COMMISSION DECISION

of 7 December 1984

relating to a proceeding under Article 85 of the EEC Treaty

(IV/28.930 — Milchförderungsfonds)

(Only the German text is authentic)

(85/76/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (1), as last amended by the Act of Accession of Greece, and in particular Article 3 thereof,

Having regard to Council Regulation No 26 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products (2), as amended by Regulation No 49 (3), and in particular Articles 1 and 2 thereof,

Having regard to the Commission Decision of 22 June 1982 to initiate proceedings in this case,

Having heard the Milchförderungsfonds pursuant to Article 19 of Regulation No 17 and Commission Regulation No 99/63/EEC of July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 (4),

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

(1) The Milchförderungsfonds (Milk Promotion Fund — 'MFF') was set up by decision of the Presidents of the German Farmers' Union (Deutscher Bauernverband) and the German Raiffeisen Association (Deutscher Raiffeisenverband) on 1 January 1955 with the task of promoting the quality and sales of milk and dairy products. It is administered by an association ('Gesellschaft bürgerlichen Rechts') formed by the German Farmers' Union and German Raiffeisen Association and their respective Land (State) associations and the Central Association of Private Dairies (Zentralverband der Privatmolkereien).

(2) Under the Guidelines of 1 January 1955 on the Financing and Use of the MFF, as last amended on 7 February 1973 (5), its resources may be used for the following purposes:

(a) the financing of measures to enhance the quality of dairy products, to carry out systematic advertising, to improve the supply of liquid milk and dairy products to the consumer, and otherwise to promote the quality and sale of milk and dairy products;

(b) the financing of such stocks of dairy products as are deemed necessary to regulate the domestic market by the Board of the MFF in consultation with the Federal Minister for Food, Agriculture and Forestry.

(3) The MFF is financed by a voluntary levy on each litre of milk delivered to dairies, which is collected with the producer's consent by the milk cooperatives and private dairies. The amount of the levy is determined by the MFF Board and may not exceed DM 0,005. The levy is currently DM 0,0005. The levies are paid in full into a trust account of the local Land Farmers' Union or Raiffeisen Association or branch of the Central Association of Private Dairies and from there are transferred

(1) OJ No 13, 21. 2. 1962, p. 204/62.
(2) OJ No 30, 20. 4. 1962, p. 993/62.
(3) OJ No 53, 1. 7. 1962, p. 1571/62.
(4) OJ No 127, 20. 8. 1963, p. 2268/63.

(5) The Guidelines form part of the decision of 1 January 1955 setting up the MFF.

to an account designated 'Special fund to promote the dairy industry' held with the German Cooperative Bank (Deutsche Genossenschaftskasse) in Frankfurt. Once they have been collected, the levies cease to be the disposable property of the milk producers and are administered by the association of the MFF as their trustee. As trustee the MFF association merely administers the funds and is bound as to the purpose for which they are used.

(4) The MFF is governed by a Board of Trustees (Kuratorium) composed of the Presidents of the German Farmers' Union, the Federal Association of Raiffeisen Trading Cooperatives (Bundesverband der Raiffeisen-Warengenossenschaften), the Land Farmers: Unions and Raiffeisen Associations, the Central Association of Private Dairies and the Dairy Industry Association (Milchindustrieverband).

As the principal governing body of the MFF, the Board of Trustees every six months issues binding guidelines for the use of the Fund in the ensuing period, laying down the types of promotional measures to be supported, the budget for each type, the period during which the measures may be mounted, and the rates of support available. The Board also takes decisions on the day-to-day administration of the Fund. Support is not automatic, but is granted at the discretion of the Board in the light of the resources available for the relevant period and the rates of support in force.

(5) In recent years the bulk of the Fund's resources have been spent on promoting exports of milk and dairy products to relieve pressure on the domestic market. Between 1978 and 1980, the total support for export promotion rose from DM 4 651 558,24 to DM 14 915 577,58. The latter figure comprised DM 6 083 083,43 on promoting exports to other Community countries, DM 922 722,27 on promoting exports to Community and non-member countries, and the remainder on promoting exports purely to non-member countries.

In 1981 support for export promotion totalled DM 9 484 609,59, of which DM 3 621 137,90 was for exports to Community countries, DM 1 262 010,29 for exports to Community and non-member countries, and the remainder for exports purely to non-member countries.

(6) The support is available for exports of butter, cheese and whole milk powder, and to a lesser extent condensed milk, baby milk, and pasteurized milk-based drinks, liquid milk and cream. The rate of support varies according to the product, the country of destination and the period for which it is granted. In 1981, it ranged from DM 5,00 to DM 20,00 per 100 kg for butter and cheese and from DM 3,00 to DM 5,00 per 100 kg for whole milk powder.

(7) The periods for which support is granted are not always evenly spread over the calendar year but in many cases are of fairly short duration. The promotional measures also tend to be targeted at specific Community countries, so that the support, too, is concentrated on such countries. In 1980 the MFF's expenditure on support for export promotion was distributed as follows:

(8)

Country of destination	Quantity exported (in kg)	Support (in DM)
Butter		
United Kingdom	10 684 750,00	3 038 089,00
Italy, France	9 324 580,94	783 915,62
Non-member countries	34 754 424,16	2 506 137,10
Total support for butter:		6 328 141,72
Cheese		
Italy	8 614 539,70	1 086 236,18
United Kingdom, Ireland, Denmark	10 299 406,10	1 163 940,63
Greece	109 020,00	10 902,00
Non-member countries	36 450 761,52	3 914 199,86
Community and non-member countries	5 253 812,90	892 401,62
Total support for cheese:		7 067 680,29
Whole milk powder		
Non-member countries	19 758 527,00	987 926,35
Condensed milk		
Non-member countries	20 000 964,00	300 013,45
Baby milk		
Non-member countries	1 249 920,00	124 992,00
Milk-based drinks		
Non-member countries	2 548 437,10	76 453,12

Country of destination	Quantity exported (in kg)	Support (in DM)
Liquid milk and cream		
Community and non-member countries	1 012 345,40	30 370,65
Grand total:		14 915 577,58

(9) The total of DM 14 915 577,58 spent on support for export promotion in 1980 was divided between 150 German dairies.

(10) In 1981 export support was distributed as follows:

Country of destination	Quantity exported (in kg)	Support (in DM)
Butter		
United Kingdom	9 847 907,00	1 388 761,85
France	3 049 329,00	304 932,90
Greece	497 201,80	74 580,27
Non-member countries	15 364 220,86	1 123 474,98
Marketing expenditure		20 000,00
Total support for butter:		2 911 750,00
Cheese		
Italy	8 267 970,02	826 797,00
United Kingdom, Ireland, Denmark	8 172 271,01	1 026 065,88
Community and non-member countries	8 129 140,06	1 105 977,63
Non-member countries	22 515 544,25	2 089 144,10
Total support for cheese:		5 047 984,61
Long-life milk and cream		
Community and non-member countries	3 120 651,84	156 032,66
Non-member countries	10 189 029,42	305 670,90
Milk-based drinks		
Non-member countries	1 197 587,18	35 927,14
Whole milk powder		
Non-member countries	22 383 862,00	1 025 600,88
Condensed milk	190 560,00	1 643,40
Total support for milk:		1 524 874,98
Grand total:		9 484 609,59

(11) The total of DM 9 484 609,59 spent on support for export promotion in 1981 was divided between 117 German dairies.

(12) The Guidelines for the use of the MFF issued on 23 November 1979 and 4 December 1980 contain the following provisions regarding measures to promote exports of butter to the United Kingdom:

'A total sum of DM 3 million is set aside for the active marketing of German butter in Great Britain in 1980 and a sum of DM 2 million for such measures in 1981.

Suppliers of German butter to the British market will again be assisted to keep up their sales by a marketing campaign tailored to British conditions'.

(13) The corresponding provisions in the Guidelines issued on 12 December 1978 contain the following clarification:

'The monies are to be made available for a marketing campaign tailored to British conditions, aimed at making up the considerable ground lost by sales of German butter in 1977 and 1978'.

(14) The support measures to promote exports of semi-hard cheese to Italy were intended to encourage and assist exporters to increase their sales promotion beyond the normal level. For this purpose the assisted exporters are said by the MFF to have carried out in 1980 targeted sales promotion campaigns, special promotions and customer recruitment drives, with brand advertising forming the bulk of this promotional expenditure.

(15) Compared with the expenditure on export promotion, the use of the MFF for measures on the domestic market, namely, measures to stabilize the market and to promote sales in Germany, has steadily declined over a number of years. The amount spent on such measures fell from DM 5 597 733.63 in 1971 to DM 356 181,38 in 1981 (for centralized delivery of butter to the intervention agency).

II. LEGAL ASSESSMENT

A. Article 2 of Regulation No 26

(16) The activity of the MFF consists in promoting in a private capacity the sale of agricultural products listed in Annex II to the Treaty (1). These products fall under Articles 1 and 2 of Regulation No 26, Article 1 of which provides that Articles 85 to 90 of the Treaty apply to the products, whilst Article 2 provides for exceptions to the application of Article 85 to the products. The first sentence of Article 2 (1) states that Article 85 (1) of the Treaty does not apply to agreements, decisions and practices relating to trade in the products which form an integral part of a national market organization or are necessary for attainment of the objectives set out in Article 39 of the Treaty. The second sentence of Article 2 (1) provides that, in particular, the said Article shall not apply to agreements, decisions and practices of farmers, farmers' accociations or associations of such associations from a single Member State which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products and under which there is no obligation to charge identical prices, unless the Commission finds that competition is thereby excluded or that the objectives of Article 39 of the Treaty are jeopardized.

(17) The decisions of the MFF are not covered by the exception contained in the first sentence of Article 2 (1) of Regulation No 26 for the following reasons.

(18) They do not form an integral part of a national market organization, since no such organization exists for the dairy sector in the Federal Republic of Germany. The national market organizations which used to exist in this sector have been replaced by the common organization of the market, the rules for which are laid down in Council Regulation (EEC) No 804/68 (2).

(19) Nor are the decisions of the MFF necessary for attainment of objectives set out in Article 39 of the EEC Treaty. The third paragraph of the preamble to Regulation No 26 shows that this exception is applicable only in so far as application of Article 85 (1) of the Treaty would jeopardize attainment of the objectives of the common agricultural policy in the sector concerned. Secondly, the means which may be employed in the dairy sector in order to attain the objectives of the common agricultural policy set out in Article 39 of the Treaty are stated in Regulation (EEC) No 804/68. Aid to promote exports of specific products to other Member States are in direct conflict with the common organization of the market (see judgment in Case 177/78 Pigs and Bacon, Commission v. McCarren [1979] ECR 2161, ground 14). Article 24 (1) of Regulation No 804/68 expressly prohibits aid whose amount is fixed on the basis of the quantity of the products concerned. This Article, it is true, applies only to State aids; whereas the support granted by the MFF is private. Nevertheless, the latter are equally detrimental to the proper application of the means provided for in Regulation (EEC) No 804/68 of attaining the objectives of the common agricultural policy. Therefore, the decisions of the MFF cannot be regarded as being necessary for the attainment of the objectives of Article 39 of the Treaty.

(20) In fact, they are prejudicial to the attainment of those objectives since they militate against the stabilization of markets provided for in Article 39 (1) (c) of the Treaty, which aims at a balance between supply and demand in order to ensure that Community products can be sold at prices that are profitable and do not fluctuate unduly. To attain this objective in the dairy sector, Regulation (EEC) No 804/68 introduced common prices and uniform arrangements for external trade in order to stabilize prices on the Community market. This stability would be undermined by subsidies on exports from one Member State to another. For this reason, national aids the amount of which is, as in the present case, fixed on the basis of the quantity of the products concerned were expressly prohibited by Article 24 of Regulation (EEC) No 804/68.

(1) List referred to in Article 38 of the Treaty, Chapter 4.
(2) OJ No C 148, 28. 6. 1968, p. 13.

(21) Since the two conditions for the exception provided for in the first sentence of Article 2 (1) of Regulation No 26 are not satisfied, the exception provided for in the second sentence is not applicable, since it refers to one particular form of the arrangements covered by the first sentence and requires that the case satisfy one of the two conditions for the exception in the first sentence as well as having the features described in the first sentence (1).

(22) However, even if the special circumstances described in the second sentence were intended to constitute a separate exception, this additional independent test would still not be met. The association formed by the German Farmers' Union and German Raiffeisen Association and their respective Land associations and the Central Association of Private Dairies to administer the MFF is an association of trade associations serving the common economic interests of its members. It is not, however, an association of farmers' associations within the meaning of the second sentence of Article 2 (1) which, like farmers' cooperatives, carry on on behalf of their members common commercial activities in the field of the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products.

(23) The MFF maintains that it is a form of self-help group formed by German milk producers and that the levies collected from them are administered by the Board of Trustees in a purely fiduciary capacity.

(24) It is true that the association of the Fund is only a trustee and as such is bound as to the use to which it puts the Fund. The relationship between the milk producers and the associations which together form the association running the fund can also be described as one of principal and agent, whereby the milk producers have appointed the associations to administer the Fund on their behalf and to employ it for the purposes they determine. This relationship does not, however, alter the nature of the trade associations and does not make them farmers' associations.

By their nature, the associations concerned are therefore not associations within the meaning of the second sentence of Article 2 (1) of Regulation No 26.

(25) In any case, the exception provided for in the special circumstances described in that provision is not applicable since, as shown above, the MFF's activity jeopardizes the attainment of the objective specified in Article 39 (1) (c) of the Treaty, namely the stabilization of markets.

(26) Hence, the exceptions provided for in Article 2 of Regulation No 26 are not applicable in the present case and do not, therefore, preclude the application of Article 85 of the EEC Treaty.

B. Article 85 (1) of the EEC Treaty

(27) The promotional activites of the MFF are determined by binding decision of the Board of Trustees, its governing body. Since the founding associations of the MFF, the German Farmers' Union and German Raiffeisen Association and their respective Land associations and the Central Association of Private Dairies have formed an association to administer the MFF, the decisions of the MFF are decisions of an association of associations of undertakings. Although Article 85 (1) does not expressly refer to decisions of associations of associations of undertakings, they are nevertheless covered by it, since for Article 85 (1) to be applicable it is only necessary that the decisions of an association of undertakings are binding on its members, as is the case here.

(28) The applicability of Article 85 (1) to decisions of associations of associations of undertakings is also confirmed by the second sentence of Article 2 (1) of Regulation No 26, which declares decisions of associations of farmers'

(1) Second report on competition policy, point 75, and Case 71/74 Frubo, [1975] ECR 563 at 579-580, where only the conditions referred to in the first sentence are mentioned as the tests for exception provided for in Regulation No 26.

associations under certain conditions to be exempt from Article 85 (1), thus implying that normally such decisions do fall within the scope of the Article.

(29) The decisions by the MFF have as their object and effect a distortion of competition within the common market in so far as the untertakings which benefit are directly enabled to reduce their selling prices. The support the Fund gives for exports to other Member States artificially strengthens the financial position of the German exporters receiving the support relative to their competitors in other Community countries who do not receive such payments. The support helps the exporters to promote sales of their products on export markets, i.e. to penetrate such markets or expand their sales there, in that they can offer their customers on those markets more favourable conditions of sale than they would be able to do if the support were not granted.

(30) In so far as the support for sales promotion and advertising was applied to semi-hard cheese in Italy, the competitive position of the supported German exporters was also strengthened: these measures related to particular brands, and could be applied without passing the resulting costs indirectly on to the selling price.

(31) In so far as they provide for support for exports to other Community countries, the decisions of the MFF are also likely to affect trade between Member States. The argument that the support helps expand trade between Member States does not rebut the presumption of an adverse effect on inter-State trade, since the EEC Treaty does not seek to bring about an increase in trade as an end in itself, but rather to create a system of undistorted competition.

(32) The distortion of competition within the common market produced by the export support is appreciable. German exporters receive substantial amounts (DM 6 076 181,43 in 1980) which they are able to use to finance sales promotion measures and to improve their conditions of sale on export markets in the Community.

(33) That the amounts paid out by the MFF do, in fact, represent appreciable financial assistance to exporters is clear from a letter from the Central Association of the Private Dairy Industry (Zentralverband der Privaten Milchwirtschaft e.V.), Bonn, to the MFF on 25 April 1973, which expressly mentions that the export had significantly assisted and boosted exports and had helped to increase Germany's market share for certain products on foreign markets.

(34) This is also borne out by the Guidelines for the use of the MFF issued on 12 December 1978, 23 November 1979 and 4 December 1980, which stated that the support for promoting butter exports to the United Kingdom, which was worth DM 3 038 089,00 in 1980, was intended for *active* marketing tailored to British conditions to help exporters of German butter to the British market to keep up their sales levels and make up the considerable ground they had lost in previous years.

(35) In this connection the degree to which the export support strengthened the position of German butter on the British market is very revealing. Almost all exports of German butter to the United Kingdom in 1980 and all those in 1981 were supported (10 685 of 11 164 tonnes in 1980 (1) and 9 847 tonnes compared with only 9 041 tonnes of recorded imports in 1981 (2). Once the MFF money for such support had run out and they no longer received any form of support, the German exporters were unable to sell butter on the UK market. In other words, without the export support Germany's share of the UK butter market would have been close to zero. In fact, German brands accounted for 4,1 and 3,2 % of the UK market in 1980 and 1981 respectively (3). The export support thus can be said to have increased the share of German butter

(1) NIMEXE 1980.
(2) NIMEXE 1981.
(3) Source: Butterdane.

on the UK market by 4,1 and 3,2 % respectively. This confirms the presumption of an appreciable distortion of competition.

(36) The support for exports of butter to the United Kingdom, which can already be seen to have produced an appreciable distortion of competion within the common market, was only part of such support, which also covered other products and other Community countries. This other support accentuated the anti-competitive effect of the MFF's activity. Against the export support for butter of DM 3 038 089,00 in 1980 and DM 1 388 761,85 in 1981, other export support came to DM 3 034 092,43 in 1980 and DM 2 232 376,05 in 1981 (with support for cheese exports to Italy alone of DM 1 086 236,18 in 1980 and DM 826 797,00 in 1981). In addition, the MFF spent DM 428 856,26 in 1980 and DM 1 262 010,29 in 1981 on support for exports to Community and non-member countries, producing a further distortion of competition.

(37) The export support for German producers clearly must have appreciably reduced the sales outlets for their competitors who did not receive such support.

(38) The situation would be different were the export support to be used for advertising and sales promotion of a general nature that is not brand orientated. In such a case the promotion would benefit all competitors and there would not be an appreciable distortion of competition. However, the promotion would not have to seek to discourage the foreign consumer from buying dairy products not from Germany or to disparage such products in the eyes of the foreign consumer. Nor must it commend German dairy products to the foreign consumer simply on the basis of their national origin.

(39) Likewise, there would not be an appreciable restriction of competition if the advertising stressed the special features of the dairy products in question or used the special characteristics of particular kinds of dairy product as a selling point, even if those kinds were typically German, since such advertising is too indefinite to have a practical effect on competition.

(40) It is the practice of the MFF to adjust the level of its support to changing market circumstances. It is possible therefore that, in some years, the MFF reduces its support for exports to other Community countries to such an extent that the actual repercussions of its activity on trade between Member States during the period are less substantial.

(41) Such reductions do not, however, alter the fundamental nature of the support system set up by the MFF. Although there may be fluctuations in the level of such support over time, the system is, as the Commission's findings for 1980 and 1981 show, intrinsically liable to affect competition and inter-State trade to an appreciable extent. The MFF's activity as it relates to the common market therefore constitutes an infringement of Article 85 (1) of the EEC Treaty.

C. Article 85 (3) of the EEC Treaty

(42) An exemption under Article 85 (3) of the Treaty cannot be granted, if only because the MFF's activity was not notified to the Commission in accordance with Article 4 (1) of Regulation No 17. Since decisions by the MFF relate to exports between Member States and more than two undertakings are party to them, they do not fall within Article 4 (2) (1) or (2) whereby under certain conditions an exemption can be granted without notification.

(43) Even if the MFF's activity had been notified, an exemption under Article 85 (3) of the EEC Treaty could not be granted, since at least one of the conditions for exemption is not satisfied: the MFF's activity contributes neither to improving the production or distribution of goods nor to promoting technical or economic progress.

(44) Although the support for exports to other Community countries helps to increase the range and quantity of products on the markets of the countries to which they are exported by making it possible for German exporters receiving such support to sell their products on those export markets or to expand their sales there, this artificial increase in supply at the expense of the sales of competitors cannot be regarded as a genuine improvement in the distribution of goods within the meaning of Article 85 (3),

HAS ADOPTED THIS DECISION:

Article 1

The decisions of the Milchförderungsfonds on the granting of support for exports within the common market constitute an infringement of Article 85 (1) of the Treaty establishing the European Economic Community.

Article 2

The Milchförderungsfonds shall refrain in future from taking any decisions on the granting of support for exports within the common market, so long as, for want of appropriate precautions on the part of the Milchförderungsfonds, there remains a possibility of the support being used by the recipient undertakings to reduce selling prices or for advertising and sales promotion measures

— which are brand-orientated,

— which seek to discourage the buying of dairy products not from Germany or to disparage such products in the eyes of the foreign consumer, or

— which commend the dairy products in question to the foreign consumer simply on the basis of their national origin.

Article 3

This Decision is addressed to:

Milchförderungsfonds,
Andreas-Hermes-Haus,
Godesberger Allee 142-148,
D-5300 Bonn 2.

Done at Brussels, 7 December 1984.

For the Commission
Frans ANDRIESSEN
Member of the Commission