II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 9 October 1985

on aids granted by the French Government to producers' organizations in the fisheries sector

(Only the French text is authentic)

(86/186/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular the first subparagraph of Article 93 (2) thereof,

Having regard to Council Regulation (EEC) No 3796/81 of 29 December 1981 on the common organization of the market in fishery products [1], as amended by Regulation (EEC) No 3655/84 [2], and in particular Article 28 thereof ;

Having given formal notice to the parties concerned to submit their comments in accordance with the provisions of the first subparagraph of Article 93 (2) of the Treaty,

Taking the following considerations into account :

I

NOTIFICATION AND DESCRIPTION OF THE AIDS

Procedure

Under Article 93 (3) of the EEC Treaty, the French Government notified the Commission, by letters of 9 April 1981, 10 July 1981 and 13 April 1982 from its Permanent Representation to the European Communities, of its intention to grant certain aids to sea-fishing undertakings. These include aid for enhancing the value of production, involving aid for the storage of surpluses by deep-freezing, granted by the FIOM (Fonds d'Intervention et d'Organisation des Marchés des Produits de la Pêche Maritime et des Cultures Marines), and aid to support prices, which is also paid by the FIOM to producers' organizations to compensate their members in part for the inadequate increases in producer prices.

By letters of 20 January and 30 May 1984 from its Permanent Representation, the French Government also forwarded to the Commission a document on the organization, financing, activities and intervention operations of the FIOM. These include aid measures to support the market such as the abovementioned aid for the storage of surpluses by deep-freezing and a measure benefiting producer organizations within the framework of an autonomous withdrawal price support system.

Aid for storage of surpluses

In some ways this aid measure is similar to storage aid as provided for in Article 14 of Regulation (EEC) No 3796/81. It is paid in the form of a premium per kilogram and only where the storage operations are covered by contracts between producers' organizations and processors : such contracts are either intervention agreements or supply contracts. The agreements relate to surpluses withdrawn from the market at the withdrawal price. In return for the aid, the processor undertakes to absorb and process species in quantities not exceeding those laid down in the agreement. The amount of aid is variable and fixed at a flat rate per species, prior to the intervention operation, by reference to the purchase price, the processing and storage costs and the cost price of the processed product, but it cannot under any circumstances be more

[1] OJ No L 379, 31. 12. 1981, p. 1.
[2] OJ No L 340, 28. 12. 1984, p. 1.

than half the withdrawal price for the species concerned. The supply contracts are concluded between producers' organizations and one or more processors before the fishing year for a given species. Commitments relate to duration, tonnage, purchase price and the amount of the aid. The prices of products involved in these two types of contract are stabilized or increased by deep-freezing of whole surplus fish, or by deep-freezing, salting, smoking or preserving of fish prepared beforehand.

The FIOM reimburses the producers' organizations 60 % of the amount of the aid (70 % in 1981) paid out by the latter or producers or to processors, and the producers' organization is responsible for the balance. There is no limit on the proportion of total production eligible for the aid.

The French Government justified this aid by the need to prevent the destruction of fishery products of which there was a structural shortfall with possible short-term surpluses.

Aid to producers' organizations under the target price system

The aim of this system is to guarantee a minimum rate of increase in the average price for a certain number of species considered as representative in the various ports.

Each producers' organization chooses a number of representative species (maximum of ten 10 in 1981 and three species in 1982). A target price *(prix d'objectif)* equal to the average price for the previous year or the same period of the previous year, plus a percentage set by the Government is fixed for each of these species. For the three four-month periods of 1981, the said percentages were 15 %, 14 % and 13 % respectively, whilst in 1982 the figure was 10 %. If the real average price is lower than the target price, the producers' organization receives a premium equal to that difference, multiplied by the tonnage of the species landed during the current period or year. This mechanism is applied in respect of each of the representative species, but the overall aid to a producers' organization cannot be greater than the difference between the real turnover for the current period and the 'target turnover', calculated in the same way as the target price, i.e. the turnover for the same period as the previous year plus the 'target percentage'.

The FIOM's contribution to this premium was set at 100 % in the first four-months period of 1981, 80 % in the second and 50 % in the third four-months period of 1981 and in 1982.

The French Government stated that this mechanism was introduced in 1981 to deal with an extremely critical situation in the fishing industry as a result of a very steep rise in operating costs which had not been offset by an increase in the price of fish at the first stage of marketing. The purpose of the scheme was therefore to enable the trading accounts of vessels to be balanced.

Aid to producers' organizations under the autonomous withdrawal price system

This involves support under a national withdrawal system for species not covered by the Community withdrawal arrangements. It is comparable to the system provided for in Article 9 (1) and (3) of Regulation (EEC) No 3796/81. Withdrawal prices for the so-called 'national' species are fixed by the FIOM each year. The producers' organizations which apply these prices must, when products are withdrawn from the market, pay to their members financial compensation equal to the withdrawal price. The FIOM reimburses 50 % of the financial compensation to these producers' organizations. The system covers 29 species.

The aids described above are covered by Articles 92, 93 and 94 of the EEC Treaty by virtue of the provisions of Article 26 of Council Regulation (EEC) No 100/76 [1] and of Article 28 of Regulation (EEC) No 3796/81.

Examination by the Commission

Aid for the storage of surpluses

Aid to producers' organizations under the target price system

After an initial examination, the Commission found that these aids constitute infringements of the provisions of Council Regulation (EEC) No 100/76, as replaced from 1 June 1982 by Regulation (EEC) No 3796/81 on the common organization of the market in fishery products. They involve autonomous national mechanisms applied in the area covered by the common organization of the market. Within the framework of the latter, the measures considered as most likely to achieve the objectives pursued (such as the application of withdrawal prices by producers' organizations, the fixing of guide and withdrawal prices for certain major species, the granting of financial compensation to producers' organizations which meet certain conditions, the carry-over premium which aims to bring onto the market certain products withdrawn after processing, and private storage aid, as provided for in Articles 9, 10, 12, 13 and 14 respectively of the above-mentioned Regulation) are jeopardized by these national measures introduced unilaterally by France in favour of national producers' organizations and their members only. Consequently, the Commission decided to initiate the examination procedure provided for in Article 93 (2) of the EEC Treaty in respect of these aids, and by letter of 15 June 1982 it gave notice to the French Government to submit its observations.

Aid to producers' organizations under the autonomous withdrawal price system

After an initial examination, the Commission found that this aid measure was liable to constitute an infringement of Regulation (EEC) No 3796/81, which provides for the fixing by producers' organizations of withdrawal prices below which they will not sell products supplied by their

[1] OJ No L 20, 28. 1. 1976, p. 1.

members, but does not make provision for a national system with publicly-funded financial compensation to cover the cost of such withdrawals. The Commission therefore decided to initiate in respect thereof the procedure provided for in Article 93 (2) of the EEC-Treaty, and by letter of 27 July 1984 it gave notice to the French Government to submit its observations.

By letter of 31 December 1984 from its Permanent Representation to the European Communities, the French Government informed the Commission of its intention to abolish, from 1985, the FIOM's intervention to support autonomous withdrawal prices for 20 species and to maintain intervention, as a transitional measure, for the nine remaining species, pending an adjustment of the common organization of the markets. After an initial examination, the Commission found that the maintenance of the system concerned in respect of nine species, albeit as a transitional measure and even in the expectation of possible changes to the Community rules, would continue to be incompatible with the common organization of the market. Consequently, the Commission decided to extend the Article 93 (2) procedure, initiated in July 1984, to this new autonomous withdrawal price system and by letter of 15 April 1985 it gave notice to the French Government to submit its observations.

Observations of the parties concerned

Several Member States and professional organizations have forwarded their observations to the Commission. These Member States and some professional organizations share the Commission's opinion. However, one French producers' organization stated that producers' organizations in France had to supplement, with the aid of the FIOM, the Community regulations on the organization of the market, which almost totally ignores French artisanal fishing, and that all the measures were cofinanced by direct contributions from fishermen ; it called for an adjustment of the common organization of the market to take account of the specific conditions affecting fishing in each country.

II

OBSERVATIONS OF THE FRENCH GOVERNMENT

Aid for storage of surpluses

Aid to producers' organizations under the target price system

In its reply to the Commission of 29 July 1982, the French Government stated that detailed explanations of these aids had already been provided and that it had no further observations to make. At a later meeting between French and Commission officials, the former stated that the two aid measures concerned would be abolished and that the aid for the storage of surpluses by deep-freezing would be replaced by the carry-over premium provided for in Article 14 of Regulation (EEC) No 3796/81.

By letter of 29 November 1983, the French Government confirmed that aid to support prices had been abolished from 1 January 1983.

Aids to producers' organizations under the autonomous withdrawal price system

In its replies to the Commission of 2 October and 31 December 1984, the French Government pointed out that the autonomous withdrawal price system should be seen as complementary to the Community system, which compensates withdrawals of only certain species consumed in major quantities, particularly those fished on an industrial scale. The FIOM system primarily covers artisanal fishing.

To avoid discrimination between industrial fishing, which receives compensation from the European Agricultural Guidance and Guarantee Fund (EAGGF), and artisanal fishing, which is of special importance to the economy of certain regions and would be forced to finance these withdrawals on its own, the French Government had introduced this FIOM-financed measure without contravening the spirit of the Community rules or affecting the conditions of competition within the common organization of the market. To the contrary, this measure, it was claimed, was fully in line with the objectives stated in the recitals of the Regulation on the common organization of the market, e.g. the achievement of market stability and the guaranteeing of a fair income to producers.

After comparing the trends in production and trade for five species subject to an autonomous withdrawal price, and in view of the fact that these FIOM-financed measures have not disturbed the conditions of competition, the French Government considers that the measures in question may be considered as compatible with the common market.

Furthermore, these measues are claimed not to have unduly strengthened the competitiveness of producers' organizations in all respects, including organizations handling species subject to the Community price support system, since the producers' organizations concerned engage only in artisanal fishing and consequently deal only in species covered by autonomous aid measures. There would therefore appear to be very slight interference between the two categories of product supported by the EAGGF and the FIOM mechanisms.

In its reply to the Commission of 15 June 1985, the French Government stated that the common organization of the market could not, in its opinion, be considered comprehensive in so far as Annex I to Regulation (EEC) No 3796/81 covered some 15 species only, while these species accounted for only 40 % of the value of French landings. It wished to maintain its assistance towards withdrawals of six species, as it considered that most of them were of importance to the acceding countries as well and that these species should consequently be

included in the Community system. In the meantime provision had been made for a Community system for three of these species under the accession arrangements. The French Government considered a further three species to be regional and wished to continue its aid for withdrawals thereof, but was prepared to support any Commission initiative to achieve further reform of the Community arrangements and accordingly to abolish the aids concerned in accordance with a timetable to be worked out in agreement with the Commission.

III

LEGAL ASSESSMENT

The producers' organizations are one of the main means of implementing the common policy on the market in fishery products. The 1981 amendments to the rules on the common organization of the market (Council Regulation (EEC) No 3796/81) have further reinforced the role assigned to the producers' organizations. Thus a reinforced system of aid has been introduced for the setting up of these producers' organizations. In certain conditions, the Member States are now able to apply the rules governing the producers' organizations to non-members. Further measures, such as the carry-over premiums and the possibility of applying withdrawal prices with a measure of discretion, have been introduced to increase the effect of market stabilization measures taken by the producers' organizations. To encourage producers' organizations to adapt supply more closely to market requirements, the rate of EAGGF financial compensation for withdrawals is reduced if there is an increase in the quantities withdrawn.

Aid for the storage of surpluses

Article 14 of Regulation (EEC) No 3796/81 makes provisions in certain conditions for a carry-over premium for species withdrawn from the market at the Community withdrawal price, which may be returned to the market for human consumption subject to compliance with certain conditions relating to processing and subsequent storage. This premium is granted for only some species of a high commercial value and for quantities not exceeding 15 % of annual landings. The amount of the premium cannot be greater than the technical costs of processing and storage and must not exceed 50 % of the Community withdrawal price. It is subject, moreover, to the conditions laid down in Article 14 (1), and in particular the provision that the products meet certain quality, size and presentation requirements.

French storage aid for the deep-freezing of surpluses is not dependent, however, on any conditions regarding the quality of the products. Moreover, it was introduced in respect of all species covered by an intervention or supply contract, including species not covered by the Community system, and without any limitation on the quantities involved. This measure therefore constitutes interference with the conditions applying on the market for fishery products in France and is at odds with the objectives of the common organization of the market (in particular the adjustment of supply to market requirements). Furthermore, the quantities affected by this aid are withdrawn from the market only temporarily and consequently increase supply after they are processed, which may have repercussions on the market for these products both in France and throughout the Community and may jeopardize the effect of the measures applicable to these products under the common organization of the market. As a consequence, the fisheries sector in France has a financial advantage over producers in the other Member States, where these products would be withdrawn from the market at a lower price or processed without any contribution from public funds.

Aid to producers' organizations under the target price system

Title III of Regulations (EEC) No 100/76 and (EEC) No 3796/81 makes provision for a price support system based on the need to stabilize prices and thus cope with market situations likely to lead to prices which might cause disturbances on the Community market. A guide price is therefore fixed for most fishery products, taking into account the market trend and the need to avoid the formation of surpluses in the Community, to help to guarantee a fair income to producers and to take the interests of consumers into consideration. This price provides a basis for determining the price level for intervention on the Community market.

The French target price system, which also aims to stabilize prices and helps to support producers' incomes is similar to the Community system. It does not involve a guide price within the meaning of the Community legislation, but a price actually paid to producers, State aid being granted to producers' organizations where the prices observed on the market are too low. Through this aid system, France has introduced an autonomous mechanism to support the prices of fishery products. This has the effect of replacing the Community system. Whereas the latter provides merely for withdrawals to adjust supply to market requirements and thus stabilize prices, the French mechanism replaces market forces by instituting guaranteed prices. In this sense, the very concept of common organization is called into question and supply is increased artificially, with repercussions for the other producers who cannot depend on a similar support mechanism.

Aid to producers' organizations under the autonomous withdrawal price system

Article 9 (1) of Regulation (EEC) No 3796/81 provides that producers' organizations may fix a withdrawal price below which they are not required to sell products supplied by their members. For certain major species a withdrawal price is fixed at Community level (Article 12). If producers' organizations apply the Community withdrawal prices for the products listed in the basic Regulation (Annex I A and D), they receive a financial contribution from the Member State under certain specific and restrictive conditions (Article 13). If producers' organizations fix autonomous withdrawal prices for these products or for any other product listed in Article 1, they can grant an indemnity to their members (Article 9 (1)).

To finance these withdrawal measures, producers' organizations create intervention funds fed by contributions assessed on quantities offered for sale or have recourse to an equalization system (Article 9 (3)). These intervention funds do not qualify for any public subsidy, apart from the fact that during the five years following their creation Member States may grant aid to producers' organizations in the form of loans on special terms to cover part of the anticipated costs (Article 6 (4)).

The granting of aid to producers' organizations is governed by Community legislation and is limited by the strict conditions of Article 6 of Regulation (EEC) No 3796/81. Aid from the FIOM to producers' organizations under the autonomous withdrawal price system is not covered by the abovementioned Regulation. The support system organized by the FIOM is a national system which applies concurrently to 29 (and more recently 9) species and which operates in addition to both the optional intervention system at producers' organization level for all species (Article 9 (1) and (3) of Regulation (EEC) No 3796/81) and the withdrawal system for approximately 15 species (Article 13). The rules of application are similar to those laid down by the Community system, but the conditions under which the aid is granted are not as strict.

The granting of this aid has significant effects on the financial status of French producers' organizations. Since withdrawal prices are fixed nationally and guaranteed thanks to a 50 % State subsidy, French producers receive a higher indemnity for quantities withdrawn than others who apply the autonomous withdrawal price system but do not have the financial resources to maintain withdrawal prices at a level markedly above the prices of fish for the production of fish meal.

Moreover, the granting of this aid must inevitably have major effects on the co-responsibility placed on producers' organizations by the organization of the market. According to information on the application of this aid in 1982, producers' organizations may receive both the financial compensation provided for by the Community rules and the financial compensation granted by the FIOM under the national withdrawal price system. The French national system does not reduce the level of compensation as the volume of withdrawals increases, so that under the Community system (Article 13 (3) of Regulation (EEC) No 3796/81) zero compensation is payable if the quantity withdrawn per species exceeds 20 % of annual landings. Consequently, there is no incentive for French producers to adjust supply more closely to market requirements.

The three aid measures involved reinforce the competitiveness of recipient producers' organizations in respect of all their activities, including those covered by the Community system. There is, for example, an undue increase in the maximum amount of launching aids under Article 6 (1) and (2) of Regulation (EEC) No 3796/81, which depends on the value of production.

Furthermore, this competitive advantage has negative effects on the position of producers in other Member States, since approximately 53 % of the French market is covered by French supplies, approximately 23 % by imports from other Member States and approximately 24 % by imports from third countries, while France exports some 23 % of its production about 58 % of which goes to the other Member States (1983 figures).

The common organization of the market in the fisheries sector as adopted by the Council covers all fishery products (Article 1). The introduction of financial intervention measures for certain species means that no such measures should apply to other fishery products. The Member States may therefore no longer set up national support arrangements to supplement Community intervention measures, even for species not covered by the present Community system. Such measures can only be contemplated at Community level if the rules governing the common organization and the single market are to be observed.

The granting of FIOM aid to producers' organizations under the target price system, the autonomous withdrawal price system, and the aid system for the storage of surpluses jeopardizes the proper functioning and runs counter to the objectives of the common organization of the market. As a consequence these aids constitute infringements of Community law.

France set up these illegal arrangements some years ago without giving prior notification to the Commission or waiting for the latter to define its position. Such notification was given only following several clear requests from the Commission. Certain details regarding the application of these aid measures have still not been forwarded, even following requests from the Commission in its formal letters.

IV

Since the measures involved are aid measures financed through State resources and conferring on French producers a competitive advantage over producers in other Member States, they are State aids within the meaning of Article 92 (1) of the EEC Treaty, which states that aids meeting certain criteria are incompatible with the common market.

The prohibition contained in Article 92 (1) of the Treaty cannot be waived by virtue of paragraph 2 of that Article since the derogations provided for are clearly not applicable in this case.

With regard to the derogations provided for in Article 92 (3), the rulings handed down by the Court of Justice of the European Communities have consistently shown that once the Community has legislated for establishment of the common organization of the market in a given sector, Member States are under an obligation to refrain from taking any measure which might undermine or create exceptions to it, having regard to the express provisions of the legislation but also to its aims and objects.

As a result of the foregoing it appears that the three aid measures undermining the common organization of the market in the sector concerned constitute infringements of Community law. Accordingly such measures can under no circumstances qualify for the derogations provided for in Article 92 (3) [1]. Moreover, the three French measures referred to above involve operating aids, which by their very nature are contrary to the common interest within the meaning of Article 92 (3) (c), in this case taking the form of the Council Regulation on the common organization of the market in fishery products.

In order to remedy the competitive disadvantage of producers in other Member States *vis-à-vis* French producers and to ensure compliance with Community law, the measures concerned must be abolished by the French Government without delay, should this not already have been done.

This Decision is without prejudice to the conclusions which the Commission may draw as regards the recovery of the abovementioned aids from the recipients and as regards the financing of the common fisheries policy by the EAGGF,

HAS ADOPTED THIS DECISION :

Article 1

1. The aid from the FIOM to producers' organizations under a surplus storage system, as granted in France for several years, is incompatible with the common market within the meaning of Article 92 of the EEC Treaty and must be abolished.

2. The aid from the FIOM to producers' organizations under a target price system, as granted in France in 1981 and 1982, is incompatible with the common market within the meaning of Article 92 of the EEC Treaty and must be abolished.

3. The aid from the FIOM to producers' organizations under an autonomous withdrawal price system for species not covered by the Community withdrawal arrangements is incompatible with the common market within the meaning of Article 92 of the EEC Treaty and must be abolished.

Article 2

France shall inform the Commission, within one month from notification of this Decision, of the measures which it has taken to comply with the provisions of Article 1.

Article 3

This Decision is addressed to the French Republic.

Done at Brussels, 9 October 1985.

For the Commission

Henning CHRISTOPHERSEN

Vice-President

[1] Judgment of the Court of Justice in Case 51/74, Hulst v. Produktschap voor siergewassen (1975) ECR 79.
Judgment of the Court of Justice in Case 169/82, Commission v. Italy, (1984) ECR 1603.