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I

(Acts whose publication is obligatory)

**COMMISSION REGULATION (EC) No 627/97
of 10 April 1997**

correcting Regulation (EC) No 622/97 fixing the maximum export refund for white sugar for the 33rd partial invitation to tender issued within the framework of the standing invitation to tender provided for in Regulation (EC) No 1464/96

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 1785/81 of 30 June 1981 on the common organization of the markets in the sugar sector ⁽¹⁾, as last amended by Regulation (EC) No 1599/96 ⁽²⁾, and in particular point (b) of the second subparagraph of Article 17 (5) thereof,

Whereas Commission Regulation (EC) No 622/97 ⁽³⁾ fixes the maximum export refund for white sugar for the 33rd partial invitation to tender issued pursuant to Commission Regulation (EC) No 1464/96 ⁽⁴⁾; whereas a check has shown that the amount is not in accordance with the opinion delivered by the Management Committee for

Sugar, whereas the Regulation in question should be corrected,

HAS ADOPTED THIS REGULATION:

Article 1

In Article 1 of Regulation (EC) No 622/97, the amount 'ECU 43,734' is hereby replaced by 'ECU 43,737'.

Article 2

This Regulation shall enter into force on 11 April 1997.

It shall apply with effect from 10 April 1997.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 10 April 1997.

For the Commission

Franz FISCHLER

Member of the Commission

⁽¹⁾ OJ No L 177, 1. 7. 1981, p. 4.

⁽²⁾ OJ No L 206, 16. 8. 1996, p. 43.

⁽³⁾ OJ No L 95, 10. 4. 1997, p. 5.

⁽⁴⁾ OJ No L 187, 26. 7. 1996, p. 42.

COMMISSION REGULATION (EC) No 628/97**of 10 April 1997****establishing the standard import values for determining the entry price of
certain fruit and vegetables**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European Community,

Having regard to Commission Regulation (EC) No 3223/94 of 21 December 1994 on detailed rules for the application of the import arrangements for fruit and vegetables ⁽¹⁾, as last amended by Regulation (EC) No 2375/96 ⁽²⁾, and in particular Article 4 (1) thereof,

Having regard to Council Regulation (EEC) No 3813/92 of 28 December 1992 on the unit of account and the conversion rates to be applied for the purposes of the common agricultural policy ⁽³⁾, as last amended by Regulation (EC) No 150/95 ⁽⁴⁾, and in particular Article 3 (3) thereof,

Whereas Regulation (EC) No 3223/94 lays down, pursuant to the outcome of the Uruguay Round multilateral trade negotiations, the criteria whereby the Commis-

sion fixes the standard values for imports from third countries, in respect of the products and periods stipulated in the Annex thereto;

Whereas, in compliance with the above criteria, the standard import values must be fixed at the levels set out in the Annex to this Regulation,

HAS ADOPTED THIS REGULATION:

Article 1

The standard import values referred to in Article 4 of Regulation (EC) No 3223/94 shall be fixed as indicated in the Annex hereto.

Article 2

This Regulation shall enter into force on 11 April 1997.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 10 April 1997.

For the Commission

Franz FISCHLER

Member of the Commission

⁽¹⁾ OJ No L 337, 24. 12. 1994, p. 66.

⁽²⁾ OJ No L 325, 14. 12. 1996, p. 5.

⁽³⁾ OJ No L 387, 31. 12. 1992, p. 1.

⁽⁴⁾ OJ No L 22, 31. 1. 1995, p. 1.

ANNEX

to the Commission Regulation of 10 April 1997 establishing the standard import values for determining the entry price of certain fruit and vegetables

(ECU/100 kg)

CN code	Third country code ⁽¹⁾	Standard import value
0702 00 20	052	93,6
	204	64,1
	212	116,5
	624	128,7
	999	100,7
0707 00 15	068	124,7
	999	124,7
0709 90 75	052	132,1
	204	62,0
	999	97,1
0805 10 11, 0805 10 15, 0805 10 19	052	64,3
	204	44,0
	212	61,7
	220	36,8
	400	37,1
	448	39,5
	600	47,2
	624	48,9
	625	36,7
	999	46,2
0805 30 20	600	63,8
	999	63,8
0808 10 61, 0808 10 63, 0808 10 69	060	48,1
	388	95,5
	400	94,1
	404	98,9
	508	82,1
	512	77,8
	524	81,6
	528	80,2
	804	101,8
	999	84,5
0808 20 37	388	71,1
	512	70,4
	528	75,9
	999	72,5

⁽¹⁾ Country nomenclature as fixed by Commission Regulation (EC) No 68/96 (OJ No L 14, 19. 1. 1996, p. 6). Code '999' stands for 'of other origin'.

**COMMISSION REGULATION (EC) No 629/97
of 10 April 1997**

**amending for the third time Regulation (EC) No 785/95 laying down detailed
rules for the application of Council Regulation (EC) No 603/95 on the common
organization of the market in dried fodder**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

HAS ADOPTED THIS REGULATION:

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 603/95 of 21 February 1995 on the common organization of the market in dried fodder⁽¹⁾, as last amended by Regulation (EC) No 1347/95⁽²⁾, and in particular Article 18 thereof,

Whereas experience has shown that when Member States communicate to the Commission the definitive data on the quantity of dried fodder qualifying for aid, one or more Member States may communicate erroneous figures and wish to correct them subsequently; whereas this may have an impact on the level of aid calculated by Commission staff; whereas, therefore, a procedure applicable in this case should be established in order to avoid the problem referred to;

Whereas certain Member States are able to use a computerized system of administration for certain operations, which has the advantage of economizing on time and money; whereas the use of this procedure should therefore be allowed under certain conditions;

Whereas, therefore, Commission Regulation (EC) No 785/95⁽³⁾, as last amended by Regulation (EC) No 620/96⁽⁴⁾, should be amended;

Whereas the measures provided for in this Regulation are in accordance with the opinion of the Management Committee for Dried Fodder,

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 10 April 1997.

Article 1

Regulation (EC) No 785/95 is hereby amended as follows:

1. the following paragraph is added to Article 6:

'4. The balance referred to in paragraph 3 above shall be calculated on the basis of the notifications from the Member States, in accordance with the second indent of Article 15 (a). Where, as a result of subsequent checks, one or more Member States submits a second, duly substantiated, notification correcting the first upward, the second notification will be taken into consideration only if the balance, calculated on the basis of the first notification, is not affected. The quantities of dried fodder which cannot be taken into consideration in application of the above will, in that case, be allocated to the following marketing year.'

2. the following is added to the first subparagraph of Article 8 (5):

'The documents in question may, where necessary, be submitted in electronic form if the parties in question mutually agree to accept that form of communication. In that case, the processing undertaking shall keep the documents in traditional form and make them available for any checks requested by the competent authority.'

Article 2

This Regulation shall enter into force on the third day following its publication in the *Official Journal of the European Communities*.

For the Commission

Franz FISCHLER

Member of the Commission

⁽¹⁾ OJ No L 63, 21. 3. 1995, p. 1.

⁽²⁾ OJ No L 131, 15. 6. 1995, p. 1.

⁽³⁾ OJ No L 79, 7. 4. 1995, p. 5.

⁽⁴⁾ OJ No L 89, 10. 4. 1996, p. 3.

COMMISSION REGULATION (EC) No 630/97

of 10 April 1997

amending Commission Regulation (EC) No 2369/96 opening and providing for the administration of a Community tariff quota for 10 000 tonnes of oat grains otherwise worked falling within CN codes 1104 22 92 and 1104 22 99

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

HAS ADOPTED THIS REGULATION:

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1095/96 of 18 June 1996 on the implementation of the concessions set out in Schedule CXL drawn up in the wake of the conclusion of the GATT XXIV.6 negotiations⁽¹⁾, and in particular Article 1 thereof,

Whereas the Community, for the purposes of the World Trade Organization, undertook to establish, per marketing year and from 1 January 1996, a tariff quota at zero duty for 10 000 tonnes of oat grains otherwise worked falling within CN codes 1104 22 92 and 1104 22 99;

Whereas the detailed rules for imports under the quota are laid down by Commission Regulation (EC) No 2369/96⁽²⁾; whereas Commission Regulation (EC) No 1734/96⁽³⁾ replaces, with effect from 1 January 1997, the CN codes for oat grains otherwise worked by the single CN code 1104 22 98; whereas, following this change of CN code, there is a risk of misunderstanding with regard to the product covered by the quota; whereas other amendments, to the provisions on the validity of import licences, are required; whereas, in the interests of simplification, references to the 1995/96 marketing year should be deleted and the time of the Commission notification to the Member States regarding the issue of import licences should be clearly specified; whereas, therefore, Regulation (EC) No 2369/96 should be amended;

Whereas the measures provided for in this Regulation are in accordance with the opinion of the Management Committee for Cereals,

Article 1

Regulation (EC) No 2369/96 is hereby amended as follows:

1. in the title, Article 1, Article 3 (1) and the fifth indent of Article 4, the words 'CN codes 1104 22 92 and 1104 22 99' are replaced by 'CN code 1104 22 98';
2. the second subparagraphs of Article 1 and Article 2 (1) are deleted;
3. Article 3 (3) is replaced by the following:
'3. Where the total quantity for which import licence applications are submitted exceeds the quantity of product which may be imported during the period in question, the Commission shall notify Member States, within three working days of expiry of the time limit for notification referred to in paragraph 2, of the percentage reduction they must apply, when issuing licences, to the quantities for which applications were submitted.';
4. The following subparagraph is added after the second subparagraph of Article 3 (4):
'Notwithstanding Article 21 (1) of Regulation (EEC) No 3719/88⁽⁴⁾, for the purposes of determining their period of validity, licences shall be considered to have been issued on the day of their actual issue.

⁽⁴⁾ OJ No L 331, 2. 12. 1988, p. 1.'

Article 2

This Regulation shall enter into force on the third day following its publication in the *Official Journal of the European Communities*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 10 April 1997.

For the Commission

Franz FISCHLER

Member of the Commission

⁽¹⁾ OJ No L 146, 20. 6. 1996, p. 1.

⁽²⁾ OJ No L 323, 13. 12. 1996, p. 8.

⁽³⁾ OJ No L 238, 19. 9. 1996, p. 1.

COMMISSION REGULATION (EC) No 631/97
of 10 April 1997
on the issuing of export licences for wine-sector products

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European Community,

Having regard to Commission Regulation (EC) No 1685/95 of 11 July 1995 on arrangements for issuing export licences for wine-sector products and amending Regulation (EEC) No 3388/81 laying down special detailed rules in respect of import and export licences in the wine sector⁽¹⁾, as last amended by Regulation (EC) No 561/97⁽²⁾, and in particular Article 3 (3) thereof,

Whereas Article 55 (7) of Council Regulation (EEC) No 822/87 of 16 March 1987 on the common organization of the market in wine⁽³⁾, as last amended by Regulation (EC) No 536/97⁽⁴⁾, limits the grant of export refunds for wine-sector products to the volumes and expenditure agreed in the Agreement on Agriculture, concluded during the Uruguay Round multilateral trade negotiations;

Whereas Article 3 of Regulation (EC) No 1685/95 lays down the conditions under which special measures may be adopted by the Commission to prevent the annual

commitment level provided for under the Agreement being exceeded;

Whereas, on the basis of information available to the Commission on 9 April 1997, the level of expenditure provided for in the Agreement could be exceeded unless the issue of export licences with advance fixing of the refund is restricted; whereas the submission of applications should be suspended from 11 April 1997,

HAS ADOPTED THIS REGULATION:

Article 1

Applications for export licences for wine-sector products with advance fixing of the refund submitted from 9 April 1997 shall be refused and the submission of applications for such licences is hereby suspended from 11 April 1997.

Article 2

This Regulation shall enter into force on 11 April 1997.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 10 April 1997.

For the Commission

Franz FISCHLER

Member of the Commission

⁽¹⁾ OJ No L 161, 12. 7. 1995, p. 2.

⁽²⁾ OJ No L 85, 27. 3. 1997, p. 34.

⁽³⁾ OJ No L 84, 27. 3. 1987, p. 1.

⁽⁴⁾ OJ No L 83, 25. 3. 1997, p. 5.

COMMISSION REGULATION (EC) No 632/97**of 10 April 1997****laying down to what extent applications for issue of export licences submitted during April 1997 for beef and veal products which may benefit from special import treatment in Canada may be accepted**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Commission Regulation (EC) No 1445/95 of 26 June 1995 on rules of application for import and export licences in the beef and veal sector and repealing Regulation (EEC) No 2377/80 ⁽¹⁾, as last amended by Regulation (EC) No 266/97 ⁽²⁾, and in particular Article 12 (a) (8) thereof,Whereas Regulation (EC) No 1445/95 lays down, in Article 12 (a), detailed rules for export licence applications for the products referred to in Article 1 of Commission Regulation (EC) No 2051/96 ⁽³⁾, laying down certain detailed rules for granting of assistance for the export of beef and veal which may benefit from a special import treatment in Canada, as amended by Regulation (EC) No 2333/96 ⁽⁴⁾;

Whereas Regulation (EC) No 2051/96 fixed the quantities of meat which might be exported on special terms for the year 1997, whereas no applications were submitted for export licences for beef and veal,

HAS ADOPTED THIS REGULATION:

Article 1

No applications for export licences were lodged for the beef and veal referred to in Regulation (EC) No 2051/96 for the month of April 1997.

Article 2

Applications for licences in respect of the meat referred to in Article 1 may be entered in accordance with Article 12a of Regulation (EC) No 1445/95 during the first 5 days of the month of May 1997 the total quantity available being 5 000 tonnes.

Article 3

This Regulation shall enter into force on 11 April 1997.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 10 April 1997.

For the Commission

Franz FISCHLER

Member of the Commission⁽¹⁾ OJ No L 143, 27. 6. 1995, p. 35.⁽²⁾ OJ No L 45, 15. 2. 1997, p. 1.⁽³⁾ OJ No L 274, 26. 10. 1996, p. 18.⁽⁴⁾ OJ No L 317, 6. 12. 1996, p. 13.

COMMISSION REGULATION (EC) No 633/97
of 10 April 1997
on the issue of import licences for high-quality fresh, chilled or frozen beef and veal

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European Community,

Having regard to Commission Regulation (EC) No 1036/96 of 10 June 1996 opening and providing for the administration of tariff quotas for high-quality fresh, chilled and frozen beef and for frozen buffalo meat for the period 1 July 1996 to 30 June 1997 ⁽¹⁾, as amended by Regulation (EC) No 1737/96 ⁽²⁾, and in particular Article 5 (3) thereof,

Whereas Commission Regulation (EC) No 1036/96 provides in Articles 4 and 5 the conditions for applications and for the issue of import licences for meat referred to in Article 2 (f);

Whereas Article 2 (f) of Regulation (EC) No 1036/96 fixes the amount of high-quality fresh, chilled or frozen beef and veal originating in and imported from the United States of America and Canada which may be imported on special terms for the period 1 July 1996 to 30 June 1997 at 12 250 tonnes;

Whereas it should be recalled that licences issued pursuant to this Regulation will, throughout the period of validity, be open for use only in so far as provisions on health protection in force permit,

HAS ADOPTED THIS REGULATION:

Article 1

1. All applications for import licences from 1 until 5 April 1997 for high-quality fresh, chilled or frozen beef and veal as referred to in Article 2 (e) of Regulation (EC) No 1036/96 shall be granted in full.

2. Applications for licences may be submitted, in accordance with Article 5 of Regulation (EC) No 1036/96, during the first five days of May 1997 for 4 347 tonnes.

Article 2

This Regulation shall enter into force on 11 April 1997.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 10 April 1997.

For the Commission

Franz FISCHLER

Member of the Commission

⁽¹⁾ OJ No L 138, 11. 6. 1996, p. 1.

⁽²⁾ OJ No L 225, 6. 9. 1996, p. 5.

COMMISSION REGULATION (EC) No 634/97
of 10 April 1997

**concerning tenders submitted in response to the invitation to tender for the
export of husked long grain rice to the island of Réunion referred to in
Regulation (EC) No 531/97**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European
Community,

Having regard to Council Regulation (EC) No 3072/95 of
22 December 1995 on the common organization of the
market in rice ⁽¹⁾, and in particular Article 10 (1) thereof,

Having regard to Commission Regulation (EEC) No
2692/89 of 6 September 1989 laying down detailed rules
for exports of rice to Réunion ⁽²⁾, and in particular Article
9 (1) thereof,

Whereas Commission Regulation (EC) No 531/97 ⁽³⁾
opens an invitation to tender for the subsidy on rice
exported to Réunion;

Whereas Article 9 of Regulation (EEC) No 2692/89 allows
the Commission to decide, in accordance with the pro-
cedure laid down in Article 22 of Regulation (EC) No
3072/95 and on the basis of the tenders submitted, to
make no award;

Whereas on the basis of the criteria laid down in Articles
2 and 3 of Regulation (EEC) No 2692/89, a maximum
subsidy should not be fixed;

Whereas the measures provided for in this Regulation are
in accordance with the opinion of the Management
Committee for Cereals,

HAS ADOPTED THIS REGULATION:

Article 1

No action shall be taken on the tenders submitted from 4
to 10 April 1997 in response to the invitation to tender
referred to in Regulation (EC) No 531/97 for the subsidy
on exports to Réunion of husked long grain rice falling
within CN code 1 006 20 98.

Article 2

This Regulation shall enter into force on 11 April 1997.

This Regulation shall be binding in its entirety and directly applicable in all Member
States.

Done at Brussels, 10 April 1997.

For the Commission

Franz FISCHLER

Member of the Commission

⁽¹⁾ OJ No L 329, 30. 12. 1995, p. 18.

⁽²⁾ OJ No L 261, 7. 9. 1989, p. 8.

⁽³⁾ OJ No L 82, 22. 3. 1997, p. 50.

COMMISSION REGULATION (EC) No 635/97

of 10 April 1997

concerning tenders submitted in response to the invitation to tender for the export to certain third countries of wholly milled long grain rice issued in Regulation (EC) No 530/97

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 3072/95 of 22 December 1995 on the common organization of the market in rice ⁽¹⁾, and in particular Article 13 (3) thereof,

Whereas an invitation to tender for the export refund on rice was issued under Commission Regulation (EC) No 530/97 ⁽²⁾;

Whereas Article 5 of Commission Regulation (EEC) No 584/75 ⁽³⁾, as last amended by Regulation (EC) No 299/95 ⁽⁴⁾, allows the Commission to decide, in accordance with the procedure laid down in Article 22 of Regulation (EC) No 3072/95 and on the basis of the tenders submitted, to make no award;

Whereas on the basis of the criteria laid down in Article 13 of Regulation (EC) No 3072/95 a maximum refund should not be fixed;

Whereas the measures provided for in this Regulation are in accordance with the opinion of the Management Committee for Cereals,

HAS ADOPTED THIS REGULATION:

Article 1

No action shall be taken on the tenders submitted from 4 to 10 April 1997 in response to the invitation to tender for the export refund on wholly milled long grain rice falling within CN code 1006 30 67 to certain third countries issued in Regulation (EC) No 530/97.

Article 2

This Regulation shall enter into force on 11 April 1997.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 10 April 1997.

For the Commission

Franz FISCHLER

Member of the Commission

⁽¹⁾ OJ No L 329, 30. 12. 1995, p. 18.

⁽²⁾ OJ No L 82, 22. 3. 1997, p. 48.

⁽³⁾ OJ No L 61, 7. 3. 1975, p. 25.

⁽⁴⁾ OJ No L 35, 15. 2. 1995, p. 8.

COMMISSION REGULATION (EC) No 636/97

of 10 April 1997

fixing the export refunds on cereals and on wheat or rye flour, groats and meal

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 1766/92 of 30 June 1992 on the common organization of the market in cereals⁽¹⁾, as last amended by Commission Regulation (EC) No 923/96⁽²⁾, and in particular Article 13 (2) thereof,

Whereas Article 13 of Regulation (EEC) No 1766/92 provides that the difference between quotations or prices on the world market for the products listed in Article 1 of that Regulation and prices for those products in the Community may be covered by an export refund;

Whereas the refunds must be fixed taking into account the factors referred to in Article 1 of Commission Regulation (EC) No 1501/95 of 29 June 1995 laying down certain detailed rules under Council Regulation (EEC) No 1766/92 on the granting of export refunds on cereals and the measures to be taken in the event of disturbance on the market for cereals⁽³⁾, as last amended by Regulation (EC) No 95/96⁽⁴⁾;

Whereas export possibilities exist for a quantity of 70 000 tonnes of maize to certain destinations; whereas the procedure laid down in Article 7 (4) of Commission Regulation (EC) No 1162/95⁽⁵⁾, as last amended by Regulation (EC) No 1527/96⁽⁶⁾, should be used; whereas account should be taken of this when the refunds are fixed;

Whereas, as far as wheat and rye flour, groats and meal are concerned, when the refund on these products is being calculated, account must be taken of the quantities of

cereals required for their manufacture; whereas these quantities were fixed in Regulation (EC) No 1501/95;

Whereas the world market situation or the specific requirements of certain markets may make it necessary to vary the refund for certain products according to destination;

Whereas the refund must be fixed once a month; whereas it may be altered in the intervening period;

Whereas it follows from applying the detailed rules set out above to the present situation on the market in cereals, and in particular to quotations or prices for these products within the Community and on the world market, that the refunds should be as set out in the Annex hereto;

Whereas the measures provided for in this Regulation are in accordance with the opinion of the Management Committee for Cereals,

HAS ADOPTED THIS REGULATION:

Article 1

The export refunds on the products listed in Article 1 (a), (b) and (c) of Regulation (EEC) No 1766/92, excluding malt, exported in the natural state, shall be as set out in the Annex hereto.

Article 2

This Regulation shall enter into force on 11 April 1997.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 10 April 1997.

For the Commission

Franz FISCHLER

Member of the Commission

⁽¹⁾ OJ No L 181, 1. 7. 1992, p. 21.

⁽²⁾ OJ No L 126, 24. 5. 1996, p. 37.

⁽³⁾ OJ No L 147, 30. 6. 1995, p. 7.

⁽⁴⁾ OJ No L 18, 24. 1. 1996, p. 10.

⁽⁵⁾ OJ No L 117, 24. 5. 1995, p. 2.

⁽⁶⁾ OJ No L 190, 31. 7. 1996, p. 23.

ANNEX

to the Commission Regulation of 10 April 1997 fixing the export refunds on cereals and on wheat or rye flour, groats and meal

(ECU / tonne)			(ECU / tonne)		
Product code	Destination (1)	Amount of refund	Product code	Destination (1)	Amount of refund
0709 90 60	—	—	1008 20 00 9000	—	—
0712 90 19	—	—	1101 00 11 9000	—	—
1001 10 00 9200	—	—	1101 00 15 9100	01	5,00
1001 10 00 9400	01	0	1101 00 15 9130	01	4,50
1001 90 91 9000	—	—	1101 00 15 9150	01	4,00
1001 90 99 9000	01	0	1101 00 15 9170	01	3,75
1002 00 00 9000	03	25,00	1101 00 15 9180	01	3,50
	02	0	1101 00 15 9190	—	—
1003 00 10 9000	—	—	1101 00 90 9000	—	—
1003 00 90 9000	03	20,00	1102 10 00 9500	01	41,00
	02	0	1102 10 00 9700	—	—
1004 00 00 9200	—	—	1102 10 00 9900	—	—
1004 00 00 9400	—	—	1103 11 10 9200	01	5,00 (2)
1005 10 90 9000	—	—	1103 11 10 9400	—	— (2)
1005 90 00 9000	03	10,00 (3)	1103 11 10 9900	—	—
	04	25,00 (3)	1103 11 90 9200	01	5,00 (2)
	02	—	1103 11 90 9800	—	—
1007 00 90 9000	—	—			

(1) The destinations are identified as follows:

- 01 All third countries,
- 02 Other third countries,
- 03 Switzerland and Liechtenstein,
- 04 Slovenia, Czech Republic, Slovakia and Poland.

(2) No refund is granted when this product contains compressed meal.

(3) Refund fixed under the procedure laid down in Article 7 (4) of Regulation (EC) No 1162/95 in respect of a quantity of 70 000 tonnes of maize.

NB: The zones are those defined in amended Commission Regulation (EEC) No 2145/92 (OJ No L 214, 30. 7. 1992, p. 20).

COMMISSION REGULATION (EC) No 637/97

of 10 April 1997

amending representative prices and additional duties for the import of certain products in the sugar sector

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 1785/81 of 30 June 1981 on the common organization of the markets in the sugar sector⁽¹⁾, as last amended by Regulation (EC) No 1599/96⁽²⁾,

Having regard to Commission Regulation (EC) No 1423/95 of 23 June 1995 laying down detailed implementing rules for the import of products in the sugar sector other than molasses⁽³⁾, as last amended by Regulation (EC) No 1127/96⁽⁴⁾, and in particular the second subparagraph of Article 1 (2), and Article 3 (1) thereof,

Whereas the amounts of the representative prices and additional duties applicable to the import of white sugar, raw sugar and certain syrups are fixed by Commission Regulation (EC) No 1195/96⁽⁵⁾, as last amended by Regulation (EC) No 619/97⁽⁶⁾;

Whereas it follows from applying the general and detailed fixing rules contained in Regulation (EC) No 1423/95 to the information known to the Commission that the representative prices and additional duties at present in force should be altered to the amounts set out in the Annex hereto,

HAS ADOPTED THIS REGULATION:

Article 1

The representative prices and additional duties on imports of the products referred to in Article 1 of Regulation (EC) No 1423/95 shall be as set out in the Annex hereto.

Article 2

This Regulation shall enter into force on 11 April 1997.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 10 April 1997.

For the Commission

Franz FISCHLER

Member of the Commission

⁽¹⁾ OJ No L 177, 1. 7. 1981, p. 4.

⁽²⁾ OJ No L 206, 16. 8. 1996, p. 43.

⁽³⁾ OJ No L 141, 24. 6. 1995, p. 16.

⁽⁴⁾ OJ No L 150, 25. 6. 1996, p. 12.

⁽⁵⁾ OJ No L 161, 29. 6. 1996, p. 3.

⁽⁶⁾ OJ No L 94, 9. 4. 1997, p. 13.

ANNEX

to the Commission Regulation of 10 April 1997 amending representative prices and the amounts of additional duties applicable to imports of white sugar, raw sugar and products covered by CN code 1702 90 99

(ECU)

CN code	Amount of representative prices per 100 kg net of product concerned	Amount of additional duty per 100 kg net of product concerned
1701 11 10 ⁽¹⁾	24,40	4,10
1701 11 90 ⁽¹⁾	24,40	9,33
1701 12 10 ⁽¹⁾	24,40	3,91
1701 12 90 ⁽¹⁾	24,40	8,90
1701 91 00 ⁽²⁾	26,32	12,07
1701 99 10 ⁽²⁾	26,32	7,55
1701 99 90 ⁽²⁾	26,32	7,55
1702 90 99 ⁽³⁾	0,26	0,39

⁽¹⁾ For the standard quality as defined in Article 1 of amended Council Regulation (EEC) No 431/68 (OJ No L 89, 10. 4. 1968, p. 3).

⁽²⁾ For the standard quality as defined in Article 1 of Council Regulation (EEC) No 793/72 (OJ No L 94, 21. 4. 1972, p. 1).

⁽³⁾ By 1 % sucrose content.

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 5 June 1996

concerning aid that the Republic of Austria intends to grant under the ERP internationalization scheme

(Only the German text is authentic)

(Text with EEA relevance)

(97/240/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 93 (2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62 (1) (a) thereof,

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

Whereas:

I

(1) By communication dated 23 March 1995, the Austrian authorities notified the ERP programme for the internationalization of Austrian enterprises (ERP Internationalisierungsprogramm). Additional information and further details were provided at a meeting held in Vienna on 28 March 1995 and by letters dated 24 April and 4 May 1995. A number of amendments were made to the original notification at a second meeting held in Eisenstadt and Vienna on 12 and 13 June 1995 and by letters dated 15 and 27 June 1995. In particular, the Austrian authorities agreed:

- to withdraw part of the scheme initially designed to promote the setting-up of distribution networks,
- to link the aid to a productive investment project.

The case was discussed again with representatives of the Austrian Government at a further meeting held on 9 October 1995.

- (2) On 31 October 1995, the Commission decided to initiate the procedure provided for in Article 93 (2) of the EC Treaty with regard to aid for projects to be carried out outside the European Economic Area (EEA). In its decision of 31 October 1995, the Commission authorized the part of the programme concerning aid for SMEs in EEA countries pursuant to Article 92 (3) (c) of the EC Treaty and Article 61 (3) (c) of the EEA Agreement since all the elements of the guidelines on State aid for SMEs had been complied with.
- (3) By letter dated 20 November 1995, the Commission informed the Austrian Government thereof and requested it to submit its comments within one month. This letter was published in the *Official Journal of the European Communities*⁽¹⁾, as notice to the other Member States and interested parties to submit any comments they might have on the measures in question within one month from the date of that publication.

⁽¹⁾ OJ No C 71, 9. 3. 1996, p. 6.

- (4) By letter dated 22 December 1995 the Austrian Government submitted detailed observations. No observations were submitted by other Member States or interested third parties.

II

- (5) The programme, which is to run for the five years between July 1995 and June 2000, provides for loans totalling ÖS 200 million (ECU 14,9 million) for the first year of operation of the scheme (1995/96). The loans are awarded at reduced interest rates corresponding to an aid equivalent of ÖS 25 million/year (ECU 1,9 million/year). The amount of a loan per project may vary between ÖS 1 million (ECU 74 500; minimum) and ÖS 100 million (ECU 7,45 million; maximum). The ERP Fund expects 10 to 50 cases under the scheme per year.

- (6) The programme provides for aid for direct investment abroad throughout the world, except in the countries of Central and Eastern Europe (thus excluding Hungary, the Czech Republic, the Slovak Republic, Poland, Romania, Bulgaria, Estonia, Latvia, Lithuania, Slovenia, Croatia and Albania), the purpose of the aid being to encourage Austrian enterprises to invest in third countries in order to strengthen their competitiveness on the world market. Qualifying investment projects must contribute to improving the strategic position of the enterprise requesting aid, have a positive impact on the Austrian economy and improve, where appropriate, restructuring and economic recovery in developing countries.

- (7) The following projects are eligible in OECD countries other than EEA countries:

- setting-up of production establishments or subsidiaries,
- setting-up of production joint ventures,
- purchase of qualifying holdings (at least 25 %) in an existing company,
- acquisition of enterprises.

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

- equity capital, provided that it is used for productive investment projects,
- shareholder's loans, provided that they are used for productive investment projects,

- the cost of acquisition of a shareholding in a foreign company, provided that the amount paid is used for productive investment projects,
- other costs directly associated with productive investment projects.

- (8) The following projects are eligible in developing countries and newly industrialized countries:

- setting-up of production establishments or subsidiaries,
- setting-up of production joint ventures,
- purchase of qualifying holdings (at least 25 %) in an existing company,
- acquisition of a company.

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

- equity capital, provided that at least two-thirds is used for productive investment projects,
- shareholder's loans, provided that they are used for productive investment projects,
- the cost of acquisition of a shareholding in a foreign company, provided that at least two-thirds of the amount paid is used for productive investment projects,
- other costs directly associated with productive investment projects.

- (9) The maximum permitted aid intensity of the reduced-interest loans is, also in combination with other aid, 7,5 % (gross). In certain cases, the maximum aid intensity may be 11,25 % (see point 27).

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

III

localization, such aid would not be covered by the general aims of the schemes.

- (11) The Austrian Government submitted observations by letter dated 22 December 1995. Identical observations were submitted to the procedure under Article 93 (2) with regard to the ERP Eastern Europe Programme on 14 February 1996⁽¹⁾. According to those observations, the reasons for the two programmes are twofold:

— for decades, the Austrian economy was characteristically determined by its extreme peripheral situation within Europe and its proximity to Eastern Europe. For that reason, the Austrian economy was and is still lagging behind the OECD average as regards integration into the world market: in 1985, the stock of outward foreign direct investments (FDI) of Austrian enterprises amounted to 1,5 % of the Austrian GDP compared to an OECD average of 8 %. Although the figure rose to 2,8 % in 1990 and 4,3 % in 1993, Austrian enterprises would have to undertake outward FDI amounting to at least ÖS 100 billion (ECU 7,45 billion) in order to enable the Austrian economy to catch up to the OECD average, which is at present at an estimated level of 10 to 12 %,

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

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

- (13) The Austrian authorities also point out that enterprises planning to change the location of production sites in view of differences in labour costs worldwide do not suffer from lack of international orientation. Although the aid schemes do not contain explicit criteria to exclude aid for projects resulting in de-

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

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

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

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

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

— programmes of the European Union with similar targets, like Phare and Tacis with the JOP instrument for CEECs and the ECIP instrument for developing and mediterranean countries, including co-financing instruments operated by Member States as expressly provided for under Article 4 of the Phare Regulation⁽³⁾,

— Common Position (EC) No 6/95 of the Council⁽⁴⁾ in which the Council underlines the importance of the role of the private sector in the

⁽¹⁾ Case C 51/95 (ex N 320/95), OJ No C 71, 9. 3. 1996, p. 9.

⁽²⁾ OJ No C 213, 19. 8. 1992, p. 2.

⁽³⁾ Council Regulation (EEC) No 3906/89 of 18 December 1989 on economic aid to the Republic of Hungary and the Polish People's Republic (OJ No L 375, 23. 12. 1989, p. 11).

⁽⁴⁾ Common Position (EC) No 6/95 adopted by the Council on 22 May 1995 with a view to adopting Regulation (EC) No .../95 on the implementation of the 'European Communities investment partners financial instrument' for the countries of Latin America, Asia, the Mediterranean region and South Africa (OJ No C 160, 26. 6. 1995, p. 8).

development process and the necessity to encourage mutually beneficial investments.

certain goods compared to other companies which do not receive aid for these activities.

- (18) Moreover, the aid promotes the economic development of areas where the standard of living is abnormally low as defined in Article 92 (3) (a) of the EC Treaty. This would hold true for activities carried out in CEECs, as these countries are recognized as areas comparable to Article 92 (3) (a) regions in the Community according to Article 63 (4) (a) of the Europe Agreements with the respective countries. Having regard to the preferential treatment foreseen under Articles 27 and 29 of the WTO subsidy code, the same applies to developing and newly industrialized countries.
- (19) The aid schemes may, in the view of the Austrian authorities, also be considered to contribute to the economic development of certain economic activities within the meaning of Article 92 (3) (c) of the EC Treaty, since they assist activities of Austrian enterprises investing abroad and thus help to raise the degree of internationalization of the Austrian economy towards the OECD average.
- (20) Finally, the Austrian authorities consider that, outside the European Economic Area, take-overs and the acquisition of shares are also eligible for aid. Regarding SMEs, the definition of eligible investment need not necessarily be identical to the definition of 'initial investment' in the regional aid rules. Moreover, even with regard to regional aid, the Community rules recognize investment in fixed assets 'by way of take-over of an establishment which has closed or which would have closed had such take-over not taken place' as 'initial investment' ⁽¹⁾. This aspect is relevant in many cases of take-overs and acquisitions abroad, in particular in Eastern European countries.
- (22) The Commission considers that aid granted to outward FDI activities of Community companies is comparable to aid granted to enterprises exporting a considerable proportion of their production. In the latter case, the Court has found 'that, having regard to the interdependence between the markets on which Community undertakings operate, it is possible that aid might distort competition within the Community, even if the undertaking receiving aid exports almost all its production outside the Community' ⁽²⁾.
- (23) The twofold reasoning given by the Austrian authorities for the scheme in question shows that the measures are intended to have effects both on the Austrian economy and on the host country market. Therefore, aid granted to an Austrian enterprise at least partially also strengthens its position on the home market *vis-à-vis* enterprises which do not receive aid to carry out those activities. Moreover, enterprises located in the European Economic Area may also compete with each other for investment abroad. Therefore, any aid exceeding the *de minimis* threshold as defined in the Commission's notice on the *de minimis* rule for State aid ⁽³⁾ must be considered to distort or at least threaten to distort competition between EEA enterprises. The limited effect of an aid on the price of the products originating from an aided production, as invoked by the Austrian authorities, does not exclude possible effects on competition between EEA enterprises.

IV

The aid character of the schemes

- (21) By aiding the setting-up of production establishments or subsidiaries, the setting-up of production joint ventures, the purchase of holdings in existing companies and the acquisition of enterprises in third countries by Austrian enterprises, the measures favour certain undertakings or the production of

- (24) The same holds true for effects on trade between Member States (Article 92 of the EC Treaty) or Contracting Parties (Article 61 of the EEA Agreement). Although such trade effects are probably felt less intensively in cases of aid to projects in third countries, they cannot *a priori* be excluded. Again, this situation may be compared to a situation in which it is reasonably foreseeable that a Community enterprise exporting a considerable proportion of its production to third countries redirects, due to the situation on the world market, its activities towards the internal Community market and the aid thus affects trade between Member States ⁽⁴⁾.

⁽¹⁾ See point 25 (11) of Procedural and Substantive Rules in the Field of State Aid (Guidelines issued by the EFTA Surveillance Authority), OJ No L 231, 3. 9. 1994, p. 57.

⁽²⁾ Case C-142/87, *Belgium v. Commission ('Tubemeuse')* [1990] ECR I, p. 959, paragraph 35.

⁽³⁾ OJ No C 68, 9. 3. 1996, p. 9.

⁽⁴⁾ Case C-142/87, *Belgium v. Commission ('Tubemeuse')* [1990] ECR I, p. 959, paragraphs 38 to 40.

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

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

The eligible costs and the aid intensity of the schemes

- (26) With regard to the definition of 'investment' eligible for investment aid, the Commission has always taken the view, for reasons of consistency, that the definition applied for investments of SMEs should be the one laid down in the principles of coordination of regional aid systems⁽¹⁾. According to point 18 (i) of those principles, which is identical to point 25 (11) of the EFTA Surveillance Authority's guidelines referred to by the Austrian Government, investment eligible for aid is 'initial investment', interpreted as investment in fixed assets,

— 'in the creation of a new establishment, the extension of an existing establishment or in engaging in an activity involving a fundamental change in the product or production process of an existing establishment (by means of rationalization, restructuring or modernization)',

or

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

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

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

- (28) Aid for projects in developing countries helps offset the significant risks attached to investment in those countries. It also contributes to the development of the countries concerned and to the strengthening of economic links with them. The Commission is aware of the importance of direct investment in third countries both for strengthening links with those countries and for diversifying and internationalizing European industry.
- (29) On the other hand, such aid certainly strengthens the position of the aid recipients on the common market as well as their competitiveness on the world market. Although it can be considered to 'facilitate the development of certain economic activities' within the meaning of Article 92 (3) (c) of the EC Treaty, such aid can be authorized only if it 'does not adversely affect trading conditions to an extent contrary to the common interest' (Article 92 (3) (c) of the EC Treaty — second part of first sentence).
- (30) In cases of aid to outward foreign direct investment (FDI), the assessment has to take account of two additional factors, which normally do not play a major role when assessing the compatibility of aid: the international competitiveness of the European industry and the European interest in strengthening economic cooperation with certain third countries. With regard to both aspects, a balance has to be found with possible negative effects within the Community, e.g. risks of delocalization and possible negative impacts on employment.

⁽¹⁾ OJ No C 31, 3. 2. 1979, p. 9.

Aid to SMEs

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

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

- (32) The application of the Communities' SME guidelines on aid to outward FDI for SMEs also implies that national aid schemes have to define the eligible costs in conformity with the guidelines. Thus, the eligible costs for investment aid for SMEs as referred to under point 4.1 of the SME guidelines have to be defined in accordance with point 18 (i) of the principles of coordination of regional aid systems. Alternatively, only the parts of the eligible costs of a national aid scheme which are in line with the Community definition of 'initial investment' can be taken into account when calculating the aid intensities. Therefore, Austria will have to ensure that the authorizable aid ceiling of 7,5 % for medium-sized enterprises, calculated in accordance with the method described above, is respected. Any aid based on eligible costs differing from those usually accepted by the Commission and leading to an aid intensity exceeding 7,5 % will be considered by the

Commission on a case-by-case basis. With regard to small enterprises, it may be noted that the ceiling of 15 % provided for under the SME guidelines will not be exceeded.

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

- it is the Commission's view that the present situation with regard to rules governing FDI is 'particularly unsatisfactory for SMEs which do not have the means to monitor and adapt to the ever-changing conditions for FDI in the host countries' ⁽¹⁾,
- the conclusions of the European Council held in Madrid on 15 and 16 December 1995 recognized the necessity to promote the internationalization of SMEs ⁽²⁾,
- clauses on encouraging close contacts between SMEs, with a view to promoting trade and industrial cooperation opportunities, are also included in cooperation agreements between the Community and third countries ⁽³⁾.

Aid to larger enterprises

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

⁽¹⁾ COM(95) 42 final, p. 5.

⁽²⁾ SI(95) 1000, p. 14.

⁽³⁾ See for example Article 6 of the proposal for the conclusion of a Cooperation Agreement with Nepal, OJ No C 338, 16. 12. 1995, p. 10, and Article 12 of the proposal for the conclusion of an interregional framework cooperation Agreement with the Southern Cone Common Market and its member countries (Argentina, Brazil, Paraguay, Uruguay), OJ No C 14, 19. 1. 1996, p. 3.

(35) The Commission reaffirms its positive attitude towards projects supporting cooperation with and the economic development of developing countries and countries in transition to a market economy, in particular with regard to central and eastern European and Mediterranean countries preparing for possible future accession to the European Union. However, the schemes in question do not fulfil the criteria which the Commission usually attaches to 'projects of common European interest' within the meaning of Article 92 (3) (b) of the EC Treaty. The schemes in question do not form part of a cross-border programme which is jointly supported by or agreed upon between two or more Member States in order to achieve a common target. There is also no evidence that the schemes form part of a development or cooperation strategy with the third countries where the aided activities are intended to be carried out. Therefore, the 'common European interest' within the meaning of Article 92 (3) (b) of the EC Treaty cannot be invoked for the schemes in question.

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

- to ensure that such aid does not contain any (disguised) export aid elements, and
- to take into account the effects on employment both in the source country and the host country, the risks of delocalization of subsidiaries or production sites from Member States to third countries, the sectoral implications and local content, the necessity of the aid, including the envisaged aid intensity, in view of international competitiveness of European industry and/or in view of the risks involved for investment projects in certain third countries.

Since this assessment has to be carried out on a case-by-case basis, the Commission must ask for individual notification of all plans to award aid under the scheme in question for enterprises not qualifying as SMEs as defined in the Commission recommendation of 3 April 1996 concerning the definition of small and medium-sized enterprises⁽¹⁾.

V

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

HAS ADOPTED THIS DECISION:

Article 1

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

Article 2

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

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

Article 3

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

⁽¹⁾ OJ No L 107, 30. 4. 1996, p. 4.

Article 4

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

Furthermore, the Austrian Government is reminded that it must observe the Community rules and regulations applicable concerning certain sectors of industry, i.e.

sectors covered by the ECSC Treaty, transport, fisheries and agriculture, including the processing and marketing of agricultural products⁽²⁾.

Article 5

This Decision is addressed to the Republic of Austria.

Done at Brussels, 5 June 1996.

For the Commission

Hans VAN DEN BROEK

Member of the Commission

⁽¹⁾ OJ No C 3, 5. 1. 1985, p. 2.

⁽²⁾ OJ No C 29, 2. 2. 1996, p. 4.

COMMISSION DECISION

of 5 June 1996

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

(Only the German text is authentic)

(Text with EEA relevance)

(97/241/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 93 (2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62 (1) (a) thereof,

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

Whereas:

thereof and requested it to submit its comments within one month. This letter was published in the *Official Journal of the European Communities*⁽¹⁾, as notice to the other Member States and interested parties to submit any comments they might have on the measures in question within one month from the date of that publication.

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

I

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

- to withdraw part of the scheme initially designed to promote the setting-up of distribution networks,
- to link the aid to a productive investment project.

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

- (2) On 31 October 1995, the Commission decided to initiate the procedure provided for in Article 93 (2) of the EC Treaty. By letter dated 27 December 1995, the Commission informed the Austrian Government

II

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

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

⁽¹⁾ OJ No C 71, 9. 3. 1996, p. 9.

(5) The following projects are eligible:

- setting-up of production establishments or subsidiaries,
- setting-up of production joint ventures,
- purchase of qualifying holdings (at least 25 %) in an existing company,
- acquisition of enterprises,
- involvement in environmental projects.

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

- equity capital, provided that at least two thirds is used for productive investment projects,
- shareholder's loans, provided that at least two thirds is used for productive investment projects,
- the cost of acquisition of a shareholding in a foreign company, provided that at least two thirds is used for productive investment projects,
- other costs directly associated with productive investment projects.

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

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

III

(8) The Austrian Government submitted observations by letter dated 14 February 1996. Identical observations

were submitted to the procedure pursuant to Article 93 (2) with regard to the ERP internationalization programme on 22 December 1996 ⁽¹⁾. According to those observations, the reasons for the two programmes are twofold:

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

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

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

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

⁽¹⁾ Case C 50/95 (ex N 317/95), OJ No C 71, 9. 3. 1996, p. 6.

⁽²⁾ OJ No C 213, 19. 8. 1992, p. 2.

- (11) The schemes are not linked to exports of goods or services and thus do not constitute export aid running counter to EC or WTO provisions. Neither are the schemes comparable to tied export-credit facilities.
- (12) Moreover, the schemes would not distort competition. In the view of the Austrian authorities, the effect of an aid on the price of a product constitutes a central criterion to establish a possible distortive effect on competition. In this context, a *de minimis* threshold of 5 % should be taken into account.
- (13) Finally, the aided projects would be carried out in third countries and thus could affect trade between Member States within the meaning of Article 92 (1) of the EC Treaty only under very rare and exceptional circumstances. The Community provisions on State aid would allow relevant cases to be taken up on an ad hoc basis, without preventing a Member State from implementing a programme as such.
- (14) Alternatively, if the schemes constituted State aid within the meaning of Article 92 (1) of the EC Treaty, they could still be considered compatible with the common market since they promote the execution of projects of common European interest as provided for pursuant to Article 92 (3) (b) of the EC Treaty. This view can be supported by reference to:
- the general spirit of the Europe Agreements and cooperation agreements with CEECs and countries of the former Soviet Union,
 - programmes of the European Union with similar targets, like Phare and Tacis with the JOP instrument for CEECs and the ECIP instrument for developing and Mediterranean countries, including co-financing instruments operated by Member States as expressly provided for pursuant to Article 4 of the Phare Regulation ⁽¹⁾,
 - Council common position (EC) No 6/95 ⁽²⁾, in which the Council underlines the importance of the role of the private sector in the development process and the necessity to encourage mutually beneficial investments.
- (15) Moreover, the aid promotes the economic development of areas where the standard of living is abnormally low as defined in Article 92 (3) (a) of the EC Treaty. This would hold true for activities carried out in CEECs, as these countries are recognized as areas comparable to Article 92 (3) (a) regions in the Community according to Article 63 (4) (a) of the Europe Agreements with the respective countries. Having regard to the preferential treatment foreseen pursuant to Articles 27 and 29 of the WTO Subsidy Code, the same applies to developing and newly industrialized countries.
- (16) The aid schemes may, in the view of the Austrian authorities, also be considered to contribute to the economic development of certain economic activities within the meaning of Article 92 (3) (c) of the EC Treaty, since they assist activities of Austrian enterprises investing abroad and thus help to raise the degree of internationalization of the Austrian economy towards the OECD average.
- (17) Finally, the Austrian authorities consider that, outside the European Economic Area, take-overs and the acquisition of shares are also eligible for aid. Regarding SMEs, the definition of eligible investment need not necessarily be identical to the definition of 'initial investment' in the regional aid rules. Moreover, even with regard to regional aid, the Community rules recognize investment in fixed assets 'by way of take-over of an establishment which has closed or which would have closed had such take-over not taken place' as 'initial investment' ⁽³⁾. This aspect is relevant in many cases of take-overs and acquisitions abroad, in particular in East European countries.
- (18) Observations were submitted by Du Pont de Nemours International SA. In its opinion, the schemes are an innovative and pragmatic approach to the need to attract foreign investment to countries in Central and Eastern Europe. Economic restructuring measures were essential to the eventual integration of those countries into the European Union.

IV

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

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

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

V

The aid character of the schemes

- (19) By aiding the setting-up of production establishments or subsidiaries, the setting-up of production joint ventures, the purchase of holdings in existing companies and the acquisition of enterprises in third countries by Austrian enterprises, the measures favour certain undertakings or the production of certain goods compared to other companies which do not receive aid for these activities.
- (20) The Commission considers that aid granted to outward FDI activities of Community companies is comparable to aid granted to enterprises exporting a considerable proportion of their production. In the latter case, the Court has found 'that, having regard to the interdependence between the markets on which Community undertakings operate, it is possible that aid might distort competition within the Community, even if the undertaking receiving aid exports almost all its production outside the Community' ⁽¹⁾.
- (21) The twofold reasoning given by the Austrian authorities for the scheme in question shows that the measures are intended to have effects both on the Austrian economy and on the host country market. Therefore, aid granted to an Austrian enterprise at least partially also strengthens its position on the home market *vis-à-vis* enterprises which do not receive aid to carry out those activities. Moreover, enterprises located in the European Economic Area may also compete with each other for investment abroad. Therefore, any aid exceeding the *de minimis* threshold as defined in the Commission's notice on the *de minimis* rule for State aid ⁽²⁾ must be considered to distort or at least threaten to distort competition between EEA enterprises. The limited effect of an aid on the price of the products originating from an aided production, as invoked by the Austrian authorities, does not exclude possible effects on competition between EEA enterprises.
- (22) The same holds true for effects on trade between Member States (Article 92 of the EC Treaty) or Contracting Parties (Article 61 of the EEA Agreement). Although such trade effects are probably felt less intensively in cases of aid to projects in third countries, they cannot *a priori* be excluded. Again, this situation may be compared to a situation in which it is reasonably foreseeable that a Community

enterprise exporting a considerable proportion of its production to third countries redirects, due to the situation on the world market, its activities towards the internal Community market and the aid thus affects trade between Member States ⁽³⁾.

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

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

The eligible costs and the aid intensity of the schemes

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

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

⁽¹⁾ Case C-142/87, Belgium v. Commission ('Tubemeuse') [1990] ECR I-959, paragraph 35.

⁽²⁾ OJ No C 68, 9. 3. 1996, p. 9.

⁽³⁾ Case C-142/87, Belgium v. Commission ('Tubemeuse') [1990] ECR I-959, paragraphs 38 to 40.

⁽⁴⁾ OJ No C 31, 3. 2. 1979, p. 9.

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

or

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

additional factors, which normally do not play a major role when assessing the compatibility of aid: the international competitiveness of the European industry and the European interest in strengthening economic cooperation with certain third countries. With regard to both aspects, a balance has to be found with possible negative effects within the Community, for example risks of delocalization and possible negative impacts on employment.

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

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

- (26) Aid for projects in developing countries helps offset the significant risks attached to investment in those countries. It also contributes to the development of the countries concerned and to the strengthening of economic links with them. The Commission is aware of the importance of direct investment in third countries both for strengthening links with those countries and for diversifying and internationalizing European industry.
- (27) On the other hand, such aid certainly strengthens the position of the aid recipients on the common market as well as their competitiveness on the world market. Although it can be considered to 'facilitate the development of certain economic activities' within the meaning of Article 92 (3) (c) of the EC Treaty, such aid can be authorized only if it 'does not adversely affect trading conditions to an extent contrary to the common interest' (Article 92 (3) (c) of the EC Treaty — second part of first sentence).
- (28) In cases of aid to outward foreign direct investment (FDI), the assessment has to take account of two

Aid to SMEs

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

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

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

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

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

- it is the Commission's view that the present situation with regard to rules governing FDI is 'particularly unsatisfactory for SMEs which do not have the means to monitor and adapt to the ever-changing conditions for FDI in the host countries' ⁽¹⁾;
- the conclusions of the European Council held in Cannes on 15 and 16 December 1995 recognized the necessity to promote the internationalization of SMEs ⁽²⁾;
- clauses on encouraging close contacts between SMEs, with a view to promoting trade and industrial cooperation opportunities, are also included in cooperation agreements between the Community and third countries ⁽³⁾.

Aid to larger enterprises

- (32) Normally, the Commission considers investment aid to large enterprises incompatible with the common market. Exemptions are only made for investment aid for projects carried out in assisted areas. However, the Commission considers that the regional exemptions provided for in Article 92 (3) (a) and (c) of the EC Treaty cannot be applied to investment carried out in a third country. Moreover, the wording of

Article 64 (3) (a) of the Europe Agreements with certain CEECs indicates that this exemption, which corresponds to the exemption provided for pursuant to Article 92 (3) (a) of the EC Treaty, clearly refers to aid granted by the country concerned and cannot be applied to aid granted by a Member State for investment projects of its companies in that country.

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

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

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

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

⁽¹⁾ COM(95) 42 final, p. 5.

⁽²⁾ SI (95) 1000, p. 14.

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

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

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

VI

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

HAS ADOPTED THIS DECISION:

Article 1

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

Article 2

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

Any aid which the Republic of Austria intends to grant to small and medium-sized enterprises, which is based on

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

Article 3

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

Article 4

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

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

Article 5

This Decision is addressed to the Republic of Austria.

Done at Brussels, 5 June 1996.

For the Commission

Hans VAN DEN BROEK

Member of the Commission

⁽¹⁾ OJ No L 107, 30. 4. 1996, p. 4.

⁽²⁾ OJ No C 3, 5. 1. 1985, p. 2.

⁽³⁾ OJ No C 29, 2. 2. 1996, p. 4.

COMMISSION DECISION

of 18 September 1996

amending Decision 92/317/EEC on State aid in favour of Hilaturas y Tejidos Andaluces SA, now called Mediterráneo Técnica Textil SA and its buyer

(Only the Spanish text is authentic)

(Text with EEA relevance)

(97/242/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 93 (2) thereof,

Having regard to the Agreement establishing the European Economic Area, and in particular point (a) of Article 62 (1) thereof,

Having given notice in accordance with Article 93 of the EC Treaty to interested parties to submit their comments to it,

Whereas:

I

Hilaturas y Tejidos Andaluces SA (Hytasa), now called Mediterráneo Técnica Textil SA (MTT), was a private company which, following financial difficulties, was acquired in 1982 by Patrimonio del Estado. Hytasa manufactured textile products in its plants in Seville and its region.

From its acquisition in 1982 through to 1986, Patrimonio del Estado launched a restructuring plan financed through a Spanish sectoral scheme as well as capital injections amounting to Pta 6 600 million. These efforts did not prevent Hytasa's poor economic results. By the eve of Spanish accession to the Community, Hytasa's capital had virtually disappeared.

In 1989, following a complaint, the Commission required the Spanish authorities to supply information about alleged capital contributions made to Hytasa from 1986 onwards. From the reply by the Spanish authorities, the Commission determined that capital injections amounting to Pta 7 100 million had been paid to Hytasa.

In 1990, the Spanish authorities informed the Commission that Hytasa was being privatized. The conditions of the privatization process entailed a Pta 4 300 million capital injection by Patrimonio del Estado.

Among the different bidders for Hytasa, the Spanish authorities selected the offer of Hilaturas Gossypium SA based in Barcelona and Industria Textil del Guadiana SA, based in Badajoz. The Spanish Government considered that these buyers had made the most interesting offer in economic terms and afforded the best assurance for the future viability of the company. The assessment was based on the industrial recovery plan suggested by the buyers, their financial ability to carry out the foreseen future capital increases, their experience in the textile sector, and also the inherent advantage in the fact that the buyers already owned industrial and commercial structures which would help with the implementation of Hytasa's industrial plan.

According to the sale contract supplied by the Spanish authorities, the terms of the sale were the following:

- the sale price for all shares of the company was set at Pta 100 million,
- over a period of three years:
 - the buyers undertook not to sell their shares unless previously authorized by Patrimonio,
 - changes in the shareholding would be restricted to operations ensuring the maintenance of a majority stake by the buyers,
 - the buyers would not carry out any lay-offs unless prior agreement was reached with the workers' representatives, and only in the framework of schemes for early retirement or temporary suspensions of employment,
- the company would not pay dividends for a five-year period; in the same period, the buyers would not split the company or sell any part of it; they would keep all facilities existing at the time of the sale, as well as some real estate,
- proceeds of any sales of any other real estate would be kept within the company,
- the buyers would implement the recovery plan attached to the sale contract,
- all new brand names and other intangibles would be acquired by Hytasa,

- the capital increase of Pta 4 300 million carried out by Patrimonio at the time of the sale would be used to improve the financial situation of Hytasa, to finance investments and to cater for dismissals,
- the buyers waived any financial benefit arising from old claims of Hytasa against Patrimonio. They considered Hytasa's balance sheet on 30 June 1990 as part of the contract, with the proviso that the seller was to bear the financial consequences of any action taken prior to the sale of the company,
- the buyers undertook to increase the capital of the company by Pta 3 700 million and would pay 25 % of that sum at the moment of purchase.

In July 1990⁽¹⁾ the Commission initiated the Article 93 (2) procedure in respect both of the Pta 7 100 million capital contributions provided by the State to Hytasa between the Spanish accession in 1986 and 1988 and of any additional aid that the State might have granted in connection with the sale of the company. The Commission considered that those financial interventions constituted aid within the meaning of Article 92 (1) and that such aid did not seem to qualify in principle for any of the exemptions provided for in Article 92 (2) and (3). The decision was notified to the Spanish Government by letter dated 3 August 1990.

On 16 October 1990 the Spanish Government gave its comments in the procedure. Among their arguments the Spanish authorities stated that no aid was involved in the sale of Hytasa, since the company was sold to the highest bidder, after being offered on the international market.

Afterwards the same authorities pointed out that even if the terms of the sale did involve some aid, the sale of Hytasa was more than just putting the company into private hands. It meant implementing a recovery plan drawn up by the buyers, who would participate in its financing through a capital contribution of Pta 3 700 million and would incorporate their know-how into the company's assets. In their view the sale was not designed simply to keep the company in business, but to ensure its economic, technical and financial recovery, for which reason the public intervention complied with the provisions applicable under Community law.

The Spanish authorities also indicated that the firm's location in Seville, eligible for regional aid, suggested that the exemption provided for under Article 92 (3) (a) could be applicable here.

Comments were received by letter dated 21 January 1991 from the German Federation of the Textile Industry in accordance with the procedure. The comments were transmitted to the Spanish authorities by letter dated 6

February 1991. The Spanish authorities replied to them by letter dated 27 March 1991.

A restructuring programme drawn up by the new owners was presented by the Spanish authorities with their comments at the opening of the procedure. The plan provided for the implementation of an investment programme of Pta 2 500 million. The main interventions concerned the cotton sector. An increase in the production of finished products was expected, ranging from 80 to 300 % as against the 1989 output.

The plan also provided for a reduction in the workforce from 1 050 employees in 1990 to 700 in 1992 through early retirements and incentives for departure. The cost of the incentives for departure to be borne by Hytasa was estimated at about Pta 2 040 million.

The plan envisaged a gradual improvement of Hytasa's financial situation. From losses amounting to Pta 1 957 million in 1990, the company anticipated a small profit of Pta 139 million in 1994.

The Commission raised doubts regarding this recovery plan, at a meeting with representatives of Patrimonio del Estado on 18 March 1991; it requested the Spanish authorities to present a revised restructuring plan. The new plan was submitted by the Spanish authorities on 13 June 1991.

The new plan provided for changes in the production and commercial policy of Hytasa. The company would sell only finished products with their production increasing between 50 and 230 %, according to the product. New production lines would be established, with a higher emphasis on design and fashion, so as to obtain a higher sales value for the product.

According to the information supplied, production capacity in the spinning and weaving operations would be reduced by between 51 and 40 % on 1989 figures. In order to fulfil additional needs for semi-finished material, the company would resort to external suppliers.

From 1 050 employees in 1990, the workforce would be reduced to 720 in 1992. The total cost of this reduction was estimated at Pta 1 250 million (Pta 750 million in 1990 and Pta 500 million in 1991).

The company would make losses in 1991 and 1992; by 1993, a modest positive result of Pta 95 million was expected. In 1994, the company would obtain a positive result of Pta 716 million.

In pursuance of the abovementioned procedure under Article 93 (2), the Commission took a final Decision on 25 March 1992, Decision 92/317/EEC⁽²⁾.

⁽¹⁾ OJ No C 320, 20. 12. 1990, p. 14.

⁽²⁾ OJ No L 171, 26. 6. 1992, p. 54.

The Decision found that the actions of Patrimonio del Estado in relation to Hytasa were to be considered State aid, given the public nature of Patrimonio's financial resources and because, on the basis of the 'private market-economy investor principle', it could not be considered that Patrimonio del Estado had acted as such.

The Commission established in its Decision 92/317/EEC that the capital contributions of Pta 7 100 million to Hytasa over the period 1986 to 1988 had been granted illegally since they had not been notified as should have been the case according to Article 93 (3). However, the Commission took into account the fact that Spanish industrial policy in respect of public companies before it joined the European Communities on 1 January 1986 had sometimes been based on principles radically different from those underlying the competition policy of the EC Treaty, and that after accession, the companies had had to adapt themselves to a new competitive environment. The capital contributions of Pta 7 100 million to Hytasa had mainly been aimed at facilitating this adaptation, and not at artificially relaunching its activities and, on that basis, the Commission, in Article 1 of its Decision, concluded that it could be considered that the aid met the conditions for the Article 92 (3) (c) exception.

However, the Commission held (as it stated in its Decision) that the aid of Pta 4 200 million⁽¹⁾ contained in the capital contribution provided by Patrimonio del Estado to Hytasa upon privatization in July 1990 was illegal because it was also awarded by the Spanish Government in breach of the provisions of Article 93 (3). Equally, the Commission considered that the aid was incompatible as it did not fulfil any of the conditions for qualification for any of the exceptions under Article 92 (2) and (3).

As to Article 92 (3) (a), the Commission considered that although Hytasa is situated in Seville, an area qualifying for regional aid under this Article, the aid to Hytasa was not granted under regional schemes previously approved by the Commission but on the basis of an *ad hoc* decision by the Spanish Government. Furthermore, it established that even if the aid were to be considered regional, it would not be eligible for compatibility under Article 92 (3) (a) since it did not genuinely contribute to the long-term development of the region.

Turning to Article 92 (3) (c), the Commission considered, after examining the initial restructuring plan and its revised version, that the planned reductions in production and sale of intermediate goods were largely offset by increases in manufacture and sale of finished products. On this basis, the Commission considered that Hytasa's

restructuring plan did not provide a sufficient *quid pro quo* for the aid.

Regarding the cutback in the number of employees envisaged by the plan, the Commission considered, on the basis of the reductions achieved up to the date at which it had adopted Decision 92/317/EEC, that the objective of reducing the workforce to 720 in 1992 would not be attained.

In Articles 2 and 3 of the Decision, the aid was considered incompatible with the common market, and Patrimonio del Estado was therefore ordered to recover the Pta 4 200 million from the company.

II

On 19 June 1992, Spain brought an action pursuant to Article 173 of the EC Treaty for the annulment of Articles 2, 3, 4 and 5 of Decision 92/317/EEC.

In its judgment of 14 September 1994 in Joined Cases C-278/92, C-279/92 and C-280/92, Spain v. Commission⁽²⁾, the Court of Justice accepted the argument that the element of Pta 4 200 million constituted aid within the meaning of Article 92 (1). The Court also agreed that this aid element was illegal since it had been granted in breach of the provisions of Article 93 (3).

The Court of Justice held, on the basis of the communication of the Commission on regional aid systems⁽³⁾, that the Commission was justified in considering that aid granted on the basis of *ad hoc* decisions does not in principle meet the criterion of regional specificity. In those circumstances it is for the Member State concerned to establish that the aid in question actually fulfils the regional specificity criterion. However, the Court of Justice ruled that the Commission should first specify the criteria according to which it considers *ad hoc* aid, exceptionally, to be regional in character, as the fact that aid is granted on the basis of *ad hoc* decisions does not necessarily preclude it from being described as regional aid within the meaning of Article 92 (3) (a).

According to the Court of Justice, the Commission had not sufficiently argued its claim that the new restructuring plan would not ensure the viability of Hytasa. The Commission had not analysed the impact of the revised plan on restoring Hytasa's profitability, and the Court deemed such an analysis to be necessary in this case, given that the new restructuring plan provided for a substantial redirection of production towards the manufacture of finished products. The Court of Justice considered that the Commission's analysis of the compatibility of the aid with Article 92 (3) (a) did not therefore meet the criteria which it had itself established.

⁽¹⁾ This aid element resulted from subtracting the Pta 100 million paid by the buyer for the company from the Pta 4 300 million capital injection by Patrimonio del Estado.

⁽²⁾ [1994] ECR, I-4103.

⁽³⁾ OJ No C 31, 3. 2. 1979, p. 9.

On that basis, the Court of Justice annulled the second paragraph of Article 2 and Articles 3, 4 and 5 of Decision 92/317/EEC. Therefore, the procedure commenced under Article 93 (2) remains open and, given the partial annulment of Decision 92/317/EEC by the Court's judgment, the Commission must now adopt a Decision amending its Decision of 25 March 1992 and putting an end to the procedure.

III

In order to take due account of the judgment of the Court of Justice, the Commission must reassess whether the aid given by Patrimonio del Estado to Hytasa as part of its privatization is compatible with the common market.

Article 92 (2) sets out those cases where aid which corresponds to the definition contained in the first paragraph shall be compatible with the common market. The aid to Hytasa does not match any of these cases.

Article 92 (3) enumerates those cases where aid may be considered compatible with the common market. Point (a) refers to aid which promotes the economic development of areas where the standard of living is abnormally low or where there is serious underemployment. Point (c) refers to aid which facilitates the development of certain economic activities or certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

The aid given to Hytasa upon privatization was not given in the framework of a regional scheme, but by virtue of an *ad hoc* decision. As it has already been mentioned in Part II of this Decision, the Court of Justice held in its judgment of 14 September 1994 that the fact that the aid was given on the basis of an *ad hoc* decision does not preclude it from being described as regional aid for the purposes of Article 92 (3) (a). It is therefore necessary to assess whether the aid to Hytasa can be considered compatible with the common market not only pursuant to Article 92 (3) (c), as the Commission has done before, but also pursuant to Article 92 (3) (a) ⁽¹⁾.

At the time when the aid was given, the Commission had established its policy on restructuring aid in point 228 of its *Eighth Report on Competition*. Restructuring aid should be strictly conditional on the implementation of a

sound restructuring and/or conversion programme and duly and effectively serve to restore the viability of the production concerned. Its intensity and amount should be restricted to the strict minimum for supporting the firm during the inevitable transitional period before such a programme takes effect. The period involved should therefore be limited and the assistance gradually reduced. These conditions should be strictly observed; otherwise they might end up by transferring social or industrial problems from one Member State to another and merely give the recipient firms a moment of respite, since their problems might then reappear in exacerbated form.

When the Commission received the first restructuring plan for Hytasa, it took the view that it did not ensure the company's viability. It therefore asked the Spanish authorities to present a new plan that did so.

The Spanish authorities submitted a new plan, which covered the period 1991 to 1994, when the company would return to viability. It envisaged a radical reorientation of activity, concentrating on the final phase of the production process. There were also increases and decreases in production capacity, and therefore, no clear yardstick for assessing precisely any reduction in the activities of the company.

According to the plan, the share of finished cotton products in the turnover would rise from 42 % in 1990 to 64 % in 1994, whilst the share of cotton clothing would rise from 10 % in 1990 to 20 % in 1994. The share of finished wool products in the turnover would decrease between 31 and 16 % in the same period.

The staff would consist of 720 employees after the restructuring process, as opposed to 700 in the original plan.

The aid element (Pta 4 200 million) greatly exceeded the investment envisaged (some Pta 2 500 million). According to the company's balance sheet, net investments amounted in 1991 to Pta 1 418 million and in 1992 to Pta 1 000 million. As these net figures also contain the value of shutdown capacity (as negative figures) new investments were even higher than stated.

According to the submitted balance sheets, the company had an unusually high equity/capital ratio and huge assets. In 1991, the company's disclosed assets were Pta 14 991 million, compared to a total operating income of Pta 3 173 million. The resulting assets turnover of 0,2 in 1991, a ratio which refers to the firm's ability to generate sales through the use of its assets, indicates that the

⁽¹⁾ The exceptions contained in Article 92 (3) (b) and (d) are not applicable to this case.

company's output was too low and/or that the company kept unnecessary assets. Both possibilities would have had a negative impact on the company's profitability, as depreciation would have been much too high in relation to the turnover and the amount of assets which had to be financed. Even in 1994 — when the company was expected to reach viability — the total asset turnover of 0,5 would have been too low.

According to the Commission's analysis, the company held extremely large stocks, particularly in 1991, when the day's sales in stocks ratio was 429 days. Stock figures did not change in the subsequent balance sheet forecasts for the following years. This is remarkable, as a decrease in stocks would have been necessary for a successful restructuring. In this context, it should be mentioned that a comparison between the envisaged production of finished cotton units and the envisaged sales shows a growth in surplus production between 1991 and 1994 equivalent to Pta 3 000 million. In relation to 1991's net turnover (Pta 3 173 million), it is nearly 100 %.

The company's main problem was its poor profitability. The Commission notes that, in order to demonstrate the company's viability, the restructuring plan made some crucial assumptions which were not explained further. These are mainly a substantial growth in turnover from 1991 to 1994, considerably higher unit prices for finished cotton products and a significant amelioration of the workforce productivity.

Turnover was expected to rise by 70 % from 1991 to 1992 and 136 % by 1994. Both finished cotton products and cotton clothing were supposed to increase by 83 % in 1992, by 120 % in 1993 and by 175 % in 1994, in relation to the total turnover in 1991. Considering the cost structure of the company, an increase in turnover was essential for its restructuring. However, no explanation was given by the Spanish authorities to justify these increases, particularly that of 1991 to 1992. Bearing in mind that the company intended to produce and sell new products, something which usually entails particular difficulties at the beginning, these forecasts are too optimistic.

According to the plan, the company envisaged for its main line of production, finished cotton products, a 53 % increase in its average price per unit from 1990 to 1991. This is a crucial assumption, but no further information or justification for this price level was provided. The company would not have been able to reach viability in 1994 if the average price per unit for finished cotton products had been 15 % less than was estimated in the restructuring programme, even if this entailed a 30 % increase in the average price from 1990 to 1991.

As for the reliability of the improvement in the workforce cost structure, the Commission has calculated the tonnes, metres and units produced per worker for each year and has compared the figures with productivity levels for 1990 and 1991. According to the restructuring plan, most workers would have been active in the spinning and weaving of both cotton and wool, as well as in the production of finished cotton products. Although the ratios indicate that the productivity of the company's workforce was very poor, offering scope for improvement, the recovery envisaged by the restructuring programme was very steep and very rapid. According to the Commission's analysis, the productivity of the workforce in finished cotton products was expected to increase by 71 % from 1991 to 1992 and by 105 % from 1991 to 1993. The productivity in cotton clothing should have increased by 83 % from 1991 to 1992 and by 175 % up to 1994. The productivity in cotton spinning and weaving activities should have increased by 60 % from 1991 to 1992. Even if 1991 were to be considered an unproductive year and the output figures per employee were to be compared with the company's productivity in 1990, the progress expected would have been extreme.

While the company intended to increase its turnover by more than 130 % in a period of four years, the workforce dealing with administrative matters would be reduced from 291 in 1990 to 188 in 1994, that is, a 55 % reduction. This would only have been possible if certain administrative tasks had been outsourced, something which in turn would have meant a considerable increase in external services' costs; this, however, was not taken into account in the restructuring plan.

The large-scale expansion planned for sales in cotton clothing, which was designed as consumables, as well as the increasing need for semi-finished products, due to the limits in production capacity, should have resulted in an increase of raw materials and consumables, while the calculated expenditure remained modest. Unfortunately, no further information concerning margins or the need for semi-finished products was contained in the plan.

Taking all the abovementioned considerations into account, as well as the fact that some figures contained in the restructuring plan, as they were presented, do not make sense, the Commission has to conclude that the assumptions necessary to show the long-term viability of the company within a reasonable time scale are unrealistic and unreliable, as they cannot be generally accepted and no evidence was ever supplied which could have made such assumptions justifiable.

The capacity of the company to repay its debts on the basis of a lower (and more realistic) turnover also raises doubts. According to the plan, the company would have obtained a positive result in 1994 (some Pta 716 million).

It is unclear how the company's owners could have assumed and financed a restructuring process which might take longer to conclude than was envisaged in the plan.

Its lack of credibility is precisely the problem which the second restructuring plan presented poses to the Commission. As has already been stated, apart from the fact that the plan was based on forecasts which can be described at least as highly optimistic, the Spanish authorities have not furnished in recent years any evidence which suggests to the Commission that the aim is indeed to ensure the reconstruction and viability of the company. The Commission has to take equally into account the fact that the buyers would not or could not fulfil their obligation to pay 25 % of the capital increase as they were required to do in the framework of the sale contract, that is, Pta 925 million out of a total of Pta 3 700 million.

According to the information available to the Commission, only Pta 512 million were paid at the moment of the sale, half of the amount expected, and at the time of adoption of Decision 92/317/EEC no further contribution had been made to the company. This raises serious doubts as to the ability and will of Hytasa's buyers to meet their obligation to increase the company's capital by Pta 3 700 million. The Commission has to conclude that the lack of financial means on which the company could legitimately count means that the feasibility of the operation and the future existence of the company, which depended on the amount of resources committed as well as the rapidity with which this should be done, were jeopardized.

It is the view of the Commission that the fact that the company to be restructured is located in an area eligible for regional aid does not justify a permissive approach to restructuring aid. In the medium to long term, artificially sustaining companies which are ultimately not viable not only cannot be considered as being covered by the exception contained in Article 92 (3) (a), but is particularly damaging to the economy of those regions where resources available through regional schemes, given their shortage, should be used to create wealth, and thus neutralize their structural underdevelopment. Therefore, the restructuring process should allow the company to be economically viable in order to contribute to the real development of the region without requiring continual aid.

The Commission considers that the restructuring plan presented by the Spanish authorities in the case of Hytasa did not ensure the company's long-term viability. Therefore, the aid cannot be deemed to promote the economic development of the area within the meaning of Article 92 (3) (a) and cannot be considered compatible with the common market on its basis.

Neither can it be considered compatible with the common market on the basis of the exception contained in Article 92 (3) (c). It is the view of the Commission that aid to firms in difficulty entail a high risk for the common market as it could frustrate or unduly retard the process of structural adjustment by maintaining firms which under normal market conditions should disappear or restructure themselves. For this reason, the Commission requires that such aid be subjected to the implementation of a solid restructuring or conversion programme which restores the long-term viability of the beneficiary. As the restructuring plan submitted did not ensure the viability of Hytasa, the exception contained in Article 92 (3) (c) cannot be applied.

The Commission's view that the abovementioned restructuring plan did not render the company viable is confirmed by the financial interventions in its favour in which the Spanish authorities had to engage after 1992. The restructuring plan was never implemented. Following the bankruptcy of one of the owners, Hilaturas Gossypium, Improasa, the executive company of Patrimonio del Estado, acquired 30 % of MTT's shares in 1992. Several properties belonging to MTT were mortgaged in favour of Improasa for some Pta 726 million. Improasa also acquired promissory notes issued by MTT for some Pta 4 660 million.

In 1992, two credits amounting to Pta 300 million were given to the company by the Instituto de Fomento de Andalucía (IFA)⁽¹⁾, as part of an aid scheme approved by the Commission⁽²⁾. MTT finds itself at present in financial straits, with liabilities worth some Pta 10 000 million, so that it has been decided by the competent Spanish authorities to suspend indefinitely the payments of the company, with a view to its liquidation and the subsequent sale of its assets to pay its debts.

IV

In cases where aid is deemed incompatible with the common market, the Commission requires the Member State to reclaim the aid from the recipient (in this respect see the Commission's communication published on 24 November 1983⁽³⁾, as well as the judgments of the Court of Justice in Cases 70/72, *Commission v. Germany*⁽⁴⁾ and 310/85, *Deufil v. Commission*⁽⁵⁾). As this is the case with the aid to Hytasa, the subject of this Decision, the Pta 4 200 million granted to this company must be recovered.

⁽¹⁾ The IFA is a public entity belonging to the Andalusian Autonomous Community.

⁽²⁾ State aid N 624/92.

⁽³⁾ OJ No C 318, 24. 11. 1983, p. 3.

⁽⁴⁾ [1973] ECR, p. 813.

⁽⁵⁾ [1987] ECR, p. 901.

The recovery of the aid shall be made in accordance with Spanish law, including the provisions concerning interest due for late payment of amounts owing to the Government, such interest running from the date of the award of the aid (see the Commission's letter to the Member States SG(91) D/4577 of 4 March 1991, as well as the judgment of the Court of Justice in Case 142/87, *Belgium v. Commission* ⁽¹⁾).

According to the case-law of the Court of Justice, such recovery of aid means that those provisions are to be applied in such a way that the recovery required by Community law is not rendered practically impossible. Any procedural or other difficulties in regard to the implementation of the measure cannot have any influence on its lawfulness (Case 142/87, previously cited).

According to the sales contract signed at the time by the Spanish authorities and the buyers, any important financial events which should occur as a consequence of acts prior to the sale of the company should be borne by the seller. This clause would allow the State to compensate the buyers for their obligation to reimburse the aid deemed by the Commission to be incompatible with the common market. As already stated in its Decision 92/317/EEC, the Commission considers that this would neutralize the essence of its Decision and would perpetuate the distortion of competition caused by the aid. This would constitute a means of circumventing the provisions regarding State aid contained in the Treaty, rendering them ineffective. Therefore, on the basis of the principle of the primacy of Community law, this provision shall not be carried out, and the company benefiting from the undue advantage conferred by the illegal aid will have to reimburse it.

HAS ADOPTED THIS DECISION:

Article 1

Commission Decision 92/317/EEC is amended as follows:

1. Article 2, second paragraph, is replaced by the following paragraph:

'This aid is considered incompatible with the common market within the meaning of Article 92 (1) of the EC

Treaty, as it does not meet the conditions for any of the exceptions contained in paragraphs 2 and 3 of the said Article to apply.';

2. Article 3 is replaced by the following text:

Article 3

Patrimonio del Estado will recover from Mediterráneo Técnica Textil (formerly Hilaturas y Tejidos Andaluces SA (Hytasa)) the Pta 4 200 million granted. The recovery of the aid shall be made in accordance with Spanish law, including the provisions concerning interest due for late payment of amounts owing to the Government, such interest running from the date of the award of the aid.

These provisions are to be applied in such a way that the recovery required by the Community law is not rendered practically impossible. Any procedural or other difficulties with regard to the implementation of the measure shall not have any influence on its effectiveness.';

3. Article 4 is replaced by the following text:

Article 4

Any agreement providing for compensation to the buyers of Hilaturas y Tejidos Andaluces SA by the State or Patrimonio del Estado as a result of their obligation to reimburse the aid on the basis of this Decision shall not be carried out.'

Article 2

The Spanish Government 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 Kingdom of Spain.

Done at Brussels, 18 September 1996.

For the Commission

Karel VAN MIERT

Member of the Commission

⁽¹⁾ [1990] ECR, p. I-959.

COMMISSION DECISION

of 1 April 1997

suspending the buying-in of butter in certain Member States

(Only the Danish, German, Greek, French, Dutch, Finnish, Swedish and English texts are authentic)

(97/243/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 804/68 of 27 June 1968 on the common organization of the market in milk and milk products⁽¹⁾, as last amended by Regulation (EC) No 1587/96⁽²⁾, and in particular the first subparagraph of Article 7a (1) and Article 7a (3) thereof,

Whereas Council Regulation (EEC) No 777/87⁽³⁾, as last amended by the Act of Accession of Austria, Finland and Sweden, sets out the circumstances under which the buying-in of butter and skimmed-milk powder may be suspended and subsequently resumed and, where suspension takes place, the alternative measures that may be taken;

Whereas Commission Regulation (EEC) No 1547/87⁽⁴⁾, as last amended by Regulation (EC) No 1802/95⁽⁵⁾, lays down the criteria for opening and suspending the buying-in of butter by invitation to tender in the Member States or, in the case of the United Kingdom and Germany, in a region thereof;

Whereas Commission Decision 97/166/EC⁽⁶⁾ suspends the buying-in of butter in certain Member States; whereas information on market prices shows that the condition laid down in Article 1 (3) of Regulation (EEC) No 1547/87 is currently met in Belgium, Denmark, Germany, Greece, France, Luxembourg, the Netherlands, Austria, Finland, Sweden, Great Britain and Northern Ireland; whereas the list of Member States in which that suspension applies must be adjusted accordingly;

Whereas the measures provided for in this Decision are in accordance with the opinion of the Management Committee for Milk and Milk Products,

HAS ADOPTED THIS DECISION:

Article 1

The buying-in of butter by invitation to tender as provided for in Article 1 (3) of Regulation (EEC) No 777/87 is hereby suspended in Belgium, Denmark, Germany, Greece, France, Luxembourg, the Netherlands, Austria, Finland, Sweden and Great Britain and Northern Ireland.

Article 2

Decision 97/166/EC is hereby repealed.

Article 3

This Decision is addressed to the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.

Done at Brussels, 1 April 1997.

For the Commission

Franz FISCHLER

Member of the Commission

⁽¹⁾ OJ No L 148, 28. 6. 1968, p. 13.

⁽²⁾ OJ No L 206, 16. 8. 1996, p. 21.

⁽³⁾ OJ No L 78, 20. 3. 1987, p. 10.

⁽⁴⁾ OJ No L 144, 4. 6. 1987, p. 12.

⁽⁵⁾ OJ No L 174, 26. 7. 1995, p. 27.

⁽⁶⁾ OJ No L 64, 5. 3. 1997, p. 22.