# COMMISSION

## COMMISSION DECISION

**of 3 February 1999**

**on an Austrian state aid granted in the form of an exemption from beverage tax of wine and other fermented beverages sold directly on the place of production to the consumer**

*(notified under document number C(1999) 325)*

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

(1999/779/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Articles 92 and 93 thereof,

Having regard to the Act concerning the Accession of Austria, Finland and Sweden to the European Union, and in particular Articles 144(a) and 149 thereof, and to the Commission decision of 24 July 1998 on transitional measures for Austria concerning tax exemptions for wine and other fermented beverages taken by virtue of Article 149,

After giving notice to the parties concerned to submit their comments, in accordance with Article 93(2),

Whereas:

I

Answering a request from the Commission of 21 March 1996, Austria sent a letter of 30 May 1996 presenting information about a national scheme for a tax exemption. As part of the preliminary procedure according to Article 93(3) of the EC Treaty, Austria has submitted further information by letter of 19 July 1996.

The measure in question provides for an exemption from beverage tax in favour of wine (heading Nos 2204 21 and 2204 29 of the Common Customs Tariff) and other fermented beverages (heading No 2206 00 of the Common Customs Tariff), where these products are sold direct to the consumer at the place of production ('farm-gate' sales). The beverage tax is generally levied at a rate of 7,58 % of the retail price (10 % excluding value added tax) for sales of alcoholic beverages to the consumers.

This exemption from the beverage tax is provided for in the *Finanzausgleichsgesetz* 1993 (Act on redistribution of income between the Federal State, the *Länder* and the municipalities of Austria), as last amended in 1997, which empowers the *Länder* and the municipalities to levy the beverage tax except for farm-gate sales of wine and other fermented beverages. As for the delimitation of the range of products covered by this exemption the *Finanzausgleichsgesetz* refers to the *Umsatzsteuergesetz 1994* (Act on turnover tax). Appropriate provisions are laid down in the secondary legislation of the *Länder* and of the municipalities in the wine-growing regions of Austria (e.g. *Steiermärkisches Getränke- und Speiseabgabengesetz 1993, Oberösterreichische Gemeinde-Getränkesteuergesetz-Novelle 1993, Salzburger Getränkesteuergesetz 1993, Getränkesteuerverordnung der Stadt Salzburg, Niederösterreichisches Getränke- und Speiseeissteuergesetz 1992, Getränkesteuerverordnung 1992 der Stadt Wien*).

The scheme had come into force before Austria's accession to the European Union and has been continously applied since Austria became a member of the European Union.

II

By letter of 20 November 1996 the Commission informed Austria of its decision to open the procedure under Article 93(2) of the EC Treaty with regard to the measure. The decision was published in the *Official Journal of the European Communities* and the Commission invited the Member States and other interested parties to submit their observations [1].

In the decision, the Commission expressed its doubts as to the compatibility of the measure with the common market. It stated that the measure might constitute state aid incompatible with the common market, as it appears to fulfil the conditions of Article 92(1) of the EC Treaty without qualifying for any of the derogations provided for in paragraphs 2 and 3 of that Article. Moreover, the aid could not be considered to constitute an 'existing' aid within the meaning of Article 93(1) of the EC Treaty as it had not been notified in accordance with Article 144 of the Act of Accession.

[1] OJ C 82, 14.3.1997, p. 9.

No observations from Member States or third parties were received after publication of the decision. Austria submitted observations by letters of 21 January 1997 and of 31 January 1997 and it sent supplementary observations in letters of 5 December 1997 and of 22 December 1997.

On 24 July 1998 the Commission, pursuant to Article 149(1) of the Act of Accession, decided, after having followed the procedure under Article 38 of Council Regulation No 136/66/EEC of 22 September 1966 on the establishment of a common organisation of the market in oils and fats ([1]), as last amended by Regulation (EC) No 1638/98 ([2]), that 'Austria may maintain, until 31 December 1998, the existing provisions of various Austrian laws exempting producers of wine and other fermented beverages from the beverage tax in relation to produce sold directly at the place of production to the consumer' ([3]). The application of Article 149 was initially due to end on 31 December 1997 but extended until 31 December 1998 by Council Regulation (EC) No 2596/97 of 18 December 1997 extending the period provided for in Article 149(1) of the Act of Accession of Austria, Finland and Sweden ([4]), by the procedure laid down in Article 149(2).

In the recitals of the preamble to the Commission decision of 24 July 1998 it was stated that the Austrian scheme purports to facilitate the development of wine growing in small or very small holdings in areas with difficult production conditions or frontier areas. Therefore, in order to facilitate the transition of the production concerned to the relevant common market organisations of Council Regulation (EEC) No 822/87 of 16 March 1987 on the common organisation of the market in wine ([5]), as last amended by Regulation (EC) No 1627/98 ([6]), and Council Regulation (EEC) No 827/68 of 28 June 1968 on the common organisation of the market in certain products listed in Annex II to the EC Treaty ([7]), as last amended by Commission Regulation (EC) No 195/96 ([8]), Austria was authorised to maintain the tax exemptions on a temporary basis.

Consequently, this decision relates to whether the measure is compatible with Community rules on state aid, given that the measure is, as of 1 January 1999, no longer considered to constitute a transitional measure and is therefore subject to those rules.

III

As regards the status of the measure, Austria recalls that the tax exemption had been in force since before Austria's accession to the Community. Even from a formalistic point of view, it was thus wrong and misleading to categorise it as a new measure and to invite the other Member States and third parties to submit their comments on it.

Austria argues that, if the Commission considered that the differences in taxation between Austria and other Member States created a distortion of the conditions of competition which should be eliminated, consultations according to Article 101 of the EC Treaty would be a more appropriate way to proceed with the case.

Furthermore, Austria contests that the measure constitutes state aid within the meaning of Article 92(1) of the EC Treaty.

In particular, the measure should be considered a general measure, quite devoid of selectivity; rather, it constitutes a normal tax measure in the agricultural sector, justified by its purpose and place within the taxation system. This system would, furthermore, not allow for any discretion on the part of the authorities charged with implementing the measure.

Austria alleges that the measure is highly unlikely to distort competition since it only reflects a traditional pattern of consumption. In this regard it is submitted that beverage tax of the present type was peculiar to Austria and that it has internal relevance only, as cross-border trade is not taxed. By exempting from beverage tax those Austrian farmers who sell wine direct on their farms, they are put on an equal footing with agricultural holdings in the rest of the European Union, where no such beverage taxes exist in the first place.

In the alternative, Austria claims that the measure qualifies for an exemption under Article 92(3)(c) of the EC Treaty. This provision allows aid to facilitate the development of certain economic activities or of certain economic areas, provided that certain preconditions are fulfilled. Austria claims that more than 7 000 viticultural holdings are concerned which are mainly situated in less favoured areas or frontier areas and are small or very small. These holdings find themselves in an economically and financially precarious situation and are often not in the position to pass the burden of the beverage tax on to the consumer.

Austria rejects the view that the measure infringes the common market organisations: the core element of the common market organisation for wine is not the management of prices but rather intervention measures such as land clearing, storage, distillation, grape juice production and the import and export regime. Previous decisions on aid measures, such as Commission Decision 93/155/EEC ([9]), would mainly refer to such measures. The prohibitive effect of common market organisations could only refer to areas covered by these. Austria, in this connection, invokes Commission Decision 89/228/EEC ([10]) concerning an Italian measure setting a maximum price on rectified concentrated grape juice, held by the Commission to be an infringement of the common market organisation. Austria affirms that, although the setting of maximum prices did indeed amount to a serious market intervention, the case of a tax exemption justified by economic and social considerations was in no way comparable.

([1]) OJ 172, 30.9.1966, p 3025/66.
([2]) OJ L 210, 28.7.1998, p. 32.
([3]) Written procedure E/1462/98.
([4]) OJ L 351, 23.12.1997, p. 12.
([5]) OJ L 84, 27.3.1987, p. 1.
([6]) OJ L 210, 28.7.1998, p. 8.
([7]) OJ L 151, 30.6.1968, p. 16.
([8]) OJ L 26, 2.2.1996, p. 13.
([9]) OJ L 61, 13.3.1993, p. 55.
([10]) OJ L 94, 7.4.1989, p. 38.

IV

**Applicability of state aid rules**

The measure in question applies to wine made from fresh grapes under heading Nos 2204 21 and 2204 29 of the Common Customs Tariff, covered by Regulation (EEC) No 822/87, and other fermented beverages under heading No 2206 00 of the Common Customs Tariff, covered by Regulation (EEC) No 827/68. By virtue of Article 42 of the EC Treaty, the rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the Council. The Council, acting under Article 76 of Regulation (EEC) No 822/87 and Article 5 of Regulation (EEC) No 827/68, decided that Articles 92, 93 and 94 of the EC Treaty apply to the production and the trade in the products covered by those Regulations.

**Status of the national measure in question**

The status of 'existing aid' within the meaning of Article 93(1) of the EC Treaty, is generally only awarded to a given measure afrer it has been formally approved by the Commission, or, where the Commission has not reacted within two months of proper notification of the measure, after the Member State has notified the Commission of its introduction.

As regards aid schemes which operated in the new Member States before their accession, Article 144, point (a) of the Act of Accession provides that 'among the aids applied in the new Member States prior to accession only those communicated to the Commission by 30 April 1995 will be deemed to be "existing" aids within the meaning of Article 93(1) of the EC Treaty'.

The mere fact of the measure's existence prior to accession, as is claimed by Austria, is not sufficient to qualify it as 'existing' within the meaning of Article 93(1) of the EC Treaty. Austria did not include the measure in the notification of existing schemes to the Commission before 30 April 1995 with reference to Article 144 of the Act of Accession; nor did Austria notify the measure after accession in accordance with Article 93(3) of the EC Treaty. The Commission came to know of the measure by way of a complaint. The measure thus cannot be deemed 'existing' within the meaning of Article 93(1) and cannot, for this reason, benefit from the legal status of such aid.

**The prohibition of state aid**

Pursuant to Article 92(1) of the EC 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 measure fulfils the above conditions and must therefore be considered to constitute state aid for the purposes of that Article.

*Aid granted through state resources*

The exemption from beverage taxes applying to wine made from fresh grapes and other fermented beverages sold direct at the place of production (farm-gate sale) is equivalent to a waiver of the fiscal revenue which would otherwise have to be paid by the producer. The exemption is borne by the public budget of Austrian *Länder* and municipalities in so far as it reduces revenues and has to be regarded as granted through state resources ([1]).

Regarding the question of direct or indirect aid, Article 92(1) also applies to indirect aid. However, despite the objections of Austria, the measure at issue is to be regarded as direct aid since the addressee of the legal provision is the same holding that actually benefits economically from the tax exemption.

*Favouring certain undertakings*

The measure benefits farmers who pursue a permanent economic activity. These businesses, provided that they sell on the farm to the consumer, are exempted from paying a tax generally levied on sales of beverages at about 7,58 % of the price charged to the consumer. The measure refers particularly to wine made from fresh grapes and other fermented beverages. The measure is therefore considered to favour certain undertakings and the production of certain goods. Austria did not take issue with these arguments.

As far as the selectivity of the measure is concerned, Austria pointed to the absence of any discretion on the part of the tax authorities to apply or withhold the exemption. This, indeed, is a necessary, but not a sufficient condition for demonstrating that a measure is non-selective. Commission policy attributes the character of specificity to any measure which derogates from the general tax system of the Member State unless this is justified by the logic of the system itself. Admissible derogations from the general system are those which, for economic reasons, prove necessary or practical in terms of the efficiency of the system (see the judgments of the Court of Justice of 2 July 1974 in Case C-173/73 *Italy* v. *Commission* ([2]) and of 17 March 1993 in Case C-72/91 *Sloman Neptun* ([3]).

The tax system in Austria provides that, in general, sales of alcoholic beverages to consumers are taxable under the beverage tax. Exemption from the beverage tax for a small group of beneficiaries selling wine or other fermented beverages directly to the consumer on the place of production constitutes a derogation from the general taxation system. This exemption does not apply to wine sold by traders to the consumer nor to off-farm sales by farmers to consumers. The Commission does not hold any evidence showing that the exemption at issue arises from the logic of the tax system; nor does it see the collection of such a tax as a technical impossibility.

([1]) For the classification of tax exemptions as a 'State aid', see for example the judgment of the Court of Justice in Case C-387/92 *Banco Exterior de Espana* [1994] ECR 1-877.
([2]) [1974] ECR 709.
([3]) [1993] ECR 887.

*Distortion of competition*

An aid measure distorts competition if it intervenes in an existing or developing competitive relationship between holdings or sectors of production and if the measure artificially modifies the conditions of competition for competitors. As may be seen from the judgment of the Court of 17 September 1980 in Case C-730/79 *Philip Morris* [1], the strengthening of the economic position of an undertaking by means of a state aid normally indicates the distortion of competition in relation to competing undertakings.

Wine and other fermented beverages sold direct to the consumer at the vineyard compete with wine and other fermented beverages offered to the same consumer by retail traders. By exempting from charges one group of products while charging the others, conditions of competition are distorted. In the case at issue the competitive advantage conferred on producers of wine who sell at the farm-gate to consumers amounts to about 7,58 % of the sales price.

Austria, in its letter of 19 July 1996, referred to a judgment of the Austrian constitutional court of 27 November 1995 [2]. In this judgment, the court finds that the exemption of certain producers from beverage taxes does not infringe the principle of equality between producers and traders since different circumstances justify different treatment. However, it has to be noted that this judgment refers to the issue of discrimination, and not to the question of the existence of a state aid and its compatibility with the common market under Article 92 of the EC Treaty. It has, therefore, no bearing on the above considerations.

*Impact on trade between Member States*

A measure will affect trade between Member States if it makes imports from Member States more difficult or if it makes exports from one Member State to other Member States easier. A decisive factor is whether, on account of the measure, trade within the Community evolves differently or is likely to do so.

There is trade in wine and other fermented beverages between Austria and other Member States. The following tables illustrate imports and exports for the year 1997 by referring to selected States.

| Exports of wine (headings No 2204 21 and 2204 29 of the Common Customs Tariff) from Austria to selected Member States in 1997 (in litres) | |
|---|---|
| Netherlands | 334 111 |
| Germany | 12 943 617 |
| Sweden | 861 885 |
| Italy | 1 110 507 |
| Total exports to other Member States | 14 513 937 |

| Imports of wine (headings No 2204 21 and 2204 29 of the Common Customs Tariff) from selected Member States into Austria in 1997 (in litres) | |
|---|---|
| France | 4 470 800 |
| Germany | 3 592 229 |
| Italy | 44 547 248 |
| Spain | 3 899 658 |
| Total imports from other Member States | 57 475 859 |

| Exports of other fermented beverages (heading No 2206 00 of the Common Customs Tariff) from Austria to selected Member States in 1997 (in litres) | |
|---|---|
| France | 5 335 |
| Germany | 126 550 |
| Sweden | 150 938 |
| Italy | 1 751 |
| Total exports to other Member States: | 285 074 |

| Imports of other fermented beverages (heading No 2206 00 of the Common Customs Tariff) from selected Member States into Austria in 1997 (in litres) | |
|---|---|
| Belgium-Luxembourg | 146 209 |
| Germany | 214 662 |
| Italy | 135 789 |
| Sweden | 9 877 |
| Total imports from other Member States: | 3 904 775 |

The beverages imported into Austria are marketed to consumers via the retail trade. By exempting Austrian wine and other fermented beverages, if sold on-farm to consumers, from a tax which is levied on wine and other fermented beverages imported into Austria from other Member States and offered by retailers, the measure creates an artificial price-gap discriminating against imports which can evidently not benefit from beverage-tax exempted sales. It is important to note that according to estimates Austrian wine sold on the farm to the consumer accounts for about 50 % of the total sales of wine in Austria. The measure thus affects trade between Member States. It can be assumed that, in absence of the measure, imports of wine (and other fermented beverages) from other Member States into Austria would be higher than at present, possibly to the detriment of sales of Austrian wine (and other fermented beverages).

[1] [1980] ECR 2671, at paragraphs 11 and 12.
[2] B 1648/94.

Moreover, businesses benefiting from the measure might export to other Member States and could conceivably use the proceeds from the aid to cross-subsidise their exports.

Austria states that the duty to pay beverage tax has to be seen as a competitive disadvantage for Austrian producers since other Member States do not levy such a tax. This line of argument cannot be accepted as foreign wine and other fermented beverages sold in Austria are subject to the beverage tax while Austrian wine and other fermented beverages sold in other Member States are not subject to the Austrian beverage tax. In any event; the Court of Justice has held in its judgment of 10 December 1969, Joined Cases 6 and 11-69 *Banque de France* [1], that the existence of a state aid measure cannot be refuted on the basis that a Member State tries to approximate rates that bear on its national products to be exported to those applied in other Member States. This finding applies *mutatis mutandis* to the case at issue.

**The derogations from the prohibition of state aid**

The prohibition in Article 92(1) of the EC Treaty is followed by exemptions in Article 92(2) and (3).

*Article 92(2) of the EC Treaty*

The exemptions listed in Article 92(2) 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.

*Article 92(3) of the EC Treaty*

Article 92(3) defines the circumstances under which state aids may be considered to be compatible with the common market. Their compatibility with the common market must be assessed from the viewpoint of the Community and not that of an individual Member State. In the interests of the smooth functioning of the common market and in keeping with Article 3g of the EC Treaty, exemptions from the prohibition of State aid must be interpreted restrictively.

With regard to Article 92(3)(a), it has to be noted that the measure does not apply exclusively in a region where, pursuant to the Guidelines on national regional aid [2], the economic situation is extremely unfavourable in relation to the Community as a whole (meaning per capita gross domestic product, measured in purchasing-power standards, of less than 75 % of the Community average).

With regard to Article 92(3)(b), it is considered that the aid in quesion 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.

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

Austria has not submitted that the above exemptions are applicable.

*Article 92(3)(c) of the EC Treaty*

According to Article 92(3)(c) of the EC Treaty, aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, may be considered to be compatible with the common market.

In justifying the measure, Austria relies on Article 92(3)(c) and refers to the small-scale structure of production of the beneficiaries, their disadvantageous location and their difficult economic and financial situation. According to Austria, without the aid many of these holdings would succumb to economic stress and would have to close down.

The Commission does not endorse state aid measures under Article 92(3)(c) which do not induce the development of a sector or region but simply preserve the *status quo*. The aid in question is not designed and is not likely to bring about structural improvements as it does not link the benefit of the tax exemption to technical or structural changes in the beneficiaries' holdings. The artificial competitive advantage conferred on the beneficiaries of the aid only persists as long as the aid is granted. Such aid does not facilitate the development of the sector or a region but is considered to be operating aid, that is to say aid which is intended to relieve an undertaking of the expenses which it would normally have to bear. Operating aid is in principle incompatible with the common market (judgment of the Court of Justice of 15 May 1997 in Case 278/95 P *Siemens* [1997] ECR I-2507).

The foregoing arguments do not detract from the view which the Commission expressed in the decision of 24 July 1998 wherein it considered the measure to be transitional, gaining time for the addressees to adapt to a new legal and economic environment. However, if Article 92(3)(c) of the EC Treaty is to operate, the Commission requires the measure to exhibit a clear and unambiguous linkage to the development of a sector or a region in order to qualify for the derogation. Since no such effect may be associated with the measure at issue, it cannot be deemed to match the exceptional circumstances envisaged by Article 92(3)(c).

The aid thus neither satisfies the requirements of Article 92(3)(c) of the EC Treaty nor matches any other derogation for state aid under Article 92(1) thereof, and consequently is considered to be incompatible with the common market.

[1] [1969] ECR 523, at paragraphs 18 to 21.
[2] OJ C 74, 10.3.1998, p. 9.

**Article 101 of the EC Treaty**

If the Commission finds that disparities between the legal and administrative provisions of Member States distort competition, it follows a special procedure provided for in Article 101 so as to remedy the situation. Austria invokes this Article when asserting that the state aid procedure commenced by the Commission is inappropriate. The Commission cannot accept Austria's line of argument since, as has been shown above, the tax exemption at issue constitutes state aid in its own right. In its judgment in Case 173/73 [1], the Court of Justice held a unilateral modification of one particular factor in the cost of production in a given sector of the economy to be liable to disturb the existing balance between the Member States regardless of the operation of Articles 99 to 102 of the EC Treaty, which provide detailed rules for the abolition of general distortions resulting from the differences between the tax systems of the different Member States.

**The common organisation of the markets**

As the Commission considers the measure to constitute a state aid incompatible with the common market according to Article 92(1) of the EC Treaty, there is no need to examine further how far the measure infringes the common organisation of the markets which govern the products covered by the tax exemption.

**Article 95 of the EC Treaty**

The same holds true in respect of the application of Article 95 of the EC Treaty. In this connection it should be mentioned that the Commission has asked the Austrian Government in the framework of the preliminary stage which can lead to the initiation of proceedings under Article 169 of the EC Treaty to present its views on whether the tax exemption constitutes a discriminatory taxation measure contrary to Article 95 (Commission letter of 6 November 1998). This decision on the aspects of the beverage tax exemption representing state aid does not prejudice the outcome of the contacts between the Commission and Austria in the framework of the Article 169 procedure.

Furthermore, reference should be made to a procedure pending before the Court of Justice under Article 177 of the Treaty [2]. The Austrian High Court of Administration (*Verwaltungsgerichtshof*) has asked the Court of Justice, on the subject of the Austrian beverage tax, for a preliminary interpretation of the sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes [3], as last amended by Directive 98/80/EC [4], and of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products [5], as last amended by Directive 96/99/EC [6], and of Article 92(1) of the Treaty,

HAS ADOPTED THIS DECISION:

*Article 1*

The measure notified by Austria whereby wine and other fermented beverages, sold direct to the consumer at the place of production, are exempted from the beverage tax which is normally levied at a rate of about 7,58 % (10 % before VAT) of the retail sales price of the product, is incompatible with the common market.

Austria may not maintain, after 31 December 1998, the measure referred to in the first paragraph.

*Article 2*

Austria shall inform the Commission, within two months of the date of notification of this Decision, of the measures adopted to comply with it.

*Article 3*

This Decision is addressed to the Republic of Austria.

Done at Brussels, 3 February 1999.

*For the Commission*

Franz FISCHLER

*Member of the Commission*

[1] [1974] ECR 709.
[2] Case 437/97 before the Court of Justice.
[3] OJ L 145, 13.6.1977, p. 1.
[4] OJ L 281, 17.10.1998, p. 31.
[5] OJ L 76, 23.3.1992, p. 1.
[6] OJ L 8, 11.1.1997, p. 12.