

COMMISSION

COMMISSION DECISION

of 12 March 2002

on the State aid implemented by Spain for producers of cows' milk considered to be priority producers

(notified under document number C(2002) 905)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2002/411/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 (EC) No 1255/1999 of 17 May 1999 on the common organisation of the market in milk and milk products ⁽¹⁾ as last amended by Regulation (EC) No 1670/2000 ⁽²⁾, and in particular Article 37 thereof,

Having called on interested parties to submit their comments pursuant to the Article cited above ⁽³⁾,

Whereas:

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ⁽⁴⁾. The Commission invited interested parties to submit their comments on the aid.

(4) The Commission received no comments from interested parties.

(5) By letter dated 11 June 2001, Spain sent a series of comments.

II. DETAILED DESCRIPTION OF THE AID

(6) Title, scheme: aid for the purchase of milk quotas.

I. PROCEDURE

(1) By means of a complaint, the Commission was informed that Spain had implemented an aid for the purchase of reference quantities by producers of cows' milk. By letters dated 27 January 1999 and 23 May 2000, Spain provided the Commission with further information.

(2) By letter dated 2 February 2001, the Commission informed Spain that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid.

(7) Budget: the planned budget for 1998 was ESP 40 million (EUR 240 404,84).

(8) Duration: the aid scheme was to apply for the 1998/1999 milk year, although it was suspended on 31 December 1998 pending the Commission Decision on compatibility with the Treaty.

(9) Recipients: producers of cows' milk falling within the categories of livestock farmers considered to be priority producers for the purposes of allocating reference quantities from the national reserve in accordance with Royal Decree No 1888/1991 of 30 December 1991 establishing a plan for the reorganisation of the milk and milk products sector ⁽⁵⁾.

⁽¹⁾ OJ L 160, 26.6.1999, p. 48. This Regulation replaces Regulation (EEC) No 804/68, applicable at the time the aid was paid. Article 23 of Regulation (EEC) No 804/68 laid down that Articles 87 and 88 (former Articles 92 and 93) of the Treaty were applicable to the sector.

⁽²⁾ OJ L 193, 29.7.2000, p. 10.

⁽³⁾ OJ C 87, 17.3.2001.

⁽⁴⁾ See footnote 3.

⁽⁵⁾ Boletín Oficial del Estado No 2, 2.1.1992, p. 84.

- (10) Objective: to facilitate the purchase of reference quantities by producers of cows' milk considered to be priority producers in accordance with Royal Decree No 1888/1991.
- (11) Possible effect of the aid: infringement of the provisions of the common organisation of the market in milk and milk products.
- (12) Aid intensity, eligible costs, overlap with other schemes, etc: the aid consists of an interest-rate rebate on loans contracted with financial institutions to purchase reference quantities from other producers. The terms of the loans are as follows: duration of 60 months; maximum eligible amount of ESP 4 million (EUR 24 040,48); interest rate of 6 % during the first 24 months, then the average monthly MIBOR one-year rate plus one percentage point; a rebate of four percentage points. The grant equivalent, calculated using the method applied to investment aid under Council Regulation (EC) No 950/97 of 20 May 1997 on improving the efficiency of agricultural structures⁽⁶⁾, is 11 % of the cost of purchasing the reference quantity. The aid cannot be combined with other aid for the same type of expenditure.
- (13) Grounds for initiating the procedure: the aid granted by Spain would infringe the provisions of the common organisation of the market in milk and milk products if found to be public aid not authorised by those provisions in a field in which the Community has exclusive competence.
- (16) A holding's individual production quota is a means of production and, as such, may confer the right to aid for the purchase of reference quantities. In accordance with point 4.1.1.6 of the Community Guidelines for State aid in the agriculture sector⁽⁹⁾, aid may be granted for the purchase of production rights only in accordance with the specific provisions of the common organisation of the market concerned and the principles set out in Articles 87 and 88 of the Treaty.
- (17) According to Spain, the objective of the aid is in accordance with those pursued by Community rules, in particular, the restructuring of the milk sector. The aid contributes to the restructuring of the sector by encouraging mechanisms to promote a degree of mobility of reference quantities within a particular geographical area, on the basis of objective criteria. Community rules are contradictory in that they allow the payment of aid of 100 % for the reallocation of reference quantities but do not authorise aid at a much lower level pursuing the same objective.
- (18) As regards the Commission's claim that the aid infringes Article 38 of Regulation (EC) No 1255/1999, which prohibits aid fixed on the basis of price or the quantity produced, Spain takes the view that the aid has no impact whatsoever on prices or on the total quantity produced, since the quantities produced are fixed for each milk year and for each Member State and the intervention prices are the same for all Member States.

IV. ASSESSMENT OF THE AID

Article 87(1) of the Treaty

- III. COMMENTS FROM SPAIN
- (14) By letter dated 11 June 2001, Spain put forward the following position.
- (15) Spain takes the view that, under Article 7(1) of Council Regulation (EEC) No 3950/92 establishing an additional levy in the milk and milk products sector⁽⁷⁾, as last amended by Commission Regulation (EC) No 603/2001⁽⁸⁾, it can be argued that the reference quantities are a capital asset of the holding. Article 8 of that Regulation authorises the transfer of reference quantities between holdings and holders and also permits the payment of financial compensation for the transfer of rights to the national reserve. Article 8(b) lays down that the quantities of milk so released may be allocated to other farmers in return for payment, made in one or more annual instalments.
- (19) Articles 87 and 88 of the Treaty apply to the milk and milk products sector pursuant to Article 37 of Regulation (EC) No 1255/1999.
- (20) Under Article 87(1) of the Treaty, any aid granted by a Member State or through State resources in any form whatsoever that 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.
- (21) In this case, the aid gives the beneficiaries an advantage by reducing the normal burden on their budgets. The aid is granted by the Member State or using State resources. The aid is specific or selective in that it favours certain undertakings or the production of certain goods, specifically the producers of cows' milk falling within the categories of livestock farmers considered to be priority producers in Asturias.

⁽⁶⁾ OJ L 142, 2.6.1997, p. 1.

⁽⁷⁾ OJ L 405, 31.12.1992, p. 1.

⁽⁸⁾ OJ L 89, 29.3.2001, p. 18.

⁽⁹⁾ OJ C 28, 1.2.2000, p. 2 (corrected version in OJ C 232, 12.8.2000, p. 17).

- (22) To be covered by Article 87(1) of the Treaty, the aid must in addition affect competition and trade between Member States. This implies that the beneficiary of the aid must carry out an economic activity. According to consistent case law concerning this provision, trade is deemed to be affected when the beneficiary undertaking carries out an economic activity that is the subject of trade between Member States. The mere fact that the aid strengthens the undertaking's position in inter-Community trade in relation to other undertakings in the same field is sufficient ground for deeming trade to be affected.
- (23) In this case, the beneficiaries carry out an economic activity, milk production, that is the subject of trade between Member States. Trade between the rest of the Community and Spain is considerable. In 1999, Spain imported 435 778 tonnes of cows' milk from the other Member States and exported 195 426 tonnes to them ⁽¹⁰⁾.
- (24) Consequently, the aid concerned may affect trade in cows' milk between Member States, which is what happens when an aid favours operators active in one Member State at the expense of those in the others. The measures in question have a direct and immediate effect on the cost of production of cows' milk in Spain. They therefore confer an economic advantage not enjoyed by holdings in other Member States because they do not have access to comparable aid. They therefore distort or threaten to distort competition.
- (25) In view of the above, the aid in question must be regarded as State aid within the meaning of Article 87(1) of the Treaty.
- (29) The Commission takes the view that the aid in question was not granted as regional aid for new investment or to create employment, nor to provide horizontal compensation for shortcomings in infrastructures suffered by all the region's undertakings, but as operating aid for the agricultural sector. Consequently, it is clearly sectoral aid that must be assessed in the light of Article 87(3)(c).
- (30) Article 87(3)(c) lays down that 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.
- (31) The aid scheme must be assessed, in particular, in the light of that provision.
- (32) In accordance with point 23.3 of the Community Guidelines for State aid in the agriculture sector, illegal aid within the meaning of Article 1(f) of Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the Treaty ⁽¹¹⁾ must be assessed on the basis of the rules and guidelines in force when the aid was granted.
- (33) The aid in question, granted in 1998 without being notified to the Commission, is an illegal aid within the meaning of Article 1(f) of Regulation (EC) No 659/1999 and must be assessed on the basis of the rules in force at the time.

Possible exceptions under Article 87(1) of the Treaty

- (26) However, there is provision for derogations from the principle of incompatibility laid down in Article 87(1) of the Treaty.
- (27) The exceptions to such incompatibility, which are set out in Article 87(2) of the Treaty, are manifestly not applicable in this case. Neither were they invoked by the Spanish authorities.
- (28) 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
- (34) The additional levy introduced by Council Regulation (EEC) No 857/84 ⁽¹²⁾, repealed and replaced by Regulation (EEC) No 3950/92, the aim of which is to reduce the imbalance between supply and demand for milk and milk products and reduce surplus production, is currently one of the basic mechanisms of the common organisation of the market concerned.
- (35) Regulation (EEC) No 3950/92 lays down the degree of flexibility with which the additional levy arrangements may be applied by the Member States.
- (36) Under Article 5 of Regulation (EEC) No 3959/92, Member States may replenish their national reserves, without exceeding the overall quantity, following an across-the-board reduction in the individual reference quantities, in order to grant additional or specific quantities to producers determined in accordance with objective criteria agreed with the Commission. Without prejudice to Article 6(1), reference quantities available to producers who have not marketed milk or other milk

⁽¹⁰⁾ Source: Eurostat (1998).

⁽¹¹⁾ OJ L 83, 27.3.1999, p. 1.

⁽¹²⁾ OJ L 90, 1.4.1984, p. 13.

- products during a 12-month period may be allocated to the national reserve and reallocated in accordance with the first subparagraph. Spain cannot justify the aid on the basis of that provision since the reference quantities for the purchase of which the aid was granted were not from the national reserve, were not made available by an across-the-board reduction in individual reference quantities and were not the reference quantities of producers who had not marketed milk or other milk products for a 12-month period.
- (37) Article 8 of Regulation (EEC) No 3950/92 stipulates the actions that Member States may take to restructure milk production. The list of measures provided for is exhaustive and the regulatory framework therefore provides Member States with specific and sufficient means to promote restructuring and an increase in the efficiency of production structures. The granting of aid for the purchase of quotas from other producers is not one of the measures provided for. On the contrary, Article 8(b) lays down that the Member States may determine on the basis of objective criteria the conditions under which producers may obtain, in return for payment, at the beginning of a 12-month period, the reallocation by the competent authority or by the body designated by that authority of reference quantities released definitively at the end of the preceding 12-month period by other producers in return for compensation in one or more annual instalments equal to the abovementioned payment.
- (38) The common organisation of the market does not just contain provisions on prices but also includes various mechanisms and provisions that together form a complete and exhaustive system which, the Commission has repeatedly affirmed, may not be derogated from and which, in accordance with the consistent case law of the Court of Justice of the European Communities, precludes the Member States from taking measures that infringe or derogate from it (see judgment of the Court of Justice of the European Communities of 26 June 1979 in Case 177/78, *Pigs and Bacon Commission v McCarren and Company Limited* ⁽¹³⁾).
- (39) The common organisation of the market in milk and milk products is based, as are all the other common organisations of the market, on the principle of an open market to which all producers have free access, governed solely by the instruments provided for by that organisation.
- (40) The aid granted by Spain thus infringes the provisions of the common organisation of the market in milk and milk products in that it takes the form of a State aid not authorised by those provisions in an area for which the Community has exclusive responsibility.
- (41) The application of Articles 87, 88 and 89 remains subject to the provisions of the relevant Regulations. In other words, recourse by a Member State to Articles 87, 88 and 89 cannot override the provisions of the Regulation governing the market organisation concerned. Under no circumstances, therefore, can the Commission approve aid which is incompatible with the provisions governing a common organisation of the market or which would impair the smooth operation of that organisation.
- (42) With regard to the arguments put forward by Spain, the Commission's position is as follows.
- (43) Aid for the purchase of production rights may be granted only if it complies with the provisions of the corresponding common organisation of the market. In this case, the aid granted does not comply with the provisions of the common organisation of the market in milk and milk products for the reasons stated. Even if the aim is not to undermine that common organisation of the market, that could be its effect (as is that of all measures that distort the rules governing the operation of the market of a particular sector).
- (44) The milk and milk products sector is being restructured throughout the Community on the basis of the mechanisms provided for in Community rules, which provide adequate means without the need for State aid such as that under consideration.
- (45) In addition, in accordance with consistent case law, from the moment the Community lays down a common organisation of the market in a particular sector, it is the Community that is responsible for finding solutions to problems under the common agricultural policy. The Member States must not therefore adopt unilateral measures, even where they are compatible with the Community's common policy (see judgment of the Court of Justice of 6 November 1990 in Case C-86/89, *Italy v Commission* ⁽¹⁴⁾).
- (46) Similarly, the aid for the purchase of quotas could force up their price and distort the smooth operation of the common organisation of the market. The price could increase because the vendor of reference quantities, knowing that the purchaser will be granted aid to finance the purchase, could increase the sales price to take that into account.

⁽¹³⁾ [1979] ECR 2161. Spanish Special Edition 1979, p. 1083.

⁽¹⁴⁾ [1990] ECR I-3891.

- (47) On a previous occasion, the Commission also took the view that aid in the form of reduced-rate loans for the purchase of reference quantities was incompatible with the common market on the basis of Article 87 (former Article 92) of the Treaty (see Commission Decision 96/616/EC⁽¹⁵⁾ on aid granted by the Region of Friuli-Venezia Giulia, Italy). Currently, point 4.1.1.6. of the Community Guidelines for State aid in the agriculture sector lays down that no aids may be granted for the purchase of production rights except in accordance with the specific provisions of the common organisation of the market concerned and the principles set out in Articles 87, 88 and 89 of the Treaty.
- (48) In the light of the above, the Commission cannot accept the arguments put forward by Spain.

Conclusion

- (49) On the basis of the above and the applicable Community rules, the Commission takes the view that, as regards the derogations provided for in Article 87(3)(a) and (c) for aid to promote or facilitate the economic development of certain regions or the development of certain activities, the aid in question could adversely affect trading conditions to an extent contrary to the common interest.
- (50) The aid therefore infringes Community rules and is consequently ineligible for any of the derogations provided for in Article 87(3) of the Treaty.

V. CONCLUSIONS

- (51) The Commission finds that Spain has unlawfully implemented the aid in question in breach of Article 88(3) of the Treaty. Since the aid in question was not notified to the Commission, its granting was illegal, given that it was granted before the Commission could decide on its compatibility with the common market.
- (52) Furthermore, for the reasons set out above, the aid is incompatible with the common market, since it is covered by Article 87(1) of the Treaty but is not eligible for any of the derogations provided for in paragraphs 2 and 3 of that Article.
- (53) Where aid is incompatible with the common market, the Commission must make use of the possibility offered by the judgment of the Court of Justice of 12 July 1973 in Case 70/72, *Commission v Germany*⁽¹⁶⁾, confirmed by the judgments of 24 February 1987 in Case 310/85,

Deufil GmbH und Co. KG v Commission⁽¹⁷⁾, and of 20 September 1990 in Case C-5/89, *Commission v Germany*⁽¹⁸⁾, and require the Member State to recover the aid granted illegally. The requirement to recover aid, which is also laid down in Article 14(1) of Council Regulation (EC) No 659/1999, is necessary in order to re-establish the previous situation by abolishing all the financial advantages enjoyed unduly by the beneficiaries since the aid was granted.

- (54) The aid granted must be repaid in full.
- (55) Repayment must be made in accordance with Spanish law. The amounts to be repaid must include interest from the date the aid was granted to its actual recovery. The interest must be calculated on the basis of the commercial rate, taking as a reference the rate used to calculate the grant equivalent of regional aid, in accordance with the Guidelines on national regional aid⁽¹⁹⁾.
- (56) This Decision does not prejudice any conclusions the Commission might draw for the financing of the common agriculture policy by the European Agricultural Guidance and Guarantee Fund (EAGGF),

HAS ADOPTED THIS DECISION:

Article 1

The State aid Spain has implemented for the purchase of reference quantities by producers of cows' milk is incompatible with the common market.

Article 2

1. Spain shall take all necessary measures to recover from the beneficiaries the aid referred to in Article 1 and unlawfully made available to the beneficiaries.

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of this Decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiaries until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

⁽¹⁵⁾ OJ L 274, 26.10.1996, p. 26.

⁽¹⁶⁾ [1973] ECR 813. Spanish Special Edition 1973, p. 211.

⁽¹⁷⁾ [1987] ECR 901.

⁽¹⁸⁾ [1990] ECR I-3437.

⁽¹⁹⁾ OJ C 74, 10.3.1998, p. 9.

Article 3

Spain shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

Article 4

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 12 March 2002.

For the Commission

Franz FISCHLER

Member of the Commission
