II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION
of 20 July 1999
on an aid scheme applied in Greece to cotton by the Greek Cotton Board

(notified under document number C(1999) 2536)

(Only the Greek text is authentic)

(2000/206/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 under the first subparagraph of Article 88(2) of the Treaty given notice to interested parties to submit their comments [1] and having regard to these,

Whereas:

I

(1) Following a complaint the Commission sent the Greek authorities by fax of 8 December 1992 a request for information on parafiscal charges levied for use by the Greek Cotton Board. The Greek authorities replied by letter of 17 March 1993 and by letter of 19 July 1993 sent further information.

(2) According to the information available the Greek Cotton Board is a public non-profit-making body the sole purpose of which is to foster development of the cotton sector. It provides services covering cotton growing, processing and marketing as follows:

(a) technical assistance;

(b) advice on suitable profitable varieties;

(c) guaranteeing of certified inspected seed and inspection of imported seed;

(d) monitoring of technological development throughout the world and technology transfer;

(e) monitoring of application of Council Regulation (EEC) No 389/82 of 15 February 1982 on producer groups and associations thereof in the cotton sector [2], as last amended by Regulation (EEC) No 3808/89 [3];

(f) trials, technology transfer and training in the areas of phytosanitary protection and restriction of input use;

(g) planning and setting up research programmes;

(h) training and advisory services;

(i) technical assistance to ginners;

(j) studies of general interest on cotton processing units and their modernisation;

(k) grants to ginning units under structural programmes;

(l) grading and standardisation of ginned cotton;

(m) links with world cotton exchanges and international organisations;

[1] OJ C 278, 24.10.1995, p. 4.

[2] OJ L 51, 23.2.1982, p. 1.
[3] OJ L 371, 20.12.1989, p. 1.

(n) monitoring of application of Community regulations on the common market organisation;

(o) quality control and laboratory analysis for seed for oil production;

(p) quality control and laboratory analysis for fibre, yarn and fabric;

(q) technical assistance services for specialised laboratories;

(r) issue of quality certificates for cotton products;

(s) checks on machines and instruments.

To be able to provide its services without additional charging of operators in the primary, secondary or tertiary sectors the Board collects a levy and a special charge.

Article 30(1) of Greek law No 2040/92 imposes on ginning plants a 1 % levy of the price paid to the grower per kilogram of delivered unginned cotton grown in Greece. Article 30(3) imposes a special charge of 1 % on the price of imported ginned cotton.

The complaints made to the Commission stated that the levy on unginned cotton grown in Greece was calculated not only on the cotton price agreed between grower and ginner but also on the direct Community aid granted under Council Regulation (EEC) No 2169/81 of 27 July 1981 laying down the general rules for the system of aid for cotton [1]. The complainants also stated that the bank security required in connection with the direct aid was blocked until proof was given of payment of the levy.

II

(1) On examining the functions of the Greek Cotton Board the Commission found that those indicated at I(2)(e), (n) and (s) were State functions thus not involving aid to individual enterprises. The Greek authorities were informed accordingly by letter SG(95) D/874 of 27 January 1995.

In that letter the Commission also informed Greece that it had decided to raise no objection to the following activities: technical assistance, advisory services, training, outlet seeking (I(2)(a), (b), (h), (l), (m) and (k)); grading and standardisation of all ginned cotton (I(2)(1)); aid for research in the cotton sector (I(2)(d), (f), (g) and (j)).

The Commission initiated the procedure provided for in Article 88(2) of the Treaty in respect of certification and quality control (I(2)(c), (o), (p) and (r)) and investment aid (point I(2)(k)). It also decided to open the Article 88(2) procedure in respect of the aids as a whole, given their financing by a special charge affecting goods from other Member States and member countries of the European Economic Area.

On quality controls the Commission, in the absence of information from the Greek authorities on whether these were compulsory or not, expressed doubt as to their compatibility with the common market in that they might be operating aid with no durable effect on the sector. It therefore asked the Greek authorities to send additional information on the nature and rate of aids for quality controls and attestations and on compatibility of these controls with Community rules. It also asked them for evidence that controls carried out in other Member States were recognised and their imported products not subjected to stricter than equivalent requirements.

In the absence of clarification by the Greek authorities on aid for investment by ginning units under structural programmes, the Commission expressed doubt as to its compatibility with the common market and asked for information on the nature and rate of the aid.

Since all the aids in question are financed by parafiscal charges (compulsory payments imposed by law) the Commission examined this financing mechanism. The Court of Justice of the European Communities has deemed [2] the financing of a State aid by a compulsory charge to be an essential element of that aid and in consequence the Commission had to examine against Community law both the aid and its financing.

[1] OJ L 211, 21.7.1981, p 2. Replaced by Regulation (EC) No 1554/95 (OJ L 148, 30.6.1995, p. 48).

[2] See Judgment of 25 June 1970 in Case 47/69, France v. Commission, [1969-1971] ECR 341.

Thus even if aid was compatible as to both form and objective, in the Court's view its financing by charges also applied to products imported from other Member States and European Economic Area countries has a protective effect going beyond the actual aid itself.

In point of fact, even if the aid financed by the Greek Cotton Board conferred some benefit in the case of imported products, the fact remained that it did not result in equality of advantage to all parties since, so the Commission considered, in practice the aid was by its nature more favourable to national operators.

The Commission also considered that imposition of an additional requirement (payment of the parafiscal charge) not included in the Community aid payment rules was an infringement of Regulation (EEC) No 2169/81 of 27 July 1981.

Lastly, the Commission considered that the special charge contravened Article 5 of Protocol 4 annexed to the Act of Accession of Greece prohibiting any restriction on cotton imports from third countries. In addition, since the charge was levied only on imports it infringed Article 25 of the Treaty prohibiting charges of equivalent effect to customs duties.

The Commission by letter No SG(95) D/874 of 27 January 1995 gave the Greek Government notice to submit its comments, and in the *Official Journal of the European Communities* [1] gave the other Member States and other interested parties notice to do likewise.

III

(1) The Greek Government presented its comments in a letter of 12 April 1995.

(a) On the points on which the Commission doubted compatibility with the common market, the Greek authorities said that the tasks indicated at I(2)(c), namely production of certified inspected seed, certification of seed produced and inspection of imported seed, were compulsory under Greek legislation. They added that expenditure on these services was financed from the Ministry of Agriculture's budget and not by a 1 % levy.

On the tasks indicated at I(2)(d), (p), (q) and (r) (quality control and laboratory analysis for seed for industrial processing, processing, quality control and laboratory analysis for fibre, yarn and fabric, technical assistance to specialised laboratories, and quality certification for cotton products) the Greek authorities stated that the control and analysis involved was not compulsory and these services were paid for at a rate calculated to cover the laboratories' operating costs.

(b) On the subsidies to ginning plants under structural programmes, the Greek authorities stated that up to 26 February 1992 investments had been made under Regulation (EEC) No 389/82. The Greek Cotton Board had then drawn up an investment programme for the sector approved by the national and Community authorities. It had not however granted subsidies to ginning plants or levied funds for drawing up the sectoral programme.

(c) On the mode of financing the Greek authorities pointed to the pre-existence of the levies referred to in paragraphs 1 and 3 of Law 2040/92. These provisions were an adjustment and consolidation of Article 10 of Law 3853/58 and Article 1 of Law 675/77 whereby a charge levied in drachmas was converted into a percentage. This was an improvement providing automatic adjustment to market fluctuations.

According to the Greek authorities the charge was made on both imported and domestic cotton and the purpose of taxing imported cotton was not to finance activities within Greece that directly or indirectly fostered production and marketing of domestic cotton. The charge was collected from ginning plants, this being the appropriate point for determining the taxable product.

They added that the charge was levied with no discrimination between imported cotton or cotton from other Member States and that produced in Greece and that there was no intention of levying a charge of effect equivalent to a quantitative restriction.

(d) The Greek authorities considered that imposition of a special charge on non-domestic cotton did not constitute a national aid within the meaning of Article 87(1) of the Treaty, since the Greek Cotton Board was not an undertaking and the purpose of the charge on cotton imported from third countries was to finance research on improving the quality of cotton produced in the Community, the findings of which were publicised and so accessible to all.

[1] See footnote 1.

(2) The Commission received no comments from other Member States.

(3) The main comments received from other interested parties were the following.

(a) The activities of the Greek Cotton Board financed by levies are State aid as defined in Article 87(1) of the Treaty. Greek ginners have never in reality benefited from the services provided by the Cotton Board. Part of the aid appears to be operating aid not justifiable under Article 87 of the Treaty.

(b) Imposition of a special charge on cotton imported from other Member States infringes Articles 23 and 25 of the Treaty and is therefore incompatible with the common market.

(c) Imposition of a compensatory levy of 1 % on not merely the commercial value of the cotton but also the aid granted by the EAGGF is against Community rules, hence incompatible with the common market.

(d) Direct linkage of release of bank security and payment of the levy and special charge is not provided for in the Community rules on the cotton market organisation and hence incompatible with the common market.

(e) Imposition of a special charge on imports to Greece of cotton products originating in third countries violates obligations arising from the Act of Accession of Greece to the European Union and obligations under GATT rules.

(f) The tasks of the Greek Cotton Board as described are its official ones but the description is not an accurate reflection of the services actually rendered to ginning plants. The Board's main activity is day-to-day management of the Community cotton system.

(g) A substantial proportion of the services provided by the Board must be considered operating aids to cotton producers. The Greek authorities have not transmitted enough information to permit cost-benefit analysis of these services.

(h) As regards the financing of aid, the charge imposed on imported products is protectionist and discriminatory, since it applies by virtue of the mere fact that they cross the Greek frontier in intra-Community trade and they derive no economic benefit from the levy, which therefore infringes Article 25 of the Treaty prohibiting Member States from introducing between themselves any customs duties on imports or exports or charges of equivalent effect. It breaches Article 5 of Protocol 4 annexed to the Act of Accession of Greece stating that the Community trading system with third countries may not be affected and that in particular no measure restricting imports may be laid down.

(4) The Commission received no comments from the Greek Government on those of interested third parties.

IV

(1) As regards the Greek Government's comments:

(a) The Commission notes that the tasks of the Greek Cotton Board indicated at I(2)(c) above, i.e. control of seed quality, are compulsory under Greek legislation.

The Commission's fixed practice on national aids for quality control, which stems from the proposal on appropriate measures on the matter of aid granted by Member States in the livestock sector [1], is to accept such measures up to 100 % of eligible expenditure if the controls are compulsory under Community or national legislation.

The Commission notes that the tasks indicated at I(2)(o) to I(2)(r) above, involving quality control at the processing stage, are services paid for at a rate sufficient to cover costs. The Commission must therefore consider that these tasks are not State aid favouring undertakings as defined in Article 87(1) of the Treaty.

In the case of task I(2)(k), i.e. financial grants to ginning units, the Commission has accepted the Greek authorities' statement that these subsidies were granted up to 1992 under Community rules and that no investment aid has been granted since then. This statement coincides with the claims of the interested third parties that no financing has been granted to ginning units.

(b) On the first argument advanced, i.e. pre-existence of the aid scheme, the Commission points out in the first place that pre-existence of a charge does not affect its compatibility or incompatibility with Community legislation, and in the second that the parafiscal charges in question cannot be considered 'existing aids' as meant by Article 88(1) of the Treaty, which covers only pre-accession aids and aids authorised by the Commission.

[1] Commission letter to Member States No S 75294/6 of 19 September 1975.

Even if a tax on cotton was in force before Greece's accession to the Community, the information transmitted by the Greek authorities shows that the arrangements were adjusted and consolidated by Law 2040/92. All the national provisions on cotton were consolidated and the parafiscal charge significantly modified to become a percentage of the total quantity purchased by ginners instead of a fixed amount.

The Commission considers therefore that Greece introduced the arrangements set out in Law 2040/92 in violation of the provisions of Article 88(3) of the Treaty and that the State aids financed with the charges levied must be considered new aids.

In general an aid cannot be financed by parafiscal charges that also apply to products imported from other Member States. In particular, in the absence of an arrangement associating the producers of all Member States and effectively guaranteeing at Community level that the proceeds of the charge are assigned so as to confer the resultant benefits on exactly the same terms for both imported and national products, obligatory levies on imported products will be classed, as appropriate, either as a charge of equivalent effect to a customs duty prohibited by Articles 23 and 25 of the EC Treaty (if no benefit results for certain products or product categories, e.g. by reason of the actual purpose of the aid) or as a discriminatory internal charge prohibited under Article 90 of the Treaty (if the advantage conferred by the aid offsets the charge on certain imported products less than for national products, e.g. by reason of the details of the aid scheme) (see Judgments of the Court of Justice of the European Communities on 27 October 1993 in Case C-72/92, Scharbatke [1] and on 20 August 1993 in Case C-266/91, Celbi [2]). Such financing has a protective effect going beyond the aid in itself in that even if equality of treatment is provided for in the rules between national and imported products, at the practical level a more favourable situation arises for national operators since the measures implemented are prompted by national specialisations, needs and lacunae. The aids indicated at I(2)(a), (b), (d), (g), (i), (j), (k) and (q) are aimed at supporting national production and confer no benefit on imports.

(c) The Greek authorities have not replied to the claim that the 1 % special charge on cotton imported from third countries is incompatible with Article 5 of Protocol 4 to the Act of Accession of Greece. The Commission therefore maintains the position it took on initiating the procedure.

(2) The Commission treated under an infringement procedure the question of compatibility with the market organisation for cotton of the 1 % levy on Greek domestic production and on the Community aid paid to Greek growers. Since Regulation (EC) No 1554/95 does not specifically exclude such a levy, the Commission decided on 2 December 1998 to close this dossier.

(3) Comments made to the Commission under the procedure provided for in Article 88(2) of the Treaty show that the parafiscal charges in question present some degree of cross-subsidy, being levied at ginning plant level to finance measures mainly addressed to farmers. The Commission's established practice on parafiscal charges is to agree to their being collected at a different stage from the production process (e.g. from slaughterhouses to finance action against epizootics). In the case in point it does not appear possible, given the market organisation mechanisms, for ginners to transfer payment of the charge to farmers.

In view of the foregoing the Commission concludes that since the method of financing the aid by a 1 % levy on domestic production and on Community aid paid to Greek producers is consonant with the market organisation it has no reason under Articles 87 to 89 of the Treaty to object to the financing method.

V

Under Article 87(1) of the Treaty any aid granted by Member States 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 incompatible with the common market.

[1] [1993] ECR I-5509.
[2] [1993] ECR I-4337.

The aids in question fall within the Article 87(1) definition.

Since they improve the economic situation of recipients compared to their competitors they distort or threaten to distort trade in the way indicated.

Given on the one hand the value of trade in cotton (in 1995 Greek exports to the rest of the EC worth ECU 309,6 million and imports from the rest of the EC into Greece worth ECU 106,4 million) [1] and on the other Greek production of 1,25 million tonnes against that of the other Member States of 1,35 million tonnes it is evident that the aid is liable to affect trade between the Member States in favouring national production to the disadvantage of that of other Member States.

Even the relatively small size of an aid or of the recipient undertaking does not automatically exclude the possibility of an impact on trade between Member States.

On the basis of the foregoing the aid in question is State aid as meant by Article 87(1) of the Treaty.

There are however exceptions to the incompatibility principle laid down in Article 87(1).

VI

The exceptions to incompatibility stated in Article 87(2) are manifestly inapplicable and were not invoked by the Greek authorities.

Those provided for in Article 87(3) of the Treaty are to be restrictively interpreted when any regional or sectoral aid programme or individual case of application of general aid schemes is examined.

They can in particular be held to pertain only in cases where the Commission can establish that the aid is necessary for achievement of one of the purposes in question. To authorise such exceptions would be to act against inter-Member State trade and permit distortion of competition unjustifiable in the Community interest and conferring improper advantage on operators in some Member States.

The aids in question are not a means of promoting execution of an important project of common European interest within the meaning of Article 87(3)(b), their potential impact on trade being in fact against the common interest.

Nor are they a means of remedying a serious disturbance in the economy of the Member State concerned within the meaning of that provision.

Nor were they notified as having a regional objective under Article 87(3)(a).

Aid to facilitate the development of certain economic activities or of certain economic areas can be considered compatible by the Commission only if it does not adversely affect trading conditions to an extent contrary to the common interest (Article 87(3)(c)).

For such aid to be considered compatible with the common market under Article 87(3)(c) it must not adversely affect trading conditions to an extent contrary to the common interest and must facilitate the development of certain economic activities or certain economic areas.

The aids granted by the Greek Cotton Board in the form of technical assistance, advisory services, training and research are liable to affect trade and distort competition (Article 87(1)) but are intended to facilitate development of the cotton sector and by their nature are not likely to affect trade to an extent contrary to the common interest. They could therefore on that count be held to fall under the Article 87(3)(c) exception.

This possibility is however ruled out by the fact that they are financed by a parafiscal charge applied to products imported from other Member States. This mode of financing renders them incompatible with the common market.

The Commission consequently finds that the exceptions provided for in Article 87(3)(a) and (c) for aid to promote or facilitate the economic development of particular areas or activities cannot be applied to the aids in question owing to their mode of financing. They are incompatible with the common market in that they are financed by parafiscal charges on imported products.

VII

The Commission finds that Greece has illegally put the aids in question into application in violation of Article 88(3) of the Treaty.

For the reasons set out above the aids satisfying the requirements of Article 87(1) of the Treaty cannot qualify for any of the exemptions provided for in Article 87(2) and (3). They are therefore incompatible with the common market since financed by a parafiscal charge on imported products.

[1] Eurostat 1995.

In cases such as the present one where non-notified aid is introduced without awaiting the Commission's final decision, the imperative character of the procedural rules set out in Article 88(3) of the Treaty, of which the Court of Justice has recognised the direct effect in its Judgments of 19 June 1973 (Case 77/72 Carmine Capolongo v. Azienda Agricola Maya ([1])), 11 December 1973 (Case 120/73 Gebr. Lorenz GmbH v. Federal Republic of Germany ([2])) and 22 March 1977 (Case 78/76 Steinicke und Weinlig v. Federal Republic of Germany ([3])), prevents any retrospective legalisation of the aids (Judgment of 21 November 1991 in Case C-354/90 Fédération nationale du commerce extérieur des produits alimentaires and others v. France ([4])).

Article 14(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for application of Article 93 of the EC Treaty ([5]) provides that when a negative decision is taken in a case of unlawful aid the Commission shall decide that the Member State concerned is to take all necessary action to recover the aid from the recipient.

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.

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.

Given the nature of the aids and the way in which they have been financed it is not possible for the Commission on its present information to calculate the amount to be recovered, i.e. the aids financed by charges on imports of cotton. The Commission calls on the Greek authorities under the cooperation procedure to notify a suitable method for calculating the amount to be recovered.

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

HAS ADOPTED THIS DECISION:

Article 1

The State aids granted in Greece in discharge of the statutory functions of the Greek Cotton Board that are financed by the compulsory contributions specified in Article 30(3) of Law 2040/92 are incompatible with the common market in that they are financed by a parafiscal charge on imported products.

Article 2

Greece must adjust the aid scheme referred to in Article 1 to make it compatible with this Decision.

Article 3

1. Greece shall take all necessary action to recover from recipients the illegally granted aid referred to in Article 1.

2. Recovery shall be in line with the procedures of national law. Interest shall be charged on the amounts to be recovered, to run from the date on which they were made available to recipients to that of actual recovery. It shall be calculated at the reference rate used for subsidy equivalent calculation in connection with aids for regional purposes.

Article 4

Within two months of notification of this Decision Greece shall inform the Commission of the action it intends to take to comply with it.

Article 5

This Decision is addressed to the Hellenic Republic.

Done at Brussels, 20 July 1999.

For the Commission

Monika WULF-MATHIES

Member of the Commission

([1]) [1972-1973] ECR 567.
([2]) [1972-1973] ECR 815.
([3]) [1977] ECR 171.
([4]) [1991] ECR I-5505.
([5]) OJ L 83, 27.3.1999, p. 1.