STATE AIDS (AGRICULTURE): THE AGRANA CASE

Subject: State aids
Time-limits
Procedure

Industry: Agricultural products
Implications for all industries

Parties: Agrana Zucker & Staerke AG
Commission of the European Communities

Source: Judgment of the Court of First Instance, dated 7 June 2001, in Case T-187/99 (Agrana Zucker und Stärke-GmbH v Commission of the European Communities)

(This was an action for annulment of a Commission Decision on State aid. The short point of general interest concerned the time-limit for investigation by the Commission, with particular reference to the "Lorenz" rule. Under this rule, the Commission is required to act with reasonable dispatch: if it has not done so within two months, and if due notice is sent to the Commission, the aid may go ahead. In the present case, the Austrian Government planned to grant aid to Agrana Stärke-GmbH to build and convert starch production facilities. However, the second condition under the Lorenz rule, that due notice must be given to the Commission, had not been met. The excerpt from the judgment, in the report below, is confined to the Court's discussion of the rule.)

The applicant's plea

30. The applicant observes that, according to settled case-law, the Commission is required to act promptly during the first stage of the procedure relating to State aids and to take into account the interest of Member States to be informed quickly whether the planned measures can be implemented (see Case 120/73 *Lorenz*. If it fails to adopt a position within a period of two months ('the Lorenz time-limit) the Commission is not acting as promptly as it is required to do. Once that time-limit has expired the Member State concerned can implement the plan. The applicant argues that the Commission did not observe the time-limit in this case.

31. It points out that it was only by a letter of 18 August 1997, delivered to the Republic of Austria's Permanent Representation to the European Communities on 19 August 1997, that is to say, two months and three days after the final information was supplied, that the examination procedure provided for in Article 88(2) EC was initiated. The Lorenz time-limit was therefore not observed. Consequently, the prohibition on implementing the aid plan, contained in Article 88(3) EC, no longer applied and the provision in the contested decision to the effect that the aid plan cannot therefore be implemented was incorrect. The contested decision should therefore be declared void.

32. The applicant agrees that the Austrian Government was informed by fax of 30 July 1997 that the Commission had decided to initiate the procedure under Article 88(2) EC, that is to say, within the two-month time-limit. However, the applicant contends that that communication did not constitute a decision suspending the Lorenz time-limit. The Commission's decision to initiate the procedure concerned should have taken the form of a decision under Article 249 EC, which should therefore have stated the reasons on which it was based. However, according to the applicant, the fax concerned did not contain any reasons and so it did not enable the Austrian Government to assess the scope of the decision and to submit its observations.

33. The applicant also acknowledges that the Republic of Austria did not give any notice that the two-month time-limit had expired, as provided for in *Lorenz*. However, in the applicant's submission, since notice is only required in order to ensure that the aid plan is implemented in the manner described in the notification, failure to give notice does not preclude the aid from being regarded as existing aid.

34. Lastly it states that it follows from the preceding considerations that the Commission was entitled to consider the contested aid only in accordance with the provisions relating to existing aid.

35. The Commission challenges the contention that it failed to observe the Lorenz time-limit in this case. It argues, in particular, that the applicant is wrong to state that the procedure under Article 88(2) EC must be initiated by a reasoned decision under Article 249 EC. The Commission observed the time-limit by communicating to the Austrian Government its decision to initiate the procedure by fax of 30 July 1997. In any event, since no notice was given when the two-month time-limit had expired, an essential condition for the application of the *Lorenz* case-law was missing and so the aid in question did not in any case constitute existing aid for the purposes of Article 88(1) EC.

Findings of the Court

36. The first point to be noted is that Article 88 EC provides for a procedure for prior examination of new aid which Member States intend to introduce, in the absence of which the aid is regarded as having been introduced unlawfully. Under the first sentence of Article 88(3) EC, as interpreted by the case-law of the Court of Justice, the Commission must be informed of any plans to grant or alter aid before they are put into effect. The Commission is then to carry out an initial examination of the proposed aid. If there are serious doubts following such examination as to whether a plan is compatible with the common market, the Commission must without delay initiate the procedure provided for in the first subparagraph of Article 88(2) EC.

37. It is clear, moreover, from the last sentence of Article 88(3) EC that the Member State concerned must not put the planned aid into effect at any time during the preliminary period. Where the examination procedure provided for in

Article 88(2) EC is initiated, the prohibition continues until the Commission reaches a decision on the compatibility of the aid plan with the common market. However, according to settled case-law, if the Commission has not responded within two months of full notification the Member State concerned may put the proposed aid into effect provided that it has given prior notice to the Commission, and that aid will then come under the scheme for existing aid (see *Lorenz*, paragraph 6, Case C-312/90, *Spain* v *Commission*, paragraph 18; Case C-39/94, *SFEI and Others*, paragraph 38; and Case C-367/95 P, *Commission* v *Sytraval and Brink's France*, paragraph 37).

38. In this particular case, it should be pointed out that the applicant does not dispute that the Republic of Austria was informed, within the two-month time-limit, in afax sent by the Commission on 30 July 1997, of the Commission's decision to initiate the *inter partes* procedure provided for in Article 88(2) EC. Since the Commission duly 'responded within the appropriate time-limit, that fax was sufficient to stop the Lorenz time-limit from running.

39. In any event, it is undisputed in this case that the Republic of Austria failed to give the Commission notice of its intention to put the planned aid into effect. Contrary to what the applicant contends, the function of such notice is not merely to ensure that the aid plan is implemented in the manner described in the notification; it is designed to meet the requirements of legal certainty (see *Lorenz*, paragraph 4). Compliance with that obligation is designed to establish, in the interest of the parties concerned and of the national courts, the date from which the aid falls under the scheme for existing aid. Since that obligation has not been met the aid concerned cannot be regarded as existing aid.

40. It follows from the foregoing considerations that the plea must be rejected. ■

The TGI Case

The Commission has declared State aid, which had not been notified, to be incompatible with the common market in a case in which €2,045,000 had been paid to Technische Glaswerke Ilmenau GmbH (TGI), of Thüringen, Germany. The German Government must recover the unlawful payment. TGI was founded in 1994 for the purpose of taking over four of the twelve production lines of the former Ilmenauer Glaswerke GmbH, a company liquidated in 1994. The purchase price amounted to €2,991,000. In December 1998 Germany informed the Commission of the waiver of €2,045,000 of the original purchase price in the context of a restructuring of the company. The Commission had doubts about the viability of the company and the proportionality of the aid. Germany took the position that the waiver was in line with the behaviour of a private creditor seeking to maximise the payment of the purchase price, as insistance on the payment of the full price would probably have driven the company into bankruptcy. The Commission disagreed. The conditions set out in the Community guidelines on rescuing and restructuring firms in difficulties had not been fulfilled. (Source: Commission Statement IP/01/786, dated 6 June, 2001.)