COMMISSION DECISION (EU) 2024/454

of 7 December 2023

on the measure SA.35484 (2013/C) (ex SA.35484 (2012/NN)): aid granted by Germany in respect of milk quality tests pursuant to the Milk and Fat Law carried out in Bavaria

(notified under document C(2023) 8388)

(Only the German version is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union (TFEU), and in particular Article 108(2), first subparagraph, thereof,

Having called on interested parties to submit their comments pursuant to the provision cited above ([1]) and having regard to their comments,

Whereas:

1. **Procedure**

(1) By letters dated 28 November 2011 and 27 February 2012, the Commission asked Germany for additional information concerning the 2010 Annual Report on State aid in the agricultural sector, which Germany had submitted according to Article 21(1) of Council Regulation (EC) No 659/1999 ([2]). Germany answered the Commission's questions by letters dated 16 January 2012 and 27 April 2012. In the light of Germany's answers, it emerged that Germany had granted financial support to the German dairy sector pursuant to the 1952 Law on the circulation of milk, milk products and fats (Gesetz über den Verkehr mit Milch, Milcherzeugnissen und Fetten, 'the MFG').

(2) By letter dated 2 October 2012, the Commission informed Germany that the measures in question had been registered as non-notified aid under the number SA.35484 (2012/NN). By letters dated 16 November 2012, 7,8, 11, 13, 14, 15 and 19 February, 21 March, 8 April, 28 May, 10 and 25 June and 2 July 2013, Germany submitted further information.

(3) By letter of 17 July 2013 (C(2013) 4457 final) ([3]), the Commission informed Germany that it had decided to initiate the procedure laid down in Article 108(2) TFEU with regard to certain sub-measures under the MFG ('the Opening Decision') ([4]). In the same letter, the Commission assessed that other sub-measures were compatible with the internal market, either during the period from 28 November 2001 to 31 December 2006 or in the period starting 1 January 2007 or in both periods ([5]), or that further sub-measures did not constitute State aid within the meaning of Article 107(1) TFEU or that they fell outside the scope of State aid rules ([6]).

(4) For the support relating to milk quality tests in Baden-Württemberg and Bavaria, the Commission found that it was compatible with the internal market for the period from 28 November 2001 to 31 December 2006 ([7]).

(5) However, the Commission expressed doubts as to the compatibility of the same support to milk quality tests with the internal market for the period from 1 January 2007 ([8]).

(6) By letter dated 20 September 2013, Germany submitted comments concerning the Opening Decision.

([1]) OJ C 7, 10.1.2014, p. 8.
([2]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 83, 27.3.1999, p. 1, ELI: http://data.europa.eu/eli/reg/1999/659/oj).
([3]) As corrected by letter of 16. December 2013 (C(2013) 9021 final).
([4]) Cf. point 278 in connection with the Annex of the Opening Decision.
([5]) Cf. point 277 in connection with the Annex of the Opening Decision.
([6]) Cf. point 276 in connection with the Annex of the Opening Decision.
([7]) Referred to in the Opening Decision as measures BW 1 and BY 1.
([8]) Cf. point 278 in connection with the Annex of the Opening Decision.

(7) The Opening Decision was published in the *Official Journal of the European Union* ([9]). The Commission invited interested parties to submit their comments within 1 month.

(8) The Commission received seven comments from interested parties relating to the measures concerning milk quality tests. The comments were transmitted to Germany.

(9) Germany responded by letter dated 3 December 2014.

(10) On 18 September 2015, the Commission adopted Decision (EU) 2015/2432 ([10]) declaring the aid granted to the dairy sector in respect of routine controls of milk in Bavaria and Baden-Württemberg for the period as of 1 January 2007 incompatible State aid to be recovered.

(11) On 26 November 2015 and 4 December 2015, Bavaria on the one hand, and Interessengemeinschaft privater Milchverarbeiter Bayerns e.V., Genossenschaftsverband Bayern e.V. and Verband der Bayerischen Privaten Milchwirtschaft e.V. on the other hand, brought actions before the General Court seeking the partial annulment of Decision (EU) 2015/2432.

(12) By two judgments of 12 December 2018, the General Court annulled Articles 1 to 4 of Decision (EU) 2015/2432 in so far as those provisions declared that the grant by Germany of State aid was incompatible with the internal market in respect of the milk quality tests carried out in Bavaria and ordered recovery of that aid ('the judgments of 12 December 2018') ([11]).

(13) On 22 February 2019, the Commission appealed those judgments before the Court of Justice of the European Union.

(14) On 10 March 2022, the Court of Justice dismissed the Commission's appeals ([12]) and upheld the judgments of 12 December 2018.

2. **Background**

(15) The Opening Decision covered measures financed by the milk levy, which the German Länder could impose on dairies under the MFG ([13]).

(16) Decision (EU) 2015/2432 concerned aid granted to the dairy sector in Bavaria and Baden-Württemberg in respect of routine controls of milk quality for the period as of 1 January 2007. That aid was found State aid incompatible with the internal market and to be recovered. For Bavaria, Decision (EU) 2015/2432 covered measures not only financed by the milk levy, but also by general budgetary resources.

(17) Pursuant to Article 264, first paragraph TFEU, where an action for annulment is well founded, the Court of Justice of the European Union shall declare the act concerned to be void. In such a case, the Commission is required to take the necessary measures to comply with the judgement ([14]).

(18) By its judgements of 12 December 2018, the General Court partially annulled Decision (EU) 2015/2432. The General Court found that the Opening Decision only covered the part of the aid that was financed from the levy imposed upon dairies, but not the part of the aid that was financed from the Land budget ([15]). The General Court held that as far as that latter part of the aid was concerned, Decision (EU) 2015/2432 had been adopted without giving the interested parties an opportunity to submit comments and had thus been adopted in breach of the applicants' right to be involved in the administrative procedure pursuant to Article 108(2) TFEU and Article 6(1) of Regulation (EC) No 659/1999.

([9]) See footnote 1.

([10]) Commission Decision (EU) 2015/2432 of 18 September 2015 concerning State aid SA.35484 (2013/C) (ex SA.35484 (2012/NN)) granted by Germany in respect of milk quality tests pursuant to the Milk and Fat Law (OJ L 334, 22.12.2015, p. 23, ELI: http://data.europa.eu/eli/dec/2015/2432/oj).

([11]) Judgments of the General Court of 12 December 2018, *Freistaat Bayern* v *Commission*, T-683/15, ECLI:EU:T:2018:916 and *Interessengemeinschaft privater Milchverarbeiter Bayerns and Others* v *Commission*, Joined Cases T-722/15 to T-724/15, EU:T:2018:920.

([12]) Judgment of the Court of Justice of 10 March 2022, *Commission* v *Freistaat Bayern*, Joined Cases C-167/19 P and C-171/19 P, ECLI:EU:C:2022:176.

([13]) Cf. section 3.3.1 of the Opening Decision.

([14]) Cf. Article 266, first paragraph TFEU.

([15]) See judgments of the General Court of 12 December 2018, *Freistaat Bayern* v *Commission*, T-683/15, ECLI:EU:T:2018:916, paragraph 69, and *Interessengemeinschaft privater Milchverarbeiter Bayerns and Others* v *Commission*, Joined Cases T-722/15 to T-724/15, EU:T:2018:920, paragraph 66.

(19) The judgements of 12 December 2018 annulled Articles 1 to 4 of Decision (EU) 2015/2432 in so far as they declared that the grant of State aid by Germany was incompatible with the internal market in respect of the milk quality tests carried out in Bavaria and ordered recovery of that aid.

(20) These judgements however did not touch upon the part of Decision (EU) 2015/2432 concerning the aid to milk quality tests carried out in Baden-Württemberg. Accordingly, that part of Decision (EU) 2015/2432 relating to the measure in Baden-Württemberg remains valid and in force.

(21) By its judgment of 10 March 2022, the Court of Justice confirmed the judgements of 12 December 2018.

(22) The present decision therefore only concerns the State aid which Germany granted in respect of the milk quality tests carried out by Bavaria in favour of dairy sector undertakings and which was financed from a milk-levy (referred to as measure BY 1 in the Opening Decision) during the period starting from 1 January 2007.

3. **Description of the measure and content of the Opening Decision**

(23) Article 22(1) of the MFG empowers the governments of the German Länder to impose a milk levy (*Milchumlage*) at the level of the dairies, based on the milk quantities delivered to these dairies. The milk levy does not apply to imported products. By contrast, exported products may be subject to that levy.

(24) Bavaria has made use of this empowerment ([16]) and, as described in the Opening Decision, granted financial support towards statutory tests aiming to assess the quality and certain features of milk under Article 22(2), point 1, and Article 10(1) of the MFG in conjunction with the Regulation on milk quality assessment and remuneration of milk delivered to dairies (*Verordnung über die Güteprüfung und Bezahlung der Anlieferungsmilch*) of 9 July 1980 ('the Milk Quality Regulation') ([17]). The performance of the statutory tests under the Milk Quality Regulation had been delegated to an approved testing centre, i.e., the Milchprüfring Bayern e.V. ('the Milchprüfring') ([18]).

(25) The milk quality tests were imposed in accordance with Article 10 of the MFG in conjunction with Article 1(1) of the Milk Quality Regulation. Any commercial consumer of milk (such as dairies) had to have milk delivered to them tested to determine its quality as regards:

— fat content,

— protein content,

— bacteriological structure,

— somatic cells content, and

— freezing point.

(26) Germany claimed that this measure did not constitute aid, as the payments were granted as compensation for necessary expenses incurred by the Milchprüfring for performing public tasks delegated by law (*hoheitliche Aufgaben*) ([19]).

(27) The Commission considered ([20]) that even if public tasks are delegated by law to a third party (such as the Milchprüfring), this activity may still benefit dairies, which are undertakings, in the form of subsidised services. Costs incurred for complying with national legal obligations (such as the obligation to perform milk quality tests, pursuant to the Milk Quality Regulation) should be considered as typical operating costs usually borne by the undertakings concerned. Where the State reimburses these costs, the conditions of aid pursuant to Article 107(1) TFEU appear to be fulfilled. The Commission therefore assumed the existence of aid.

([16]) Cf. Section 2.5 of the Opening Decision.
([17]) Referred to as measure BY 1 in the Opening Decision. See the description of the measure in the Opening Decision, Section 2.6.1.1, and the preliminary legal assessment relating to the existence of aid in Section 3.3 and Section 3.5.2, in particular point 130, finding that the levy used for financing the measure constitutes a State resource; the preliminary compatibility assessment is in Section 3.5.16 and Section 4.
([18]) Cf. section 2.6.1.1. of the Opening Decision.
([19]) Cf. section 2.6.1.1. of the Opening Decision.
([20]) Cf. section 3.5.2 of the Opening Decision.

(28) In the Opening Decision, the Commission found that the measure (defined as aid for routine controls of milk quality in Bavaria financed via the milk levy and carried out in the period from 2007 ([21])) likely constituted State aid ([22]) and expressed doubts as to the compatibility with the internal market ([23]) and requested Germany to submit its comments and to provide all such information as may help to assess the aid concerning the period from 1 January 2007 ([24]).

(29) The Commission furthermore found that the method of financing (parafiscal levy) formed an integral part of the aid measure and that therefore the method of financing had to be taken into account when examining the aid ([25]).

(30) As regards the milk levy, the Commission found that it did not discriminate against imported products, was not in contravention of the provisions laid down by Article 110 TFEU and did not run counter to the objectives of the common market organisation for milk ([26]).

4. **Repeal of the measure and recovery of the aid**

(31) Aid for routine controls of milk quality was abolished in Bavaria in 2013.

(32) Following the adoption of Decision (EU) 2015/2432, aid amounting to some EUR 22,4 million, which had been financed by the milk levy, was recovered by 2017. Since the milk levy was found to be an integral part of the aid measure (see recital 29), Decision (EU) 2015/2432, by declaring the aid incompatible with the internal market, implicitly also declared that the levy had been collected unlawfully.

(33) Bavaria confirmed that the recovery of aid financed via the milk levy, which was finalised in 2017 as an offset against the milk levy, was irrevocable and would not be reversed ([27]).

(34) Therefore, the procedure initiated by the Opening Decision in respect of routine controls of milk quality in Bavaria financed via the milk levy and carried out in the period from 2007 has become without object.

5. **Conclusion**

(35) The Commission recalls that the powers of the Commission according to Articles 107 and 108 TFEU are designed to avoid the granting of incompatible aid. As far as recovery is concerned, the Court has consistently held that the Commission's power to order the Member State to recover aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the situation prior to granting of incompatible State aid ([28]).

(36) In other words, one of the goals of State aid control is to prevent the granting of incompatible State aid. The other goal is to ensure that the situation prior to the distortion of competition caused by incompatible State aid is restored.

(37) In the case at hand, the granting of the aid identified in the Opening Decision no longer exists, having been definitively and unconditionally recovered ([29]).

(38) Under these circumstances, the formal investigation procedure initiated under Article 108(2) TFEU in respect of routine controls of milk quality in Bavaria financed via the milk levy and carried out in the period from 2007 has become without object,

([21]) Cf. section 3.5.2 of the Opening Decision.
([22]) Cf. section 3.3. of the Opening Decision.
([23]) Cf. section 4 of the Opening Decision.
([24]) Cf. section 5 of the Opening Decision.
([25]) Cf. section 3.5.16 of the Opening Decision.
([26]) Cf. section 3.5.16.2 of the Opening Decision.
([27]) The Commission recalls that according to established case law (cf. judgment of the Court of Justice of 5 March 2019, *Eesti Pagar AS* v *Ettevotluse Arendamise Sihtasutus*, C-349/17, ECLI:EU:C:2018:768), under Article 108(3) TFEU, all national authorities are under an obligation to recover ex officio any unlawful aid, even in the absence of a Commission decision.
([28]) Judgement of the Court of Justice of 14 September 1994, *Spain* v *Commission*, Joined Cases C-278/92, C-279/92 and C-280/92, ECLI:EU:C:1994:325, para 75.
([29]) Cf. recitals 32 and 33.

HAS ADOPTED THIS DECISION:

Article 1

The procedure initiated under Article 108(2) TFEU on 17 July 2013 in respect of routine controls of milk quality in Bavaria financed via the milk levy and carried out from 1 January 2007 has become without object and is hereby terminated.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 7 December 2023.

For the Commission
Didier REYNDERS
Member of the Commission