case 177/78 *Pigs and Bacon Commission* v *McCarren* ([16]). The Court of Justice has consistently held, in particular in its judgment in Case 35/88 KYDEP ([17]) that Member States are barred from adopting national measures which are liable to undermine the machinery of price formation established by a common market organisation. Given the precedence of the common agricultural policy over the rules on competition laid down in the Treaty (Article 36 of the Treaty), national measures hampering the common organisation of an agricultural market may in no case be approved under a State aid scheme on the grounds that a derogation applies. This policy has been confirmed many times ([18]), and was recently incorporated in the Community Guidelines for State aid in the agriculture sector ([19]).

(48) In view of the above, it must be concluded that the provisions notified constitute State aid within the meaning of Article 87(1), which cannot qualify for any of the exceptions provided for in Article 87(2) or (3).

([16]) [1979] ECR 2161.
([17]) [1990] ECR I-3125.
([18]) 20th Report on Competition Policy, 1990, points 337 and 347; 21st Report on Competition Policy, 1991, points 316 and 317; 22nd Report on Competition Policy, 1992, points 503 and 504; 23rd Report on Competition Policy, 1993, points 547 and 548; 25th Report on Competition Policy, 1995, pp. 238 to 240; 26th Report on Competition Policy, 1996, pp. 251 to 255.
([19]) OJ C 28, 1.2.2000, p. 2.

V

CONCLUSIONS

(49) The Commission considers that the aid measures implemented by Portugal constitute State aid within the meaning of Article 87(1) of the Treaty. The Commission regrets that Portugal has infringed Article 88(3) of the Treaty by unlawfully implementing the abovementioned aid measures.

(50) For the reasons set out above, aid falling within the scope of Article 87(1) of the Treaty cannot qualify under any of the exemptions provided for in Article 87(2) or (3). The aid measures under consideration are therefore incompatible with the common market.

(51) Where non-notified aid is introduced without awaiting the Commission's final decision, as is the case of the measures under consideration, the binding nature of the procedural rules set out in Article 88(3) of the Treaty, the direct effect of which was recognised by the Court of Justice in its judgments in Case 77/72 *Carmine Capolongo* v *Azienda Agricola Maya* ([20]), Case 120/73 *Gebr. Lorenz GmbH* v *Federal Republic of Germany* ([21]) and Case 78/76 *Steinicke und Weinlig* v *Federal Republic of Germany* ([22]), prevents any retrospective legalisation of the aid (judgment in Case C-354/90 *Fédération nationale du commerce extérieur des produits alimentaires and others* v *France* ([23])).

(52) Article 14(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 88 of the EC Treaty ([24]) provides that when a negative decision is taken in a case of unlawful aid the Commission is to decide that the Member State concerned is to take all necessary action to recover the aid from the recipients. Reimbursement is necessary in order to restore the previous situation by removing all financial advantages unduly gained by the recipients since the date of granting of the aid.

(53) Article 14(2) of Regulation (EC) No 659/1999 states that the aid to be recovered is to include interest at an appropriate rate set by the Commission. Interest runs from the date on which the illegal aid was made available to the recipients until that of its recovery.

([20]) [1973] ECR 611.
([21]) [1973] ECR 1471.
([22]) [1977] ECR 595.
([23]) [1991] ECR I-5505.
([24]) OJ L 83, 27.3.1999, p. 1.

(54) The aid should be repaid in accordance with the procedures of Portuguese law. The aid is to bear interest from the date on which it was granted to the date on which it is actually recovered. It is to be calculated on the basis of the market rate, by reference to the rate used for calculating the grant-equivalent of regional aid ([25]).

(55) This Decision is without prejudice to any conclusions that the Commission may draw as regards the financing of the common agricultural policy by the European Agricultural Guidance and Guarantee Fund (EAGGF),

HAS ADOPTED THIS DECISION:

Article 1

The State aid that Portugal has granted in favour of the pigfarming sector under Decree-Law No 4/99 of 4 January 1999 in the form of a moratorium on short-term loan agreements and a new short-term credit line are incompatible with the common market.

Article 2

1. Within two months of notification of this Decision the Portuguese authorities shall take all measures necessary to recover from the beneficiaries the aid referred to in Article 1 and unlawfully made available to them.

2. The aid shall be recovered in accordance with the procedures of Portuguese law. The sums to be recovered shall include interest payable from the date on which they were made available to the beneficiaries until their actual recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant-equivalent of regional aid.

Article 3

Within two months of notification of this Decision Portugal shall inform the Commission of the measures it has taken to comply with it.

Article 4

This Decision is addressed to the Portuguese Republic.

Done at Brussels, 4 October 2000.

For the Commission

Franz FISCHLER

Member of the Commission

([25]) OJ C 74, 10.3.1998, p. 9.