

DECISIONS

COMMISSION DECISION (EU) 2017/1441

of 30 June 2017

on the aid scheme notified by Poland entitled 'Aid scheme for milk producers' SA.45447 (2016/C)
(ex 2016/N)

(notified under document C(2017) 4359)

(Only the Polish text is authentic)

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,

Having called on interested parties to submit their comments pursuant to the provision cited above,

Whereas:

1. PROCEDURE

- (1) By letter of 23 May 2016, Poland notified, in accordance with Article 108(3) TFEU, an aid scheme for milk producers ('the aid scheme').
- (2) Poland submitted additional information by letter of 1 June 2016. By letter of 11 July 2016, the Commission asked for additional information, which the Polish authorities provided in a letter of 15 July 2016.
- (3) By letter of 16 September 2016 ⁽¹⁾ ('the Opening Decision'), the Commission informed Poland that it had decided to initiate the procedure laid down in Article 108(2) TFEU in respect of the aid scheme. In the same letter, the Commission expressed doubts as to the compatibility of the aid scheme with the internal market.
- (4) By letter of 12 October 2016, Poland submitted information concerning the Opening Decision.
- (5) The Opening Decision was published in the *Official Journal of the European Union* ⁽²⁾. The Commission invited interested parties to submit their comments within one month.
- (6) The Commission received no comments from interested parties and informed Poland thereof by letter of 13 January 2017.
- (7) By letters of 14 November 2016 and 13 January 2017, the Commission asked Poland for additional information. Poland replied to these letters by letter of 20 January 2017.

2. BACKGROUND

- (8) In the milk and milk products sector, the quantitative limitation of production ('milk quota system') had been an essential market policy instrument for many years. Introduced in 1984, it was extended several times, and most recently until 31 March 2015 by Council Regulation (EC) No 1234/2007 ⁽³⁾ ('Single CMO Regulation'). The last

⁽¹⁾ C(2016) 5770 final.

⁽²⁾ OJ C 406, 4.11.2016, p. 86.

⁽³⁾ Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) (OJ L 299, 16.11.2007, p. 1).

quota year was therefore 2014/2015. The main purpose of the milk quota system consisted in reducing the imbalance between supply and demand on the respective market and the resulting structural surpluses, thereby achieving a better market equilibrium. A levy was applied to quantities of milk collected or sold for direct consumption above a certain guarantee threshold. The levy was payable by the Member States as soon as the national quota was exceeded. Member States had to pay to the European Agricultural Guarantee Fund (EAGF) the levy corresponding to the overrun of their national quota, reduced by a flat-rate amount of 1 % in order to take account of cases of bankruptcy or the definitive inability of certain producers to make their contribution to the payment of the levy due. The Member States then were obliged to divide the burden of payment among the producers who had contributed to the overrun. Those producers were liable vis-à-vis the concerned Member State for payment of their contribution to the levy due by virtue of the fact of having overrun their available quantity ⁽¹⁾.

- (9) In the quota year 2014/2015, the national quota assigned to wholesale suppliers (milk producers) in Poland was exceeded by 580,3 million kg, making it necessary to pay a levy of PLN 659,8 million (approximately EUR 152,7 million) to the Union budget. Polish milk producers who overran their individual quotas were required to pay a levy for exceeding the milk quota at a rate of PLN 90,98 per 100 kg of overrun.
- (10) In March 2015, in a context of low prices for milk and financial difficulties in the milk sector, Commission Regulation (EC) No 595/2004 ⁽²⁾ was amended by Commission Implementing Regulation (EU) 2015/517 ⁽³⁾ in order to ease the financial burden for producers who had to pay a surplus levy related to the quota year 2014/2015.
- (11) On that basis, Poland adopted rules which allowed the concerned Polish milk producers to pay the levy for exceeding the milk quota in three instalments ⁽⁴⁾. The first instalment, accounting for at least one third of the levy due, was to be paid by those milk producers by 30 September 2015, with a further sum of at least one third of the total levy due to be paid by 30 September 2016. The balance of the levy due was to be settled by 30 September 2017. The systems for payment in instalments were applied in accordance with the conditions laid down in Commission Regulation (EU) No 1408/2013 ⁽⁵⁾.
- (12) As stated above in recital 1, on 23 May 2016, Poland notified to the Commission an aid scheme which would allow for write-off of the outstanding levy due ('the levy due') from milk producers for exceeding individual quotas in the quota year 2014/2015.

3. DESCRIPTION

- (13) The national legal base for the aid scheme is a Cabinet Resolution establishing an aid scheme for milk producers ⁽⁶⁾ ('the Cabinet Resolution') and the Public Finances Act ⁽⁷⁾.
- (14) Pursuant to the Cabinet Resolution, the Minister for Agriculture and Rural Development may, following an application from a milk producer, issue a decision granting a full or partial write-off of the levy due.
- (15) Pursuant to the Cabinet Resolution, aid may be granted to milk producers who:
 - (a) are medium and small enterprises; and

⁽¹⁾ In Poland, this obligation was laid down in the Act of 20 April 2004 on the organisation of the market in milk and milk products (Journal of Laws 2004, No 93, item 897, as subsequently amended).

⁽²⁾ Commission Regulation (EC) No 595/2004 of 30 March 2004 laying down detailed rules for applying Council Regulation (EC) No 1788/2003 establishing a levy in the milk and milk products sector (OJ L 94, 31.3.2004, p. 22).

⁽³⁾ Commission Implementing Regulation (EU) 2015/517 of 26 March 2015 amending Regulation (EC) No 595/2004 laying down detailed rules for applying Council Regulation (EC) No 1788/2003 establishing a levy in the milk and milk products sector (OJ L 82, 27.3.2015, p. 73).

⁽⁴⁾ Cabinet Regulation of 29 July 2015 on the breaking down into instalments by the Agricultural Market Agency of the levy due from milk producers for exceeding individual quotas in quota year 2014/2015 (Journal of Laws 2015, item 1105) (*Rozporządzenie Rady Ministrów z dnia 29 lipca 2015 r. w sprawie realizacji przez Agencję Rynku Rolnego zadania polegającego na rozkładaniu na raty opłaty należnej od producentów mleka za przekroczenie kwot indywidualnych w roku kwotowym 2014/2015*, Dz. U. 2015, poz. 1105).

⁽⁵⁾ Commission Regulation (EU) No 1408/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid in the agriculture sector (OJ L 352, 24.12.2013, p. 9).

⁽⁶⁾ Cabinet Resolution of 19 May 2016 establishing an aid scheme for milk producers (*Uchwała Rady Ministrów z dnia 19 maja 2016 r. w sprawie ustanowienia programu pomocy producentom mleka*).

⁽⁷⁾ Public Finances Act of 27 August 2009 (Journal of Laws 2013, item 885, as subsequently amended) (*Ustawa z dnia 27 sierpnia 2009 r. o finansach publicznych* (Dz.U. z 2013 r., poz. 885, z późn. zm.)).

- (b) in the quota year 2014/2015, placed on the market a quantity of milk or milk products that exceeded the individual quota available on a given day of the year, as per the situation as at 31 March 2015, and were required to pay the levy laid down in the Single CMO Regulation; and
 - (c) have paid the first instalment of the levy due; and
 - (d) fulfil conditions for writing-off budget receivables laid down in Articles 56 and 57 of the Public Finances Act; in other words, write-off will be applicable if:
 - (i) a natural person has died without leaving any assets, or has left assets which, under separate provisions, are exempt from enforcement, or has left items of everyday household use with a total value not exceeding PLN 6 000;
 - (ii) a legal person has been struck off the relevant register of legal persons while at the same time not having any assets against which the levy due can be enforced, and liability for the budget receivable has not been transferred by law to a third party;
 - (iii) there are reasonable grounds to suspect that enforcement proceedings will not yield an amount exceeding the costs of seeking to recover and enforce the levy due, or enforcement proceedings have been unsuccessful;
 - (iv) an organisational unit without legal personality has been liquidated;
 - (v) it serves a vital interest of the debtor or the public interest;
 - (vi) it is justified for social or economic reasons, in particular the debtor's ability to pay and a legitimate interest of the State Treasury.
- (16) Pursuant to the Cabinet Resolution, aid may be granted with effect from the date on which the Commission issues a positive decision on compatibility of the aid scheme with the internal market, until 31 October 2017.

4. REASONS TO INITIATE THE PROCEDURE PROVIDED FOR IN ARTICLE 108(2) TFEU

- (17) According to the assessment undertaken by the Commission in the Opening Decision, all the conditions for the existence of aid prescribed in Article 107(1) TFEU were met (recitals 28-33 of the Opening Decision).
- (18) As regards the question of compatibility with the internal market, the Commission noted that the aid did not qualify for the derogations provided for in Article 107(2)(a)(b) and (c) TFEU nor Article 107(3)(a),(b) and (d) TFEU (recitals 35-36 of the Opening Decision).
- (19) In addition, the Commission had doubts on whether Article 107(3)(c) TFEU would be applicable, given that the aid did not seem to correspond to any of aid categories foreseen in the State aid rules applicable in the agricultural sector, i.e. Commission Regulation (EU) No 702/2014 ⁽¹⁾, European Union Guidelines for State aid in the agricultural and forestry sectors and in rural areas 2014 to 2020 ⁽²⁾ ('the Agricultural Guidelines'), Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty ⁽³⁾ ('the Rescue and Restructuring Guidelines') or Regulation (EU) No 1408/2013 (recitals 37-39 and 48-49 of the Opening Decision). The aid furthermore did not seem to facilitate the development of the milk sector in the sense of Article 107(3)(c) TFEU.
- (20) It also emerged in the Opening Decision that the aid scheme appeared as a breach of the provisions of the Single CMO Regulation which regulate the milk levy (recitals 40-47 of the Opening Decision)

⁽¹⁾ Commission Regulation (EU) No 702/2014 of 25 June 2014 declaring certain categories of aid in the agricultural and forestry sectors and in rural areas compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union (OJ L 193, 1.7.2014, p. 1).

⁽²⁾ OJ C 204, 1.7.2014, p. 1.

⁽³⁾ OJ C 249, 31.7.2014, p. 1.

5. POLAND'S COMMENTS

- (21) Poland did not submit any comments to allay the doubts raised when the formal investigation procedure was initiated. However, in the letters of 12 October 2016 and 20 January 2017, Poland explained that the aid has not been and will not be implemented in Poland given the absence of a positive decision from the Commission (see recital 16).

6. COMMENTS FROM INTERESTED PARTIES

- (22) The Commission received no comments from interested parties.

7. ASSESSMENT OF THE EXISTENCE OF STATE AID

- (23) According to Article 107(1) TFEU, '[s]ave as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.
- (24) The qualification of a measure as aid within the meaning of Article 107(1) TFEU therefore requires the following cumulative conditions to be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage on its recipient; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and affect trade between Member States.

Aid granted by the State or through State resources

- (25) The aid scheme provides for a write-off of the levy due. It results from national provisions and is therefore imputable to the State. It is also financed from the State budget in the sense that the levy has already been paid by Poland to EAGF and now the Polish State, by writing-off the levy due, foregoes revenues that could be used for other purposes. Waiving revenue which would otherwise have been paid to the State constitutes a transfer of State resources ⁽¹⁾.

Selective advantage/Undertakings

- (26) Potential beneficiaries of the aid scheme are certain milk-producing agricultural holdings in Poland (recital 15) ⁽²⁾.
- (27) An advantage, within the meaning of Article 107(1) TFEU, is any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention ⁽³⁾. For it to constitute aid, the measure must confer on the beneficiary advantages that relieve it of charges that would normally be borne from its budget.
- (28) Recent case law, namely the judgment of the General Court in case T-538/11 *Kingdom of Belgium v European Commission* has reiterated that 'the concept of a charge which is normally borne by the budget of an undertaking covers, in particular, the additional costs which undertakings must bear by virtue of obligations imposed by law, regulation or agreement which apply to an economic activity' ⁽⁴⁾.
- (29) Costs, such as the milk levy in the present case, are expenses which a milk producer has to bear from its own budget in the framework of its normal business activity. The obligation to pay milk levy stems from the Single CMO Regulation and the national rules on the organisation of the market in milk and milk products (see recitals 8-10). If certain undertakings are fully or partially relieved from such expenses, then they benefit from an advantage.
- (30) The Commission therefore considers that the aid scheme confers a selective advantage on milk producers.

⁽¹⁾ See judgment in case *France v Ladbroke Racing Ltd and Commission*, C-83/98 P, EU:C:2000:248, paragraphs 48 to 51.

⁽²⁾ In the Opening Decision (recital 31, footnote 8), the Commission raised doubts, in particular, as regards the likelihood for some beneficiaries to effectively benefit from the aid. However, the Polish authorities did not provide any information allowing the Commission to clarify its doubts.

⁽³⁾ See judgment in cases *SFEI and Others*, C-39/94, EU:C:1996:285, paragraph 60; *Spain v Commission*, C-342/96, EU:C:1999:210, paragraph 41.

⁽⁴⁾ EU:T:2015:188, paragraph 76.

Distortion of competition and effect on trade

- (31) The Court of Justice has consistently held that strengthening the competitive position of an undertaking through the granting of State aid generally distorts competition with other competing undertakings not having benefited from this aid ⁽¹⁾. Aid for an undertaking that operates in a market open to intra-Union trade is likely to affect trade between Member States ⁽²⁾. There is substantial intra-Union trade in agricultural products, including milk ⁽³⁾ and Poland is one of the largest milk producers in the Union ⁽⁴⁾.
- (32) The aid scheme being assessed in this Decision is designed to support activities in the agricultural sector, in particular the activities of dairies. As described above, trade in the products of dairies does exist within the Union. The Commission therefore takes the view that the scheme at issue affects trade between the Member States.
- (33) In view of the substantial level of trade in agricultural products, it can therefore be assumed that the scheme in question distorts or threatens to distort competition and affects trade between Member States.

Conclusion on the presence of aid

- (34) It can therefore be concluded that the aid scheme qualifies as State aid within the meaning of Article 107(1) TFEU.

8. ASSESSMENT OF THE LAWFULNESS OF AID

- (35) Pursuant to Article 108(3) TFEU, Member States have the obligation to inform the Commission about any plan to grant aid and are not to put such aid into effect until the Commission authorises it as compatible (stand still obligation).
- (36) The aid scheme was notified to the Commission on 23 May 2016 and it has not been implemented. Therefore, Poland has complied with its obligation under Article 108(3) TFEU.

9. ASSESSMENT OF THE COMPATIBILITY

- (37) In so far as the aid scheme constitutes State aid within the meaning of Article 107(1) TFEU, its compatibility must be assessed in the light of the relevant State aid rules in the area of agriculture. It is settled case-law that the burden of proof for demonstrating that a measure is compatible with the internal market lays on the Member State ⁽⁵⁾. The Commission notes that the Polish authorities have not presented any information on why the aid scheme could be considered compatible with the internal market on the basis of any of the Commission's State aid instruments, in particular such as those listed below.
- (38) As already indicated in the Opening Decision, the assessed aid scheme does not correspond to any of the aid categories provided for in the Agricultural Guidelines or in Regulation (EU) No 702/2014. In the absence of any relevant comments from Poland, the Commission notes that its doubts on the applicability of the Agricultural Guidelines and Regulation (EU) No 702/2014 are confirmed.
- (39) Furthermore, as already indicated in the Opening Decision, aid under the assessed scheme does not fulfil the criteria of aid for undertakings in difficulty in the sense of the Rescue and Restructuring Guidelines. In the absence of any relevant comments from Poland, the Commission notes that its doubts on the applicability of the Rescue and Restructuring Guidelines are confirmed.
- (40) In the absence of any relevant comments from Poland concerning de minimis aid, the Commission further notes that its doubts on the applicability of Regulation (EU) No 1408/2013 are confirmed.

⁽¹⁾ See judgment in case *Philip Morris Holland BV v Commission*, C-730/79, EU:C:1980:209, paragraphs 11 and 12.

⁽²⁾ See, in particular, judgment in case *French Republic v Commission*, C-102/87, EU:C:1988:391, paragraph 19.

⁽³⁾ In 2015, the intra-Union trade amounted to more than EUR 4,5 billion for milk and to more than EUR 28 billion for all dairy products. Source: Eurostat.

⁽⁴⁾ In 2015, Poland was the fifth largest producer of cows' milk in the Union, producing more than 10 million tonnes of milk. Source: Eurostat.

⁽⁵⁾ See judgment in cases *Italy v Commission*, C-364/90, EU:C:1993:157, paragraph 20; *Freistaat Sachsen and Others v Commission*, Joined Cases T-132/96 and T-143/96, EU:T:1999:326, paragraph 140; *Italy v Commission*, C-372/97, EU:C:2004:234, paragraph 81.

- (41) In its notification, Poland referred to point 30 of the Agricultural Guidelines. According to point 30 of the Agricultural Guidelines, the Commission assesses aid schemes not covered by the Agricultural Guidelines or by any other relevant State aid rules on a case by case basis directly on the basis of Article 107(3) TFEU, taking into account the rules laid down in Articles 107, 108 and 109 TFEU, the Common Agriculture Policy and by analogy the Agricultural Guidelines, where possible. Member States notifying State aid not covered by the scope of the Agricultural Guidelines have to demonstrate that the State aid in question meets the common assessment principles as laid down in Chapter 3 of Part I of the Agricultural Guidelines. The Commission only approves such measures if the positive contribution to the development of the sector clearly outweighs the risks of distorting competition in the internal market and affecting trade between Member States.
- (42) In aid cases falling under Article 107(3) TFEU the Commission has wide discretion ⁽¹⁾.
- (43) Article 107(3) TFEU specifies four types of cases in which State aid can be considered compatible with the common market. The Commission considers that the derogations provided for in Article 107(3)(a), (b) and (d) TFEU are not applicable in the present case because the aid scheme in question is not intended for the promotion of the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, nor is it intended for projects of common European interest or to remedy a serious disturbance in the economy or for the promotion of culture and heritage conservation.
- (44) Under Article 107(3)(c) TFEU, aid to facilitate the development of certain economic activities or of certain economic areas may be considered to be compatible with the common market, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.
- (45) In order to be compatible with Article 107(3)(c) TFEU, aid must pursue an objective of common interest. In this regard, aid in the agricultural sector should in particular be in line with the rules on the common organisation of the markets in agricultural products. Where there is a regulation on the common organisation of the market in a given area, the Member States are under an obligation to refrain from taking any measures which might undermine or create exceptions to it ⁽²⁾.
- (46) In the milk and milk products sector, the rules concerned are established in the Single CMO Regulation and Regulation (EC) No 595/2004. Regulation (EC) No 595/2004 lays down detailed rules for applying a levy in the milk and milk products sector as regards, among others, the payment of the levy. A modification introduced by Implementing Regulation (EU) 2015/517 permitted Member States to decide that the amount of the levy due related to the 12-month period beginning on 1 April 2014 is paid by 30 September 2017 in three yearly instalments without interest. The Single CMO Regulation does not provide for further exceptions with regard to the payment of the levy. Poland made use of the said permission through the use of *de minimis* aid. In addition, the present aid scheme provides for cancellation of the levy (second and third instalments) for farmers who overran their available quantity and thus, under the rules on the common organisation of the markets in agricultural products, are liable vis-à-vis the Polish State for payment of the levy. Exempting certain Polish milk producers from the obligation to pay the levy would undermine the quota system and distort competition with those producers who respected their quotas and those who have taken steps to pay their individual levy bills ⁽³⁾.
- (47) On that basis, the Commission considers that the write-off of milk levy is not compatible with the Single CMO Regulation and Regulation (EC) No 595/2004 and thus with the rules on the common organisation of the markets in agricultural products as regards the milk quota system.
- (48) The write-off of milk levy is a mere instrument intended to improve the financial situation of undertakings but which in no way contributes to the development of the sector or pursue an objective of common interest and which is not compatible with the CMO rules.
- (49) Moreover, if a State aid measure entails a non-severable violation of Union law, the aid cannot be declared compatible with the internal market ⁽⁴⁾.

⁽¹⁾ See for instance judgment in cases *SFEI and Others*, C-39/94, EU:C:1996:285, paragraph 36; *Vlaamse Gewest v Commission*, T-214/95, EU:T:1998:77, paragraph 86.

⁽²⁾ See for instance judgment in case *France v Commission*, C-456/00, EU:C:2002:753, paragraphs 30-33.

⁽³⁾ Currently, there is an ongoing infringement procedure against Italy for failure to recover milk levies due from Italian producers (case C-433/15).

⁽⁴⁾ See for instance judgment in cases *Germany v Commission*, C-156/98, EU:C:2000:467, paragraph 78 and *Régie Networks v Rhone Alpes Bourgogne*, C-333/07, EU:C:2008:764, paragraphs 94 to 116.

(50) Consequently, the aid scheme cannot be considered as compatible with the internal market.

Conclusion on the compatibility

(51) In the light of the above, the Commission finds that the notified aid scheme constitutes State aid within the meaning of Article 107(1) TFEU which is incompatible with the internal market.

(52) Since the aid scheme has not been implemented (recital 21), there is no need for recovery of State aid,

HAS ADOPTED THIS DECISION:

Article 1

The aid scheme for milk producers notified by Poland on 23 May 2016 constitutes State aid within the meaning of Article 107(1) TFEU. This State aid is incompatible with the internal market. Consequently, the aid may not be implemented by the Polish authorities.

Article 2

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

Article 3

This Decision is addressed to the Republic of Poland.

Done at Brussels, 30 June 2017.

For the Commission
Phil HOGAN
Member of the Commission
