COMMISSION DECISION

of 8 December 1999

on the Directives promoting the rearing of she-goats (Lower Austria)

(notified under document number C(1999) 5210)

(Only the German text is authentic)

(2000/335/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2)(1) thereof,

Having regard to Council Regulation (EC) No 2467/98 of 3 November 1998 on the common organisation of the market in sheepmeat and goatmeat [1], and in particular Article 22 thereof, and Council Regulation (EEC) No 804/68 of 27 June 1968 on the common organisation of the market in milk and milk products [2], amended for the last time by Council Regulation (EC) No 1587/96 [3], and in particular Article 23 thereof,

Having called on interested parties to submit their comments pursuant to Article 88(2)(1) [4],

Whereas:

I. PROCEDURE

(1) By letter dated 26 August 1997, Austria notified the Commission of the abovementioned aid. By letter(s) dated 13 July 1998 and 19 October 1998, Austria provided the Commission with further information.

(2) By letter dated 21 January 1999, the Commission informed Austria that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [5]. The Commission invited interested parties to submit their comments on the aid.

(4) The Commission received no comments from interested parties.

II. DESCRIPTION

(5) The measure in question concerns a general aid scheme providing for a direct grant of ATS 250 per she-goat per year in less-favoured areas of Lower Austria within the meaning of Article 21 of Council Regulation (EC) No 950/97 of 20 May 1997 on improving the efficiency of agricultural structures [6] and ATS 200 per she-goat per year in other parts of the province.

(6) The objective of this scheme is to promote goat farming as an alternative to the tradition of dairy cattle farming. Austria also aims to make goat farming on grassland and in hill and mountain areas sustainable, extensive use of these areas being in the common interest.

(7) In principle, those eligible for the scheme are natural and legal persons keeping goats on a commercial scale in Lower Austria. To qualify for the premiums they must keep at least 10 she-goats on the holding all year round. The goats must be at least one year old or have kidded at least once.

(8) The annual budget set for this measure is ATS 500 000, i.e. EUR 36 350. The measure is of unlimited duration.

(9) After an initial examination of the information received, the Commission decided to open the procedure laid down in Article 88(2) of the EC Treaty in order to examine the scheme in greater detail. The Commission expressed doubts when opening the procedure as to whether the scheme was compatible with the common market since it appeared at first sight to constitute operating aid having no positive structural impact. Moreover, the scheme appeared to allow aid over and above, and similar to, those aids provided for under the

[1] OJ L 312, 20.11.1998, p. 1.
[2] OJ L 148, 28.6.1968, p. 13.
[3] OJ L 206, 16.8.1996, p. 21.
[4] OJ C 113, 24.4.1999, p. 4.
[5] See footnote 4.
[6] OJ L 142, 2.6.1997, p. 1.

common organisation of the market concerned, which is exclusive within its particular sphere of activity.

III. COMMENTS FROM AUSTRIA

(10) Austria confirmed that the aid in question was designed to promote goat farming as an alternative line of production. In that way it was intended to ensure that extensive use was made of grassland and mountain areas in Lower Austria.

(11) Austria maintained that the argument that the aid in question was intended merely to cut the costs of goat farms and was therefore contrary to Article 87 of the EC Treaty did not hold water since the objective of the aid was in accordance with Article 87(3)(c) of the EC Treaty, whereby aid to facilitate the development of certain economic activities or of certain economic areas is compatible with the common market where such aid does not adversely affect trading conditions to an extent contrary to the common interest. The purpose of the aid in question was, they stated, not to assist certain breeders but, in accordance with Article 87(3)(c) of the EC Treaty, to make a tangible contribution to the development and establishing of goat breeding and rearing in the province of Lower Austria.

(12) Austria pointed out that Lower Austria was currently not self-sufficient in goat products, which conclusively indicated that there was scarcely any trade in the products in question between the Member States. Nor were fears founded that there could be distortions of competition or that trade could be affected between the Member States.

(13) According to Austria, Article 2(1) of Council Regulation (EEC) No 2078/92 of 30 June 1992 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside [7] was applicable to the aid in question since it provided for aid for rearing animals of local breeds in danger of extinction. Such was the aim of the planned aid for goats since it would promote a species under extreme threat, which would thus have a positive impact on the environment, thanks to utilisation of the mountain area for goat keeping, thus curbing degeneration of the landscape into karst and steppe.

(14) Before the Article 88(2) procedure was opened, Austria had also argued that the legal basis for the scheme was the provisions governing the compensatory allowance provided for in Regulation (EC) No 950/97, amended by Council Regulation (EC) No 2331/98 [8].

[7] OJ L 215, 30.7.1992, p. 85.
[8] OJ L 291, 30.10.1998, p. 10.

IV. ASSESSMENT OF THE AID

Market organisations

(15) Article 22 of Regulation (EC) No 2467/98 lays down that Articles 87, 88 and 89 of the EC Treaty apply to products covered by the Regulation. Under Article 23 of Regulation (EEC) No 804/68 Articles 87, 88 and 89 of the EC Treaty also apply to products covered by that Regulation.

(16) The sector concerned by the aid scheme in question (i.e. goat's milk, [she-]goats and goatmeat) is therefore subject to the Community rules on granting State aids.

Prohibition of State aids under Article 87(1) of the EC Treaty

(17) Under Article 87(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 is, in so far as it affects trade between Member States, incompatible with the common market.

Aids granted from State resources

(18) In view of the fact that the aid is granted in the form of a direct provincial grant, the scheme appears beyond any doubt to constitute aid granted 'through State resources'. The Court of Justice has consistently ruled that aids granted by administrative bodies at a level below the federal level are covered by the ban on State aid [9].

Selectivity of the measure

(19) One effect of the measure is that certain undertakings or a certain line of agricultural production is assisted especially since the premiums are paid direct to the goat farmers. Austria has stated that this is intended to make a tangible contribution to the establishment and development of goat breeding and keeping in the province of Lower Austria [10]. Austria actually states in its letter of 19 October 1998 that the purpose of the aid is to promote a specific economic sector. Therefore the measure is selective in the sense that only one region in

[9] Court of Justice judgment of 14 October 1987, Case C-248/84, ECR 1987, p. 4013.
[10] See letter of 22 February 1999.

Austria is granted the aid and in the sense that a particular sector within agriculture — the keeping of she-goats — is promoted.

Distortion of competition

(20) According to the case-law of the Court of Justice, improvement in the competitive position of an undertaking resulting from a State aid generally points to a distortion of competition compared with other competing undertakings not receiving such assistance ([11]). Neither the relatively low level of aid nor the relatively modest size of the beneficiary undertaking rules out the possibility of trade between Member States being distorted ([12]). Application of the *de minimis* rule is excluded for the agricultural sector by the Commission communication on *de minimis* aids ([13]).

Interference with trade

(21) A measure affects trade between Member States if it hampers imports from other Member States or facilitates exports to other Member States; the deciding factor is whether there is a risk that intra-Community trade will develop differently or is liable to develop differently as a result of the measure in question.

(22) The products to which the aid scheme in question relates are involved in trade between Member States and thus exposed to competition. In 1998 151 goats were imported into Austria, worth EUR 4 370. In the same year 1 518 goats, worth EUR 50 160 were exported from Austria to other Member States. Even aid of a relatively small amount is liable to affect trade between Member States where, as here, there is strong competition in the sector in which the recipient operates ([14]). Furthermore, they are also in competition with products from other Member States which the consumer regards as more or less similar and as possible substitutes. The aid thus affects trade between Member States.

([11]) See judgment of the Court of Justice of 17 September 1980, Case C-730/79, Philip Morris, ECR 1980, p. 2671, paragraphs 11 and 12.

([12]) Court of Justice judgments of 21 March 1990, Case C-142/87, Belgium v Commission, ECR 1990, I-959, paragraph 43, and of 14 September 1994, Cases C-278/92, C-279/92 and C-280/92, Spain v Commission, ECR 1994, I-4103, paragraphs 40 to 42.

([13]) OJ C 68, 6.3.1996.

([14]) See Cases 259/85 France v Commission [1987] ECR 4393, paragraph 24, and C-303/88 Italy v Commission, [1991] ECR I-1433, paragraph 27.

(23) The conclusion of Austria that, given that Lower Austria is not self-sufficient in goat products, there is virtually no trade in the products in question between Member States does not hold water. Apart from the fact that there is insufficient evidence to support this claim, as stated above, for Article 87(1) to be applied, it is not necessary in principle for trade between Member States to attain a certain scale; on the other hand, there is the matter of product substitutability, so the market to be considered is broader in scope than the products directly concerned.

(24) The argument put forward by Austria that, given the relatively low level of prices in Lower Austria compared with other Member States, there is no distortion of competition cannot be accepted because this price level could, on the contrary, encourage producers to seek outlets outside Lower Austria, and the aid would help them to do so by reducing their production costs.

(25) The measure in question thus constitutes aid within the meaning of Article 87(1) of the EC Treaty.

Article 87(2) of the EC Treaty: exceptions

(26) Exceptions to the prohibition laid down in Article 87(1) of the EC Treaty are set out in Article 87(2) and (3).

(27) The exceptions listed in Article 87(2) are not applicable, given the nature of the aid measure and its objectives. Nor has Austria claimed that Article 87(2) is applicable.

Article 87(3) of the EC Treaty: exceptions at the Commission's appreciation

(28) Article 87(3) lists aids which may be considered to be compatible with the common market. Their compatibility with the Treaty has to be studied from the point of view of the Community, not solely that of a given Member State. To ensure the proper operation of the common market and compliance with Article 3(1)(g) of the EC Treaty, the exceptions provided for in Article 87(3) must be interpreted in a strict manner.

(29) As regards Article 87(3)(a), it is pointed out that the measure is not to be applied only in regions where the

economic situation can be described as extremely unfavourable in relation to the Community as a whole according to the Guidelines on national regional aid ([15]) (having a per capita gross domestic product, measured in purchasing power standards, of less than 75% of the Community average).

(30) As regards Article 87(3)(b), it is noted that the measure concerned is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of Austria.

(31) Nor is the aid designed or intended or appropriate to the objectives referred to in Article 87(3)(d).

Article 87(3)(c) of the EC Treaty

(32) Aid to facilitate the development of certain economic activities or of certain economic areas may be deemed by the Commission to be compatible with the common market under Article 87(3)(c) of the EC Treaty if the aid does not adversely affect trading conditions to an extent contrary to the common interest.

(33) The measure in question cannot, however, be regarded as serving the development of certain economic sectors or economic areas. Without making the aid conditional upon structural improvements to production, the effect and the declared purpose of the measure is to cut the production costs of beneficiaries for the duration of the aid. The effect of the measure is therefore limited in time and disappears as soon as the aid is no longer granted. It has been the consistent practice of the Commission to consider such aid as not meeting the criteria of Article 87(3)(c) of the EC Treaty and to regard it as operating aid and as such incompatible with the common market ([16]).

(34) Austria referred to Regulation (EEC) No 2078/92 as justification for the aid scheme in question. In the decision opening the procedure the Commission noted that it had received no details about the environmental aspect of the measure. Austria was requested to supply such information in their comments. The Commission notes that Austria's comments on the environmental aspect of the measure do not contain further details, apart from the brief remark that goat farming ensures utilisation of the mountain countryside, which curbs the formation of karst and steppe.

(35) It should be pointed out, on the one hand, that the aid as it stands would not be granted solely in the mountain areas of Lower Austria. On the other hand, Austria has not, despite requests, stated what specific environmetal benefit would result from continuing to keep goats when this is no longer economically viable or what costs would be linked to this keeping of goats. Therefore, there is no reason to grand aid as a compensation for environmental undertakings.

(36) Regulation (EEC) No 2078/92 cannot therefore be regarded as a valid legal basis for deeming the aid to be compatible with the common market; it should also be stressed that, with the exception of permissible payments for reducing the number of livestock units and for endangered species (see Article 4 of Regulation (EEC) No 2078/92), support per production unit cannot be part-financed under the Regulation or be regarded as permissible under the system provided for in Articles 87 to 89 of the EC Treaty in conjunction with Article 10 of the Regulation.

(37) In so far as Austria refers to the 'endangered breeds' aid category under Article 1(c) of Regulation (EEC) 2078/92, it should be pointed out the measure does not concern an aid for a particular breed of goats that is in danger of extinction. The measure grants aid for keeping (female) goats in general. Furthermore, the Commission only considers a breed to be in danger of extinction on the basis of scientific data showing trends in numbers of the breed concerned ([17]). Austria has not submitted data indicating that a particular breed of goats is in danger in Lower Austria. Therefore, the measure cannot be considered an aid for endangered breeds under Regulation (EEC) 2078/92 as there is no information indicating that goats are in danger of extinction in Lower Austria and as the measure does not concern a goat breed but goats in general.

(38) Before the main investigation procedure under Article 88(2) was introduced, Austria indicated that the provisions on the compensatory allowance served as a legal basis, without, however, giving any further explanation as to how the measure was geared to the criteria laid down in Article 17 et seq. of Council Regulation (EC) No 950/97. The requests to substantiate these arguments remained unanswered in the comments by Austria of 22 February 1999. The Commission's statements on opening the procedure thus remain undisputed: under Article 37(1) of the said Regulation the granting of State aids as a compensatory allowance within the meaning of Article 17 et seq. is excluded. The compensatory allowance scheme is thus not an appropriate legal basis for the measure in question.

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

([16]) Judgment of the Court of First Instance of 8 June 1995, Case T-459/93, Siemens, ECR 1995, p. II-1675.

([17]) In the past the Commission has aproved aids for goat breeds that were considered to be in danger of extinction in Austria. This concerned the breeds Gemsfarbige Gebirgsziege, Pinzgauer Ziege, Saanenziege, Toggenburgerziege, and Tauernschecken.

Legal implications of the market organisations

(39) As mentioned in recital 15, the relevant common organisations of the markets determine the applicability of Articles 87 to 89 of the EC Treaty to the products in question. In accordance with the consistent case-law of the Court of Justice, this is to be understood in such a way that the Member States may grant aid outside the scope of a common organisation of the market, provided that it is compatible with the abovementioned Articles. Within the scope of a market organisation, however, additional State aids are excluded since such aids would affect the operation of this market organisation ([18]). Even if there were a possibility of an exception under Article 87(2) or (3) of the EC Treaty, it would have to be rejected by the Commission on the grounds of incompatibility with the common market organisation ([19]).

(40) Austria in its comments neither disputed the Commission's position as set out when it initiated the procedure, nor argued that the aid scheme in question was not to be regarded as an additional measure in the sense described in recital 39.

(41) The Commission therefore takes the view that the aid scheme in question constitutes by its nature (payments per production unit) an additional measure over and above the price support mechanisms provided for in the common organisation of the market in sheepmeat and goatmeat. It therefore amounts to a State aid in the area exclusively covered by Council Regulation (EC) No 2467/98 and is therefore unlawful. On this ground alone the Commission is obliged to prohibit the aid measure.

V. **CONCLUSION**

(42) The aid is therefore to be regarded as operating aid prohibited under Article 87(1) of the EC Treaty, while not qualifying as an exception under Article 87(2) or (3). It is as such incompatible with the common market. It is, moreover, contrary to Council Regulation (EC) No 2467/98,

HAS ADOPTED THIS DECISION:

Article 1

The aid scheme notified by Austria whereby it plans to grant ATS 250 per she-goat per year in the less-favoured areas of Lower Austria within the meaning of Article 21 of Council Regulation (EC) No 950/97 and ATS 200 per she-goat per year in other areas of Lower Austria, is according to Article 87(1) of the EC Treaty incompatible with the common market.

The aid scheme is furthermore contrary to Council Regulation (EEC) No 2467/98.

The aid scheme may accordingly not be implemented.

Article 2

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

Article 3

This Decision is addressed to the Republic of Austria.

Done at Brussels, 8 December 1999.

For the Commission
Franz FISCHLER
Member of the Commission

([18]) Judgment of the Court of Justice of 12 June 1990, Case 35/88, KYDEP, ECR 1990, p. I-3125.
([19]) Court of Justice judgment of 26 June 1979, Case 177/78, Pigs and Bacon Commission, ECR 1979, p. 2161.