JUDGMENT OF THE COURT OF FIRST INSTANCE (Sixth Chamber)

18 November 2009 *

In Case T-375/04,

Scheucher-Fleisch GmbH, established in Ungerdorf (Austria),

Tauernfleisch Vertriebs GmbH, established in Flattach (Austria),

Wech-Kärntner Truthahnverarbeitung GmbH, established in Glanegg (Austria),

Wech-Geflügel GmbH, established in Sankt Andrä (Austria),

Johann Zsifkovics, established in Vienna (Austria),

represented by J. Hofer and T. Humer, lawyers,

applicants,

* Language of the case: German.

Commission of the European Communities, represented by V. Kreuschitz and A. Stobiecka-Kuik, acting as Agents,

defendant,

APPLICATION for annulment of Commission Decision C(2004) 2037 final of 30 June 2004 on State aid NN 34A/2000 concerning the quality programmes and labels AMA-Biozeichen and AMA-Gütesiegel in Austria,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Sixth Chamber),

composed of A.W.H. Meij, President, V. Vadapalas (Rapporteur) and L. Truchot, Judges,

Registrar: T. Weiler, Administrator,

having regard to the written procedure and further to the hearing on 12 February 2009,

gives the following

Judgment

Facts

1 Scheucher-Fleisch GmbH, Tauernfleisch Vertriebs GmbH, Wech-Kärntner Truthahnverarbeitung GmbH, Wech-Geflügel GmbH and Johann Zsifkovics, the applicants, and Grandits GmbH, are five limited liability companies incorporated under Austrian law and a sole trader all specialising in the slaughter and butchering of animals.

2 In 1992, the Republic of Austria adopted the Bundesgesetz über die Errichtung der Marktordnungsstelle 'Agrarmarkt Austria' (Federal Law on the establishment of the market-regulating agency 'Agrarmarkt Austria') (BGBl. 376/1992; 'the AMA-Gesetz 1992'), Paragraph 2(1) of which created a public-law corporation, Agrarmarkt Austria ('AMA'). Its operational activities are the responsibility of Agrarmarkt Austria Marketing GmbH ('AMA Marketing'), a wholly-owned subsidiary of AMA. The AMA-Gesetz 1992 has been amended on several occasions.

3 Under Paragraph 3(1)(3) of the AMA-Gesetz 1992, AMA's function is the promotion of agricultural marketing. To that end, it is responsible for the collection of contributions which must, in particular, under Paragraph 21c(1)(3) of the AMA-Gesetz 1992 in the version thereof produced by the applicants and Grandits, be paid for the slaughter of cattle, calves, pigs, lambs, sheep and poultry.

4 The aid in question consists in encouraging the production, treatment, processing and sale of agricultural products in Austria by means of the AMA bio-label and AMA quality label (the AMA labels).

5 In their capacity as undertakings specialising in the slaughter and butchering of animals, the applicants and Grandits are subject to the payment of contributions to AMA under Paragraph 21c(1)(3) of the AMA-Gesetz 1992, without their products being entitled to the AMA labels.

6 With about 20 other slaughtering undertakings, the applicants and Grandits appealed to the Austrian authorities against the imposition in their regard of contributions to AMA. The Federal Minister for Agriculture and Forests, the Environment and Water did not uphold their appeals. In proceedings brought by the applicants and Grandits, the Verwaltungsgerichtshof (Administrative Court), by judgments of 20 March and 21 May 2003, annulled the Federal Minister's decisions for procedural irregularities.

7 Also, the applicants and Grandits complained to the Commission of the European Communities on 21 September 1999, claiming that they had been damaged by certain provisions of the AMA-Gesetz 1992.

8 By letter of 15 February 2000, the Commission sent the applicants' and Grandits' complaint to the Austrian authorities and requested them to submit their comments. Following the Austrian authorities' response on 20 March 2000, the Commission informed them, on 19 June 2000, that the measures in question had been provisionally registered as non-notified aid under reference NN 34/2000.

9 Following a request from the Austrian authorities dated 8 March 2003, the Commission decided to examine the measures in question separately depending on whether

they were earlier or later than 26 September 2002, on the ground that significant changes had been made on that date to the detailed rules for applying the AMA-Gesetz 1992. The registration number NN 34A/2000 was given to the examination concerning the provisions applicable after 26 September 2002.

10 By Decision of 30 June 2004 on State aid NN 34A/2000 concerning the quality programmes and labels AMA-Biozeichen and AMA-Gütesiegel in Austria, the Commission decided not to raise any objections to the measures 'notified' ('the contested decision'). In that regard, it decided that those measures were compatible with the common market within the meaning of Article 87(3)(c) EC, in that they complied with the conditions imposed by Points 13 and 14 of the Community Guidelines for State aid in the agricultural sector (OJ 2000 C 28, p. 2) and by the Community Guidelines for State aid for advertising of products listed in Annex I to the EC Treaty and of certain non-Annex I products (OJ 2001 C 252, p. 5; 'the Guidelines for State aid for advertising').

11 According to recital 67 in the preamble to the contested decision, all the measures implemented by AMA and AMA Marketing before 26 September 2002 were expressly excluded from the examination.

12 On 16 July 2004, AMA informed the applicants and Grandits of the contested decision.

Procedure and forms of order sought by the parties

13 The applicants and Grandits brought the present action by application lodged at the Registry of the Court of First Instance on 17 September 2004.

14 On 10 November 2004, the case was assigned to the Fourth Chamber of the Court of First Instance.

15 By document lodged at the Court Registry on 9 December 2004, the Commission raised an objection of inadmissibility pursuant to Article 114(1) of the Rules of Procedure of the Court of First Instance. The applicants and Grandits lodged their observations on that objection on 25 January 2005. By order of the Court (Fourth Chamber) of 15 September 2006, the objection was joined to the substance and the costs were reserved.

16 After a change in the composition of the Chambers of the Court, the Judge-Rapporteur was attached to the Sixth Chamber, to which the present case was consequently assigned.

17 As a member of the Chamber was unable to sit, the President of the Court of First Instance designated another Judge to complete the Chamber pursuant to Article 32(3) of the Rules of Procedure.

18 Upon hearing the report of the Judge-Rapporteur, the Court (Sixth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure under Article 64 of the Rules of Procedure, requested the parties, Grandits and the Federal Government of the Republic of Austria, to reply to certain written questions. Those requests were complied with within the period allowed.

19 By letter lodged at the Court Registry on 23 January 2009, Grandits informed the Court, in accordance with Article 99 of the Rules of Procedure, that it was discontinuing its action. By order of 4 February 2009 of the President of the Sixth Chamber of the Court, Grandits' name was removed from the Court's register and each of the parties was ordered to pay its own costs.

20 The parties presented oral argument and replied to the questions put by the Court at the hearing on 12 February 2009.

21 The applicants claim that the Court of First Instance should:

— annul the contested decision;

— order the Commission to pay the costs.

22 The Commission contends that the Court of First Instance should:

— dismiss the action as inadmissible, or in the alternative, as unfounded;

— order the applicants to pay the costs.

Law

Admissibility

Arguments of the parties

23 First, the Commission contends that the applicants are not individually concerned by the contested decision. For them it is a 'general rule', which concerns them solely because of their objective status as being subject to payment of contributions, in the same way as any other undertaking actually or potentially in an identical situation.

24 The Commission denies, next, the averment that four retail chains are the sole beneficiaries of the measures in question. It submits that, in fact, the AMA labels are intended to encourage the sale of high quality agricultural products and therefore benefit all agricultural undertakings and foodstuff producers.

25 In addition, the applicants, specialists in the slaughter and butchering of animals, are not in competition with the retailers whom they portray, in their application, as the direct beneficiaries of the aid in question. Moreover, the applicants do not explain why they are distinguished individually by the fact that the four retail chains awarded the quality label are known by name. Nor do the applicants state the reasons why they are not entitled to the AMA labels or why they cannot supply those four retail chains.

26 In its rejoinder, the Commission adds that the applicants have not shown that certain slaughterhouses and cutting plants benefited from the aid in question and are active

on the same geographical market. Moreover, while the applicants do pay contributions, they also benefit, in the Commission's submission, from promotional activities organised in connection with the AMA labels. In fact, as they argue themselves, those promotional activities consist in advising consumers to purchase products of Austrian origin. Therefore the applicants suffer no damage.

27 Secondly, the applicants are not directly concerned by the aid in question, as they acknowledge in the application. In that regard, the implementation measures examined in the contested decision are general and abstract. However, being distinguished individually occurs only as a result of individual legal measures, namely administrative decisions. Moreover, the contested decision does not require the Republic of Austria to impose contributions on slaughterhouses or cutting plants.

28 Thirdly, it follows from the procedural guarantees laid down by Article 88(2) EC that the Commission is required to give formal notice to interested parties to submit their comments. However, in this case, by lodging a complaint, the applicants have already stated their views and thus exhausted their right to make comments.

29 The applicants maintain that they are parties concerned for the purposes of Article 88(2) EC. Consequently, they can institute proceedings for annulment under the fourth paragraph of Article 230 EC in their capacity as persons directly or individually concerned by the contested decision.

30 The applicants submit that the direct beneficiaries of the aid are four retailers, which they name and which have acquired the right to use the AMA quality label. There is also a direct competitive relationship between the applicants and the slaughtering and butchering undertakings entitled to the label, since the AMA quality label is applied from an animal's birth until its meat is sold in the retail trade and since an undertaking may be entitled to it at every level of the chain of production and distribution. As regards animals imported from other Member States and slaughtered in

Austria, no contribution is levied by AMA, but the sale of the products is hindered by the advertising campaigns organised in favour of the labels.

31 Referring to the judgment in Joined Cases C-261/01 and C-262/01 *van Calster and Others* [2003] ECR I-12249, the applicants argue that the Commission's consideration of the aid must necessarily also take into account the method of financing the aid in a case where it forms an integral part of the measures, as it does in this case. In that regard, the applicants emphasise that they contribute to the financing of the aid.

32 In addition, according to the judgment in *van Calster and Others*, cited in paragraph 31 above, the Commission could not retroactively remedy the aid's incompatibility with the common market. Yet, since the contested decision concerns the measures in force after 26 September 2002, the applicants might have to pay the contributions retrospectively with effect from that date.

33 Finally, the applicants refute the argument that by making their complaint they exhausted their right to make comments.

Findings of the Court

34 Under the fourth paragraph of Article 230 EC, any natural or legal person may institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

35 In this case, it is common ground that the contested decision is addressed to the Republic of Austria and not to the applicants. It must therefore be determined whether the contested decision is of direct or individual concern to them.

36 First, direct concern requires that the impugned Community measure directly produces effects on the legal situation of the individual concerned and leaves no discretion to the addressees of that measure who are entrusted with the task of implementing it and such implementation must be purely automatic and follow solely from the Community rules, without the application of other intermediate rules. In the case of a decision authorising aid, the same applies where the possibility that the national authorities will decide not to grant the aid authorised by the contested Commission decision is purely theoretical and there is no doubt that those authorities intend to act in that way (Case C-386/96 P *Dreyfus* v *Commission* [1998] ECR I-2309, paragraphs 43 and 44, and Case T-289/03 *BUPA and Others* v *Commission* [2008] ECR II-81, paragraph 81).

37 In this case, it is clear from the contents of the Court file that, at the date the contested decision was adopted, 30 June 2004, the aid in question had already been implemented by the Republic of Austria. In that regard, the applicants adduced internet pages of AMA and a retailer, showing that the AMA labels had already been issued prior to the contested decision. They also produced the demand for payment addressed by AMA to Grandits concerning contributions due for the period from May 2002 to April 2003, which covers, at least partially, the period of application of the measures covered by the contested decision.

38 Therefore, the possibility of the Austrian authorities deciding not to grant the aid in question was purely theoretical.

39 It follows that the applicants are, for the purposes of the fourth paragraph of Article 230 EC, directly concerned by the contested decision.

40 Secondly, as regards the applicants being individually concerned, it should be recalled that, according to settled case-law, persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of those factors distinguishes them individually just as in the case of the person addressed (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at 107, and Case C-78/03 P *Commission* v *Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, paragraph 33).

41 In the context of the procedure for reviewing State aid provided for in Article 88 EC, the preliminary stage of the procedure for reviewing aid under Article 88(3) EC, which is intended merely to allow the Commission to form a prima facie opinion on the compatibility with the common market of the aid in question, must be distinguished from the formal investigation under Article 88(2) EC. It is only in connection with the latter, which is designed to enable the Commission to be fully informed of all the facts of the case, that the EC Treaty imposes an obligation on the Commission to give the parties concerned notice to submit their comments (Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraph 22; Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 16; and *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, cited in paragraph 40 above, paragraph 34).

42 It follows that where, without initiating the formal investigation procedure under Article 88(2) EC, the Commission finds, by a decision adopted on the basis of Article 88(3) EC, that aid is compatible with the common market, the persons intended to benefit from those procedural guarantees may secure compliance therewith only if they are able to challenge that decision before the Community judicature (*Cook* v *Commission*, cited in paragraph 41 above, paragraph 23; *Matra* v *Commission*, cited in paragraph 41 above, paragraph 17; and *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, cited in paragraph 40 above, paragraph 35). For those reasons, an action for the annulment of such a decision brought by a person who is concerned within the meaning of Article 88(2) EC is admissible where he seeks, by instituting proceedings, to safeguard the procedural rights available to him under the latter provision (*Commission* v *Aktionsgemeinschaft Recht und Eigentum*, cited in paragraph 40 above, paragraph 35; see also, to that effect, *Cook* v *Commission*, cited in paragraph 41 above, paragraphs 23 to 26; and *Matra* v *Commission*, cited in paragraph 41 above, paragraphs 17 to 20).

43 The parties concerned within the meaning of Article 88(2) EC who are thus entitled under the fourth paragraph of Article 230 EC to institute proceedings for annulment are those persons, undertakings or associations whose interests might be affected by the grant of the aid, in particular undertakings competing with the beneficiaries of that aid and trade associations (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 41, and *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, cited in paragraph 40 above, paragraph 36).

44 On the other hand, if the applicant challenges the substance of the decision appraising the aid as such, the mere fact that it may be regarded as concerned within the meaning of Article 88(2) EC cannot suffice to render the action admissible. The applicant must then demonstrate that it has a particular status within the meaning of the case-law resulting from *Plaumann* v *Commission*, cited in paragraph 40 above. That would apply in particular where the applicant's market position is substantially affected by the aid to which the decision at issue relates (Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391, paragraphs 22 to 25, and *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, cited in paragraph 40 above, paragraph 37).

45 Finally, the fact that a measure is, by its nature and scope, a provision of general application inasmuch as it applies to the traders concerned in general, does not of itself prevent it being of individual concern to some of them (Case C-309/89 *Codorníu* v *Council* [1994] ECR I-1853, paragraph 19, and Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10505, paragraph 32).

46 In this case, the applicants rely, in essence, on three pleas in law in support of their action.

47 The first plea in law alleges infringement of procedural rules. It is put forward in four parts, first, the lack of notification to the Commission of the aid in question, second, breach of the procedural guarantees provided for by Article 88(2) EC, third, breach of

the duty to state the reasons for a decision and, fourth, breach of the principle that the Commission must act within a reasonable time. In the second part of the first plea in law, the applicants maintain, expressly, that the Commission should have opened the formal investigation procedure, in accordance with Article 4(4) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 88 EC (OJ 1999 L 83, p. 1), because there were doubts as to the compatibility of the measures in question with the common market.

48 The second plea in law alleges breach of Article 87(3)(c) EC. In that regard, the applicants maintain, in particular, that the guarantee of quality, as required for entitlement to the AMA labels, is not a matter of 'development' within the meaning of that provision.

49 In their third plea in law, the applicants allege that the Commission infringed the 'standstill clause' laid down by Article 88(3) EC and Article 3 of Regulation No 659/1999.

50 Since the applicants are thus putting in issue both the Commission's refusal to initiate the formal investigation procedure and the substance of the decision appraising the aid as such, the Court must, in order to determine whether they are entitled to bring the present action, analyse, first, their standing to bring proceedings to enforce their procedural rights and, second, their standing to bring proceedings to challenge the contested decision's substance.

51 First, as regards the applicants' standing to bring proceedings to enforce their procedural rights, it must be noted, at the outset, that, according to recital 14 in the preamble to the contested decision, the AMA labels are awarded only to products satisfying certain quality standards from the point of view of production and product characteristics and, in certain cases, requirements relating to their geographical provenance. Thus, according to recital 27 in the preamble to the contested decision, the

aid in question assists certain undertakings in the sector concerned with the production, treatment, processing and sale of agricultural products in Austria.

52 As regards, more particularly, meat, as the applicants point out, there is a production and distribution chain specific to the AMA labels, from the birth and raising of the animals until retail distribution, in the course of which, at each stage, precise requirements as regards quality and the inspections to guarantee it must be complied with, with the aim of developing the sale of high quality products.

53 Consequently, the beneficiaries of the aid in question are not only retailers. They also include all undertakings forming part of the chain of production and distribution specific to the AMA labels. The applicants, undertakings specialising in the slaughter and butchering of animals, are competitors of the slaughtering and butchering undertakings entitled to the AMA labels. They also operate on the same geographical market, namely Austria, as they made clear in reply to a written question from the Court.

54 In addition, the fact that, in this case, the applicants were able, by lodging their complaint against the aid in question, to put forward their arguments already during the preliminary examination procedure under Article 88(3) EC cannot deprive them of the right to enforce the procedural guarantee expressly conferred on them by Article 88(2) EC (see, to that effect, *BUPA and Others* v *Commission*, cited in paragraph 36 above, paragraph 76).

55 It follows that the applicants have the necessary standing to bring proceedings in so far as they seek to enforce their procedural rights under Article 88(2) EC.

56 Consequently, the second part of the first plea in law, alleging infringement of the procedural guarantees provided for by Article 88(2) EC, is admissible.

57 Secondly, as regards the applicants' standing to challenge the contested decision's substance, the mere fact that the decision in question may exercise an influence on the competitive relationships existing on the relevant market and that the undertakings concerned are in a competitive relationship with the beneficiary of that decision does not constitute a significant effect (see, to that effect, Joined Cases 10/68 and 18/68 *Eridania and Others* v *Commission* [1969] ECR 459, paragraph 7, and *British Aggregates* v *Commission*, cited in paragraph 45 above, paragraph 47). Therefore, an undertaking cannot rely solely on its status as a competitor of the undertaking in receipt of aid but must additionally show that its circumstances distinguish it in a similar way to the undertaking to which the decision is addressed (see, to that effect, Case C-106/98 P *Comité d'entreprise de la Société française de production and Others* v *Commission* [2000] ECR I-3659, paragraph 41, and *British Aggregates* v *Commission*, cited in paragraph 45 above, paragraph 48).

58 However, the applicants, in their pleadings, deploy no argument of law or fact to establish the particular nature of their competitive situation on the market in question.

59 Furthermore, in reply to a written question from the Court on the substantial effect on their position, the applicants confined themselves to mentioning the existence of 'considerable overcapacities' on the slaughter and butchering market, with no more detail, and pointed out that the aid in question had significant effects on cross-border trade and on competition.

60 It follows from the foregoing that the applicants have not shown that their position on the market could be substantially affected by the aid which is the subject of the contested decision.

61 Therefore, the first and fourth parts of the first plea in law as well as the third plea in law must be dismissed as inadmissible, since they do not seek to safeguard the applicants' procedural rights under Article 88(2) EC.

62 On the other hand, the Court of First Instance must interpret an applicant's pleas in terms of their substance rather than of their classification (see, to that effect, Joined Cases 19/60, 21/60, 2/61 and 3/61 *Fives Lille Cail and Others* v *High Authority* [1961] ECR 281). Consequently, it may also examine other arguments which an applicant advances in order to verify whether they too contribute evidence of arguments in support of a plea, put forward by the applicant, expressly claiming the existence of doubts which would have justified the initiation of the procedure referred to in Article 88(2) EC (judgment of 20 September 2007 in Case T-254/05, *Fachvereinigung Mineralfaserindustrie* v *Commission*, not published in the ECR, paragraph 48, and see, to that effect, Case T-158/99 *Thermenhotel Stoiser Franz and Others* v *Commission* [2004] ECR II-1, paragraphs 141, 148, 155, 161 and 167).

63 Here, it is clear from the application that the third part of the first plea in law as well as the second plea in law plead matters in support of the second part of the first plea in law, since the applicants there maintain that there were serious difficulties which would have justified the initiation of the formal investigation procedure. In effect, the applicants intend also to maintain, by the second plea in law, that their procedural rights under Article 88(2) EC were infringed when the contested decision was adopted. Likewise, the third part of the first plea in law, alleging the inadequacy of the statement of reasons, supports the second part of the first plea in law, since, in default of an adequate statement of reasons, the parties concerned are not in a position to ascertain the justification for the Commission's conclusion on the absence of serious difficulties, nor is the Court to carry out its review.

64 Consequently, the third part of the first plea in law and the second plea in law must, only in so far as they seek to enforce the applicants' procedural rights under Article 88(2) EC, be declared to be admissible.

Substance

Arguments of the parties

65 The applicants submit that Article 4(4) of Regulation No 659/1999 required the Commission to initiate the formal investigation procedure of the aid in question since there were doubts as to its compatibility with the common market. They rely on several documents, taken, in particular, from AMA's internet pages and those of a retailer, which prove that products entitled to the AMA labels must be exclusively of Austrian origin. The applicants refer also to a letter of 19 June 2000 from the Commission to the Austrian authorities, which they submit contains an explanation of the reasons giving rise to doubts as to the compatibility of the aid in question with the common market, in particular with Article 28 EC. In the light of those circumstances of fact and law, the Commission should have adopted a decision to initiate the formal investigation procedure.

66 In their reply, the applicants add that Paragraph 21 of the AMA-Gesetz 1992 precludes the AMA quality label being issued for non-Austrian products and any marketing campaign being undertaken for their promotion. Likewise, AMA Marketing's Articles of Association state that it must cover national agricultural and forestry products. The AMA-Gesetz 1992 and AMA Marketing's Articles of Association are thus incompatible with Article 28 EC. In that regard, it is not sufficient to insert, in AMA's directives, an 'opening clause' for foreign products. Furthermore, the applicants submit that the contested decision should have been based not on the provisions of those directives, but on the measures actually implemented.

67 The Commission responds that all the documents relied upon by the applicants predate 26 September 2002. However, under the contested decision, the measures adopted by AMA and AMA Marketing before 26 September 2002 were expressly excluded from the review. In addition, as regards the measures which entered into effect after 26 September 2002, the Commission refers to various AMA directives, of

January 2001, September 2002 and February 2003 respectively, which show that the applicants' complaints lacked any basis. The Commission was not therefore obliged to initiate the formal investigation procedure.

68 In its rejoinder, the Commission points out that, as AMA's directives show, the labels, with or without an indication of origin, are not restricted to Austrian undertakings or Austrian products. In the Commission's submission, the applicants have failed to submit a single case or application to obtain the quality label which was refused to a non-Austrian applicant on the basis of AMA Marketing's Articles of Association.

— Findings of the Court

69 As a preliminary matter, it must be observed that the Commission is required to initiate the formal investigation procedure if, in the light of the information obtained during the preliminary examination procedure, it still faces serious difficulties in assessing the measure under consideration. That obligation follows directly from Article 88(3) EC, as interpreted by the case-law, and is confirmed by the provisions of Article 4(4) in conjunction with Article 13(1) of Regulation No 659/1999, when the Commission finds, after a preliminary examination, that the unlawful measure raises doubts as to its compatibility with the common market (see, to that effect, *BUPA and Others* v *Commission*, cited in paragraph 36 above, paragraph 328).

70 In effect, according to a consistent line of cases, the procedure under Article 88(2) EC is obligatory where the Commission experiences serious difficulties in establishing whether or not aid is compatible with the common market. The Commission cannot therefore limit itself to the preliminary procedure under Article 88(3) EC and take a favourable decision on a State measure unless it is in a position to reach the firm view, following an initial examination, that the measure cannot be classified as aid within the meaning of Article 87(1) EC or that the measure, while constituting aid, is compatible with the common market. On the other hand, if the initial examination results in the Commission taking the contrary view to the aid's compatibility with the

common market, or if it does not put the Commission in a position to overcome all the problems raised by its assessment of the compatibility of the measure in question with the common market, the Commission has a duty to obtain all the necessary views and, to that end, to initiate the procedure under Article 88(2) EC (*Matra* v *Commission*, cited in paragraph 41 above, paragraph 33; *Commission* v *Sytraval and Brink's France*, cited in paragraph 43 above, paragraph 39; and *BUPA and Others* v *Commission*, cited in paragraph 36 above, paragraph 329).

71 Thus, it is for the Commission to decide, on the basis of the factual and legal circumstances of the case, whether the difficulties involved in assessing the compatibility of the aid require the initiation of that procedure (*Cook* v *Commission*, cited in paragraph 41 above, paragraph 30). That decision must satisfy three requirements.

72 Firstly, under Article 88 EC the Commission's power to find aid to be compatible with the common market upon the conclusion of the preliminary examination procedure is restricted to aid measures that raise no serious difficulties. That criterion is thus an exclusive one. The Commission may not, therefore, decline to initiate the formal investigation procedure in reliance upon other circumstances, such as third party interests, considerations of economy of procedure or any other ground of administrative convenience (Case T-73/98 *Prayon-Rupel* v *Commission* [2001] ECR II-867, paragraph 44).

73 Secondly, where it encounters serious difficulties, the Commission must initiate the formal procedure, having no discretion in this regard. Whilst its powers are circumscribed as far as initiating the formal procedure is concerned, the Commission nevertheless enjoys a certain margin of discretion in identifying and evaluating the circumstances of the case in order to determine whether or not they present serious difficulties. In accordance with the objective of Article 88(3) EC and its duty of good administration, the Commission may, amongst other things, engage in talks with the

notifying State or with third parties in an endeavour to overcome, during the preliminary procedure, any difficulties encountered (*Prayon-Rupel* v *Commission*, cited in paragraph 72 above, paragraph 45).

74 Thirdly, the notion of 'serious difficulties' is an objective one. Whether or not such difficulties exist requires investigation of both the circumstances under which the contested measure was adopted and its content. That investigation must be conducted objectively, comparing the grounds of the decision with the information available to the Commission when it took a decision on the compatibility of the disputed aid with the common market (see *Prayon-Rupel* v *Commission*, cited in paragraph 72 above, paragraph 47 and the case-law cited).

75 In this case, the Commission ruled, in the contested decision, that the aid in question was compatible with the common market since it complied with the Guidelines for State aid in the agricultural sector and with the Guidelines for State aid for advertising.

76 In that regard, it is to be noted, first of all, that the Guidelines for State aid for advertising provided particularly as follows, as regards products which must meet particular quality requirements:

'49. National quality control schemes should be dependent solely on the existence of intrinsic objective characteristics which give the products the quality required or which concern the production process required, and not dependent on the origin of the products or the place of production. Irrespective of whether the quality control schemes are compulsory or voluntary, access to such schemes must therefore be granted to all products produced in the Community, irrespective of their origin, provided that they meet the conditions laid down …

50. Where the scheme is restricted to products of a particular origin …, the scheme itself is contrary to the Treaty, and it is self-evident that the Commission cannot consider aid for the advertising of such a scheme to be compatible with the common market.

…'

77 It follows from the same guidelines, in particular from their Point 46, that the 'origin' of the products is to be understood as being a 'national, regional or local origin'.

78 Next, in recital 52 in the preamble to the contested decision, the Commission found that, in this case, the aid complied with the condition that a national quality control scheme cannot be restricted to products of a particular origin. In fact it stated as follows:

'The use of the quality label is available for all products grown or produced within the Community which meet the quality conditions for that use. Those particular conditions for candidate products must either concern the quality of the product or seem to be limited to enabling their geographical origin to be verified. The particular conditions can in all cases be met irrespective of the product's geographical provenance.'

79 To the same effect, in recital 66 in the preamble to the contested decision, the Commission rejected the applicants' arguments in their complaint that the AMA labels were available exclusively to Austrian producers, in the following terms:

'… [T]he measures notified, relating to the bio-label and to the quality label, which have been applied since 26 September 2002, are not restricted to Austrian products and … the products' origin does not constitute the principal message either in the labels or in the corresponding advertising.

…'

80 In addition, it is clear from recital 67 in the preamble to the contested decision that the Commission relied on the measures adopted by AMA and AMA Marketing as applicable after 26 September 2002. The Commission cites, to that effect, in the defence, three of AMA's directives, of January 2001, September 2002 and February 2003.

81 In the application, the applicants aver that the products entitled to the AMA labels must be exclusively of Austrian origin. In that regard, they produced, in particular, a version of the AMA-Gesetz 1992, which was not challenged by the Commission, according to which, under Paragraph 21a, relating to the purpose of the contribution:

'The contribution for the purposes of agricultural marketing … is to be collected for the pursuit of the following objectives:

1. promoting and guaranteeing the sale of national agricultural and forestry products and their derivative products;

2. opening and servicing markets for those products within the country and abroad;

3. improving the distribution of those products;

4. encouraging general measures for improving and guaranteeing the quality of those products (in particular of the corresponding agricultural products);

5. promoting other marketing measures (in particular the supply of services and staff costs connected therewith).'

82 However, in reply to a written question from the Court, the Commission stated, first, that, in the course of negotiations with it, the Austrian authorities undertook responsibility for the subsequent adaptation of the AMA-Gesetz 1992 and, second, that Paragraph 21a had been amended by a federal law of 2007 (BGBl. 55/2007), with effect from July 2007. According to the Commission, since that date, Paragraph 21a(1) of the AMA-Gesetz 1992 has no longer contained the word 'national'.

83 Admittedly, the Commission points out too that, since its initial version, Paragraph 21a(5) of the AMA-Gesetz 1992 established also, among the purposes of the contribution, 'promoting all other marketing measures', without any restriction to national products.

84 Nonetheless, it is clear from the Commission's reply that, when it examined the compatibility of the aid in question with the common market, the principal provisions of Paragraph 21a of the AMA-Gesetz 1992 referred only to national products.

85 Consequently, that paragraph did not comply with the condition set out in the Guidelines for State aid for advertising that a national quality control scheme cannot be restricted to products of a particular origin. It is clear also from the Commission's written reply that, since negotiations had taken place on that question between the Austrian authorities and the Commission, the latter was aware of that fact.

86 Therefore, even if AMA's directives stipulated no condition as to the origin of products, the fact remains that the restriction to national products in Paragraph 21a(1) of the AMA-Gesetz 1992 raised doubts as to the compatibility of the aid in question with the Guidelines for State aid for advertising. Consequently, the Commission should have applied Article 4(4) of Regulation No 659/1999.

87 It must be concluded that the assessment of the compatibility with the common market of the aid in question raised serious difficulties which should have led the Commission to initiate the procedure provided for by Article 88(2) EC.

88 Accordingly, the contested decision must be annulled, without the necessity of examining the third part of the first plea in law or the second plea in law.

Costs

89 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to bear its own costs and to pay those of the applicants.

On those grounds,

THE COURT OF FIRST INSTANCE (Sixth Chamber)

hereby:

1. **Annuls Commission Decision C (2004) 2037 final of 30 June 2004 on State aid NN 34A/2000 concerning the quality programmes and labels AMA-Biozeichen and AMA-Gütesiegel in Austria;**

2. Orders the Commission of the European Communities to bear its own costs and to pay those incurred by Scheucher-Fleisch GmbH, Tauernfleisch Vertriebs GmbH, Wech-Kärntner Truthahnverarbeitung GmbH, Wech-Geflügel GmbH and Johann Zsifkovics.

Meij Vadapalas Truchot

Delivered in open court in Luxembourg on 18 November 2009.

[Signatures]