

**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***(notified under document C(2015) 6295)***(Only the German text is authentic)**

THE EUROPEAN COMMISSION,

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

Having called on the interested parties to submit their observations pursuant to the said provision <sup>(1)</sup>,

Whereas:

**1. PROCEDURE**

- (1) By letters dated 28 November 2011 and 27 February 2012, the European Commission (hereinafter: '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 <sup>(2)</sup> (hereinafter 'Regulation (EC) No 659/1999'). 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 *Gesetz über den Verkehr mit Milch, Milcherzeugnissen und Fetten* (hereinafter: 'Milch- und Fettgesetz' [Milk and Fat Law] or '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) the Commission informed Germany that it had decided to initiate with regard to certain sub-measures under the MFG the procedure laid down in Article 108(2) of the TFEU <sup>(3)</sup> (hereinafter: 'initiation Decision'). 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, 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.
- (4) For the support covered by the present Decision 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.
- (5) However, the Commission expressed doubts as to the compatibility of the same milk quality tests with the internal market for the period from 1 January 2007.
- (6) This Decision relates exclusively to the milk quality tests carried out in the period from 1 January 2007.

<sup>(1)</sup> OJ C 7, 10.1.2014, p. 8.

<sup>(2)</sup> 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).

<sup>(3)</sup> With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 87 and 88 of the EC Treaty should be understood as references to Articles 107 and 108 of the TFEU, where appropriate.

- (7) By letter dated 20 September 2013, Germany submitted comments concerning the initiation Decision.
- (8) The initiation Decision was published in the *Official Journal of the European Union* <sup>(4)</sup>. The Commission invited interested parties to submit their comments within one month.
- (9) The Commission received 19 comments from interested parties. One of these parties asked the Commission not to disclose its identity and gave sound reasons for this. A total of 7 of the 19 comments from interested parties, although not the latter, related to the measures concerning milk quality tests at issue here.
- (10) The comments received were transmitted to Germany by letters of 27 February, 3 March and 3 October 2014 without the identity of the above-mentioned interested party being disclosed.
- (11) Germany did not initially respond to the comments submitted by interested parties in February 2014. Germany responded to an additional opinion dated 8 July 2014 by letter dated 3 December 2014.

## 2. DESCRIPTION OF THE MEASURES

- (12) Below is a description of the financial support relating to milk quality tests carried out in Baden-Württemberg and Bavaria, designated in the initiation Decision as sub-measures BW 1 and BY 1, about which the Commission expressed doubts as to their compatibility with the internal market for the period from 1 January 2007.

### **Reasons that prompted the Commission to initiate the procedure provided for in Article 108(2) TFEU**

- (13) The MFG is a Federal law which entered into force in 1952 and has since been amended several times, most recently on 31 October 2006. It constitutes the legal frame of the underlying aid measures at issue, and its validity is unlimited in time.
- (14) As Germany has indicated, the milk quality tests carried out in Bavaria are funded not solely from milk levy resources but also from the *Land* budget.
- (15) Section 22(1) of the MFG authorises the German *Länder* to impose a milk levy on dairies based on the quantities of delivered milk. The levies imposed by the *Länder* amount to up to EUR 0,0015 per kg of milk.
- (16) Germany has outlined that the milk levy imposed in the respective *Länder* is not applicable to imports. By contrast, exports may be subject to the milk levy.
- (17) Section 22(2) of the MFG provides that the revenues obtained from the milk levy may be used solely for:
  - 1. improving and sustaining quality on the basis of certain implementing provisions;
  - 2. improving hygiene during milking and the delivery, processing and distribution of milk and milk products;
  - 3. milk yield recording;
  - 4. advice to operators on matters relating to the dairy industry and ongoing training of young employees;
  - 5. advertising aimed at increasing the consumption of milk and milk products;
  - 6. performance of the tasks conferred by the MFG.

<sup>(4)</sup> See footnote 1. A corrigendum was previously submitted to Germany by letter dated 9 December 2013.

- (18) Section 22(2a) of the MFG provides that, by derogation from paragraph 2, the revenues generated pursuant to paragraph 1 may also be used to:
1. reduce increased structural collection costs in respect of the supply of milk and cream from the producer to the dairy.
  2. reduce increased transport costs in respect of the supply of milk between dairies where such supply is necessary to ensure the supply of drinking milk to the recipient dairy's sales area, and
  3. improve quality regarding the central distribution of milk products.
- (19) Section 22(4) of the MFG provides that contributions and fees paid by dairies or their associations to establishments in the dairy industry for the purposes set out in paragraph 2 may be offset in full or in part by the revenues generated by the milk levy.
- (20) Baden-Württemberg and Bavaria grant financial support in respect of milk quality tests designated in the initiation Decision as sub-measures BW 1 and BY 1. The total funds earmarked (by both *Länder* combined, including general *Land* budget resources in the case of Bavaria) amounted to some EUR 9 million *per annum*.
- (21) Under Section 10 of the MFG, as read in conjunction with Section 1(1) of the *Verordnung über die Güteprüfung und Bezahlung der Anlieferungsmilch* (*Milch-Güteverordnung* [Milk Quality Regulation]; hereinafter 'the MG') of 9 July 1980 <sup>(5)</sup>, buyers of milk are required, for the purposes of quality assessment, to have all delivered milk tested or to test it themselves for:
- fat content,
  - protein content,
  - bacteriological content,
  - somatic cell content and
  - freezing point.
- (22) The tests referred to in Section 1(1) of the MG are mandatory for the milk obtained by dairies in Germany (milk buyers).
- (23) There are no *Länder* other than Baden-Württemberg and Bavaria, including those *Länder* that do not charge a milk levy, that grant financial support for milk quality tests.
- (24) The legal bases listed below regulate the implementation of sub-measures BW 1 and BY 1:
- Section 22(2), point 1, of the MFG;
  - the MG of 9 July 1980;
  - the MG Implementing Regulation of 18 May 2004 <sup>(6)</sup>;
  - the Communication on the approval of Milchprüfing Baden-Württemberg e.V. [Baden-Württemberg Testing Agency], as amended on 21 July 2004 <sup>(7)</sup>;
  - Sections 23 and 44 of the Baden-Württemberg *Land* Budget Order (LHO);
  - Regulation on a levy for milk (BayMilchUmlV) of 17 October 2007 <sup>(8)</sup>;

<sup>(5)</sup> Federal Law Gazette (BGBl.) I p. 878, 1081, as last amended by Article 1 of the Regulation of 17 December 2010 (BGBl. I, p. 2132)

<sup>(6)</sup> Law Gazette (GBl.) No 8, p. 350.

<sup>(7)</sup> State Gazette [Staatsanzeiger] No 30 of 2 August 2004.

<sup>(8)</sup> GVBl 2007, p. 727, as last amended by Regulation of 29 November 2012.

- Regulation on the charging of levies in respect of the dairy industry of 18 May 2004 <sup>(9)</sup>, repealed by the Regulation of the Ministry of Rural Affairs and Consumer Protection of 14 February 2013 repealing the Regulation on the charging of levies in respect of the dairy industry;
  - Sections 23 and 44 of the Bavarian *Land Budget* (BayHO).
- (25) Germany claims that these measures do not constitute aid for the following reasons: The payments are made to compensate the testing agencies for the expenditure they incur in performing public tasks.
- (26) The payments compensate for necessary burdens that the *Milchprüfinge* have to shoulder for performing tasks incumbent to the State. The tests ensure the safety of products with a view to protecting consumers against health hazards and providing the public with high-quality products.
- (27) Particularly important are additional tests on raw milk, which go well beyond what is required by the MGV. This allows the testing agencies to operate an inhibitor monitoring system to identify and, if necessary, penalise the addition of inhibitors to delivered milk in a targeted manner in suspected cases. The Commission notes that financial support paid in respect of these additional tests are covered by a separate Decision.
- (28) After the Commission had registered all of the measures coming under the MFG as non-notified aid by letter of 2 October 2012, Baden-Württemberg and Bavaria agreed to suspend the reimbursement of costs relating to official milk quality tests that had previously been covered by revenues from the milk levy. Instead, the dairy industry will in future reimburse the costs directly to the testing agencies. Given that the bulk of the milk levy resources in Baden-Württemberg (around 80 %) were being spent on the said official tests of delivered milk, Baden-Württemberg had, for reasons of simplification and reduction of red tape, completely abolished the collection of the milk levy as of 1 January 2013. In Bavaria, however, the suspension of the reimbursement of costs has been offset by a reduction in the milk levy rate.

### Germany's comments of 20 September 2013

- (29) On the subject of sub-measures BY 1 and BW 1 at issue here, Germany submitted the following comments that had been coordinated between the two *Länder* concerned.
- (30) It deemed that the cost compensation towards routine controls on milk quality to be also lawful beyond the period 2001-2006. By dint of the fact that *Milchprüfing Bayern e.V. (MPBY)/Milchprüfing Baden-Württemberg e.V. (MPBW)* had carried out the tests, no aid had been granted because there was no favouring of the dairy industry within the meaning of Article 107(1) TFEU. Even if aid had been granted (which Germany refutes), it should have been regarded as existing aid. In any case, Germany argued that the measures BY 1 and BW 1 were compatible with the internal market. It was only for reasons of legal certainty that Bavaria had temporarily suspended levy funding. Likewise, it was only for reasons of legal certainty linked to the specific situation in Baden-Württemberg that levy funding and collection had been completely suspended on 31 December 2012.
- (31) The measures BY 1 and BW 1 did not involve any aid within the meaning of Article 107(1) TFEU because dairies were not favoured by the tests carried out by MPBY and MPBW. In particular, dairies were not spared any costs that they would normally have to bear. It was incorrect to regard costs incurred in maintaining national legal obligations as typical operating costs that the undertakings in question, i.e. dairies, would usually have to bear themselves.
- (32) The costs which an undertaking would 'normally' have to bear derived from the requirements laid down by national law (ancillary test). This gave rise to the question as to the burdens which an undertaking would 'normally' have to assume. With regard to tax schemes, the Court of Justice had acknowledged that no (selective) advantage that is relevant from a State aid point of view exists where different tax arrangements apply in different regions of a Member State. The reference framework for tax schemes did not necessarily need to be defined within the borders of the Member State concerned, so that a measure conferring an advantage in only one part of the national territory was not selective on that ground alone for the purposes of Article 107(1) TFEU <sup>(10)</sup>.

<sup>(9)</sup> GBl. p. 350.

<sup>(10)</sup> Judgment of the Court of 6 September 2006, *Portugal v Commission*, C-88/03, ECLI:EU:C:2006:511, paragraph 56.

- (33) The same must apply when this is applied to paying the costs of milk quality tests. Because powers are allocated on a Federal basis, 'normal taxation' in Germany derived solely from an interplay between Federal and *Land* law. Accordingly, the costs of milk testing did not constitute typical operating costs for dairies.
- (34) Federal law did not lay down that dairies have to bear the costs of quality tests. The matter of who bears the costs was determined by neither the MFG nor the MGV. Section 1(1) of the MGV reads as follows: Buyers of milk shall, for the purposes of quality assessment '[...] have all delivered milk tested or test it themselves in accordance with Section 2(1) to (8).'
- (35) Section 2(8) merely provides that it is *not* the dairies but authorised testing bodies that carry out the tests. 'Analyses may only be carried out by an testing body authorised by a competent authority under *Land* law. The competent authority under *Land* law may allow the tests to be carried out by the buyer itself.'
- (36) Consequently, Federal law (the MFG and the MGV) only stipulated that buyers of milk have a duty to ensure that analyses are carried out. Under Section 10(2) of the MFG, therefore, competence for determining how milk testing is implemented in practice (in particular as regards who bears the costs) lay with the *Länder*.
- (37) It was therefore determined under *Land* law whether the tests were carried out by a testing body or by the buyer itself. The matter of who was obliged to pay the costs (the buyer or testing body) could also be decided by the *Land* in question. As a result, different arrangements existed in Germany on the matter of who was required to meet the costs. In accordance with the above-mentioned case law, these formed the reference framework for resolving the question as to which costs an undertaking should 'normally' bear.
- (38) In Bavaria, therefore, it was MPBY that is entrusted with testing milk. It was the only authorised testing body in Bavaria. It performed public tasks as a neutral testing organisation and was therefore subject to permanent State control. The costs it incurred in this respect were covered in part from the levy charged pursuant to Section 22 of the MFG and in part, as Germany had communicated, from the general budget. Since the *Länder* have the power to regulate who is required to bear the costs for their particular area, certain undertakings were not favoured within the meaning of Article 107(1) TFEU if quality tests were funded within a given *Land* entirely or partly by the milk levy. Federal law was not the correct reference framework for determining the matter of who should bear the costs. It was therefore irrelevant that in *Länder* other than Baden-Württemberg and Bavaria such (partial) funding from the levy did not take place.
- (39) Within Bavaria and Baden-Württemberg all undertakings had to bear the costs equally. There was therefore no (selective) favouring of some undertakings over others.
- (40) A further aspect also demonstrated that there was no favouring of dairies that was relevant from a State aid point of view, i.e. the fact that dairies were not spared costs that they would normally have to bear because they were required in return to pay a higher contribution to the milk levy. The levy was only partially used to fund milk testing. When the level of funding for milk testing from the levy was ended in the light of the Commission's proceedings, the levy rate was also reduced. The remuneration received by dairies in respect of quality tests thus increased in order to offset the lower level of funding from the levy. The Court of Justice had held in this respect that no advantage existed where a contribution corresponds to the actual economic cost of the benefits provided in return <sup>(11)</sup>. Such a link between the benefit and the consideration paid for it did exist in the case of (parafiscal) charges if the charges were collected in relation to a specific purpose. As the Commission had itself established <sup>(12)</sup>, such 'hypothecation' did exist in this case. Since the benefit (contribution to the levy) exceeded the consideration (lower costs of milk tests) in this case, any advantage relevant from a State aid point of view could be ruled out.
- (41) In the alternative, Germany claimed that the sub-measures in question constituted existing aid.
- (42) The basis for funding the tests from the revenues generated by the levy was Section 22(2), point 1, of the MFG. The support granted pursuant to that provision was (at most) existing aid and was therefore subject to grandfathering. The support's status as existing aid was undermined neither by any changes nor by any appropriate measures.

<sup>(11)</sup> Judgment of the Court of 22 May 2003, *Freskot*, C-355/00, ECLI:EU:C:2003:298, paragraph 84.

<sup>(12)</sup> Opening Decision, paragraphs 265 *et seq.*

- (43) Article 1(b)(i) of Regulation (EC) No 659/1999 provided that ‘existing aid’ encompasses aid which ‘existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty’. The MFG was drafted in 1952 and had remained in force largely unamended ever since. The aid scheme had therefore been introduced well before the relevant qualifying date (1 January 1958).
- (44) Under the first sentence of Article 108(3) TFEU, existing aid lost its protection under grandfathering and was liable to be notified if the aid was altered. According to settled case law and decisional practice, aid could only be deemed to have been altered within the meaning of the first sentence of Article 108(3) TFEU if it had been significantly amended.
- (45) An amendment was only relevant if it affected the essential nature of the aid, if the aid was granted on a different legal basis or if it amended the scope of the scheme. The (possibility of applying) the aid scheme had not undergone any significant amendment since 1958. In particular, Section 22(2) of the MFG, which serves as a basis for the measures at issue here, had undergone only minimal changes, and point 1 of that provision, which is relevant to this case, had remained completely intact. Only point 5 of Section 22(2), which is irrelevant to this case, had been amended.
- (46) Amendments to the provisions of the individual *Länder* did not affect the scope or nature of the measures in question. Indeed, the purposes for which revenues from the levy could be used were stipulated by Sections 22(1) of the MFG. To the extent that individual procedural rules had been amended, this would have altered the existing aid within the meaning of the first sentence of Article 108(3) TFEU only if its compatibility with the internal market had been affected. In the case of Bavaria, the relevant Regulation on a levy for milk (BayMilchUmlV) only regulated details, e.g. concerning the collection of the levy, and the same also applied to Baden-Württemberg. The aspects relevant to the aid’s compatibility with the internal market, i.e. the provenance of the funds (the levy pursuant to Section 22(1)) and the purpose for which they were used (Section 22(2)) were, however, already sufficiently set out in the MFG.
- (47) The levy rates applied in both *Länder* had also steadily fallen since 1984. Falling levy rates could not undermine the aid scheme’s compatibility.
- (48) The fact that some of the funds had possibly been granted on the basis of the MFG in individual cases and only temporarily <sup>(13)</sup> (see recital 147 of the Decision) was not an obstacle to their being regarded as existing aid. This support was granted on the basis of the MFG, which was an aid scheme and thus, by its nature, described individual aid purely in abstract terms. Moreover, it was not required that an aid scheme be used on a continuous basis.
- (49) The appropriate measures contained in the Community Guidelines for State Aid in the Agricultural Sector 2000-2006 <sup>(14)</sup> (hereinafter: ‘the 2000-2006 Guidelines’) and in the Community Guidelines for State Aid in the Agricultural and Forestry Sector 2007-2013 <sup>(15)</sup> (hereinafter: ‘the 2007-2013 Guidelines’) were not applicable to the measures relevant in this case, meaning that they continued to constitute existing aid. The appropriate measures would have to relate specifically to the aid in question and determine that it was not compatible with the internal market.
- (50) The 2007-2013 Guidelines did not address the matter of the compatibility of support for milk quality checks, at least not with the necessary detail. In this context, Germany referred to paragraphs 108 and 109 of the 2007-2013 Guidelines.
- (51) The classification of aid in the 2007-2013 Guidelines and in Commission Regulation (EC) No 1857/2006 <sup>(16)</sup> distinguished between ‘aid in the livestock sector’ and ‘aid for the production and marketing of agricultural products’. Paragraph 108 of the 2007-2013 Guidelines was clearly concerned solely with support for livestock holdings since it related to the ‘genetic quality of Community livestock’. Experience had ‘shown that this aid should be maintained only where it really contributes to the maintenance and improvement of the genetic quality

<sup>(13)</sup> See initiation Decision, recital 147.

<sup>(14)</sup> OJ C 28, 1.2.2000, p. 2.

<sup>(15)</sup> OJ C 319, 27.12.2006, p. 1.

<sup>(16)</sup> Commission Regulation (EC) No 1857/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) No 70/2001 (OJ L 358, 16.12.2006, p. 3).

of livestock'. The introduction of innovative animal breeding techniques would be compatible with this, while support for the maintenance of breeding animals would not. Paragraph 109 of the 2007-2013 Guidelines could only be understood as meaning that it should take account of this knowledge concerning the maintenance of the genetic quality of livestock (paragraph 108) as this was the only thing it dealt with.

- (52) Article 16 of Regulation (EC) No 1857/2006, to which paragraph 109 of the 2007-2013 Guidelines referred, was concerned with 'support for the livestock sector' and not with milk quality checks in the sense that was relevant in this case. Article 16(1)(b) of Regulation (EC) No 1857/2006 dealt with milk quality checks linked to the breeding of animals. This was apparent from the context of the provision, which stipulated that the exemption extended to aid (up to a rate of 70 %) to determine the genetic quality or yield of livestock. If routine milk quality checks were excluded from this, then this could also only relate to checks that are generally suited to determining the yield of animals. The exception related solely to routine milk quality checks carried out directly on the dairy cow because only such checks could determine the characteristics of the animal in question. In Bavaria, this quality testing on animals was carried out by the Landeskuratorium der Erzeugerringe für tierische Veredelung in Bayern e.V. (LKV), while in Baden-Württemberg it was carried out by the Landesverband Baden-Württemberg für Leistungsprüfungen in der Tierzucht e.V.
- (53) By contrast, the milk quality testing carried out by the MPBY and the MPBW that is relevant to this case related to determining the characteristics of the milk itself (and not the genetic characteristics of the cow). The characteristics of the milk in question (e.g. fat and protein content) were relevant to the sale and placing on the market of milk. They did not allow inferences to be made concerning individual animals because they were carried out differently. Samples were not separated so as to be able to identify which cow they came from, but were instead taken from milk tankers. This meant that it was no longer possible to separate the milk according to the cow it had come from because milk from a variety of cows had already been mixed together when the sample was taken.
- (54) Consequently, neither paragraph 109 nor any other provision of the 2007-2013 Guidelines excluded the possibility that aid for milk quality checks was compatible with the internal market. The onus was on the Commission to prove that individual measures were incompatible with the internal market. Any ambiguity in the formulation of appropriate measures could not be to the detriment of the Member States <sup>(17)</sup>.
- (55) The acceptance by the Member State required under Article 19(1) of Regulation (EC) No 659/1999 could therefore only be effective if the Member State was aware which measures it was specifically accepting. The *Länder* in question could therefore assume that the disputed measures were compatible with the internal market. If the Commission had intended to find the Bavarian and Baden-Württemberg milk quality tests to be incompatible with the common market, it could have (expressly) addressed this in a form consistent with how it had done this in other decisions. <sup>(18)</sup> The Commission had not, however, broached the question of the compatibility with the internal market of funding the milk quality tests in Bavaria and Baden-Württemberg by means of a levy. In view of the wording of the 2007-2013 Guidelines, which is at the very least unclear, it would have been necessary in accordance with the general principles of legal certainty and sincere cooperation (Article 4(3) TEU) to specifically deal with these measures, particularly given that the *Länder* in question had assumed that sub-measures BY 1 and BW 1 did not involve any aid.
- (56) The 2007-2013 Guidelines should therefore not be understood as meaning that measures implemented pursuant to Section 22(2)(1) of the MFG were incompatible with the internal market. Consequently, the funding of milk quality tests in Bavaria and Baden-Württemberg by means of a levy (BY 1/BW 1) did not fall under the definition of appropriate measures.
- (57) In the alternative, Germany also argued that the measures were compatible with the internal market even if they did constitute aid.
- (58) It did not result from Article 16(1)(b) of Regulation (EC) No 1857/2006 that it was incompatible with the internal market to grant aid for controls of milk quality. Under that provision, these were not 'automatically' compatible with the internal market and thus exempt from the notification requirement. However, the Commission could decide in an individual case that the aid was compatible with the internal market.

<sup>(17)</sup> Judgment of the Court of 2 February 1988, *Commission v The Netherlands*, 213/85, ECLI:EU:C:1988:39, paragraph 29 *et seq.*

<sup>(18)</sup> See, for example, Commission Decision of 27 March 2012 in case E 10/2000 — *Anstaltslast und Gewährträgerhaftung*.

- (59) The alleged aid for Bavarian/Baden-Württemberg dairies was in any case compatible with the internal market in accordance with Article 107(3)(c) TFEU. This view was also supported by the fact that this form of aid was compatible with the internal market under point 13.3 of the 2000-2006 Guidelines, as the Commission had itself acknowledged in its initiation Decision (paragraphs 164 *et seq.*). In particular, it relates to prescribed checks that are carried out by third parties. Compatibility with the internal market is further confirmed by the fact that the dairies themselves met the costs of the quality checks via the milk levy. This minimised any potential advantages that the dairies might enjoy <sup>(19)</sup>. Competition between dairies was not undermined by the different system, irrespective of whether costs were borne directly or a levy was charged. The upshot was that dairies bore the costs in either case. It was not clear how the compatibility with the internal market of aid that had explicitly been included in the 2000-2006 Guidelines should have changed from 2007.

#### Comments from interested parties

- (60) Between 5 and 7 February 2014, the Commission received a total of seven letters from interested parties containing comments concerning the support granted in respect of the milk quality tests.
- (61) In its letter of 5 February, the MPBY argued that dairies had not in recent years been afforded any advantage by dint of levy funding. It was therefore completely incomprehensible how this long-standing and generally accepted system could distort competition or negatively affect trade between the Member States. In the context of the further procedure, therefore, the measures referred to [in the initiation Decision] under the heading BY 1 should, after re-examination, be regarded as settled.
- (62) The MPBW stated in its comments of 6 February that payments relating to sub-measure BW 1 did not meet the conditions for aid pursuant to Article 107(1) TFEU. In particular, the system of carrying out quality tests on delivered milk in Baden-Württemberg was not associated with any cost to the public exchequer. Advantages similar to subsidies that may be traced back to a state measure without there being any corresponding financial loss to the public purse did not, however, fall within the scope of Article 107(1) TFEU <sup>(20)</sup>.
- (63) Under Section 22(3) of the MFG, the funds raised had to be managed separately. They were not allowed to be used to cover the administrative costs of the highest *Land* authorities and their subordinate departments. They had to be shown in the Baden-Württemberg *Land* budget under a separate sub-heading, and the budget expressly referred to the fact that they were earmarked for a specific purpose. The revenues from the milk levy were therefore never used for purposes not falling within the scope of the MFG.
- (64) Above all, however, in the context of the tasks assigned to it, the MPBW received payments from levy resources which did not exceed the resources funded from the levy. This meant that no State funds — from taxes or other state revenues, for example — were paid to the MPBW but only the revenues accruing from the levy paid by dairies. Instead, Baden-Württemberg had merely taken on the task of organising and distributing the milk levy. The system of quality tests on delivered milk in Baden-Württemberg did not therefore lead to any financial loss to the public purse.
- (65) Since Baden-Württemberg had not granted any subsidies in addition to the milk levy and there was not any corresponding financial net cost to the *Land* budget, it could not have granted any aid 'in the form of subsidised services'.
- (66) Even if the milk levy in Baden-Württemberg were attributable to the State contrary to the criteria set out by the Court of Justice in *PreussenElektra*, there was not any advantage to dairies. The aspect of 'favouring' as the central element of Article 107(1) TFEU has been widely interpreted by reference to established case law and the Commission's practice <sup>(21)</sup>.

<sup>(19)</sup> 2000-2006 Community Framework, point 13.4.

<sup>(20)</sup> Judgment of the Court of 13 March 2001, *PreussenElektra*, C-379/98, ECLI:EU:C:2001:160.

<sup>(21)</sup> Judgment of the Court of 15 December 2005, *Italy v Commission*, C-66/02, ECLI:EU:C:2005:768, paragraph 77; established case law, see the Judgment of 23 February 1961, *Limburg v High Authority*, 30/59, ECLI:EU:C:1961:2. Judgment of 7 March 2002, *Italy v Commission*, C-310/99, ECLI:EU:C:2005:768; paragraph 51; Judgment of 10 January 2006, *Cassa di Risparmio*, C-222/04, EU:C:2006:8, paragraph 131.



- (67) Parafiscal charges often formed the basis for systems involving the provision of services that are in the specific interest of those liable to pay them (aspect of group benefit). In such systems, those paying the levy were *prima facie* identical to those who benefited from the service funded by the parafiscal levy. In the case of parafiscal levies, case law therefore dictated that it must be examined whether the service received corresponds in value to the contribution (levy) paid, i.e. that there is equivalence in terms of the payment and the benefit received.
- (68) Such equivalence should not be examined individually but in relation to the overall system. While it is true that parafiscal systems of funding services typically involve a certain element of redistribution, i.e. not all of those liable to pay draw the same benefit from each of the individual services on offer, the aspects of balance and equivalence in such systems were nevertheless not undermined if such redistribution occurred on the basis of solidarity <sup>(22)</sup>.
- (69) The level of the levy in Baden-Württemberg was determined according to the specific quantity of delivered milk. Dairy A that delivered twice as much milk for quality testing by MPBW would have to pay exactly twice the levy. This meant that the notion of equivalence in terms of the payment and the benefit received was not undermined.
- (70) The competent authorities in Baden-Württemberg had no discretion whatsoever in calculating the milk levy. This system also ensured that there could not be any structural net beneficiaries because all dairies were liable to the levy solely on the basis of the quantity of milk delivered and would receive services from MPBW solely on that basis.
- (71) The MPBW therefore assumed that no aid was being granted, or at least no advantage.
- (72) In its comments of 5 February 2014, Landesvereinigung der Bayerischen Milchwirtschaft e.V. claimed that the system of charging a milk levy was highly appreciated among consumers, that it was not seen outside Bavaria as an advantage that distorted competition, and that it was not challenged by dairies either in Germany or abroad. It was therefore incomprehensible that it was no longer permissible to test milk quality from 2007 onwards. This had served in both the past and the present to guarantee consumers high quality milk that was free from inhibitor residues <sup>(23)</sup>.
- (73) In its comments of 7 February 2014, the DHB — Netzwerk Haushalt considered the services provided by muva Kempten in the area of the tests carried out to detect nutritionally relevant constituents to make a vital contribution to the protection of and information available to consumers. The fact that the results of analyses were neutral and not influenced by dairies or the trade, the rapid detection of any harmful contaminants in milk and dairy products and, consequently, the ability to react quickly in a crisis situation were all elements that the DHB — Netzwerk Haushalt appreciated. These measures helped ensure that high-quality food was available to the trade and thus to consumers. The importance of these tests to all consumers could not be overestimated.
- (74) In its comments of 6 February 2014, the Nahrung-Genuss-Gaststätten Region Allgäu trade union indicated that Landesvereinigung der Bayerischen Milchwirtschaft e.V. had always been seen as a consumer-protection association. By deciding on how the resources from the levy were to be used, in particular as regards milk quality tests, it could exert significant influence to be exerted on how these tests were carried out.
- (75) According to the opinion of the Genossenschaftsverband Bayern e.V., as set out in its comments of 5 February 2014, neither individual farms nor individual milk-processing undertakings could derive any kind of competitive advantage from the charging of the levy. When routine milk quality checks had been partially funded from levy resources in the past, milk-processing undertakings had paid contributions towards the levy and therefore bore the full cost of this co-funding. In other German *Länder* in which no levy was charged, dairies did not pay any levies, but testing bodies neither received any levy resources.

<sup>(22)</sup> See to that effect the Judgment in *Freskot*, C-355/00, ECLI:EU:C:2003:298, paragraph 86, the Opinion of Advocate General Stix-Hackl in *Freskot*, C-355/00, ECLI:EU:C:2002:658, paragraphs 76-77, and the Opinion of Advocate General Stix-Hackl in *Nazairdis*, Joined Cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04, ECLI:EU:C:2005:480, paragraph 51.

<sup>(23)</sup> Comment by the Commission: This comment also relates to the 'contaminant monitoring' sub-measures (sub-measures BW 9, BY 5, HE 8, NI 2, NW 1, RP 3, SL 4 and TH 8 in the opening Decision), which are not dealt with in this Decision.

- (76) In its letter of 7 February 2014, the Landesvereinigung der Milchwirtschaft Niedersachsen e. V. (LVN) did not comment directly on the payments granted for the milk quality tests, but it did fundamentally deny the existence of any aid for any of the sub-measures under the MFG.
- (77) On the individual issues, the LVN put forward its views that the measures funded by milk levy resources did not involve any loss to the *Land* budget, that the State did not have any power of disposal or control over the milk levy resources, and that the State did not exercise any control over either the amount of the levy or the content of the measures. Consequently, the payments in question could not be attributed to the State. Moreover, the State neither controlled the level of payments nor was it involved organisationally in the LVN.
- (78) It also stated that the LVN was not overseen by state bodies but rather by the Hannover Chamber of Agriculture, a public self-regulating body which therefore did not come directly under the public administration.
- (79) In supplementary comments submitted on 8 July 2014, the LVN referred, inter alia, to the Commission Decision 2014/416/EU <sup>(24)</sup> in the case Val'Hor. In that Decision the Commission had acknowledged that neither the State's power to recognise an interbranch organisation nor its regulatory support in the collection of sector-related 'contributions' (through the possibility, in the case in question, of extending agreements) led to the conclusion that the measures implemented by the interbranch organisation were attributable to the State. Whether State involvement in para-fiscal systems of funding led to advantages being attributable to the State as 'State aid' depended on the circumstances in the individual case and on an overall assessment to be made on that basis. The aspects that were relevant to an examination as to whether State aid existed, as developed by case law, were as follows:
- Who decided about the collection and use of the funds?
  - If this was a private organisation, how did the State influence this decision?
  - From what resources were the payments funded?
  - What type of measures were funded?
  - From whom were the resources collected?
  - Who was responsible for initiating the measure?
- (80) Via its legal representatives, the LVN had examined the legal situation in other German *Länder* and had come to the conclusion that the indicators for the existence of State aid developed by case law were not met, which meant that the MFG could not overall be regarded as comprising an aid element.
- (81) According to the LVN, it was the *Land* associations that decided to collect the levy from dairies. Under the first sentence of Section 22(1) of the MFG, the levy could only be collected in consultation with the *Land* associations. Under the second sentence of Section 22(1) of the MFG, any increase in the levy had to be requested by the *Land* association.
- (82) The detailed arrangements and amount of the levy were regulated in Lower Saxony and Thuringia by a Levy Collection Regulation [*Umlageerhebungsverordnung* (UmlErhVO)] which had been issued 'in consultation' with the relevant *Land* association.
- (83) The *Land* association in question also determined how the revenues from the levy, which had to be administered separately (see the first sentence of Section 22(3) of the MFG), were to be used. For this reason, they were in some cases even paid into an account belonging to the *Land* association (see, for example, Section 3(1) of the Thuringia Levy Collection Regulation). The *Land* associations thus drew up proposals under their own responsibility in the area as to how the revenues should be used. In Thuringia, for example, this occurred on the basis of applications submitted to the local *Land* association, the Landesvereinigung Thüringer Milch (LVTM), by its members (see point 6.3 of the Thuringia Working Guidelines [*Thüringer Arbeitsrichtlinie*]).

<sup>(24)</sup> Commission Decision 2014/416/EU of 9 April 2014 on State aid scheme SA.23257 (12/C) (ex NN 8/10, ex CP 157/07) implemented by France (interbranch agreement concluded under the auspices of the French Association for developing the horticultural and landscaping sectors and their products — 'Val'Hor') (OJ L 192, 1.7.2014, p. 59).

- (84) Although the proposals on the use of the resources drawn up by the *Land* associations were ‘enacted’ (for Lower Saxony, see point 6.2 of the Payment Guidelines [*Zuwendungsrichtlinie*], and for Thuringia, see Section 4 of the Thuringia Levy Collection Order) or ‘approved’ (as in North Rhine-Westphalia and Bavaria) by a State body, this did not mean that the State exercised any significant influence since the only basis for State ‘overseeing’ was what was laid down by Section 22(2) of the MFG. Consequently, the provisions in question conferred upon State bodies no more power to direct or influence the administration of the funds than in *Doux Elevage* <sup>(25)</sup>.
- (85) Moreover, the revenues from the levy were indeed used in all *Länder* in accordance with the proposals put forward by the *Land* associations. That in itself was evidence enough — irrespective of the specific legal arrangements that were applicable — that the revenues in question were not imputable to the State <sup>(26)</sup>.
- (86) According to the LVN, each of the *Land* associations had the status of a public body. Their statutes made it clear that they considered themselves to represent the interests of their members, who were recruited solely from the dairy industry (including consumer representatives).
- (87) In Section 14 of the MFG, *Land* associations were described as ‘voluntary’ organisations made up of businesses and consumers involved in the dairy industry whose purpose it was to ensure the joint representation of their member’s economic interests.
- (88) The *Land* associations differed from the *Hoofdbedrijfschap Ambachte*, the opticians’ trade association entrusted with collecting and allocating a compulsory levy for advertising measures, which was at issue in the case *Pearle*. Although this trade association had the status of a public body, the Court of Justice found that State aid did not exist because the advertising measures were not funded by resources made available to State bodies but rather by levies collected from undertakings operating in the sector <sup>(27)</sup>.
- (89) The *Land* associations, as the bodies competent for collecting and allocating the milk levy, also differed from the agricultural committees in the case *Plans de Campagne*, which were not involved in defining the measures in question and did not have any discretion in their application <sup>(28)</sup>.
- (90) The *Land* associations were non-State and entirely private bodies that determined the amount and allocation of the milk levy as such on their own responsibility.
- (91) Moreover, the benefit enjoyed by the dairy industry was not a drain on the public exchequer because the milk levy was collected from operators belonging to the dairy industry, i.e. the selective ‘advantage’ was offset by a selective burden. This in itself was enough to rule out any preferential treatment or distortion of competition because the ‘advantages’ enjoyed by dairies and milk producers were offset by having to pay the levy.
- (92) In the case *Vent de Colère*, the Court of Justice had found a system of charges to constitute State aid because — following a change to the law — the burden was no longer offset solely by charges paid by members of the economic sector in question (energy) but by charges paid by all end consumers of electricity resident in the national territory <sup>(29)</sup>.
- (93) The LVN also considered State aid not to exist in the event that it related to ‘collective operations’ implemented in the interests of a specific sector and funded on the basis of contributions collected from members of that sector.
- (94) The contested measures were intended solely to promote milk as a product and thus the collective interest of the dairy industry. The measures in question also partially protected consumer interests because the two purposes could not be separated from each other owing to the overlapping of interests that existed.

<sup>(25)</sup> Judgment of the Court of 30 May 2013, *Doux Elevage*, C-667/2011, ECLI:EU:C:2013:348, paragraph 38.

<sup>(26)</sup> Judgment of the Court of 18 May 2002, *Stardust Marine*, C-482/99, ECLI:EU:C:2002:294, paragraph 52.

<sup>(27)</sup> Judgment of the Court of 15 July 2004, *Pearle BV*, C-345/02, ECLI:EU:C:2004:448, paragraph 36.

<sup>(28)</sup> Judgment of Court of 27 September 2012, *Plans de Campagne*, T-139/09, ECLI:EU:T:2012:496, paragraph 62.

<sup>(29)</sup> Judgment of the Court of 19 December 2013, *Vent de Colère and Others*, C-262/12, ECLI:EU:C:2013:851, paragraph 11; as clearly confirmed by the Opinion of Advocate-General Jääskinen of 11 July 2013, *Vent de Colère and Others*, C-262/12, ECLI:EU:C:2013:851, paragraph 49.

- (95) The role of the State was limited to making a statutory compensation mechanism available to the dairy sector via the MFG that — by its nature — guaranteed that the members of the dairy industry that benefited from the measures implemented in favour of milk were the ones who contributed to the costs. As in the cases *Pearle*, *Doux Elevages* and *Val'Hor*, the State thus functioned solely as a facilitator enabling the compensation mechanism that had been brought into being by the private sector to be made mandatory and thus ensuring a fair sharing of burdens <sup>(30)</sup>.
- (96) The levy had been initiated by the *Land* associations and thus by the private sector. The levy was thus collected pursuant to Section 22 of the MFG solely in 'consultation' with the *Land* associations. The *Land* associations were themselves not a product of State action either but rather 'voluntary' organisations made up of members of the dairy industry (Section 14 of the MFG). The situation in Thuringia, where the *Land* association was not recognised until 1999, was clearly documented in this respect. At the request of the Thuringian Farmers' Association, the competent Ministry 'initiated the necessary formal administrative steps' to collect the levy from dairies and milk collection centres. This made it blatantly clear that the milk levy was a purely private compensation mechanism, with the State acting solely as a facilitator in order to make payment of the levy mandatory <sup>(31)</sup>.
- (97) In summing up, the LVN stressed what it considered to be the similarities and differences between various legal cases on the one hand and the MFG on the other.
- (98) In the case *Val'Hor* (Decision 2014/416/EU) (result: no aid), as in the case of the milk levy, the funds were collected and allocated essentially by a state-recognised private and voluntary interbranch organisation, the contributions paid by operators within the branch were used to fund collective operations for the benefit of the branch, the possibility provided for by law of state recognition of the private interbranch organisation did not in itself lead to the assumption of public control, the State could not in fact use the funds to support certain businesses, and the interbranch organisation decided itself on how the funds were to be used.
- (99) In the case *Vent de Colère* (C-262/12) (result: aid), unlike with the milk levy, the amount of the charge in question was fixed unilaterally by ministerial decree without the involvement of private parties, there was a state guarantee, the funds were managed by a public body and a state penalty mechanisms were put in place.
- (100) In the case *Doux Elevage* (C-677/11) (result: no aid), as in the case of the milk levy, the funds were collected and allocated essentially by a state-recognised private and voluntary interbranch organisation, the possibility provided for by law of state recognition of the private interbranch organisation did not in itself lead to the assumption of public control, the funds came entirely from contributions collected from economic operators, the State could not in fact use the funds to support certain businesses, and the interbranch organisation decided itself on how the funds were to be used.
- (101) In the case *Plans de Campagne* (T-139/09) (result: aid), unlike with the milk levy, an authority decided on the level of contributions, the income from contributions was topped up by State resources, measures were defined by the State (stamp of the State financial controller, etc.) without involvement on the part of branch committees, the latter had no discretion in applying the measures, and a representative of the Minister took part in committee meetings.
- (102) In the case *Pearle* (C-345/02) (result: no aid), as in the case of the milk levy, funds were used solely for the purposes of the branch in question, an association of a specific branch had asked a public body to collect contributions in order to implement certain measures for the benefit of that branch, and, unlike with the milk levy, a public and not a private professional association played an important role in collecting and allocating the compulsory levy, with the result that *Pearle* seemed to be more problematic than the milk levy.

<sup>(30)</sup> Judgment of the Court of 15 July 2004, *Pearle BV*, C-345/02, ECLI:EU:C:2004:448, paragraph 37. Judgment of the Court of 30 May 2013, *Doux Elevage*, C-667/2011, ECLI:EU:C:2013:348, paragraph 40. Decision 2014/416/EU.

<sup>(31)</sup> See Judgment of 15 July 2004, *Pearle BV*, C-345/02, EU:C:2004:448, paragraph 37; Judgment of 30 May 2013, *Doux Elevage*, C-667/2011, ECLI:EU:C:2013:348, paragraph 40.

**Germany's submission of 3 December 2014**

- (103) Germany did not initially respond to the comments submitted by interested parties in February 2014. Germany responded to an additional opinion of the LVN dated 8 July 2014 by letter dated 3 December 2014, as follows:
- (104) In their comments in the formal investigation procedure concerning the milk levy provided for in the MFG, the German *Länder* in question had focused on two aspects: the consistency of the measures implemented with the material requirements of the State aid rules (in particular as regards their compatibility with the requirements of the Agriculture Exemption Regulation and the current agricultural guidelines), and the question whether there was any 'favouring' relevant to the State aid rules within the meaning of Article 107(1) TFEU.
- (105) The LVN's comments of 8 July 2014 and the current decisional practice of the European Courts and the European Commission gave rise to the need for additional comments of a fundamental nature concerning whether State aid within the meaning of Article 107(1) TFEU indeed existed, and in particular whether the constituent element of aid being granted 'through State resources' applied.
- (106) The LVN's comments of 8 July 2014 and an examination of the above-mentioned Judgments at least gave rise to doubts as to whether the element of aid being granted 'through State resources' applied in this case and whether, therefore, the collection and allocation of the milk levy constituted State aid. The reasons for this were as follows:
- (107) As had emerged from the cases *Val'Hor* (Decision 2014/416/EU) and *Doux Élevage* (C-677/11), measures funded and implemented by private interbranch organisations did not constitute State aid. The *Land* associations for milk that existed in the individual *Länder* were organisations that could be regarded as comparable to the organisations referred to in *Val'Hor* and *Doux Élevage*. State bodies had never been members of these *Land* associations. They took part in meetings without any voting rights and thus essentially as external guests. The involvement of state bodies in implementing the milk levy or monitoring compliance with the legal conditions set out in the MFG did not alter the fact that the *Land* associations were the competent body for selecting projects.
- (108) In actual fact, it was the respective *Land* associations that managed revenues from the levy and determined how they should be allocated. No State influence as a result of the 'monitoring' or 'adoption' of the *Land* association's proposals by State bodies existed in reality since the latter merely operated as provided for in Section 22(2) of the MFG and sought to examine whether the statutory requirements of Section 22 of the MFG were being met. The levy resources were used in accordance with the proposals which the *Land* associations themselves made concerning their allocation, a fact which, in accordance with the Judgment of the Court of Justice of 16 May 2002 in the case *Stardust Marine* (C-482/99), clearly indicated that they were not State resources.
- (109) The *Land* associations were purely private organisations. This fact, together with the observation that the *Land* associations managed the milk levy and how it was used, was a clear indication that the milk levy should, in line with the above-mentioned case law, not be classified as State aid.
- (110) The existence of State aid was further disproved by the fact that the milk levy resources were purely private resources. They were resources derived from the assets of the private undertakings that were required to pay the levy. In the case of the milk levy, there was no State funding or guarantee, in contrast to the situation in Cases C-262/12 (*Vent de Colère*) and T-139/09 (*Plans de Campagne*), in which it was found that State aid existed for this very reason.
- (111) Moreover, the milk levy was a collective, industry-wide measure which, in accordance with the current legal situation as established in cases *Val'Hor* (Decision 2014/416/EU) and *Doux Élevage* (C-677/11), militated against the existence of State aid.
- (112) It was also doubtful whether any advantage was conferred by the scheme, something that it would have to do if it were to be assumed to constitute aid. This was because the advantages enjoyed by dairies and milk producers were fully cancelled out or 'neutralised' by the levies paid by dairies and thus indirectly by milk producers. This was also confirmed by the Judgment of the Court of Justice of 19 December 2013 in the case *Vent de Colère*, in which it was also deemed that State aid existed because the costs were no longer met solely by operators in the branch but by all domestic electricity consumers.

- (113) It followed from these points, some of which had emerged from a re-examination of the milk levy scheme and from the fact that the German *Länder* in question were maintaining their current position, that doubts existed as to whether the milk levy system did constitute State aid. This question, and in particular whether the 'State resources' element existed, had to be answered by the European Commission.

### 3. ASSESSMENT

#### Existence of aid

- (114) Article 107(1) TFEU lays down that any aid granted by a Member State or through State resources in any form which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and affects trade between Member States is incompatible with the internal market.

#### Aid granted by the State or through State resources

- (115) It must be examined on the basis of the available information and, in particular, the comments submitted by the interested parties and by the German authorities whether the milk levy resources constitute State aid within the meaning of Article 107(1) TFEU.
- (116) According to settled case-law, it is not appropriate to distinguish between cases in which aid is granted directly by the State and those in which it is granted by a public or private body designated or established by that State <sup>(32)</sup>. However, for advantages to be capable of being categorised as State aid within the meaning of Article 107(1) TFEU, they must, first, be granted directly or indirectly through State resources and, second, be imputable to the State <sup>(33)</sup>.
- (117) With regard to the measures described above in Section 2 of the present Decision, it is apparent that support is granted on the basis of legal provisions of the German *Länder*, for which in turn the MFG constitutes the legal framework.
- (118) Specifically, the first sentence of Section 22(1) of the MFG provides that the *Land* Governments, acting in consultation with the *Land* association or professional organisations, may collect levies of up to 0,1 cent per kilogram of delivered milk jointly from dairies, milk collection centres and creameries. Under the second sentence of Section 22(1) of the MFG, *Land* Governments may, if requested to do so by the *Land* association or professional organisations, collect joint levies of up to 0,2 cents per kilogram of delivered milk if the levies provided for under the first sentence are not sufficient for the performance of tasks.
- (119) The *Land* Governments collect the milk levy in consultation with the *Land* association in question. However, 'consultation' represents a significantly weaker form of participation than 'agreement'. While 'agreement' means that another body (e.g. a legislative body or authority) must necessarily give its consent before a legal act is (lawfully) adopted, a decision that is to be adopted in 'consultation' with another body does not, by contrast, necessarily depend on that other body's consent. This distinction between different forms of participation is made in some areas of German administrative law <sup>(34)</sup>: Because the first sentence of Section 22(1) of the MFG provides

<sup>(32)</sup> Judgment of the Court of 20 November 2003, *Ministère de l'Économie, des Finances et de l'Industrie v GEMO*, C-126/01, ECLI:EU:C:2003:622, paragraph 23.

<sup>(33)</sup> Judgment of the Court of 20 November 2003, *Ministère de l'Économie, des Finances et de l'Industrie v GEMO*, C-126/01, ECLI:EU:C:2003:622, paragraph 24.

<sup>(34)</sup> See, for example, the third sentence of Section 37(2) of the German Building Code (BauGB). Sections 17(1), (2), 18 (3), (4) and 22(5) BNatSchG, Sections 2(7), 11(2), (3), 12(7), 14(4), second point, 26(3), 35a(3) AEG. See in relation to the former Section 9 BNatSchG the judgment of the Federal Administrative Court of 29.4.1993, Az: 7 A 4/93, point 22 ('a decision in "consultation" requires by contrast to a decision in "agreement" no concurrence of will'. It means no more than the (advisory) hearing of the other authority, which then has the opportunity to make its view known to the proceeding. Regarding the former Section 18, second paragraph, first sentence, point 2 of the AEG, see the judgments of the Federal Administrative Court of 31 October 2000, Az: 11 VR 12/00, point 5 ('The consultation with the applicant, as provided for in Section 18, second paragraph, first sentence, point 2 AEGDas in § 18 Abs. 2 Satz 1 Nr. 2 AEG, requires by contrast to agreement no concurrence of will ...') and of 7 February 2005, Az: 9 VR 15/04, point 11 ('The required consultation with the applicant has been complied with by the plan authorisation authority by providing the applicant with the opportunity to submit its view').

for the form of participation of ‘consultation’, the power to collect the levy and the decision to do so lies with the *Land* Governments <sup>(35)</sup>. By contrast, the *Landesvereinigungen* are only called upon for preparation and technical implementation of the measures to be taken pursuant to Section 22, and are in that respect subjected to the supervision of the *oberste Landesbehörde* (second and fourth paragraph of Section 14 MFG).

- (120) The legal basis for *collecting* a milk levy in the individual German *Länder* is provided by corresponding *Land* regulations on the detailed arrangements for collecting the levy, including the amount of the levy <sup>(36)</sup>. It is therefore the State (represented by the respective *Land* Government) that regulates the levy's collection. As explained in the previous recital 119, this is not altered by the fact that the regulations in question are issued in consultation with the respective *Land* association representing the dairy industry.
- (121) In the case in hand, a levy is collected from private undertakings. Revenues from this levy accrue to the respective *Land* budget before they are used to fund the various support measures and, under the first sentence of Section 22(3) of the MFG, must be managed separately within it. Under Section 23 of the respective budgetary ordinances (see recital 25), expenditure and commitment appropriations for payments to bodies outside the *Land* administration to meet specific purposes (subsidies) may only be made available if the *Land* has a significant interest in the bodies in question fulfilling a given purposes that cannot be satisfied, or not to the necessary extent, without subsidies. This requirement implies the State interest in the measures being implemented.
- (122) In response to the arguments presented by the interested parties and by Germany, the Commission finds as follows:
- (123) The assertion by MPBW that the milk levy scheme is not associated with any cost to the public exchequer in Baden-Württemberg (recitals 60 to 63) is first contradicted by the fact that revenues from the milk levy are entered under a specific sub-heading in the budget (recital 61). It is generally the case that even if resources used for a subsidy are derived from a (specific) charge (levy) paid by private parties, it must be assumed that there is a cost to the public exchequer and that State resources are thus being used if those resources first accrue to the budget. In this respect, there is a significant difference compared with the *PreussenElektra* Case cited by MPBW, which was concerned with a system of minimum prices, where financial means never entered the State budget or the State in other form exerted control over them (and even in form of a conferral to third parties). Consequently, the use of State resources was ruled out in that case <sup>(37)</sup>.
- (124) Moreover, it cannot be concluded from the mere circumstance that MPBW did not receive any payments from tax or other State revenues to carry out the milk quality tests that the payments in question did not constitute State resources. According to the Commission's decisional practice in this area, measures funded solely from parafiscal resources are considered to constitute aid within the meaning of the first sentence of Article 107(1) TFEU <sup>(38)</sup>.
- (125) With regard to the LVN's assertion that it is the *Land* associations that actually decide to collect the levy from dairies (recitals 82 to 86 and 91), the Commission considers that it is the Federal Government that, on the basis of Section 22(1) of the MFG, has empowered the *Land* Governments to collect a milk levy. That provision stipulates, inter alia, that the milk levy may normally amount to 0,1 cents per kilogram and that the *Land* Government may increase the levy to 0,2 cents per kilogram *if requested* to do so by the *Land* association or jointly by the professional organisations.

<sup>(35)</sup> See also the sixth sentence of Section 22, paragraph 1 MFG with reference to the ‘powers’ of the *Land* governments (and the possibility to delegate tasks to the *obersten Landesbehörden*) and the second paragraph of Section 23 MFG, according to which levies shall be recovered pursuant to the provisions of the *Abgabenordnung*, which in turn requires issuing a tax act or similar administrative act (cf. Sections 122 and 251 AO). According to the third paragraph of Section 14 MFG no tasks incumbent on the State must be conferred to the respective *Landesvereinigung*.

<sup>(36)</sup> For Baden-Württemberg: Regulation on the charging of levies in respect of the dairy industry of 18 May 2004 (GBl. p. 350), replaced by the Regulation of the Ministry of Rural Affairs and Consumer Protection of 14 February 2013 repealing the Regulation on the charging of levies in respect of the dairy industry.  
For Bavaria: Regulation on a levy for milk (BayMilchUmlV) of 17 October 2007 (GVBl 2007, p. 727), as last amended by Regulation of 29 November 2012.

<sup>(37)</sup> See Judgment of the Court of 13 March 2001, *PreussenElektra*, C-379/99, ECLI:EU:C:2001:160, paragraphs 7 and 8; Judgment of the Court of 16 July 2014, *Greece v Commission*, T-52/12, ECLI:EU:T:2014:67,7, paragraphs 119 and 120. for the purposes of distinguishing from *PreussenElektra*, see judgment of the Court of 11 December 2014, *Austria v Commission*, T-251/11, ECLI:EU:T:2014:1060, paragraphs 56-71 and 82.

<sup>(38)</sup> See, inter alia, Decision SA.35932 (2013/N) Netherlands — Cultivation matters fund, recitals 31 to 35.

- (126) In addition, Section 22(2), points 1-6, of the MFG stipulates the purposes for which milk levy resources may be used.
- (127) Under the third sentence of Section 22(3) of the MFG, the *Land* association or professional associations must merely be consulted before the resources are used.
- (128) This indicates that, although the State (at Federal level) grants the *Land* associations certain rights of participation, it has nevertheless established a clear legal framework in that the respective *Land* governments (or in case of delegation the *oberste Landesbehörden*) decide on the rates that must be applied in respect of the milk levy and how the resources are to be used. It would not, for example, be possible for the rate of the levy to be increased to more than 0,2 cents per kilogram if the *Land* associations were to request this or that the resources were used for purposes other than those set out in Section 22(2), points 1-6, of the MFG. Moreover, the duty of consultation in respect of usage of the resources (third sentence of Section 22, paragraph 3 of the MFG) does not in any way require the views of those consulted to be followed. The final decision as to how the resources are to be used lies with the respective *Land* authorities, i.e. with the State.
- (129) This distinguishes this case significantly from the *Doux Elevage* Case cited by the LVN. Collection of the milk levy and the allocation of the corresponding resources is regulated by the State at two levels, i.e. Federal and *Land*. In Germany, the legislator has not only granted the *Land* Governments the power to collect the levy but has also restricted the margin available to dispose at *Land* level of the resources generated from levies by Federal law. The *Land* associations are not able to seek to amend the objectives that may be promoted as set out in Section 22(2), points 1-6, of the MFG, for example by submitting a request to that end. A State restriction of this nature did not form part of the facts on which the *Val'Hor* und *Doux Elevage* Cases were based.
- (130) Moreover, the MFG cannot be understood merely as a means of enforcing purely economic interests of an interbranch organisation. Section 14 of the MFG stipulates, for example, that, if they wish to participate, professional organisations acting for agriculture, dairies and the dairy trade must be represented within it, while an appropriate representation of consumers must also be ensured in the bodies of the association. With these requirements concerning participation and representation, the legislator (and hence the State) ensures that when pursuing the objectives of public nature as referred to in the MFG all interests are represented in the widest possible manner, thus going well beyond the mere promotion of an economic sector.
- (131) Contrary to the case *Doux Elevage*, the promotion objectives set out in the MFG are not objectives that the interbranch organisations have themselves laid down and introduced <sup>(39)</sup>. Objectives 1 ('improving and sustaining quality on the basis of provisions issued under Section 10 of this Act or Section 37 of the *Milchgesetz* [Milk Act] of 31 July 1930 (Reich Law Gazette I, p. 421)' and 2 ('improving hygiene during milking and the delivery, processing and distribution of milk and milk products') set out in Section 22(2) of the MFG in particular display characteristics that — contrary to the case *Doux Elevage* <sup>(40)</sup> — form part of a policy determined by State authorities and refer to tasks incumbent to the State, which according to the third paragraph of Section 14 MFG must *a priori* not be conferred to the *Land* associations.
- (132) Also in contrast to the situation in *Doux Elevage*, the *Land* associations do not have to follow the normal civil or commercial judicial process in order to collect milk levies in the event of non-payment <sup>(41)</sup>. This is because Section 23(2) of the MFG stipulates that levies are recoverable in accordance with the *Abgabenordnung* (General Tax Code) and its implementing provisions. In their respective milk levy collection regulations, the *Länder* in question likewise provided for recovery in accordance with the *Abgabenordnung* and its implementing provisions <sup>(42)</sup>. Under the German legal system, the *Abgabenordnung* is considered to form part of public law. In Germany, public debts are enforced through administrative channels, while under civil law they are enforced through the courts. Administrative channels are as compared to Court procedures the more effective method of enforcement, because the public authorities can obtain an executory title for themselves by issuing an administrative act <sup>(43)</sup>, which in case of civil law debts must be contended through the Court <sup>(44)</sup>. This indicates that the State is interested in the effective and complete collecting (and, where appropriate, recovering) outstanding levy payments to the maximum possible extent, including in order to guarantee that the State objectives funded by levy resources are timely realised.

<sup>(39)</sup> Judgment of the Court of 30 May 2013, *Doux Elevage SNC et Coopérative agricole GBP-ARREE v Ministère de l'Agriculture*, C-677/11, ECLI:EU:C:2013:348, paragraph 40.

<sup>(40)</sup> Judgment of the Court of 30 May 2013, *Doux Elevage SNC et Coopérative agricole GBP-ARREE v Ministère de l'Agriculture*, C-677/11, ECLI:EU:C:2013:348, paragraph 31.

<sup>(41)</sup> Judgment of the Court of 30 May 2013, *Doux Elevage SNC et Coopérative agricole GBP-ARREE v Ministère de l'Agriculture*, C-677/11, ECLI:EU:C:2013:348, paragraph 32.

<sup>(42)</sup> See, for example, Section 6(3) of the Regulation on a levy for milk (BayMilchUmlV) of 17 October 2007.

<sup>(43)</sup> See, for example, Section 5 of the Regulation on a levy for milk (BayMilchUmlV) of 17 October 2007.

<sup>(44)</sup> See Judgment of the Court of 11 September 2014, *Commission/Germany*, C-527/12, ECLI:EU:C:2014:2193, paragraphs 41 and 56.



- (133) Thus, the above arguments disprove the LVN's assertion that the milk levy resources are not State resources within the meaning of Article 107(1) TFEU.
- (134) Consequently, the revenues from the levy in question should be regarded as being under State control <sup>(45)</sup> and the measures funded by them were granted through State resources and are attributable to the State.
- (135) This is even truer with regard to the general budget resources used in Bavaria to finance the milk quality tests at issue. These resources constitute likewise State resources within the meaning of Article 107(1) TFEU.

### **Selective advantage/Undertakings**

- (136) The recipients of payments of State resources are initially MPBW and MPBY. They conduct laboratory tests on the State's behalf. However, these tests are ultimately of benefit to dairies because it is they who are required by law to test the milk delivered to them. The laboratory tests are thus services which MPBW and MPBY provide for the dairies. The dairies may therefore be regarded as beneficiaries of aid granted in the form of benefits in kind. It is beyond doubt that the dairies are undertakings within the meaning of Article 107(1) TFEU. Any possible advantage is granted to 'certain undertakings', because there are many other economic sectors other than the dairy sector that do not benefit from the measures in question. The possible advantage being conferred is thus selective.
- (137) Under Section 1(1) of the MGv, the dairies, as commercial buyers of milk, are required to have all delivered milk tested or to test it themselves. As when they test it themselves, in which case the costs necessarily have to be borne by the dairies, the costs arising when milk is submitted to a testing body for testing is to be regarded as typical operating costs which are normally borne by the undertakings in question, i.e. the dairies, as the parties required to perform the analyses under the national scheme. The Commission therefore assumes that the dairies in Baden-Württemberg are granted an advantage from milk levy resources and in Bavaria from milk levy and general budgetary resources as a result of being refunded the costs of laboratory tests from levy resources, an advantage which, as explained in recital 136, has a selective impact.
- (138) In this context, it should also be examined whether the laboratory tests carried out are related to economic activities.
- (139) Germany claims that by carrying out milk quality tests the milk testing agencies are performing tasks that are incumbent on the State, (see above recital 26). The milk quality tests are in fact performed on the basis of rules of public law, i.e. the MGv. The requirement to carry out tests laid down in Section 1(1) of the MGv pursues a public purpose (ensuring milk quality) and can be publicly enforced by means of penalties under administrative law. However, it cannot be concluded from this that the funding of milk quality tests by means of the levy is not related to economic activities pursued by undertakings <sup>(46)</sup>. Rather at issue is one of numerous regulatory requirements (e.g.: product safety, environment standards, etc.) that economic operators (here: the dairies) have to comply with when pursuing their economic activities. In addition, the milk quality tests do not constitute any activity which forms part of the essential tasks of the State within the meaning of paragraph 16 of the Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest <sup>(47)</sup>.
- (140) Section 1(1) of the MGv is the basis of a requirement for the dairies to carry out tests. This requirement is coupled with an obligation to assume the costs of carrying out tests, i.e. the costs of laboratory tests incurred by the milk testing agencies (see recital 137 above). This clearly results from the fact that the performance of tests is a pre-requisite for dairies being allowed to sell the milk that has been tested. Undertakings have to bear themselves the costs incurred to market their products as typical operating costs. Accordingly, in *Länder* other than Baden-Württemberg and Bavaria, in which the MGv is equally applicable, the dairies in question are not refunded these costs from milk levy resources, i.e. they are not spared them and consequently have to meet them.

<sup>(45)</sup> Judgment of the Court of 30 May 2013, *Doux Élevage SNC et Coopérative agricole GBP-ARREE v Ministère de l'Agriculture*, C-677/11, ECLI:EU:C:2013:348, paragraphs, 32, 35 and 38.

<sup>(46)</sup> See Judgment of the Court of 25 March 2015, *Belgium/Commission*, T-538/11, point 96, ECLI:EU:T:2015:188, according to which the fact that undertakings are burdened with charges under national law that inevitably relates to the exercising of public power by the Member State, does not rule out any qualification of these charges as 'charges that normally have to be borne by the undertaking'.

<sup>(47)</sup> OJ C 8, 11.1.2012, p. 4.

The sale of milk by dairies is undoubtedly an economic activity. By having the costs of the analyses refunded from levy resources, the dairies in Baden-Württemberg and Bavaria are thus exempted from costs that they would normally have to meet themselves in exercising economic activities.

- (141) With regard to Germany's claim that Federal law is not the reference framework for determining the matter of who should bear the dairies' costs and therefore cannot be the basis for any selectivity (recitals 31 to 38), it is found that the requirement to carry out tests that gives rise to the obligation to meet the costs thereof is ultimately regulated by Federal law, i.e. in Section 1(1) of the MGV.
- (142) As stated above, Section 1(1) of the MGV requires dairies to carry out tests on the milk delivered to them (see also recitals 139 and 142). The same MGV, in Section 6, grants certain powers to the *Länder*, in particular as regards sampling under Section 2 of the MGV. These powers should not, however, stand in the way of the MGV (Section 6 of the MGV).
- (143) In the same context, on the matter of the demarcation of powers between the Federal and *Land* authorities, Germany referred to Section 10(2) of the MFG (recital 37). This provision states that the *Land* Governments may issue rules provided that the Federal Ministry has not itself issued rules. As indicated above, the competent Federal Ministry has in fact done so by means of the MGV. Although the *Land* Governments are authorised to collect levies under the first sentence of Section 22(1) of the MFG, at the same time the MFG limits the autonomy of the *Länder* by setting limits on the amount of the levy and the measures that may be supported under Sections 22(2), points 1-6, of the MFG.
- (144) As regards the case *Portugal v Commission* <sup>(48)</sup> cited by Germany in this context (recitals 31 to 38), the Commission notes that it concerned a system of differentiated taxation, from which the present case differs significantly. If the findings in *Portugal v Commission* were nevertheless applied to the facts of this case, as Germany is seeking to do, the reference framework referred to in paragraph 64 of that case would be the obligation to meet the costs of the tests laid down by Section 1(1) of the MGV. The reference framework is thus regulated at Federal level, i.e. by 'central government' in the terms used in the case *Portugal v Commission*. A refund of the costs in question from levy resources thus leads, by a process of *a contrario* reasoning with regard to paragraph 64, to the conclusion that a selective advantage does exist.
- (145) The Commission further takes the view that the existence of a selective advantage cannot be refuted by claiming that the dairies have already paid the value of the tests carried out by means of the milk levy. Indeed, the Commission rejects the claim made by Germany and the MPBW that the levy corresponds to the actual economic cost of the services provided in return (recital 39). As is apparent from Chapter 2.6. of the Decision, a variety of different sub-measures are funded by the milk levy. It is in the nature of the sub-measures that the benefit which each individual undertaking derives from specific sub-measures is not necessarily equivalent to the levy amounts previously paid. Additionally in the case of Bavaria, the measures at issue are not only financed from milk levy resources but also from additional resources stemming from the general budget for which reason a 'compensation' is ruled out.
- (146) The Commission thus finds that the dairies in Baden-Württemberg and Bavaria obtain a selective advantage as a result of being refunded the costs of milk quality tests from levy resources.

### Distortion of competition and effect on trade

- (147) According to the case law of the Court of Justice, strengthening the competitive position of an undertaking through the granting of State aid generally distorts competition with other competing undertakings not having benefited from this aid. <sup>(49)</sup> Aid for an undertaking that operates in a market where there is intra-Union trade is liable to affect trade between Member States <sup>(50)</sup>, even if the undertaking receiving it does not itself participate at

<sup>(48)</sup> See Judgment of the Court of 6 September 2006, *Portugal/Commission*, C-88/03, ECLI:EU:C:2006:511.

<sup>(49)</sup> Judgment of the Court of 6 September 2006, *Philip Morris Holland BV v Commission*, 730/79, ECLI:EU:C:1980:209, paragraphs 11 – 12.

<sup>(50)</sup> See, in particular, the Judgment of the Court of 13 July 1988 *French Republic v Commission*, 102/87, ECLI:EU:C:1988:391.

all in intra-Community trade <sup>(51)</sup>. There was substantial intra-Union trade in agricultural products in the period 2001-2012. For example, intra-Community imports to and exports from Germany of products falling within heading 0401 of the Combined Nomenclature (milk and cream, not concentrated nor containing added sugar or other sweetening matter) <sup>(52)</sup> were worth EUR 1,2 billion and EUR 957 million respectively in 2011 <sup>(53)</sup>.

- (148) The measures being assessed in this Decision are designed to support activities in the agricultural sector, in particular the activities of dairies. As described above, trade in the products of dairies does exist within the Union. The Commission therefore takes the view that the measures at issue affect trade between the Member States.
- (149) In view of the substantial level of trade in agricultural products, it can therefore be assumed that the sub-measures in question distorted or threatened to distort competition and affected trade between Member States.

### Existing aid/new aid

- (150) According to Article 108(1) TFEU, the Commission must, in cooperation with Member States, keep under constant review all existing systems of aid. To that end, the Commission can obtain from Member States all information necessary for the review of existing aid schemes and, if necessary, issue a recommendation on appropriate measures.
- (151) Article 1(b)(i) Regulation (EC) No 659/1999 defines existing aid as all aid which existed prior to the entry into force of the Treaty in the respective Member State and is still applicable after the entry into force of the Treaty.
- (152) However, according to Article 1(c) Regulation (EC) No 659/1999, any alteration to existing aid makes it 'new aid'. Article 4 of Commission Regulation (EC) No 794/2004 <sup>(54)</sup> defines an alteration to existing aid as 'any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the common market'.
- (153) According to case law <sup>(55)</sup>, only where the alteration affects the actual substance of the original scheme is the latter transformed into a new aid scheme. There can be no question of such a substantive alteration where the new element is clearly severable from the initial scheme.
- (154) According to Article 108(3) TFEU, all new aid has to be notified to the Commission and it cannot be put into effect before it has been approved by the European Commission (standstill obligation).
- (155) According to Article 1(f) of Regulation (EC) No 659/1999, new aid put into effect in contravention of Article 108(3) TFEU is unlawful.
- (156) On the basis of the MFG and in the context of the powers conferred on them, the competent Federal Ministry and the German *Länder* (see recital 24 above) have adopted implementing measures which constitute the legal bases for the measures being assessed in this Decision. With the exception of the MFG itself (which is only a framework law and an enabling act for *Land* schemes, but which provides for no right to financial support), the German authorities have not presented any information demonstrating that a legal basis issued before 1958 was still applicable in its original version during the period of investigation. The applicable regulations under which

<sup>(51)</sup> Judgment of the Court of 14 January 2015, *Eventech Ltd v Parking Adjudicator*, C-518/13, ECLI:EU:C:2015:9, paragraph 67.

<sup>(52)</sup> Commission Implementing Regulation (EU) No 927/2012 of 9 October 2012 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ L 304, 31.10.2012, p. 1).

<sup>(53)</sup> Source: Eurostat.

<sup>(54)</sup> Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

<sup>(55)</sup> Judgment of the Court of 30 April 2002, *Gibraltar v Commission*, T-195/01 and T-207/01, ECLI:EU:T:2002:111, paragraph 111.

the levy is collected date from 2004 (Baden-Württemberg) and 2007 (Bavaria) respectively (see recital 24). The legal bases for the use of resources are the Budget Orders of the *Länder*, which, as far as the expenditure purpose is concerned, solely need to comply with the frame of Section 22(2) of the MFG. Bases on this, the *Land* authorities authorise in each respective budgetary year the expenditure of resources per expenditure act. The measures in question therefore constitute new aid that should have been notified pursuant to Article 108(3) TFEU. Because Germany has not at any time notified the aid scheme at issue, it is unlawful (Article 1(f) of Regulation (EC) No 659/1999).

- (157) There is consequently no need to discuss Germany's assertion that sub-measures BW 1 and BY 1 do not fall under the definition of appropriate measures (recitals 49 to 56) because that assertion is based on the assumption that the sub-measures constitute existing aid, which, as explained above, is not the case.

### Compatibility assessment of the milk quality tests

- (158) Aid granted between 28 November 2001 and 31 December 2006 for the purpose of refunding the costs of milk quality tests was examined by the Commission on the basis of the Community guidelines for State aid in the agricultural sector (2000-2006) and approved as being compatible with the internal market in the context of the Decision of 17 July 2013 (C(2013) 4457 final) (recitals 162 to 165 of the positive Decision).

### Applicable rules

- (159) Under Article 107(3)(c) TFEU, aid to facilitate the development of certain economic activities or of certain economic areas may be considered compatible with the internal market, where such aid does not adversely affect trading conditions to an extent contrary to the Union interest.
- (160) According to the Commission notice on the determination of the rules applicable to the assessment of unlawful aid <sup>(56)</sup>, any unlawful aid within the meaning of Article 1(f) of Regulation (EC) No 659/1999 is to be appraised in accordance with the rules applicable at the time the aid was granted.
- (161) Aid granted since 1 January 2007 will be assessed in the light of the 2007-2013 Guidelines.
- (162) In the initiation Decision, the Commission expressed doubts as to whether aid granted in connection with milk quality tests since 1 January 2007 can be regarded as compatible with the internal market (recitals 166 and 167 of the Decision).
- (163) As already indicated in the initiation Decision, the Commission considers that aid towards routine controls of milk does not meet the conditions of paragraph 109 of the 2007-2013 Guidelines, as read in conjunction with Article 16(1) of Regulation (EC) No 1857/2006. Indeed, the latter provision expressly stipulates that aid involving the refund of the costs of such routine controls cannot be compatible with the internal market.
- (164) Contrary to the view expressed by Germany in its comments (recital 53), the Commission takes the view that the costs of 'routine controls of milk quality' referred to in Article 16(1)(b) of Regulation (EC) No 1857/2006 also cover the costs of carrying out the milk quality tests at issue here. Although 16(1)(b) specifically states that aid for the 'costs of tests performed by or on behalf of third parties, to determine the genetic quality or yield of livestock' is compatible with the internal market,
- (165) The explicit negative exclusion in Article 16(1)(b) of Regulation (EC) No 1857/2006 in relation to support towards routine controls of milk quality has in the view of the Commission to be understood in a broader manner, because this provision stresses the legislator's intention to exclude such support from the compatibility with the internal market.

<sup>(56)</sup> OJ C 119, 22.5.2002, p. 22.

- (166) Controls of milk quality relate to the quality of milk as such, i.e. to the microbiological characteristics of the milk. However, these characteristics are not directly related to the genetic quality or yield of livestock. The microbiological characteristics specifically include those that are established by means of the milk quality tests (e.g. fat or somatic cell content).
- (167) The exclusion provided for in Article 16(1)(b) is essentially aimed at excluding all routine controls of milk quality from compatibility with the internal market because the costs incurred in their respect form part of the operating costs of an undertaking. Aid involving the refund of operating costs has a particularly distorting effect on the internal market <sup>(57)</sup>.
- (168) In this respect, the Commission recalls the general prohibition of granting aid laid down in Article 107(1) TFEU. Exceptions from this general ban are provided for in Article 107(2) and (3) TFEU, applied in conjunction with compatibility rules in the form of regulations, guidelines, etc. For the period 2007-2013, no such compatibility provision existed for the routine controls of milk (independent from a certain quality and not for the purpose of improving the quality). These provisions typically stipulate express compatibility with the internal market for a given set of circumstances. However, here for the period 2007-2013. Instead, Article 16(1)(b) of Regulation (EC) No 1857/2006 stresses the legislator's intention to rule out expressly the compatibility with the internal market. Already Section 13.3 of the Guidelines 2000-2006 stipulated that the range of controls undertaken routinely during the production process had increased substantially, and the cost of such controls had become a normal part of production costs, and that because of the direct impact of the costs of quality control on production costs, such aids present a real risk of a distortion of competition. Albeit according to the same provision, aid could be granted in respect of controls undertaken by or on behalf of third parties, such as the competent regulatory authorities, or bodies acting on their behalf. Under the Guidelines 2007-2013, the legislator has, taking into account the risk of competition distortion, declared aid towards routine controls of milk quality as incompatible with the internal market. In the light of this clear legislative decision, there is no scope for any declaration of compatibility based on Article 107(3)(c) of the TFEU.
- (169) The fact that the Commission has regarded the milk quality performed during the period 2001-2006 as compatible with the internal market cannot, as Germany claims (recital 60), automatically lead to the aid in question continuing to be compatible with the internal market in the subsequent period of 2007-2013. It is apparent from Article 108(1) TFEU that the internal market is progressively developing and that the Commission by further developing State aid guidelines and other State aid rules (e.g. block exemption Regulations) may take account of this development to guarantee the functioning of the internal market. It is in the nature of compatibility provisions that are limited in time, as is the case with the Guidelines issued in the area of agriculture, that a subsequent State aid guidelines respectively Block exemption regulations do not necessarily maintain the provisions of the previous rules.
- (170) In the light of the above, the Commission concludes that the aid granted in the period 2007-2013 in connection with milk quality tests, funded in the case of sub-measure BW 1 entirely from milk levy resources and in the case of sub-measure BY 1 from the milk levy and general budgetary resources, is incompatible with the internal market.

#### 4. CONCLUSION

- (171) Article 15(1) Regulation (EC) No 659/1999 lays down that the powers of the Commission to recover aid are subject to a limitation period of 10 years. According to Article 15(2) of Regulation (EC) No 659/1999, 'any action taken by the Commission with regard to unlawful aid interrupts this limitation period.'

<sup>(57)</sup> See in that respect also recital 17 of Regulation (EC) No 1857/2006, according to which aid 'should not have the sole effect of continuously or periodically reducing the operating costs which the beneficiary would normally have to bear'.

- (172) Further to Germany's submission of the 2010 Annual Report on State aid in the agricultural sector, the Commission asked Germany by letter of 28 November 2011 to provide additional information on the scheme. This action by the Commission interrupted the limitation period. Since the Commission already through the positive Decision assessed that the milk quality controls at issue were compatible with the internal market during the period from 28 November 2001 to 31 December 2006 and since between 31 December and 28 November 2011 less than 10 years lapsed, the period to which the present Decision applies starts on 1 January 2007.
- (173) The Commission finds that Germany granted aid unlawfully in breach of Articles 107 and 108 TFEU which, insofar as it was granted on or after 1 January 2007 (see recitals 160 and 164), is not compatible with the internal market. This aid was granted in the case of Baden-Württemberg solely from milk levy resources pursuant to the MFG and in the case of Bavaria from milk levy and general budgetary resources.

HAS ADOPTED THIS DECISION:

#### *Article 1*

The State aid which the Federal Republic of Germany has granted unlawfully in breach of Article 108(3) TFEU in respect of the milk quality tests carried out by the Länder Baden-Württemberg and Bavaria in favour of dairy sector undertakings in these Länder is during the period starting 1 January 2007 incompatible with the internal market.

#### *Article 2*

1. The Federal Republic of Germany recovers from the beneficiaries the aid that was granted in relation to the aid scheme referred to in Article 1 and that is incompatible with the internal market.
2. The sum to be recovered shall bear interest throughout the period running from the date on which it was put at the disposal of the beneficiaries until its actual recovery.
3. The interest shall be calculated in conformity with the provisions laid down in Chapter V of Regulation (EC) No 794/2004 and Commission Regulation (EC) No 271/2008 <sup>(58)</sup> amending Regulation (EC) No 794/2004 on a compound basis.
4. Germany shall cancel all outstanding payments of the aid referred to in Article 1 with effect from the date of adoption of this decision.

#### *Article 3*

1. Recovery of the aid granted on the basis of the scheme referred to in Article 1 shall be immediate and effective.
2. Germany shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

#### *Article 4*

1. Within two months following notification of this Decision, Germany shall submit the following information:
  - (a) a list of the beneficiaries that received aid in accordance with the scheme referred to in Article 1 and the total amount of aid that each of them received in accordance with that scheme;

<sup>(58)</sup> Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 82, 25.3.2008, p. 1).

- (b) the total amount (principal and recovery interests) to be recovered from each beneficiary;
- (c) a detailed description of the measures already taken and planned to comply with this Decision;
- (d) documents demonstrating that the beneficiaries have been ordered to repay the aid.

2. Germany shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid granted in accordance with the scheme referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.

#### *Article 5*

This Decision is addressed to the Federal Republic of Germany. Germany is requested to provide the beneficiaries with a copy of this Decision without any delay.

Done at Brussels, 18 September 2015.

*For the Commission*  
Phil HOGAN  
*Member of the Commission*

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