COMMISSION

COMMISSION DECISION

of 30 September 1998

concerning aid which Austria plans to grant to Agrana Stärke GmbH to build and convert starch production facilities

(notified under document number C(1998) 3023)

(Only the German text is authentic)

(1999/342/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 1766/92 of 30 June 1992 on the common organisation of the market in cereals [1], as last amended by Commission Regulation (EC) No 923/96 [2],

Having invited interested parties to submit their comments in accordance with Article 93(2) of the EC Treaty,

Having taken account of those comments,

Whereas:

I

(1) Austria notified the Commission by letter dated 28 June 1996 (recorded as received on 2 August 1996) in accordance with Article 93(3) of the EC Treaty of an aid measure for Agrana Stärke-GmbH, Hollandstraße 2, 1020 Vienna (Agrana). Additional information was submitted by letters dated 18 September and 14 November 1996, 29 January, 7 March and 11 June 1997 (recorded as received on 19 September and 18 November 1996, 31 January, 12 March and 16 June 1997 respectively).

(2) Austria wrote to the Commission on 20 December 1996 (letter recorded as received on 23 December 1996) requesting the procedural separation of the two aid measures which are the subjects of this procedure. The three remaining aid measures of the project as originally notified were approved by the Commission by letter SG(97) D/461 of 23 January 1997 (N 517/96).

(3) The measures in question relate to investments by the company Agrana in the starch sector. The measures involve aid for (a) converting a high-pressure soaking facility for maize starch to standard technology and increasing its capacity from [...] (*) to [...] (*) and (b) investing in a [...] (*) with an annual capacity of [...] (*) while closing down the existing obsolete, lower-capacity plant, both of these measures being at the Aschach site. According to Austria's notification the aid amounts to ATS 57,4 million (ECU 4,13 million), corresponding to an aid intensity of 20 % of the investment costs [...] (*).

(4) Agrana has already completed the investments. At present Austria, in accordance with Article 93 of the EC Treaty, has neither approved nor paid the notified aid.

II

(5) The Commission after an initial examination of the notification decided to open the procedure under Article 93(2) of the EC Treaty.

[1] OJ L 181, 1.7.1992, p. 21.
[2] OJ L 126, 24.5.1996, p. 37.

(*) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

(6) That decision was communicated to the Austrian Government by letter dated 18 August 1997 and published in the *Official Journal of the European Communities* ([3]). In the decision the Commission invited the other Member States and interested parties to submit their comments on the aid in question.

(7) In the decision the Commission expressed its doubts concerning the compatibility of the aid with the common market. The Commission noted that under the current selection criteria for the grant of State aid the investments in question were ineligible ([4]). In addition, the aid was not in conformity with the Community Guidelines on State aid for rescuing and restructuring firms in difficulty ([5]) in that it would aid the expansion of production capacity in a sector displaying structural overcapacity in the relevant market in the Community. Lastly, the Commission doubted whether the aid was actually necessary since Agrana had already completed the investments and the respective plants had officially commenced operation in spring 1997.

(8) Austria informed the Commission of its position on the initiation of proceedings by letter dated 18 September 1997.

(9) The Italian and Spanish Governments submitted their comments by letter dated 12 December 1997. The Fachverband der Stärkeindustrie e.V., the Association des amidonneries de céréales de l'UE and the Asociacion de Transformadores de Maiz por Via Húmeda submitted their comments by letters dated 5, 9 and 12 December 1997 respectively. They mainly supported the argument that the Community starch market was in overcapacity and as a result aid for the expansion of capacity was excluded by Community law. The aid measures proposed would distort trade conditions to the detriment of Agrana's competitors.

(10) Austria responded to those comments in a letter dated 12 February 1998.

III

(11) Austria argues that the selection criteria under Decision 94/173/EC and the Guidelines for restructuring aid should not be applied to the State aid project in question.

(12) The view that the selection criteria according to Decision 94/173/EC do not permit investments in cereal starch is, according to Austria, not correct as regards the aid project in question. Article 16(5) of Council Regulation (EEC) No 866/90 of 29 March 1990 on improving the processing and marketing conditions for agricultural products ([6]) permits State aid provided it is compatible with Articles 92, 93 and 94 of the EC Treaty. Point VII.D.1 of Annex XV to the Act of Accession expressly states that when applying Article 16(5) Regulation (EC) No 951/97 with respect to Austria and Finland, the Commission will proceed in accordance with Declaration No 31 on the processing industry in Austria and Finland of the Final Act. That Declaration states that flexibility will be used where transitional national aid schemes designed to facilitate restructuring are concerned. The Commission, when assessing this particular case, should not therefore merely apply the aid rules which would normally be applicable.

(13) With regard to the interpretation of the term 'flexible' and to the question whether it permits aid for an investment having the effect of increasing production capacity, Austria refers to the opinion of the Commission on the accession of Austria, in which the difficult situation of the Austrian starch industry is mentioned, and to point VII.D.1 of Annex XV to the Act of Accession which, in its original version assuming Norway to become a Member State, stipulated that when applying Article 16(5) of Regulation (EEC) No 951/97 the Commission could authorise Norway to grant national aids on condition that the production capacity in the said sector was not increased. With regard to Austria and Finland, the Commission would implement those provisions in accordance with Declaration No 31 of the Final Act. The conclusion *e contrario* would be that the general condition for national restructuring aid in sectors with overcapacity, i.e. a reduction in capacity, should not apply to Austria.

([3]) OJ C 342, 12.11.1997, p. 4.
([4]) See Commission Decision 94/173/EC of 22 March 1994 on the selection criteria to be adopted for investments for improving the processing and marketing conditions for agricultural and forestry products and repealing Decision 90/342BEC (OJ L 79, 23.3.1994, p. 29).
([5]) OJ C 283, 19.9.1997, p. 2.
([6]) OJ L 91, 6.4.1990, p. 1; recast by Council Regulation (EC) No 951/97 (OJ L 142, 2.6.1997, p. 22); in the following reference is made only to Regulation (EC) No 951/97.

(14) The beneficiary's need to adjust does not arise from its poor performance but from the radically altered economic conditions resulting from Austria's accession. Before accession the Austrian starch industry was prevented from being competitive because exports of Community starch to Austria were heavily subsidised while exports by Austrian companies to the Community were made practically impossible by prohibitive import levies. The aid would therefore not worsen the economic situation of starch producers in other Member States in comparison to the situation which existed before Austria's accession.

(15) The above indicates that the only provisions applicable to the present measure are Article 92(3)(c) of the EC Treaty in conjunction with Article 151(1) of the Act of Accession and point VII.D.1 of Annex XV to the Act of Accession as well as Declaration No 31 in conjunction with the Commission's opinion on the accession of Austria. According to Article 92(3)(c) of the EC Treaty, the Commission may approve aid to facilitate the development of certain economic areas where such aid does not adversely affect trading conditions to an extent contrary to the public interest.

(16) The aid should therefore be regarded as serving the adjustment of a specific sector. Without that adjustment the undertaking would not be competitive. The trading conditions would not be adversely affected to an extent contrary to the public interest: starch producers in the Member States have benefited from Austria's accession and this positive change in trading conditions would in no way be diminished or even overcompensated for by the aid project in question. A greater demand for starch products on the Austrian market is to be anticipated (paper and fermentation sector) and the planned production increase could therefore be absorbed by the Austrian market.

(17) Moreover, the aid is necessary. The investment decision was taken only after notification to the Commission and in reliance on domestic political commitments. The aid in question is subject of negotiations between Austria and the Commission for nearly three years. In view of the need for structural adjustment, it would seem unreasonable to expect a company fighting for its survival in the common market to stand idly by waiting for a decision while its economic existence is being seriously threatened. The Commission would have been in no doubt whether the investment project would not also have been carried out without the aid if Austria had actually already granted the aid.

(18) The conclusion that because Agrana belongs to a group of companies Austria could expect that group to invest unlimited funds in a particular sector is unjustified. Even if the Commission considered the status of Agrana with a view to the group of companies it is part of, the notified investment project would not have been economically viable without the aid and the more likely outcome would have been the liquidation of the company. The aid rate of 20 % is low and would enable the company to expect profits at the earliest in seven years.

(19) Moreover, the aid does not affect trading conditions to an extent contrary to the public interest. In fact, Austria's accession to the European Union brought benefits to starch producers in the other Member States; the Community does not have to incur expenditure in refunds for starch exports to Austria anymore. In addition, imports of starch products to Austria after accession increased by a total of some 46 % in 1995 and 1996, and the share of Member States accounted for around 96 % of that. That situation would scarcely change, especially because the aid rate would be low. The increase in production volume, a mere 1 % of Community starch production, can be absorbed by the increasing demand from the paper and fermentation industry in Austria.

IV

(20) The investments in question are being undertaken in the maize-to-starch processing area. Starch obtained from maize as well as its saccharification-products are products covered by Regulation (EEC) No 1766/92. Article 19 of that Regulation stipulates that Articles 92, 93 and 94 of the EC Treaty apply to the products covered by it.

(21) Article 92(1) of the EC Treaty prohibits any aid which meets the criteria set out in it (State aid). Therefore, in a first step it must be examined whether the notified aid measure constitutes State aid within the meaning of Article 92(1) of the EC Treaty.

(22) The aid is to be granted in the form of a direct subsidy by Austria and there is therefore no doubt that the relevant criteria of Article 92(1) are satisfied. Also the aid benefits a particular company in

that Agrana is to receive 20 % of the relevant investment costs. As results from the judgment of the Court of Justice of the European Communities of 17 September 1980 in Case C-730/79 (Philip Morris v Commission) ([7]) the strengthening of the economic position of an undertaking by means of State aid normally indicates distortion of competition in relation to competing undertakings.

(23) As regards the criterion of adversely affecting trade Austria has, as detailed above, disputed the contention that such would be the consequence of the aid. The Commission cannot accept Austria's arguments. In assessing that criterion, the fact that Austria's accession to the European Community had a positive impact on starch producers in the Member States is irrelevant. According to Article 92 of the EC Treaty, the existence or otherwise of a distortion of trade must be judged purely on the basis of the circumstances of the aid in question. According to the judgment of the Court of Justice of 21 March 1990 in Case C-142/87 (*Tubemeuse*) ([8]) even the relatively small aid rate or the slight increase in production capacity does not exclude the possibility of trade being affected. Indeed the affectation of trade is, similar to the distortion of competition, indicated since the aid envisaged by Austria would strengthen Agrana's position in relation to competitors in intra-Community trade ([9]).

(24) There is a substantial volume of intra-Community trade in starch. The following table shows that Austria imports a major proportion of starch from other Member States. Austria has an annual domestic production of some 180 000 tonnes and has achieved a current degree of self-sufficiency of 55 %.

	1995	1996	1997 (11 months)
Wheat starch	2 742	3 090	2 414
Maize starch	10 516	22 698	18 446
Potato starch	527	2 287	3 268
Modified starch and dextrin	41 573	52 693	44 851
Total	55 358	80 768	68 979

([7]) [1980] ECR 2671, paragraphs 11 and 12.
([8]) [1990] ECR, I-959, paragraph 43.
([9]) See footnote 7.

(25) Since there is a structural production surplus of 20 % on the Community market there are no free market segments and starch producers in the Member States are therefore in a tense competition situation. This situation exists not only on the Community market but also on markets in third countries to which the surpluses are exported with the aid of export refunds.

(26) Under the scheme of the EC Treaty, the prohibition in Article 92(1) is followed by exemptions in Article 92(2) and (3).

(27) The exemptions listed in Article 92(2) of the EC Treaty are inapplicable given the nature of the aid measure in question and its objectives. Austria has in fact not submitted that Article 92(2) is applicable.

(28) Article 92(3) specifies the circumstances under which State aids which can be considered to be compatible with the common market. Their compatibility with the common market must be assessed from the point of view of the Community and not that of an individual Member State. In the interest of the functioning of the common market and having regard to Article 3(g) of the EC Treaty, the exemptions laid down in Article 92(3) from the prohibition of State aid must be interpreted restrictively.

(29) With regard to Article 92(3)(a), it has to be noted that the investment projects are not located in a region where pursuant to the Guidelines on national regional aid ([10]) the economic situation is extremely unfavourable in relation to the Community as a whole (per capita gross domestic product measured in purchasing power standards of less than 75 % of the Community average).

(30) With regard to Article 92(3)(b), it should be found that the aid in question is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in Austria's economy.

(31) The aid is, moreover, neither intended to achieve nor suitable for achieving the objectives contained in Article 92(3)(d).

([10]) OJ C 74, 10.3.1998, p. 9.

(32) Austria has not submitted that the above exemptions are applicable.

Community Guidelines on State aid for rescuing and restructuring firms in difficulty

(33) In accordance with the Guidelines, restructuring aid may, if it meets the conditions laid down in them, be considered to contribute to the development of certain economic sectors within the meaning of Article 92(3)(c) of the EC Treaty, without adversely affecting trading conditions to an extent contrary to the common interest.

(34) It should be noted at this point that Austria does not submit that the admissibility of the present aid measure results from these Guidelines.

(35) The Commission had already pointed out on the occasion of the initiation of the procedure that if restructuring aid is granted in a market characterised by structural overcapacity the Guidelines demand a reduction in capacity, in absence of which the aid is contrary to the public interest ([11]).

(36) The starch market is characterised by structural overcapacity, which in consequence necessitates the grant of export refunds and the sector's exclusion from eligibility for investment aids.

(37) While the investments subject to the present aid measure are intended to achieve a restructuring of the company concerned, which would, in accordance with the Guidelines become competitive in the long term, the grant award is not conditional upon a reduction in production capacity but, on the contrary, will contribute to a substantial increase in production capacity.

(38) The above arguments demonstrate that the Guidelines do not constitute a legal basis for approving the aid in question.

Regulation (EC) No 951/97

(39) Austria has, as explained above, disputed the applicability of the selection criteria set out in the Annex to Decision 94/173/EC. Pursuant to Article 16(5) of Regulation (EC) No 951/97 Member States may grant investment aid for the processing and marketing of products listed in Annex II to the EC Treaty provided the aid is compatible with Articles 92, 93 and 94 of the EC Treaty. With regard to the application of Articles 92, 93 and 94, the Commission has adopted the Guidelines for State aid in connection with investments in the processing and marketing of agricultural products ([12]) which refer to the selection criteria set out in Decision 94/173/EC. The first indent of point 2.1 of the Annex to that Decision stipulates that investments in the cereals sector in cereal starch facilities are excluded.

(40) It follows that the said provisions not only do not constitute a legal basis for approving the aid measure; as the aid relates to investments in the production of starch from cereals it would be explicitly excluded from State aid and would be considered to be incompatible with the common market.

(41) In this regard, Austria argues that the above legal basis has been altered by point VII.D.1 of Annex XV to the Act of Accession in conjunction with Declaration No 31 of the Final Act and the Commission's opinion on Austria's accession application in so far that aid may be regarded as compatible with the common market under Article 92(3)(c) of the EC Treaty even if its effect is to expand production capacity.

(42) Article 151(1) of the Act of Accession stipulates that the acts listed in Annex XV to the Final Act apply in respect of the new Member States under the conditions laid down in that Annex. Point VII.D.1 of Annex XV to the Act of Accession provides that Regulation (EEC) No 866/90 and hence Regulation (EC) No 951/97 ([13]) shall be applicable in the new Member States. With regard to the application of Article 16(5) of the said Regulation, which stipulates that Articles 92, 93 and 94 of the EC Treaty apply to the field of application of the Regulation, it is laid down that the Commission is to implement those provisions with regard to Austria and Finland in accordance with Declaration No 31 of the Final Act. Declaration No 31 reads in this regard:

> '[The Contracting Parties agree on the following: . . .] flexibility on transitional national aid schemes designed to facilitate restructuring.'

([11]) Points 3.2.2 (ii) and 3.2.5 (a) of the Guidelines.

([12]) OJ C 29, 2.2.1996, p. 4.

([13]) See footnote 6.

(43) The question arises whether application of the above provisions leads to the admissibility of aid linked to an expansion of production capacity in sectors excluded by Decision 94/173/EC.

(44) As a preliminary the Commission notes that the opinion Austria is referring to is not a legal document but a political document and therefore of restricted value for the examination of the case at hand.

(45) It should be noted furthermore that, as the Court of Justice has held in Case C-730/79 (Philip Morris) ([14]), in considering the possibility of an exemption from Article 92(1) under Article 92(3) of the EC Treaty, the Commission is granted a certain margin of discretion. That discretion the Commission is to use on the basis of a comprehensive social and economic appraisal of the impact of the aid on the Community. In doing so Declaration No 31, which Austria has adduced to support its arguments, must be taken into account and indeed has led in three previous cases to the approval of aid which would have been excluded pursuant to the 'normal' State aid regime (see: Austria N 445/B/95 ([15]), Finland N 14/96 ([16]) and Austria N 517/96). The Commission, in Case N 517/96, accepted three aid projects in favour of Agrana which involved investments in the potato starch sector. In that decision the Commission relied on Declaration No 31 in the Final Act but also on the fact that the investments could not possibly entail an increase in production capacity since the potato starch sector is governed by a quota system by virtue of Council Regulation (EC) No 1868/94 of 27 July 1994 establishing a quota system in relation to the production of potato starch ([17]). It is therefore not correct that the Commission, despite Declaration No 31, 'simply applies the rules which it otherwise applies to aid'.

(46) The present aid measure differs from the above cases in that it involves an expansion of production capacity in a sector which is not regulated by a quota system and is characterised by structural overcapacity.

([14]) See Philip Morris (footnote 7), paragraph 24.
([15]) As regards the effectiveness of a provision (see for instance judgment of the Court of Justice in Case C-34/62, *Germany v. Commission* [1963] ECR 271.
([16]) See fottnote 5, points 3.2.3 and 3.2.4.
([17]) OJ L 197, 30.7.1994, p. 4.

(47) Austria claims that the original wording of point VII.D.1 of Annex XV to the Act of Accession (when Norway was still an applicant country) indicates *a contrario* that, in contrast to Norway, capacity reductions were not a precondition for the admissibility of investment aid for Austria (and Finland). Point D originally had a first indent and read as follows:

'[. . .] When applying Article 16(5) [of Regulation (EEC) 866/90], the Commission:

— may authorise Norway to grant, for the three years which follow its accession, national aids to investments in any sector of products falling within Annex II to the EC Treaty and in need of being restructured, on condition that the production capacity of the said sector is not increased,

— will implement these provisions with respect to Austria and Finland in accordance with Declaration No 31 set out in the Final Act.'

(48) The Austrian argumentation *a contrario* must be rejected where *ipso interpretatione* the automatic result appears to be the admissibility of expansions in production capacity regardless of the merits of each individual case. In fact, such a result would be tantamount to divesting the flexibility referred to in Declaration No 31 of its meaning. Also, it is noted that the above provision which includes the reference to Norway has in this form not become part of Community law.

(49) Rather, the Commission, in the framework of the comprehensive examination which includes Declaration No 31, is called upon to consider whether the aid is likely to promote the development of an economic sector or area without affecting trading conditions to an extent contrary to the common interest.

(50) With regard to the development of the economic sector, the Commission assumes that such would be the effect of the aid. As a result of its expansion of capacity, Agrana should succeed in significantly reducing the ratio of fixed costs to production volume and thereby become competitive. The Commission accepts that Agrana's previous production capacity would not have been enough to guarantee its long-term competitiveness.

(51) The Commission also took account of the fact that, with the accession of Austria to the European Community, Agrana no longer had the protective economic conditions from which it had previously benefited. Since Austria was not granted any transitional aid through the Act of Accession in the starch sector the economically unfavourable cost structure of Agrana had an immediate impact following Austria's accession.

(52) With regard to the impact of the aid on trading conditions and common interest, it has already been shown that there is intra-Community trade in starch. Starch producers in other Menber States which export to Austria may find their competitive position on the Austrian market affected by Agrana's capacity, expansion or may be exposed to intensified competition on other markets. In so far as Austria puts forward the possibility of new outlets for starch created by the Austrian paper and citric acid industry, it is reasonable to assume that starch producers from other Member States will be interested to covering these new or growing market segments without having aid to a competitor alter competitive conditions to their disadvantage since the Austrian starch market has already been penetrated.

(53) Also, an aid which is to provide a stimulus to compensate for the positive impact of increasing demand on the existing market disequilibrium by increasing production capacity appears to be problematic. Such an aid would not be covered by Declaration No 31 because it contorts its aim and scope beyond what could still be considered reasonable in terms of distortion of competition with a view to the common organisation of market in cereals ([18]). This result is also coherent with the approach the Commission has adopted in the Guidelines on State aid for rescuing and restructuring which foresee flexibility as regards assisted areas and small and medium-sized enterprises (SMEs) ([19]). Whilst not as such applicable to the present case the notion of flexibility as defined in those Guidelines is of value in a systematic context. In the Guidelines, flexibility is specified to mean a latitude in determing the extent of the capacity reduction but does on no account confer the power allow for a capacity increase.

(54) It is the Commission's opinion that the aid affects trading conditions to an extent contrary to the common interrest by helping to increase supply in a market marked by limited demand and thereby distorts competition. It should be noted that the problem of surpluses in the common agricultural policy has been countered by the Guidance Section of the European Agricultural Guidance and Guarantee Fund in that it has not made available any part-financing for investments in the concerned sector since July 1980.

(55) In addition, the aid would indirectly contribute to an aggravation of a situation in which Community funds are used for exporting the surplus of over demand in starch of about 20 % to third countries.

(56) Therefore, and notwithstanding the flexibility clause in Declaration No 31, the Commission considers the aid to be incompatible with the common market pursuant to Article 92(3)(c) of EC Treaty.

Necessity of the aid

(57) A further element which leads the Commission to reject applicability of Article 92(3)(c) of the EC Treaty is that Agrana has already completed the investments and that respective facilities are operational.

(58) Pursuant to Article 92(3)(c) and to the case-law of the Court of Justice ([20]) aid can only be considered to facilitate the development of a sector if, without it, the free play of market forces would not persuade potential beneficiaries to act so as to bring about the development of the sector.

(59) Setting aside that principle would mean permitting aid in situations where competition itself ensures the optimum allocation of resources and provides for the development of the sector. Such aid would mean granting to the companies concerned unjustified trading advantages by improving their financial position without providing a stimulus to invest. For that reason the Commission tends to regard retroactive investment aid as operating aid and the resultant effect on trade as contrary to the common interest as embodied in Article 92(3)(c).

([18]) In this case investment aid was granted to restructure the marketing sector and restrict capacity in the sugar sector, which is excluded from investment aid.

([19]) In this case capacity restrictions were made a condition for investment aid to restructure the production sector.

([20]) See Philip Morris (footnote 7), point 17.

(60) If the Article 93 procedure is not to be rendered futile, a potential aid recipient cannot normally entertain legitimate expectations of a positive Commission decision before the aid examination procedure is complete. That principle must particularly apply to aids for which the Commission has a degree of discretion which is not circumscribed through secondary legislation (guidelines, frameworks).

(61) In particular, political commitments made by the national government or the national authorities of a Member State to the potential beneficiary [21] cannot engage the Commission and neither can they create legitimate expectations on the part of the potential beneficiary.

(62) In the light of the above arguments, Agrana can be said to have acted 'at its own risk' in carrying out the investments. If the owners of Agrana could not have had legitimate expectations as to a positive decision about the notified aid, and if consequently Agrana in accordance with the requirements of good commercial practice, must be presumed to have at least taken into consideration the opposite outcome, namely a Commission decision not to allow the aid then the completion of the investments is circumstantial evidence for the opinion of Agrana's owners that the investments would pay off even without the aid.

(63) By way of a subsidiary observation the Commission considers the definition of an 'undertaking' used by Austria to be too narrow in this context. Theoretically, the Commission has substantiated that conception in its decision to initiate proceedings by referring to the 'market economy investor principle' [22] and has stated that a private holding company or group of enterprises can be expected to pursue a structural, global or sectoral policy guided by a longer-term view of profitability and therefore to make decisions at group level in a wider financial context and may therefore inject new capital to ensure the survival of a company experiencing temporary difficulty but which could be expected to return to profit after restructuring.

(64) In the course of the proceedings Austria has not adduced any arguments which would persuade the Commission to dismiss that conclusion.

(65) Austria's argument to the effect that the owners of Agrana cannot be expected to invest unlimited funds in a specific sector is not convincing, and neither does the economically isolated view of Agrana as advocated by Austria accord with economic reality.

(66) The Commission noted when initiating the procedure that the economic data initially supplied by the Austrian authorities related only to Agrana and ignored its financial links with an international holding company, Agrana Beteiligungs-AG. Agrana is 98,75 %-owned by Agrana Beteiligungs-AG and the latter is linked to another large group, Deutsche Südzucker AG, by a capital holding. Deutsche Südzucker AG has 50 % of the voting capital in Agrana Beteiligungs-AG. Agrana Beteiligungs-AG's accounts for the 1995/96, 1996/97 and 1997/98 financial years showed increasing annual profits after tax and it is pursuing an international strategy which is reflected in holdings in eastern Europe. Deutsche Südzucker AG is also internationally active and had an appreciably increased consolidated annual profit for the 1996/97 financial year.

(67) Regardless of the organisational independence of Agrana Beteiligungs-AG, Agrana and the other subsidiaries and regardless of the absence of civil law claims by Agrana on Agrana Beteiligungs-AG to assume the former's losses, it would be economically unreasonable for the owners of a company to act without considering its economic options.

(68) In view of the resultant spectrum of economic opportunities (particularly regarding the temporal perspectives of the investment). which was broader than the one the deficit Agrana, if regarded in isolation, would have disposed of, it cannot be doubted that the owners of Agrana decided in favour of the option which they regarded as financially appropriate under the given circumstances, which included uncertainty as to the grant of the aid. The hypothesis that it would have been more probable that the company would have been liquidated out of financial considerations had there been no aid proves to be inaccurate given the actual decision taken.

(69) In conclusion, the aid should be considered an operating aid covered by the prohibition on State aid under Article 92(1) of the EC Treaty which does not qualify for one of the derogations set out in Article 92(2) and (3) of the EC Treaty. The aid is therefore incompatible with the common market,

[21] Austrian letter of 13 February 1998 and points 3 and 4.5 of Austria's letter of 14 November 1996.

[22] See in this respect Commission Communication of 17 September 1984: Application of Articles 87 and 88 of the EC Treaty to public authorities' holdings (Bulletin EC 9-1984) and Commission Communication to the Member States on the application of Articles 87 and 88 of the EC Treaty and Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector (OJ C 307, 13.11.1993, p. 3).

HAS ADOPTED THIS DECISION:

Article 1

The aid plan notified by Austria, according to which aid is to be granted to Agrana Stärke-GmbH, Hollandstraße 2, 1020 Wien, for the following investments in Aschach in the starch production sector:

(a) converting a high-pressure soaking facility for maize starch to standard technology and increasing its capacity from [...](*) tonnes to [...](*) tonnes of maize per day;

(b) investing in a saccharification line using maize starch as the raw material with an annual capacity of [...](*) tonnes dry matter,

at an intensity of 20 % of the investment costs is incompatible with the common market.

The aid plan does not qualify for any of the exemptions from the prohibition of State aid as listed in Article 92(2) and (3) of the EC Treaty. It may not therefore be implemented.

Article 2

This Decision is addressed to the Republic of Austria.

Done at Brussels, 30 September 1998.

For the Commission

Franz FISCHLER

Member of the Commission