# COMMISSION DECISION

## of 14 September 1994

## on aid in respect of exports of mushrooms, granted in connection with the Market Development Fund in Ireland

**(Only the English text is authentic)**

(94/814/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Having regard to Council Regulation (EEC) No 1035/72 of 18 May 1972 on the common organization of the market in fruit and vegetables [1], as last amended by Regulation (EC) No 3669/93 [2], and in particular Article 31 thereof,

Having given formal notice, in accordance with Article 93 (2) of the Treaty, to the parties concerned to submit their comments [3] and having taken due account of the same,

Whereas :

I

(1) The Commission was informed that State aid was being granted to producers of mushrooms in the form of aid related to the quantitiy of mushrooms exported ; this aid, according to the same information, was being granted from the Market Development Fund. By letter dated 17 December 1992, the Commission asked the Permanent Representative of Ireland whether such an aid existed and if so to inform it how this measure could be reconciled with the Market Development Fund, a scheme to which the Commission did not formulate objections in November 1992 (Aid No 644/92). Under the Market Development Fund, assistance to business producing agricultural products covered by common organizations of the market was confined to aid for training, market development or advertising and aid to certain investments and/or short-term operating loans. By letter dated 1 April 1993, the Irish authorities sent the Commission an answer that was not very detailed ; on 7 April 1993, therefore, the Commission asked for additional clarifications in order to avoid any misunderstandings concerning the application of the Market Development Fund to mushroom producers.

By telex message of 14 April 1993, the Commission asked for a reply to its telex message sent on 23 February 1993, to which no reply had been received, asking for precise details on one of the conditions for granting the aid in question.

The Irish authorities replied to the request from the Commission of 7 April 1993 by telex message of 7 May 1993. In addition, by telex message of 12 May 1993, the Irish authorities answered the telex message of 23 February 1993. The telex message of 12 May 1993 led the Commission to require more detailed clarifications by telex message of 17 May 1993.

The Irish authorities answered the Commission's telex message of 17 May 1993 by telex message of 23 June 1993. However, despite this telex message, justified doubts continued to exist and a meeting between the Irish authorities and Commission staff took place on 29 June 1993. At the end of this meeting, the doubts concerning the application of the Market Development Fund to the mushroom sector persisted.

(2) According to information reaching the Commission, based especially on a document appearing to be a circular of the Irish Trade Board, of which the Commission has a copy, the recipients of the aid are individual mushroom producers who buy their compost from one or more of the five Irish compost-selling undertakings and who export fresh mushrooms ; the amount of aid is based on the quantity of mushrooms exported. In fact, according to a complainant submitted to the Commission, the aid is between 3,5p and 6,5p per pound and totals £ Irl 1,2 million.

The various answers and clarifications provided by the Irish authorities, including the statements that the quantity of mushrooms exported is only a condition of eligibility for aid, that the amount of aid granted is not linked to the quantity of mushrooms exported and that the only aid granted to the mushroom producers under the Market Development Fund is exclusively a function of the producers' eligible expenditure on training, market development and promotion, are not consistent with the information contained in the document referred to above which appears to be a circular of the Irish Trade Board.

[1] OJ No L 118, 20. 5. 1972, p. 1.
[2] OJ No L 338, 31. 12. 1993, p. 26.
[3] OJ No C 251, 15. 9. 1993, p. 5.

By letter dated 23 June 1993, the Irish authorities confirmed the existence of the said circular but stated that it had been sent to some of the compost firms before any aids was paid and that the situation was rectified subsequently. However, the Irish authorities did not provide precise evidence in support of this statement concerning retification. In addition, at the meeting on 29 June 1993, no new evidence was produced of a nature to eliminate the doubts as to whether the aid was compatible with the Market Development Fund.

II

(1) By letter dated 29 July 1993 to the Irish Government, the Commission stated that it had decided to initiate the procedure provided for in Article 93 (2) of the Treaty with regard to this aid.

In that letter, the Commission informed the Irish authorities that it considered, on the basis of the information contained in the document referred to above which appeared to be a circular of the Irish Trade Board, that the aid in question could not on principle be regarded as a proper application of the Market Development Fund to mushroom producers. In fact the aid in question, which according to the circular was calculated according to the quantities exported, amounted to an operating aid with the direct effect of artificially lowering the cost of the products of the benefiting producers. It was consequently likely to distort competition and to affect trade between Member States and met the criteria of Article 92 (1) of the Treaty without qualifying for any of the exemptions provided for in Article 92 (2) and (3).

Furthermore, the measure infringed Regulation (EEC) No 1035/72. The provisions of that Regulation are to be regarded as a complete and exhaustive system, excluding any possibility for Member States to take complementary market measures.

In addition, a condition set for the granting of aid, in this case the obligation to buy compost from one or more of five Irish compost-selling undertakings, constitutes a measure of equivalent effect to a quantitative restriction on trade and thus infringes Articles 30 *et seq.* of the Treaty. The Commission considers on principle any aid to be incompatible within the meaning of Article 92 if the conditions for granting the aid conflict within the meaning of Article 92 if the conditions for granting the aid conflict with another provision of Community law, since any such aid must be considered contrary to the common interest.

(2) Under the abovementioned procedure, the Commission gave notice to the Irish Government to make known its comments.

The Commission also gave notice to the other Member States, as well as interested parties other than the Member States, to make their comments (see footnote 3).

III

Two Member States and various interested parties communicated their comments to the Commission. The correspondence containing these comments was passed on to the Irish authorities in a letter dated 10 February 1994.

By letter dated 11 October 1993, the Irish authorities announced that they would reply to the letter of 29 July 1993 as soon as possible and, in letter dated 24 March 1994, undertook to give an answer within two weeks. In addition, in the latter letter, it was stated that the Irish authorities were reviewing the application of the Market Development Fund and that they needed slightly more time to finalize this review as regards small businesses.

By letter dated 6 April 1994, the Irish authorities provided replies to the Commission cencerning some fundamental aspects of the scheme. In connedtion with the problem of the infringement of Article 30 of the Treaty, they stressed that initially the staff responsible for paying aid under the Market Development Fund considered that aid should not be granted to firms importing their compost because they had profited from the devaluation of the pound sterling. However, following representations from some firms and in the light of experience in applying the Fund, it was decided to allow aid to be paid to applicant businesses which had imported their compost. In support of this argument the Irish authorities provided a letter from the Irish Mushroom Growers' Association dated 4 April 1994 confirming that it was satisfied that all the potential applicants for aid had been informed of the existence of the scheme and that firms using imported compost were eligible for and had received aid.

Regarding the problem of the operative event for payment of the aid, the Irish authorities stated that they had made inquiries into the activities of the main firms assisted by the Market Development Fund and that the expenditure had indeed been on activities covered by the scheme approved by the Commission.

They added that the expenditure by the four largest beneficiary undertakings (accounting for almost 85 % of aid to the mushroom sector under the Market Development Fund) in the period from October 1992 to the end of 1993 in respect of the following activities, viz : market research, sales personnel and recruitment, establishment of overseas companies/offices, trade fairs, etc, travel to

overseas markets, overseas customer visits, tendering costs, advertising and promotion, design and product development, and training had exceeded the aid received from the Market Development Fund. As for the smaller businesses, accounting for the remaining 15 % of the Market Development Fund, the Irish authorities affirmed that they were confident that expenditure had been incurred at least equal to the amount of aid received.

It is clear that the evidence provided involves only an *ex-post* comparison of aid granted and that the expenditure recorded in the major undertakings over a period was also determined *ex-post*. The Commission felt therefore that it was necessary to seek additional clarifications and a meeting took place on 19 April 1994 between the Irish authorities and Commission staff. As a result of this meeting the Irish authorities undertook to provide the Commission with official documents within a very short time, provided that such documents existed, showing that steps had been taken in good time, and at the latest before the first payment of aid, to link the granting of aid to recipients' eligible expenditure in accordance with the rules of the Market Development Fund.

Although the Irish authorities provided certain additional information about the grant of the aid, no document or other precise evidence in that regard was supplied by the Irish authorities. The information they provided is as follows :

(a) a letter dated 27 April 1994, the contents of which were similar to that of 6 April 1994 but containing copies of the guidelines for the application of the Market Development Fund, as well as for completing the aid application form (which the Commission already had in its possession), these being documents which were sent to all firms requesting aid ; this letter also contained copies of certificates issued by the accountants of the five undertakings certifying that in the period from September 1992 to December 1993 these firms had incurred expenditure, depending on the firm, on market research, recruitment and training, sales personnel and recruitment, advertising and promotion, overseas customer visits, establishment of overseas companies, trade fairs, exhibitions, demonstrations, travel to overseas markets, tendering costs, design and product devlopment, product and pack house development.

To this letter dated 27 April 1994 was also attached a copy of a letter sent by the Irish authorities on 27 April 1994 to the chairman of the Irish Mushroom Growers' Association and referring to the condition contained in the circular of 20 November 1992 (see point II.1), according to which aid would be granted only to mushroom producers who buy all their compost in Ireland. The contents of this latter letter are as follows :

'I refer to the assistance provided by the Market Development Fund during the currency crisis of 1992/93.

At the commencement of the Fund's operations, a circular issued from the Fund on 20 November 1992 stating that assistance will be provided to mushroom growers who buy all their compost in Ireland.

As you know, this condition was not implemented, as it was not in accordance with the terms of the approval of the EU Commission for the operation of the Fund. (I note in this regard the terms of your letter of 5 April 1994). Moreover, purchase of Irish compost would not be a condition of eligibility for any existing or future scheme of State assistance.

To remove any doubt there may be that growers may have been persuaded by the Fund letter of 20 November 1994 that any State assistance in the future may be linked to, or conditional upon, the purchase of Irish compost by potential beneficiaries, I should be grateful if you would circulate a copy of this letter of your members and if you would confirm to me that you have done so.' ;

(b) a letter dated 29 April 1994, which repeated the arguments advanced in the previous letters from the Irish authorities but added the following new points :

(i) that the provisions contained in the circular of 20 November 1992 were drawn up before the Commission approved the Market Development Fund scheme and that they were communicated to the staff implementing the scheme ; that payments from the Market Development Fund were not made until early December 1992 ; that, at that time, the arrangements referred to in the circular of 20 November 1992 had been superseded and were not applied ; that aid was paid by the authorities to firms exporting mushrooms without any conditions which would require its distribution to the mushroom growers ;

(ii) that the conditions on the use of aid were made clear to beneficiaries by :

— the guidelines for the application of the scheme and the aid application form (see point (a)),

— the formal letters of approval issued from the Irish Trade Board to all firms who received assistance from the fund; these letters made no reference to a condition that the monies received had to be passed on to mushroom producers and indeed no such condition was imposed,

— the formal document of transfer of funds and the formal document of acknowledgement that firms had to complete, which showed that:

(i) there was no obligation to pass on the monies to producers, and

(ii) the amount of aid was linked to the number of employees of the firm and was not calculated by reference to the quantity of mushrooms exported.

In support of these arguments, the Irish authorities provided a copy of the guidelines already mentioned, a copy of an aid approval letter from the Irish Trade Board, a copy of the administrative aid-payment document and a copy of the acknowledgment of receipt to be filled in by the undertaking.

Finally, in this same letter, the Irish authorities stated that all these points constituted sufficient evidence to satisfy the Commission that:

(i) Market Development Fund assistance was paid to firms exporting mushrooms;

(ii) the amount of the assistance was not calculated by reference to the quantity of mushrooms exported by these firms;

(iii) there were no conditions requiring these firms to pass on the monies received to producers;

(iv) the use of Irish compost as a condition of eligibility was discarded before any decision was taken on the question of any firm's eligibility;

(v) there is no possible beneficiary who was left unaided as a result of the initial adoption of that condition; and

(vi) any influence that the initial condition may have had on a firm's decision to source compost has been neutralized.

IV

(1) In accordance with Article 31 of Regulation (EEC) No 1035/72, Articles 92, 93 and 94 of the Treaty are applicable to the product concerned.

The aid in question can on principle only be regarded as an application of the Market Development Fund if the beneficiaries received it on the terms laid down for the Fund. In fact, the Market Development Fund — to which the Commission did not formulate any objection on 12 November 1992 — was a temporary scheme which expired at the latest at the end of March 1993, designed to help small and medium-sized businesses to cope with their financial difficulties following the devaluation of the pound sterling. More particularly for firms whose production includes agricultural products covered by common organizations of the market (as is the case for mushrooms), and unlike the aid for firms whose production does not involve agricultural products, the aid was to be limited to eligible expenditure for activities such as training, market development and advertising, and certain investments and/or short-term operating loans.

One of the conditions of eligibility under this scheme was dependence on the UK market. However, in the case in question not only was the quantity of mushrooms exported a condition of eligibility as the Irish authorities state (see I.2), but it appears from the circular that the Commission has in its possession, and the existence of which has been confirmed by the Irish authorities, that the amount of aid granted to producers was calculated on the basis of the quantities of mushrooms exported and not on their eligible expenditure.

According to the Irish authorities this document was subsequently corrected before any payments of aid were carried out, but no document or other precise evidence of this correction, or of how it was done, has been supplied to the Commission, either at the bilateral meeting on 29 June 1993 or in the letters dated 11 October 1993, 24 March 1994, or 6 April 1994 following the opening of the procedure under Article 93 (2), or at the meeting on 19 April 1994, or in the letters dated 27 and 29 April 1994.

The replies of the Irish authorities of 24 March and 6 April 1994 provide no new details regarding the operative event for payment of the aid.

The *ex-post* check carried out by the Irish authorities showing that the aid was actually granted in accordance with the rules of the Market Development Fund, as referred to in the replies of 24 March, 6 April and 27 and 29 April 1994, does not allow the Commission to change its assessment of non-confor-

mity of the aid. Thus, although the Irish authorities made an *a posteriori* examination of expenditure, this is not a demonstration that the aid was granted only for expenditure, this is not a demonstration that the aid was granted only for expenditure allowed under the Market Development Fund for operators producing or trading in products covered by Annex II to the Treaty. Such eligible expenditure should have been determined at the latest when the aid was initially granted.

In addition, the checks made by the Irish authorities, although supposed to be made on the recipients of aid, in fact involved only the undertakings which, according to the circular of 20 November 1992, were required to pass on the aid directly without deductions to the mushrooms growers.

As regards the administrative documents which the Irish authorities undertook at the meeting on 19 April 1994 to supply within a short time to the Commission — provided such documents existed — so that the Commission could satisfy itself that steps were taken in good times to link the granting of aid to the recipients' eligible expenditure in accordance with the rules of the Markets Development Fund, no document of this kind has been received from the Irish authorities. The letter referred to earlier that was sent on 27 April to the Irish Mushroom Growers' Association mentions only the use of compost by the mushroom producers.

As regards the letter dated 29 April 1994 and the attached documents, they provide no evidence that before the granting of aid at the end of 1992 any steps were taken to link the granting of aid to the types of expenditure referred to in the Commission's letter of 16 November 1992 (see point I.1). Moreover,

— although it is stated in that letter that the provisions of the circular of 20 November 1992 were replaced and were not applied, no document or precise evidence has been provided repealing and replacing that circular,

— the absence of any indication, in the copy of the administrative letter of the Irish Trade Board approving aid to firms (example letter dated 15 December 1992), of an obligation on firms to pass on the aid to the mushroom growers does not prove that this obligation was not actually applied, as required by the circular of 20 November 1992,

— the same conclusion applies to the administrative document transferring aid monies to the firms,

— the fact that point 3 of the Irish Trade Board letter quoted above recalls that the aid is granted only if compost is bought from an Irish undertaking ('domestic source') strengthens the idea that the circular of 20 November 1992, which already contained this condition, was in fact never replaced.

(2) It is also clear that, whether or not there was an obligation on the recipient firms to pay the aid to producers, the aid must still be regarded as operating aid incompatible with the common market, because it follows from the details of the case that the aid payment was not linked to the types of expenditure specified in the Commission's letter of 16 November 1992.

(3) The fact that, as alleged in the Irish authorities' letter of 29 April 1994, the aid granted was based on the number of employees of the recipient firm and not on the quantity of mushrooms exported does not change the character of the aid from being operating aid to mushroom-exporting undertakings.

Such aid has the effect of putting the recipients in a more favourable situation compared with operators in the same sector in the other Member States.

The result is, consequently, to distort competition between the Irish operators receiving the aid, producers and/or exporters, and corresponding operators in the other Member States.

In addition, since 1981 Ireland has increased its presence in the mushroom market and become the largest exporter of fresh mushrooms to the remainder of the Community, almost exclusively to the United Kingdom, in absolute terms (in 1980 Ireland produced 6 000 tonnes of mushrooms, compared with 37 000 tonnes in 1991; of these 37 000 tonnes, Ireland exported 24 193 tonnes to other Community countries, including 24 172 to the United Kingdom). In 1991, total intra-Community trade amounted to 70 448 tonnes.

The aid in question is therefore likely to affect trade between Member States, more especially as more than half of Irish production is exported to other Community countries.

The measure thus falls within the terms of Article 92 (1) of the Treaty.

(4) Article 92 (1) states that aid schemes fulfilling the terms it sets out are on principle incompatible with the common market.

The exemptions provided for in Article 92 (2) are clearly not applicable to the aid scheme concerned, nor have these exemptions been invoked by the Irish authorities.

The exceptions provided for in Article 92 (3) list objectives pursued in the interests of the Community and not solely in the interests of individual sectors of national economies. These exemptions are to be interpreted strictly during the examination of any programme of regional or sectoral aid or of any individual case of application of general aid schemes.

In particular, these exemptions can be granted only if the Commission can establish that the aid is necessary for carrying out one of the objectives pursued. To grant the benefit of one of these exemptions to aid schemes not involving any such counterpart would amount to allowing damage to trade between Member States and distortions of competition that cannot be justified in the Community interest and, at the same time, to permitting undue advantages to accrue to operators in certain Member States.

In the case at issue, the aid does not involve any such counterpart. The Irish Government has not provided, nor has the Commission discovered, any evidence that the aid in question meets the terms of one of the exemptions provided for in Article 92 (3).

The scheme is not intended to promote the carrying out of an important project of common European interest within the meaning of Article 92 (3) (b), since, given the effects that it can have on trade, the aid runs counter to the common interest. Nor is it a measure designed to remedy a serious disturbance of the economy of the Member State concerned within the meaning of that same provision.

With regard to the exemptions provided for in Article 92 (3) (a) and (c) for aid schemes intended to encourage or facilitate the economic development of the regions as well as of certain activities referred to in Article 92 (3) (c), it must be noted that the measure at issue, because it is an operating aid, is not of a nature to improve in a durable way the situation in which the recipient producers are placed since, once it ceased to be paid, they would again be in the same situation as existed before the State aid was provided.

(5) Furthermore, it must be remembered that the aid concerns a product covered by a common organization of the market and that there are limits to the powers of Member States to intervene autonomously in the operation of such a common organization comprising a common support system, which thereby falls within the exclusive competence of the Community.

The payment of the aid at issue in the mushrooms sector is counter to the principle that Member States no longer have the power to take unilateral decisions on farmers' incomes within the framework of a common organization of the market by granting aid of this type. Even if an exemption under Article 92 (3) were possible for producers of the agricultural product in question, the aid scheme infringes the common organization of the market and would thereby be excluded from such an exemption (see judgment of the Court of Justice of 26 June 1979 in Case 177/78, Pigs and Bacon Commission v. Mc Carren Company Ltd [1].

Accordingly, the aid must be regarded as aid not eligible for any of the exemptions provided for in Article 92 (3).

(6) In addition, since according to the circular of 20 November 1992 the aid was restricted to producers buying compost from one or more of the five undertakings selling Irish compost, it must be regarded as a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty. The scheme encouraged the mushroom producers to purchase their supplies of compost only from national producers and thus indeed constitutes a measure having an effect equivalent to a quantitative restriction which cannot be justified under Article 36 because it involves a purely economic measure; the Irish authorities, in particular in their replies of 23 June 1993 and 29 April 1994, stated that the circular referred to above had actually been sent to some of the firms concerned. According to the Irish authorities this happened before payments of aid were made and the situation was rectified subsequently.

The Commission considers an aid scheme on principle to be incompatible with the common market within the meaning of Article 92 of the Treaty if the conditions on granting the aid infringe another provision of Community law.

Although the Irish authorities declared in their letter dated 29 April 1994 that the circular of 20 November 1992 had been repealed and replaced before payments were made, the same letter contains a copy of a letter sent by the Irish Trade Board on 15 December 1992 to a recipient of the aid approving the grant of the aid but also recalling that it was granted on condition that compost was bought from an Irish company.

[1] ECR [1979] 2161.

However, the information contained in the letter dated 27 April 1994 sent by the Irish authorities to the Mushroom Growers' Association with a request to circulate it to all members, reminded the Association that such a condition requiring the purchase of compost was not applied and recognized that this provision was contrary to Community law. Under these circumstances the Commission considers that, as from that date, the effects of this provision of the circular of 20 November 1992 were corrected.

(7) The aid in question must therefore be considered incompatible with the common market within the meaning of Article 92 of the Treaty.

(8) Since the aid was granted without being first notified as a draft measure to the Commission, it must be considered illegal under Article 93 (3) of the Treaty.

V

In cases of incompatibility of an aid scheme with the common market, the Commission is entitled, in accordance with the case law of the Court of Justice and in particular the judgment delivered on 12 July 1973 in Case 70/72 [1], as confirmed by judgments of 24 February 1987 and of 20 September 1990 in Cases 310/85 [2] and C-5/89 [3] respectively, to require Member States to recover from the recipients any aid granted improperly.

In light of the above considerations, the aid paid out, the exact amount of which is not known to the Commission but which according to information reaching the Commission amounts to £ IRL 1,2 million (± ECU 1,5 million), should be refunded.

The refunds are to be collected in accordance with the procedures and provisions of Irish legislation and in particular provisions concerning interest on overdue sums owed to the State, to be calculated from the date when the aid in question was granted.

This is a necessary measure in order to restore the previous situation by cancelling all the financial advantages the recipients of the improperly granted aid have enjoyed unduly since the date of payment of the aid.

This Decision does not anticipate any consequences which the Commission may draw, if necessary, in connection with the financing of the common agricultural policy through the European Agricultural Guidance and Guarantee Fund (EAGGF),

HAS ADOPTED THIS DECISION:

*Article 1*

The aid for producers and/or exporters of mushrooms granted by the Market Development Fund, c/o An Bord Tráchtála (The Irish Trade Board), is illegal. Such aid is, moreover, incompatible with the common market within the meaning of Article 92 of the EC Treaty.

*Article 2*

Ireland is hereby required to cancel the aid referred to in Article 1 and to recover the sums paid out, within two months from the notification of this Decision.

This recovery shall be carried out in accordance with the procedures and provisions of national legislation and in particular in accordance with those concerning interest payable on overdue sums owed to the State. The amounts to be recovered shall bear interest from the date on which the aid in question was granted.

*Article 3*

Ireland shall inform the Commission, within two months from the notification of this Decision, about the measures that it has taken to comply with Article 2.

*Article 4*

This Decision is addressed to Ireland.

Done at Brussels, 14 September 1994.

*For the Commission*

René STEICHEN

*Member of the Commission*

[1] ECR [1973] 813.
[2] ECR [1987] 901.
[3] ECR [1990] I-3437.