II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 25 June 1986

on an aid to fish producers' organizations granted by the German Government

(Only the German text is authentic)

(86/561/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 markets in fishery products [1], as last amended by the Act of Accession of Spain and Portugal, and in particular Article 28 thereof,

Having given notice, pursuant to the provisions of the first subparagraph of Article 93 (2) of the Treaty, to those concerned to submit their comments [2],

Whereas :

I

Notification and description of the aid

In letters from its Permanent Representative to the European Communities dated 8 July and 22 October 1982, the German Government notified the Commission, in accordance with Article 93 (3) of the EEC Treaty, of its intention to convert into subsidies the market stabilization loans made to organizations of producers engaged in inshore and cutter fishing in 1975 and 1976.

This is an aid scheme coming under the area of the market organization for fishery products. Article 6 (2) of Council Regulation (EEC) No 100/76, on the common organization of the markets in fishery products [3], and Article 6 (4) of Regulation (EEC) No 3796/81, which succeeded the former Regulation, stipulate that the Member States may make aid available to producers' organizations, either directly or through credit institutions, in the form of loans on special terms to cover part of the anticipated cost of market intervention within the meaning of Article 8 or 9 of these Regulations, i.e. market withdrawal measures. In 1975/76, four German cutter fishing organizations obtained, under this article, loans totalling DM 4 500 000. These were to be reimbursed from 1979 onwards in ten equal annual instalments, the interest rate being between 2 % and 4 %. However, several of these organizations were forced to cease repayments because of economic problems besetting the industry.

The German Government was prepared to forego reimbursement of the amounts of these loans outstanding (DM 3 150 000) provided that all the organizations of cutter fishermen agreed to market their output jointly and to set up a single marketing organization for this purpose. The draft contracts on the conversion into subsidies of the amounts of the loans outstanding stipulated that any producers' organizations withdrawing from joint marketing would be required to reimburse the balance

[1] OJ No L 379, 31. 12. 1981, p. 1.
[2] OJ No C 57, 2. 3. 1983, p. 6.
[3] OJ No L 20, 28. 1. 1976, p. 1.

outstanding by 1989. The balance is calculated on the basis of one-seventh per remaining year of the amount of the debt when the contracts entered into force.

Under Article 28 of Regulation (EEC) No 3796/81, this aid comes under Articles 92, 93 and 94 of the EEC Treaty.

Review by the Commission

After a tentative review, the Commission took the view that the principle of joint marketing of fishery products is compatible with Regulation (EEC) No 3796/81, but that the methods proposed to achieve such marketing, the conversion into subsidies of loans on special terms, are not provided for in the abovementioned Regulation on the market organization ; the organization is a comprehensive system and any aid not provided for is liable to interfere with its proper operation ; the entry into force of the aid scheme therefore constitutes an infringement of the provision set out in that Regulation.

Accordingly, the Commission decided to initiate, in respect of this aid, the review procedure provided for in Article 93 (2) of the EEC Treaty, and, in a letter dated 23 December 1982, it gave notice to the German Government to submit its comments.

II

Comments of the parties concerned

Several Member States, and one producers' organization, sent comments to the Commission. All these comments endorse the Commission's assessment.

Comments of the German Government

In its reply, sent to the Commission on 25 January 1983, the German Government made the following comments :

1. The purpose is not to grant additional funds to the producers' organizations concerned, but only to cancel the redemption of loans granted in the past, one-third of which had in fact already been reimbursed. Dispensation from reimbursement of annual payments against loans granted is authorized under very strict conditions set by the budgetary legislation of the German Federation. Article 59 (1), Section 3, of the Organic Law on the Federal budget confers on the competent authorities the right to remit claims where recovery in the specific case would entail particular hardship for the debtor.

2. The Commission has acknowledged that the aim of the scheme, i.e. the joint marketing of the products of the organizations concerned, is in line with the objectives of the common organization of the market.

3. The loans on special terms provided for in Article 6 (4) of Regulation (EEC) No 3796/81 are defined only in a very general way and remission of the reimbursement obligation made to avoid jeopardizing the very existence of the debtor could be included in the special terms of these loans. Also, this provision sets no absolute limit to the level of the aid, as the anticipated intervention costs which the aid will cover at least in part have only to be estimated. Nor does it make any restriction with regard to the rate of the interest subsidy, or the number of years for which the reimbursement can be deferred or even for the reimbursement deadlines. It would therefore be possible to grant loans which would provide equal cover of intervention costs and identical terms of reimbursement but would represent a subsidy equivalent exceeding the amount concerned in this case.

4. The scheme has a structural character because of its long-lasting impact on the improvement of the facilities for marketing fishery products, since the remission of the debt is linked with an obligation on producers' organizations to market their products jointly without limitation as to time. Failure to comply with this obligation entails a requirement to repay the loan, that is, cancellation of the remission. The structural objective of the scheme, which requires the beneficiary organization to adopt an attitude in line with the market organization for fishery products, is therefore achieved with limited means and underpinned by a strict obligation. These structural effects of the scheme are such as to qualify it under Article 92 (3) (c) of the EEC Treaty. Rulings of the Court of Justice of the European Communities to the effect that national aid not provided for under existing market organizations is automatically incompatible with the Treaty, refer to aid concerning products and not aid designed to ensure improvement of production or marketing structure.

5. According to the guidelines concerning aid for the purchase of fuel for heating glasshouses, the Commission would not be opposed to such aid in view of the structural aspect, although it is operating aid coming under Council Regulation (EEC) No 1035/72 [1] on the common organization of the market in the fruit and vegetables sector.

6. Articles 8 and 9 of Council Regulation (EEC) No 101/76, on the establishment of a common policy on structures in the fisheries sector [2], authorize Member States to grant financial aid which contributes to the

[1] OJ No L 118, 20. 5. 1972, p. 1.
[2] OJ No L 20, 28. 1. 1976, p. 19.

adaptation of production and marketing conditions in relation with market requirements. This would cover not only investment aid but also other aid in line with the same objectives.

The German Government's conclusion is that the aid scheme concerned can be considered compatible with the common market by virtue of Article 92 (3) (c) of the EEC Treaty.

In a supplementary communication dated 14 May 1984, replying to letters from the Commission dated 17 November 1983 and 26 April 1984, the German authorities provided further information on the financial situation of the producers' organizations concerned, showing that reimbursement of the loan would prevent these organizations from continuing their work and indicating the legal consequences for the cooperatives (legal status of the producers' organizations), which would no longer be in a position to settle their debts. The balance sheets of the producers' organizations show that they would no longer be in a position to ensure pursuit of their operations if they had to reimburse the loans. Also, under German legislation on cooperatives, the bankruptcy procedure is activated at the time of excess debt, a situation faced by all the beneficiaries concerned.

III

Legal assessment

On the initiation of the Article 93 (2) procedure in respect of this aid scheme the Commission stated that the aim of the scheme seemed favourable to the development of the market, as sought by the common market organization, but that the method chosen by the German Government for this purpose was not in line with Article 6 of Regulation (EEC) No 3796/81. Meetings between German officials and Commission staff, and an exchange of letters between the German Government and the Commission, failed to yield a solution other than that proposed in the notification. In these circumstances, the German Government decided to grant the aid provisionally; in the contracts with the producers' organizations there is a clause providing for cancellation of the commitment of the German Government to forego reimbursement of the loans should there be a Commission decision to the effect that the aid is incompatible.

Article 6 (4) of Regulation (EEC) No 3796/81 stipulates that, during the five years immediately following the creation of the intervention funds referred to in Article 9 of the same Regulation (financing of withdrawal), Member States may make aid available to producers' organizations, i.e. either directly or through credit institutions, in the form of loans on special terms to cover part of the anticipated cost of market intervention within the meaning of Article 9. However, the purpose of the German aid in question is the conversion into outright grants of such loans made to organizations of cutter fishermen in 1975 and 1976.

A broad interpretation of the expression 'special terms' for the loans mentioned above, going so far as to cover actual remission of the repayment requirement, cannot be accepted since an outright grant is not a 'loan' at all. Community Regulations provide for the grant of loans, even on favourable redemption terms, only '... to cover part of the anticipated cost of market intervention within the meaning of Article 9' (of Regulation (EEC) No 3796/81). It follows that a comparison of the amount of the aid, in subsidy equivalent, in the form of direct subsidy is ruled out, since to forego completely reimbursement of a loan is tantamount to the granting of a new non-repayable subsidy. It would thus constitute a direct aid to producers' organizations in conflict with the restrictive provisions of Article 6 (4) of the abovementioned Regulation. Also, the original loans were granted under either Article 6 (2) of Council Regulation (EEC) No 2142/70 [1] or Article 6 (2) of Regulation (EEC) No 100/76 (since superseded by Article 6 (4) of Regulation (EEC) No 3796/81), which provide for this measure a time limit of five years following the constitution of the intervention funds referred to in Articles 7 and 8, respectively. The subsequent conversion of these loans must be deemed to be a new aid having in principle the same objective, i.e. to cover part of the anticipated cost of intervention on the market for withdrawals, but the granting of which in 1983 came after the time limit set and was, for this reason, in conflict with the Regulations.

The aid cannot be considered as aid benefiting structures which would have a lasting effect on the improvement of marketing facilities. The objective sought was the joint marketing of the products of the beneficiary producers' organizations. This aim, though desirable under the market organization, is not covered by the types of measure referred to in the second indent of Article 9 of Regulation (EEC) No 101/76 concerning the adaptation of marketing conditions, in particular through the development of conservation and treatment facilities necessary to strengthen the effectiveness of the work of the producers' organizations.

[1] OJ No L 236, 27. 10. 1970, p. 5.

The joint marketing referred to here is one of the normal marketing measures, which may require the constitution of a new organization structure, which may therefore be stimulated by the aids provided for in Article 6 of the abovementioned Regulation on the common organization of the market. The aid concerned has no direct link with this joint marketing, but is designed to restore the producers' organizations to a sound financial footing, thus facilitating for them the creation of new organizational structures, e.g. joint marketing. The link between the aid and such joint marketing is relied upon by the German authorities to justify the 'structural' nature of the measure, but neither the grant itself nor the amount of the aid have a comparative basis with any costs that may be involved in instituting joint marketing.

The reference to the guidelines on aid for the purchase of fuel for heating glasshouses is immaterial; the fuel aid enjoyed an authorization restricted in time on severe terms to enable horticulturists to adapt to the sharp increases in oil prices. Such a temporary authorization was also agreed for fisheries. This operating aid concerned and its purpose was to cushion the impact of a sharp increase in a production cost which cannot be recuperated by necessary structural measures, the effect of which can only be achieved in the longer term. There is no direct link with the marketing of the products concerned and the aid concerned therefore cannot be considered as a marketing aid, interfering directly in the common organization of the market.

The conversion of loans into subsidies cannot therefore qualify under the strict terms governing the grant of certain aids to producers' organizations, laid down in Article 6 of Regulation (EEC) No 3796/81. It has a direct impact on the financial situation of the cutter fishermen's organizations in Germany, especially with regard to possibilities for support of autonomous withdrawal prices, as the intervention funds available to each organization are increased indirectly by the amounts of the loans which are not repaid. These intervention funds, normally provided by levies based on quantities sold, cannot qualify for financial compensation from public funds. The difficult financial situation of these organizations when the relevant aid was granted cannot justify the grant of an aid conflicting with the Regulations on the common organization of the markets.

It should also be recalled that the producers' organizations receiving the aid also benefited from the financial compensation arrangements for withdrawals provided for in Community Regulations. This strengthening of their competitive situation may have a negative influence on their readiness to adapt towards the objectives set under the common organization of the markets, i.e. an incentive to tailor supply more closely to market needs; there is also discrimination against competing producers' organizations, which had not enjoyed the same financial advantages.

A stronger competitive situation for these organizations weakens that of producers in the other Member States, since only about a quarter of the German market is covered by its own landings and about half the supplies are imports from the other Member States; Germany exports about half of its production and, of this, three-quarters goes to other Member States (1984).

IV

Aid in the form of release from the obligation to repay loans made to producers' organizations jeopardizes the proper operation of the EEC market organization and runs counter to the objectives of the organization. It therefore constitutes an infringement of Community law.

The scheme in question, being a support measure financed from State resources and strenthening the competitive position of German producers vis-à-vis that of producers in the other Member States, is a state aid incompatible with the common market within the meaning of Article 92 (1) of the EEC Treaty. None of the derogations laid down in Article 92 (2) of the EEC Treaty is applicable in this case.

As for the derogations laid down in Article 92 (3) of the EEC Treaty, the Court of Justice of the European Communities has consistently held that, wherever the Community has adopted regulations establishing market organizations, Member States must refrain from any action liable to entail exceptions to the organization or to hamper its operation, having due regard not only to express provisions but also to the objectives of the regulations. It follows from the foregoing that the scheme in question is harmful to the market organization in the relevant sector and is thus a measure infringing Community law. Consequently, this measure may in no circumstances qualify for the derogations laid down in Article 92 (3) of the EEC Treaty [1].

To ensure compliance with Community law, the scheme in question, if it has not yet been discontinued by the German Government, must be brought to an end without delay.

[1] Judgment of the Court on 23 January 1975 in Case 51/74, *Hulst/Produktschap voor Siergewassen.* ECR (1975), p. 79. Judgment of the Court on 27 March 1984 in Case 169/82, *Commission v Italy,* ECR (1984), p. 1603.

This Decision is without prejudice to the consequences which, as appropriate, the Commission may draw with regard to the recovery of the abovementioned aid from beneficiaires and with regard to the financing of the common fisheries policy by the EAGGF,

HAS ADOPTED THIS DECISION :

Article 1

The aid from the German Government to inshore and cutter fishing producers' organizations, in the form of conversion into subsidies of market stabilization loans, is hereby found incompatible with the common market pursuant to Article 92 of the EEC Treaty and must be discontinued.

Article 2

The Federal Republic of Germany shall inform the Commission, within one month from notification of this Decision, of the action it has taken to ensure compliance with Article 1.

Article 3

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 25 June 1986.

For the Commission

António CARDOSO E CUNHA

Member of the Commission