COMMISSION DECISION

of 5 June 1996

concerning aid that the Republic of Austria intends to grant pursuant to the ERP Eastern Europe programme

(Only the German text is authentic)

(Text with EEA relevance)

(97/241/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 the Agreement on the European Economic Area, and in particular Article 62 (1) (a) thereof,

Having given notice to the parties concerned, in accordance with the aforementioned Articles, to submit comments, and having regard to those comments,

Whereas:

I

(1) By communication dated 23 March 1995, the Austrian authorities notified the ERP programme for investments in Eastern Europe (ERP — Osteuropaprogramm). Additional information and clarifications were presented at a meeting held in Vienna on 28 March 1995 and by a communication dated 20 April. A number of amendments were made to the original notification at a second meeting held in Eisenstadt and Vienna on 12 and 13 June 1995 and by a communication dated 27 June 1995. In particular, the Austrian authorities agreed:

— to withdraw part of the scheme initially designed to promote the setting-up of distribution networks,

— to link the aid to a productive investment project.

By a communication dated 10 August 1995, the Austrian authorities transmitted additional information. The case was discussed again with the representatives of the Austrian authorities at a further meeting held on 9 October 1995.

(2) On 31 October 1995, the Commission decided to initiate the procedure provided for in Article 93 (2) of the EC Treaty. By letter dated 27 December 1995, the Commission informed the Austrian Government thereof and requested it to submit its comments within one month. This letter was published in the *Official Journal of the European Communities* [1], as notice to the other Member States and interested parties to submit any comments they might have on the measures in question within one month from the date of that publication.

(3) By letter dated 14 February 1996, the Austrian Government submitted detailed observations. Observations were also submitted by Du Pont de Nemours International SA on 9 April 1996. Those observations were submitted to the Austrian Government for its comments by fax dated 22 April 1996. Other Member States did not react to the notice.

II

(4) The programme, which is to run for the five years between July 1995 and June 2000, provides for loans totalling ÖS 350 million (ECU 26 million) for the first year of operation of the scheme (1995/96). The loans are awarded at reduced interest rates corresponding to an aid equivalent of ÖS 44 million/year (ECU 3,3 million/year). The amount of a loan per project may vary between ÖS 1 million (ECU 74 500; minimum) and ÖS 100 million (ECU 7,45 million; maximum). The ERP Fund expects 10 to 50 cases under the scheme per year.

The programme provides for aid for direct investment of Austrian enterprises in the countries of Central and Eastern Europe (Hungary, the Czech Republic, the Slovak Republic, Poland, Romania, Bulgaria, Estonia, Latvia, Lithuania, Slovenia, Croatia and Albania). Qualifying investment projects must contribute to restructuring and economic recovery in Eastern European countries, improve the strategic position of the enterprise requesting aid, and have a positive impact on the Austrian economy.

[1] OJ No C 71, 9. 3. 1996, p. 9.

(5) The following projects are eligible:

— setting-up of production establishments or subsidiaries,

— setting-up of production joint ventures,

— purchase of qualifying holdings (at least 25 %) in an existing company,

— acquisition of enterprises,

— involvement in environmental projects.

The following costs are eligible for the scheme and may be financed by a reduced-interest loan:

— equity capital, provided that at least two thirds is used for productive investment projects,

— shareholder's loans, provided that at least two thirds is used for productive investment projects,

— the cost of acquisition of a shareholding in a foreign company, provided that at least two thirds is used for productive investment projects,

— other costs directly associated with productive investment projects.

(6) The maximum permitted aid intensity of the reduced-interest loans is, also in combination with other aid, 11,25 % (gross).

(7) When opening the proceedings, the Commission took the view that the reduced-interest loans in question may constitute State aid within the meaning of Article 92 (1) of the EC Treaty and Article 61 (1) of the EEA Agreement in that they improve the economic situation of the enterprises requesting aid and are likely to affect trade between Member States. The Commission expressed doubts whether and under what conditions investment aid granted to enterprises established in the European Union with a view to promoting commercial activities carried out by them outside the European Economic Area was compatible with the common market: the scheme was not restricted to SMEs, and the ceilings for the combination of different types of aid laid down in the guidelines on State aid for SMEs was likely to be exceeded. In view of those doubts, the Commission considered none of the derogations provided for in Article 92 (2) and (3) to be applicable and decided to initiate proceedings pursuant to Article 93 (2) in respect of the scheme in question.

III

(8) The Austrian Government submitted observations by letter dated 14 February 1996. Identical observations were submitted to the procedure pursuant to Article 93 (2) with regard to the ERP internationalization programme on 22 December 1996 [1]. According to those observations, the reasons for the two programmes are twofold:

— For decades, the Austrian economy was characteristically determined by its extreme peripheral situation within Europe, and its proximity to Eastern Europe. For that reason, the Austrian economy was and is still lagging behind the OECD average as regards integration into the world market: in 1985, the stock of outward foreign direct investments (FDI) of Austrian enterprises amounted to 1,5 % of the Austrian GDP compared to an OECD average of 8 %. Although the figure rose to 2,8 % in 1990 and 4,3 % in 1993, Austrian enterprises would have to undertake outward FDI amounting to at least ÖS 100 000 million (ECU 7 045 million) in order to enable the Austrian economy to catch up to the OECD average, which is at present at an estimated level of 10 to 12 %.

— The aid schemes should, in parallel, contribute to the economic development of countries in transition to a market economy and developing countries and help to establish market-economy structures in those countries.

(9) The Austrian authorities stress that the aim of the programmes, i.e. to make up for 'internationalization' deficits of Austrian enterprises, could not be achieved if the programmes were restricted to SMEs as defined in the Community guidelines on State aid for small and medium-sized enterprises [2]. Those deficits are much more relevant for enterprises with 1 000 and more employees. However, it is recognized that large multinational concerns do not suffer from those deficits. Projects of such enterprises would also hardly fulfil the criteria of the two schemes.

(10) The Austrian authorities also point out that enterprises planning to change the location of production sites in view of differences in labour costs worldwide do not suffer from lack of international orientation. Although aid schemes do not contain explicit criteria to exclude aid for projects resulting in delocalization, such aid would not be covered by the general aims of the schemes.

[1] Case C 50/95 (ex N 317/95), OJ No C 71, 9. 3. 1996, p. 6.
[2] OJ No C 213, 19. 8. 1992, p. 2.

(11) The schemes are not linked to exports of goods or services and thus do not constitute export aid running counter to EC or WTO provisions. Neither are the schemes comparable to tied export-credit facilities.

(12) Moreover, the schemes would not distort competition. In the view of the Austrian authorities, the effect of an aid on the price of a product constitutes a central criterion to establish a possible distortive effect on competition. In this context, a *de minimis* threshold of 5 % should be taken into account.

(13) Finally, the aided projects would be carried out in third countries and thus could affect trade between Member States within the meaning of Article 92 (1) of the EC Treaty only under very rare and exceptional circumstances. The Community provisions on State aid would allow relevant cases to be taken up on an ad hoc basis, without preventing a Member State from implementing a programme as such.

(14) Alternatively, if the schemes constituted State aid within the meaning of Article 92 (1) of the EC Treaty, they could still be considered compatible with the common market since they promote the execution of projects of common European interest as provided for pursuant to Article 92 (3) (b) of the EC Treaty. This view can be supported by reference to:

— the general spirit of the Europe Agreements and cooperation agreements with CEECs and countries of the former Soviet Union,

— programmes of the European Union with similar targets, like Phare and Tacis with the JOP instrument for CEECs and the ECIP instrument for developing and Mediterranean countries, including co-financing instruments operated by Member States as expressively provided for pursuant to Article 4 of the Phare Regulation [1],

— Council common position (EC) No 6/95 [2], in which the Council underlines the importance of the role of the private sector in the development process and the necessity to encourage mutually beneficial investments.

(15) Moreover, the aid promotes the economic development of areas where the standard of living is abnormally low as defined in Article 92 (3) (a) of the EC Treaty. This would hold true for activities carried out in CEECs, as these countries are recognized as areas comparable to Article 92 (3) (a) regions in the Community according to Article 63 (4) (a) of the Europe Agreements with the respective countries. Having regard to the preferential treatment foreseen pursuant to Articles 27 and 29 of the WTO Subsidy Code, the same applies to developing and newly industrialized countries.

(16) The aid schemes may, in the view of the Austrian authorities, also be considered to contribute to the economic development of certain economic activities within the meaning of Article 92 (3) (c) of the EC Treaty, since they assist activities of Austrian enterprises investing abroad and thus help to raise the degree of internationalization of the Austrian economy towards the OECD average.

(17) Finally, the Austrian authorities consider that, outside the European Economic Area, take-overs and the acquisition of shares are also eligible for aid. Regarding SMEs, the definition of eligible investment need not necessarily be identical to the definition of 'initial investment' in the regional aid rules. Moreover, even with regard to regional aid, the Community rules recognize investment in fixed assets 'by way of take-over of an establishment which has closed or which would have closed had such take-over not taken place' as 'initial investment' [3]. This aspect is relevant in many cases of take-overs and acquisitions abroad, in particular in East European countries.

IV

(18) Observations were submitted by Du Pont de Nemours International SA. In its opinion, the schemes are an innovative and pragmatic approach to the need to attract foreign investment to countries in Central and Eastern Europe. Economic restructuring measures were essential to the eventual integration of those countries into the European Union.

[1] Council Regulation (EEC) No 3906/89 of 18 December 1989 on economic aid to the Republic of Hungary and the Polish People's Republic (OJ No L 375, 23. 12. 1989, p. 11).

[2] Common position (EC) No 6/95 adopted by the Council on 22 May 1995 with a view to adopting a Council Regulation on the implementation of the European Communities investment partners Financial Instrument for the countries of Latin America, Asia, the Mediterranean region and South Africa (OJ No C 160, 26. 6. 1995, p. 8).

[3] See point 25 (11) of Procedural and Substantive Rules in the Field of State Aid (Guidelines issued by the EFTA Surveillance Authority) (OJ No L 231, 3. 9. 1994, p. 57).

V

The aid character of the schemes

(19) By aiding the setting-up of production establishments or subsidiaries, the setting-up of production joint ventures, the purchase of holdings in existing companies and the acquisition of enterprises in third countries by Austrian enterprises, the measures favour certain undertakings or the production of certain goods compared to other companies which do not receive aid for these activities.

(20) The Commission considers that aid granted to outward FDI activities of Community companies is comparable to aid granted to enterprises exporting a considerable proportion of their production. In the latter case, the Court has found 'that, having regard to the interdependence between the markets on which Community undertakings operate, it is possible that aid might distort competition within the Community, even if the undertaking receiving aid exports almost all its production outside the Community' ([1]).

(21) The twofold reasoning given by the Austrian authorities for the scheme in question shows that the measures are intended to have effects both on the Austrian economy and on the host country market. Therefore, aid granted to an Austrian enterprise at least partially also strengthens its position on the home market *vis-à-vis* enterprises which do not receive aid to carry out those activities. Moreover, enterprises located in the European Economic Area may also compete with each other for investment abroad. Therefore, any aid exceeding the *de minimis* threshold as defined in the Commission's notice on the *de minimis* rule for State aid ([2]) must be considered to distort or at least threaten to distort competition between EEA enterprises. The limited effect of an aid on the price of the products originating from an aided production, as invoked by the Austrian authorities, does not exclude possible effects on competition between EEA enterprises.

(22) The same holds true for effects on trade between Member States (Article 92 of the EC Treaty) or Contracting Parties (Article 61 of the EEA Agreement). Although such trade effects are probably felt less intensively in cases of aid to projects in third countries, they cannot *a priori* be excluded. Again, this situation may be compared to a situation in which it is reasonably foreseeable that a Community enterprise exporting a considerable proportion of its production to third countries redirects, due to the situation on the world market, its activities towards the internal Community market and the aid thus affects trade between Member States ([3]).

Therefore, it can be concluded that trade between Member States (Article 92 of the EC Treaty) or Contracting Parties (Article 61 of the EEA Agreement) is affected in cases where the goods produced in a third country are reimported into the European Economic Area. Moreover, such aid may also strengthen the position of the aid recipient located in Austria and thus in the common market. In such a case, aid to the projects which can be supported by the scheme may have direct effects on trade between Member States.

(23) Accordingly, the proposed aid scheme must be deemed to fall within the scope of Article 92 (1) of the EC Treaty and Article 61 (1) of the EEA Agreement. This is in particular true for an aid scheme which is by nature open to an undefined number of cases of application, where it is impossible to clarify *a priori* the hypothetical trade effects of the individual cases under the scheme. This does not, however, prevent the Commission from concluding that Article 92 (1) of the EC Treaty does not apply to certain instances of the application of the schemes under examination, in particular with regard to projects carried out in developing countries or in countries in transition to a market economy.

The eligible costs and the aid intensity of the schemes

(24) With regard to the definition of 'investment' eligible for investment aid, the Commission has always taken the view, for reasons of consistency, that the definition applied for investments of SMEs should be the one laid down in the principles of coordination of regional aid systems ([4]). According to point 18 (I) of those principles, which is identical to point 25 (11) of the EFTA Surveillance Authority's guidelines referred to by the Austrian Government, investment eligible for aid is 'initial investment', interpreted as investment in fixed assets,

— 'in the creation of a new establishment, the extension of an existing establishment or in engaging in an activity involving a fundamental change in the product or production process of

([1]) Case C-142/87, Belgium v. Commission ('Tubemeuse') [1990] ECR I-959, paragraph 35.
([2]) OJ No C 68, 9. 3. 1996, p. 9.
([3]) Case C-142/87, Belgium v. Commission ('Tubemeuse') [1990] ECR I-959, paragraphs 38 to 40.
([4]) OJ No C 31, 3. 2. 1979, p. 9.

an existing establishment (by means of rationalization, restructuring or modernization)',

or

— 'by way of take-over of an establishment which has closed or which would have closed had such take-over not taken place'.

(25) With regard to the schemes under examination, the Commission notes that the reduced interest loans are directly linked to initial investment projects as defined by the principles of coordination. In accordance with the common method for assessing aid (see point 5 of the Annex to the Council Resolution of 20 October 1971), the maximum aid intensity is 7,5 %. However, calculated on the basis of the eligible costs as defined under point 18 (i) of the principles of coordination of regional aid systems, the maximum aid intensity may be as high as 11,25 % (gross) in cases where only two thirds of the reduced interest loans are used for productive investment projects and the conditions set out in the second indent above (take-over) are not fulfilled.

The assessment of the compatibility of the schemes with the common market

(26) Aid for projects in developing countries helps offset the significant risks attached to investment in those countries. It also contributes to the development of the countries concerned and to the strengthening of economic links with them. The Commission is aware of the importance of direct investment in third countries both for strengthening links with those countries and for diversifying and internationalizing European industry.

(27) On the other hand, such aid certainly strengthens the position of the aid recipients on the common market as well as their competitiveness on the world market. Although it can be considered to 'facilitate the development of certain economic activities' within the meaning of Article 92 (3) (c) of the EC Treaty, such aid can be authorized only if it 'does not adversely affect trading conditions to an extent contrary to the common interest' (Article 92 (3) (c) of the EC Treaty — second part of first sentence).

(28) In cases of aid to outward foreign direct investment (FDI), the assessment has to take account of two additional factors, which normally do not play a major role when assessing the compatibility of aid: the international competitiveness of the European industry and the European interest in strengthening economic cooperation with certain third countries. With regard to both aspects, a balance has to be found with possible negative effects within the Community, for example risks of delocalization and possible negative impacts on employment.

Aid to SMEs

(29) With regard to SMEs, the Communities' SME guidelines recognize that aid is justified to help SMEs to overcome their specific handicaps. Compared to large enterprises, SMEs have greater difficulties in gaining access to the capital market in general and in raising finance in particular, and this may constitute a severe obstacle for their development. The Community guidelines on State aid to small and medium-sized enterprises demonstrate the Commission's positive attitude towards different types of aid helping SMEs to overcome those handicaps, in particular with regard to aid for investment. The analysis made by the Commission in the SME guidelines did not lead to any differentiation with regard to the location of the investment within or outside the Community. This indicates that the SME guidelines can be applied to any investment made by SMEs regardless of location.

Moreover, the handicaps with which SMEs are faced are the same or even bigger for investment activities outside the European Economic Area. In the case of SMEs, the possible negative effects of outward FDI on the European economy, for example on employment or with regard to delocalization risks, can be said not to be perceptible. In addition, the definition of eligible investment ('initial investment') ensures that the transfer of a plant located in the Community to a third country cannot be eligible for aid.

(30) The application of the Communities' SME guidelines on aid to outward FDI for SMEs also implies that national aid schemes have to define the eligible costs in conformity with the guidelines. Thus, the eligible costs for investment aid for SMEs as referred to under point 4.1. of the SME guidelines have to be defined in accordance with point 18 (i) of the principles of coordination of regional aid systems. Alternatively, only the parts of the eligible costs of a

national aid scheme which are in line with the Community definition of 'initial investment' can be taken into account when calculating the aid intensities. Therefore, Austria will have to ensure that the authorizable aid ceiling of 7,5 % for medium-sized enterprises, calculated in accordance with the method described above, is respected. Any aid based on eligible costs differing from those usually accepted by the Commission and leading to an aid intensity exceeding 7,5 % will be considered by the Commission on a case-by-case basis. With regard to small enterprises, it may be noted that the ceiling of 15 % provided for under the SME guidelines will not be exceeded.

(31) The applicability of the SME guidelines is supported by the Communities' SME policy in other areas:

— it is the Commission's view that the present situation with regard to rules governing FDI is 'particularly unsatisfactory for SMEs which do not have the means to monitor and adapt to the ever-changing conditions for FDI in the host countries' [1];

— the conclusions of the European Council held in Cannes on 15 and 16 December 1995 recognized the necessity to promote the internationalization of SMEs [2];

— clauses on encouraging close contacts between SMEs, with a view to promoting trade and industrial cooperation opportunities, are also included in cooperation agreements between the Community and third countries [3].

Aid to larger enterprises

(32) Normally, the Commission considers investment aid to large enterprises incompatible with the common market. Exemptions are only made for investment aid for projects carried out in assisted areas. However, the Commission considers that the regional exemptions provided for in Article 92 (3) (a) and (c) of the EC Treaty cannot be applied to investment carried out in a third country. Moreover, the wording of Article 64 (3) (a) of the Europe Agreements with certain CEECs indicates that this exemption, which corresponds to the exemption provided for pursuant to Article 92 (3) (a) of the EC Treaty, clearly refers to aid granted by the country concerned and cannot be applied to aid granted by a Member State for investment projects of its companies in that country.

(33) The Commission reaffirms its positive attitude towards projects supporting cooperation with Central and East European countries. However, the schemes in question do not fulfil the criteria which the Commission usually attaches to 'projects of common European interests' within the meaning of Article 92 (3) (b) of the EC Treaty. The schemes in question do not form part of a cross-border programme which is jointly supported by or agreed on between two or more Member States in order to achieve a common target. There is also no evidence that the schemes form part of a development or cooperation strategy with the third countries where the aided activities are intended to be carried out. Therefore, the 'common European interest' within the meaning of Article 92 (3) (b) of the EC Treaty cannot be invoked for the schemes in question.

(34) However, the Commission cannot exclude the possibility that aid to certain projects of large enterprises under the schemes in question may not constitute State aid within the meaning of Article 92 (1) of the EC Treaty, or could be exempted from the general prohibition by applying the exemption clause provided for pursuant to Article 92 (3) (c) of the EC Treaty. In order to establish whether such aid does not adversely affect trading conditions to an extent contrary to the common interest, the Commission would have, among others,

— to ensure that such aid does not contain any (disguised) export aid elements, and

— to take into account the effects on employment both in the source country and the host country, the risks of delocalization of subsidiaries or production sites from Member States to third countries, the sectoral implications and local content, the necessity of the aid, including the envisaged aid intensity, in view of international competitiveness of European industry and/or in view of the risks involved for investment projects in certain third countries.

Since this assessment has to be carried out on a case-by-case basis, the Commission must ask for individual notification of all plans to award aid under the scheme in question for enterprises not qualifying

[1] COM(95) 42 final, p. 5.
[2] SI (95) 1000, p. 14.
[3] See for example Article 6 of the proposal for the conclusion of a Cooperation Agreement with Nepal, (OJ No C 338, 16. 12. 1995, p. 10), and Article 12 of the proposal for the conclusion of an Interregional Framework Cooperation Agreement with the Southern Cone Common Market and its Member Countries (Argentina, Brazil, Paraguay, Uruguay), (OJ No C 14, 19. 1. 1996, p. 4).

as SMEs as defined in the Commission recommendation of 3 April 1996 concerning the definition of small and medium-sized enterprises [1].

VI

(35) The Commission therefore concludes that the aid scheme may be considered compatible with the common market pursuant to Article 92 (3) (c) of the EC Treaty and Article 61 (3) (c) of the EEA Agreement and to the Community guidelines on State aid for small and medium-sized enterprises (SMEs). However, the Commission cannot authorize aid for projects carried out by large enterprises. It therefore requests the Austrian Government to notify any such plans individually pursuant to Article 93 (3) of the EC Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The aid which the Republic of Austria intends to grant, under the ERP East European programme, to small and medium-sized enterprises, within the meaning of the Commission recommendation of 3 April 1996 concerning the definition of small and medium-sized enterprises, is compatible with the common market pursuant to Article 92 (3) (c) of the EC Treaty and Article 61 (3) (c) of the EEA Agreement.

Article 2

Any aid which the Republic of Austria intends to grant pursuant to the scheme referred to in Article 1 to enterprises not qualifying as small and medium-sized enterprises as defined by the Commission recommendation of 3 April 1996 concerning the definition of small and medium-sized enterprises shall be notified individually pursuant to Article 93 (3) of the EC Treaty.

Any aid which the Republic of Austria intends to grant to small and medium-sized enterprises, which is based on eligible costs differing from those usually accepted by the Commission for investment aid for SMEs as referred to under point 4.1 of the SME guidelines and the principles of coordination of regional aid systems and which, calculated on the basis of the eligible costs accepted by the Commission, leads to an aid intensity exceeding 15 % for small enterprises and 7,5 % for medium-sized enterprises shall be notified individually pursuant to Article 93 (3) of the EC Treaty.

Article 3

The Austrian Government is requested to submit to the Commission an annual report on the application of the scheme.

Article 4

The Austrian Government is reminded that the application of this scheme is subject to the rules on the cumulation of aid, whether such cumulation involves aid for different purposes [2] or aid for the same purpose under schemes adopted by the same entity or by different entities (central, regional and/or local). In the latter case, the maximum ceiling authorized for the scheme referred to in Article 1 must not be exceeded.

Furthermore, the Austrian Government is reminded that it must observe the Community rules and regulations applicable concerning certain sectors of industry, i.e. sectors covered by the ECSC Treaty, transport, fisheries and agriculture, including the processing and marketing of agricultural products [3].

Article 5

This Decision is addressed to the Republic of Austria.

Done at Brussels, 5 June 1996.

For the Commission

Hans VAN DEN BROEK

Member of the Commission

[1] OJ No L 107, 30. 4. 1996, p. 4.

[2] OJ No C 3, 5. 1. 1985, p. 2.

[3] OJ No C 29, 2. 2. 1996, p. 4.