II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 2 April 1997

on aid to the sheepmeat industry (promotional aid)

(Only the French text is authentic)

(Text with EEA relevance)

(97/611/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 3013/89 of 25 September 1989 on the common organization of the market in sheepmeat and goatmeat [1], as last amended by Regulation (EC) No 1589/96 [2], and in particular Article 27 thereof,

Having given the interested parties notice, pursuant to the first subparagraph of Article 93 (2) of the Treaty, to submit their comments [3] and having regard to those comments,

Whereas:

I

By letter of 12 August 1994, recorded as received on 16 August 1994, the French Permanent Representative to the European Union notified the Commission of the measures under discussion, in response to the Commission's request of 27 June 1994 for such notification. By letter of 22 February 1995, recorded as received on 23 February 1995, the French authorities provided additional information in response to the Commission's request of 25 August 1994.

On the basis of the information in its possession, the Commission therefore undertook a preliminary examination of three sets of measures for the sheepmeat industry, namely two 'production guidance' programmes entailing technical support and investment aid, and some promotional measures.

The Commission had no objections to raise pursuant to Articles 92 and 93 of the EC Treaty with regard to the aid for technical support and investment in the sheepmeat industry.

However, the Commission initiated the procedure provided for in Article 93 (2) of the Treaty in respect of the promotional measures by letter No SG(95) D/3878 of 29 March 1995, giving the French Government notice to submit its comments. The other Member States and interested parties were given notice to submit their comments in a notice published in *Official Journal of the European Communities* C 289 of 31 October 1995.

By letter of 14 July 1995 the French authorities provided the information requested in the course of the said procedure.

Third parties also submitted comments by letter of 18 December 1995. These were forwarded to the French authorities by letter of 28 January 1997.

They have not dispelled the Commission's doubts as to the compatibility of the measures in question, for the reasons set out in the recitals of the draft decision.

[1] OJ L 289, 7. 10. 1989, p. 1.
[2] OJ L 206, 16. 8. 1996, p. 25.
[3] OJ C 289, 31. 10. 1995, p. 12.

II

The measures in respect of which the Commission has initiated the procedure provided for in Article 93 (2) of the Treaty consist of promotional measures for sheepmeat. At least 50 % of the cost of the measures is financed by the industry and the rest by the public authorities (Ministry of Agriculture and Fisheries, Ofival).

The details of the measures are as follows:

— assistance for measures undertaken by farmers as part of the operation and by the structure responsible for exploiting a quality mark (designation of origin, label, certification of conformity of the products),

— organization of promotional campaigns for the disposal of such products coming from specific regions, with public awareness campaigns in hypermarkets, supermarkets and retail butchers' shops and a radio publicity campaign promoting the advantages of these products (nearness, quality, authenticity, local or regional origin, etc.).

On the basis of the information available to it, the Commission has decided to initiate the abovementioned procedure because of probable infringement of Article 30 of the Treaty.

The measures in question were published in the French Ministry of Agriculture's Bulletin d'Information of 25 June 1994.

As that publication states, the 'quality marks' selected by the French authorities refer to the national origin of the products by displaying the French flag and the expressions 'agneau français, qualité bouchère' and 'agneau des bergers de France'.

By letter of 22 February 1995 the French authorities indicated that the campaigns had mainly been undertaken through the mass-communication media. According to the letter of 17 July 1995 the campaign in question ran from January to March 1995 and received a State contribution of FF 5 million.

III

The Commission may regard promotional measures as compatible with the common market under the following conditions (1):

— the granting of aid for promotional measures contravening Article 30 of the Treaty or for advertising to promote particular enterprises is prohibited,

— promotion must cover surplus agricultural production, new or non-surplus replacement products, the development of certain regions, the development of small and medium-sized enterprises, or quality and health-food products,

— the aid may not, as a general rule, exceed 50 % of the expenditure.

The guidelines for Member States' involvement in promotion of the abovementioned agricultural and fisheries products (point 2.2.1 of the Annex to the Commission Communication published in *Official Journal of the European Communities* C 272 of 28 October 1986) cite promotional campaigns advising consumers to buy national products solely on account of their national origin among the promotional actions which clearly infringe Article 30 of the Treaty.

In its communication initiating the procedure, the Commission took the view that in the case in point, on the basis of the information available to it, only compliance with the condition set out in the third indent above could be verified; compliance with the condition set out in the second indent above could not be verified and in any case Article 30 of the Treaty referred to in the first indent above was likely not to be complied with.

IV

Following the initiation of the procedure, the Commission has received comments from France and from an interested party, both of whom deny any infringement of Article 30. They argue, first, that consumers in France are in no case encouraged to buy the product in question 'solely on account of its national origin'. They advance several pieces of information in support of this argument:

— the publicity does not refer 'solely' to the national origin of the product,

— it promotes quality meat (with strict quality control),

— only products meeting specific quality criteria are eligible for promotion,

— the national logo is merely a support for regional promotion campaigns (regional labels, etc.),

(1) See the framework for national aids for the advertising of agricultural products and certain products not listed in Annex II to the EEC Treaty, excluding fishery products, OJ C 302, 12. 11. 1987, p. 6.

— the national reference should be understood only as the signature of the promoter of the measure,

— it does not aim at giving undue weight to the national origin,

— the purpose is to inform (not incite) the consumer by stating *inter alia* the geographical origin of the product,

— Articles 2 (1) (a) (i) and 3 (1) (7) of Directive 79/112/EEC, dealing with the labelling of foodstuffs.

With regard to the second condition referred to above, the interested party argued that only lambs produced under certain conditions were eligible for the promotional aid. These conditions presupposed artisanal production in small undertakings, almost all of the lambs in question being reared in less favoured regions and having to meet quality criteria laid down in accordance with detailed and rigorous specifications.

The purpose of the promotion campaign was to introduce consumers to the value of superior quality products. Standard quality products could in no circumstances qualify for promotion aid, nor could they benefit, therefore, from the promotional materials made available only to those who complied with the rules laid down in the specifications.

V

Article 27 of Regulation (EEC) No 3013/89 provides that Articles 92, 93 and 94 of the Treaty apply to the production of, and trade in, the products listed in Article 1, save as otherwise provided in that Regulation.

According to Article 92 (1) of the Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

The measures in question constitute aid granted within the meaning of Article 92 (1) of the Treaty.

They improve the financial situation of the beneficiary firms as compared with their competitors who do not receive the aid. They therefore distort or threaten to distort competition for the above purposes.

Taking into consideration the value, on the one hand, of the trade in sheepmeat concerned (for 1995: exports from France to the EC: ECU 32,7 million; imports from the EC into France: ECU 354,9 million [1]) and, on the other hand, of French production (ECU 461,48 million) as compared with the production of the other Member States (ECU 3 739,27 million) [2], it is clear that this aid is likely to affect trade between Member States if it benefits national production to the detriment of imports from other Member States.

In this respect, it should be stressed that, even where aid covers a relatively small amount or where the beneficiary undertaking is of relatively modest size, there is still a possibility that trade between Member States may be affected.

In view of the above, the aid in question is State aid which fulfils the criteria of Article 92 (1) of the Treaty.

There are, however, exceptions to the principle of incompatibility laid down in Article 92 (1).

VI

The derogations from this incompatibility provided for in Article 92 (2) clearly do not apply. Nor, indeed, have they been pleaded by the French authorities.

The derogations under Article 92 (3) of the Treaty must be construed restrictively for the purposes of examining regional or sectoral aid programmes or any individual case of the application of general aid schemes.

In particular, a derogation may be granted only where the Commission is able to establish that the aid is necessary for the attainment of one of the objectives in question. To grant the benefit of such derogations to aid which is not necessary for that purpose would be tantamount to allowing trade between Member States to be affected and competition to be distorted without any justification in the light of the Community interest and thereby bestowing an unwarranted advantage on operators in certain Member States.

In the case in point the aid does not contribute to attaining any of the objectives in question. The French Government has provided no valid justification, nor has the Commission been able to find any, showing that the aid in question meets the requisite conditions for application of one of the derogations provided for in Article 92 (3).

[1] Comext 2.
[2] Comext 2.

These are not measures to promote the execution of an important project of common European interest within the meaning of Article 92 (3) (b) since, in view of the effect they could have on trade, these aids are counter to the common interest. Nor are they measures to remedy a serious disturbance in the economy of the Member State concerned within the meaning of that same provision. Nor was the aid notified as a regional aid under Article 92 (3) (a).

The comments of the French Government and the interested party lead the Commission to make the following observations and draw the following conclusions.

The Commission could consider aid to facilitate the development of certain economic activities or of certain economic areas to be compatible, where such aid does not adversely affect trading conditions to an extent contrary to the common interest (Article 92 (3) (c)).

In order for such aid to be considered compatible with the common market under Article 92 (3) (c) of the Treaty, aid for a specific publicity campaign:

— must not adversely affect trading conditions to an extent contrary to the common interest, and

— must facilitate the development of certain economic activities or certain regions by promoting disposal of their specific products.

By definition, aids within the meaning of Article 92 (1) are those which distort or threaten to distort competition, but under Article 92 (3) (c) such aids are considered incompatible only if they do so to an extent contrary to the common interest, the requirements of which are specified in the framework for national aids for the advertising of agricultural products and certain products not listed in Annex II to the EEC Treaty, excluding fishery products [1], account being taken of the objectives referred to in Article 39 of the Treaty.

The compatibility of each case of advertising aid should be scrutinized in the above order; consequently, according to the abovementioned framework, where there is exclusion from compatibility by one of the negative criteria below, the question as to whether the aid can be justified under one of the positive criteria referred to at point 3 no longer arises and need not be raised. According to the abovementioned framework, the granting of the aids concerned is against the common interest in the following cases:

Aid for advertising related directly to the products of one or more firms (point 2.2) and aid for campaigns contrary to Article 30 of the Treaty (point 2.1).

National aid for an advertising campaign which, by virtue of its content, infringes Article 30 of the Treaty cannot be considered compatible with the common market within the meaning of Article 92 (3).

The Commission has not been able to establish that the advertising aid was intended directly to benefit the products of one or more firms.

However, the Commission considers that the advertising aids in respect of which the procedure has been initiated are contrary to Article 30 of the Treaty.

Article 30 provides that quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States, without prejudice to Articles 31 to 37 of the Treaty.

For the purposes of this prohibition it is sufficient that the measures in question be capable of hindering trade between Member States, directly or indirectly, actually or potentially (see Dassonville case [2]).

The measures in question are capable of hindering trade between Member States for the following reasons.

The Commission established its policy with regard to the interpretation of Article 30 in the area of State aids in its communication concerning State involvement in the promotion of agricultural and fisheries products [3].

The third party contested the force in law of the said communication. The Commission cannot follow this line of reasoning. The Commission's role under Articles 92 to 94 of the Treaty includes the task of ensuring compliance with Article 30 of the Treaty in line with the case law of the Court of Justice [4], the principles of which are set out in the abovementioned framework [5].

Point 2.2.1 of the guidelines for the Member States annexed to the communication provides that promotional campaigns which encourage consumers to buy national products solely because of their national origin infringe Article 30.

This is clearly the case with the 'agneau des bergers de France' campaign. From the consumer's point of view the only point of reference is that this is a national product. The addition of 'berger' in no way alters that assessment.

However, the Commission finds that the other measure in question ('agneau français, qualité bouchère') also infringes Article 30, because it attributes excessive importance to the national origin of the product.

[1] OJ C 302, 12. 11. 1987, p. 6.

[2] Case 8/74, [1974] ECR 837, at p. 852.

[3] OJ C 272, 28. 10. 1986, p. 3.

[4] Cases 249/81 ('Buy Irish') and 222/82 ('Apple and Pear Development Council').

[5] See the Framework for national aids for the advertising of agricultural products and certain products not lised in Annex II to the EEC Treaty, excluding fishery products, OJ C 302, 12. 11. 1987, p. 6.

In 2.3.1 of the abovementioned guidelines, the Commission expressly invites Member States to ensure particularly that the following guideline is strictly respected:

> 'Identification of the producing country by word or symbol may be made providing that a reasonable balance between references, on the one hand to the qualities and varieties of the product and, on the other hand, to its national origin is kept. The references to national origin should be subsidiary to the main message put over to consumers by the campaign.'

This requirement has not been met either. The reference to the national origin is certainly not subsidiary, as can be seen from the specimens provided, which show that the words 'Agneau français' are printed twice the size of 'qualité bouchère', with 'Agneau français' appearing in red and superimposed on 'qualité bouchère', which is printed in blue.

The effect is reinforced by the use of the French flag.

In these circumstances there is no question of a reasonable balance between references, on the one hand to the qualities of the product and, on the other hand, to its national origin.

The signs in question bear no further reference.

The matter of quality criteria and quality control is therefore irrelevant, as it does not prevent the measure from hindering free trade.

This conclusion has been confirmed by the case law of the Court of Justice [1], according to which in a market which, as far as possible, must present the features of a single market, entitlement to a designation of quality for a product can — except in the case of the rules applicable to designations of origin and geographical indications — only depend upon the intrinsic objective characteristics governing the quality of the product compared with a similar product of inferior quality, and not on the geographical locality where a particular production stage took place.

This also holds true for the claim that the national logo is merely a support for regional promotion campaigns or simply informs the consumer of the geographical origin of the product, on the one hand, and the argument that the national reference should be understood only as the signature of the promoter of the measure, on the other.

With regard to these arguments, it should be recalled that, in the Commission's view, mere reference to national origin or to the promoter of the measure does not infringe Article 30 provided that the reference is not excessive.

The objective 'sought' by the campaign in question, defined by the French authorities in negative terms (the aid does not 'seek' to place undue emphasis on national origin), does nothing to alter its effect and is thus in any case irrelevant for the purposes of Article 30 of the Treaty. What *is* important is that the national reference is understood as the signature of the promoter of the measure who is openly and emphatically declared to be French (cf. 'French' lamb, 'bergers de France'). Moreover, indeed, the reply of the French authorities actually bears out the Commission's complaint, particularly since it refers to the decline in the competitiveness of the French sheepmeat sector, the need to target campaigns on the 'quality guaranteed by your butcher or on lambs from our shepherds, with the objective of dealing with the stagnation of lamb sales on our territory'.

The interested party claimed that the prohibition on mentioning the French origin of the lamb ran counter to Community law.

This argument seems quite irrelevant in view of the fact that the Commission has never proposed that mention of the origin should be prohibited, as is quite clear, on the one hand, from the guidelines attached to the abovementioned communication of 28 October 1986 and, on the other hand, from the communication initiating the procedure pursuant to Article 93 (2) of the Treaty.

Lastly, the obligatory indication of origin under the labelling directive [2] concerns only cases where failure to give such particulars is likely to mislead the consumer as to the material qualities of the product. A reference to origin which contains no other explicit information as to the intrinsic qualities of the product certainly does not prevent such error. In other words, no explanation is given as to how the reference to French origin enlightens the consumer as to the qualities of the product.

It is still necessary to determine whether measures of the type scrutinized under Article 30 might, while constituting measures having an effect equivalent to quantitative restrictions, be permissible by virtue of Article 36 of the Treaty.

[1] Case 13/78, 'Eggers', [1978] ECR 1935, point 24 et seq.

[2] Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, OJ L 33, 8. 2. 1979, p. 1.

Article 36 stands as an exception to the basic principle of free movement of goods and must therefore be construed in such a way that its effects do not extend beyond that which is necessary to protect the interests which it seeks to guarantee.

However, none of the comments submitted sought the application of Article 36, nor has the Commission found any evidence likely to call for its application.

The Commission has therefore concluded that the planned aid measures do not meet the Community criteria which would enable them to be regarded as facilitating the development of the sectors concerned.

Consequently, the Commission finds that these measures cannot qualify for the derogations provided for in Article 92 (3) (a) and (c) with regard to aid to encourage or facilitate the economic development of certain regions or the development of certain activities referred to in the abovementioned point (c).

In view of the above, the Commission cannot accept the justifications put forward by the French Government and the interested party.

The aid measures cannot, therefore, qualify for any of the derogations provided for in Article 92 of the Treaty and are to be considered incompatible with the common market.

VII

Since initiation of the procedure under Article 93 (2), the Commission has received information indicating that the aid in question was granted before the said procedure had resulted in a final decision. The sum paid amounts to FF 5 million. Since the aid was not notified and was implemented without awaiting the Commission's final decision, it should be noted that, in view of the binding nature of the rules of procedure laid down in Article 93 (3) of the Treaty, the direct effect of which was recognized by the Court of Justice in its judgments of 19 June 1973 (Case 77/72, Carmine Capolongo v. Azienda Agricola Maya) [1], 11 December 1973 (Case 120/73, Gebr. Lorenz GmbH v. Federal Republic of Germany) [2] and 22 March 1977 (Case 78/76, Steinike & Weinlig v. Federal Republic of Germany) [3], the illegality of the aid in question cannot be rectified after the event (judgment of 21 November 1991 in Case C-354/90, Fédération nationale du commerce exterieur des produits alimentaires and Others v. France) [4].

Where aids are incompatible with the common market, the Commission should make use of the option given it by the judgments of the Court of Justice of 24 February 1987 in Case 310/85 [5] and 20 September 1990 in Case C-5/89 [6], and require the Member State to recover from the beneficiaries the full amount of aid illegally granted.

Such a refund is necessary in order to re-establish the prior situation by removing all the financial advantages which the beneficiary (Interbev) of the illegally granted aid has unduly enjoyed since the date on which the aid was granted.

Reimbursement must therefore be carried out in accordance with the procedures and provisions of French law, with interest running from the date on which the aid in question was granted. The interest must be calculated on the basis of the commercial rate, with reference to the rate used for the calculation of the subsidy equivalent in regional aids [7].

This Decision is without prejudice to any inferences which the Commission may draw in relation to the financing of the common agricultural policy by the European Agricultural Guidance and Guarantee Fund (EAGGF),

HAS ADOPTED THIS DECISION:

Article 1

The promotional aid measures notified by letter of 12 August 1994 from the French Permanent Representation to the European Union are illegal under Article 93 (3) of the Treaty in the case where they have been applied; the aid is incompatible with the common market under Article 92 of the EC Treaty and may not be granted.

Article 2

France is required to abolish the aid referred to in Article 1 within two months of the date of notification of this Decision.

Article 3

France is required to demand reimbursement of the aid referred to in Article 1 by means of recovery from the direct beneficiary (Interbev) within six months of the date of notification of this Decision.

Reimbursement shall be carried out in accordance with the procedures and provisions of French law. The sums to be recovered shall attract interest from the date on which

[1] [1973] ECR 611.
[2] [1973] ECR 1471.
[3] [1977] ECR 595.
[4] [1991] ECR I-5505.
[5] [1987] ECR 901.
[6] [1990] ECR I-3437.
[7] Commission communication to the Member States (OJ C 156, 22. 6. 1995, p. 5).

the aid in question was granted. The interest shall be calculated on the basis of the commercial rate, with reference to the rate used for the calculation of the subsidy equivalent in the context of regional aids.

Article 4

France shall inform the Commission, on the one hand, within two months from the date of notification of this Decision, of the measures it intends to take to comply with this Decision and, on the other hand, within the time limit provided for in Article 3, of the measures it has taken to comply with this Decision.

Article 5

This Decision is addressed to the French Republic.

Done at Brussels, 2 April 1997.

For the Commission

Franz FISCHLER

Member of the Commission