2024/2474

20.9.2024

COMMISSION DECISION (EU) 2024/2474

of 5 April 2024

on the aid schemes SA.50787 (2021/C) (ex 2018/N) and SA.50837 (2021/C) (ex 2018/N) implemented by Czechia in favour of large enterprises active in primary agricultural production

(notified under document C(2024) 2096)

(Only the Czech 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 interested parties to submit their comments pursuant to the first subparagraph of Article 108(2) TFEU ([1]) and having regard to their comments,

Whereas:

1. PROCEDURE

(1) By letter dated 29 March 2018, Czechia notified the Commission of the aid scheme SA.50787 (2018/N). The Commission requested additional information by letters of 22 May 2018, 19 July 2018, 8 October 2018, 17 December 2018, 6 March 2019, 28 May 2019 and 6 May 2020. The Czech authorities submitted additional information by letters of 21 June 2018, 20 August 2018, 8 November 2018, 18 January 2019 and on 29 May 2020.

(2) By letter of 6 April 2018, Czechia notified the aid scheme SA.50837 (2018/N). The Commission requested additional information by letters of 1 June 2018, 14 August 2018, 8 October 2018, 17 December 2018, 6 March 019, 28 May 2019 and 6 May 2020. The Czech authorities submitted additional information by letters of 21 June mber 2018, 13 September 2018, 8 November 2018, 18 January 2019, 29 March 2019 and 29 May 2020.

(3) By letter of 6 March 2019, the Commission informed the Czech authorities of its decision to transfer the two notifications into the register of non-notified aid measures, because aid was granted prior to the notification of the aid schemes to the Commission. At the same time, the Commission decided to merge these cases for the purpose of their assessment, for the reason of identical subject matter.

(4) By letter dated 12 January 2021, the Commission informed Czechia that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (hereafter the 'TFEU') in respect of the aid granted to large undertakings before the adoption of Decision C(2021)41 final of 12 January 2021 ([2]) ('the opening decision') and its notification to the Czech authorities. At the same time, the Commission decided not to raise objections to the aid which would be granted under the two schemes SA.50787 and SA.50837 after the adoption of the opening decision and its notification to the Czech authorities, on the grounds that it was compatible with the internal market pursuant to Article 107(3), point (c), TFEU.

(5) The Commission decision to initiate the procedure laid down in Article 108(2) TFEU was published in the *Official Journal of the European Union* ([3]). The Commission called on interested parties and on Czechia to submit their comments.

([1]) Invitation to submit comments pursuant to Article 108(2) TFEU, State aid SA.50787 (2019/NN) (ex 2018/N) and SA.50837 (2019/NN) (ex 2018/N), OJ C 60, 19.2.2021, p. 39.
([2]) OJ C 60, 19.2.2021, p. 39.
([3]) Cf. footnote 2.

(6) The Commission received five comments from interested parties. It forwarded them to Czechia, which was given the opportunity to react. By the same letter, the Commission also invited the Czech authorities to provide an up-date on the state of play of the recovery procedures initiated by the Czech authorities, in particular on the related Court proceedings ([4]). Czechia submitted its comments by letter dated 23 May 2022.

(7) By letter of 15 June 2022, the Commission demanded further clarification as regards the rulings issued by the national Court concerning the recovery of the aid granted prior to the notification of the Commission opening decision to the Czech authorities. The Czech authorities replied by letter of 24 August 2022.

2. DETAILED DESCRIPTION OF THE AID SCHEMES

2.1. Scope of the decision

(8) This decision covers aid unlawfully granted to large enterprises for the restructuring of orchards and for the construction of drip irrigation in orchards, hop fields, vineyards and nurseries, before the notification of the schemes SA.50787 and SA.50837.

(9) The notified schemes are the following:

(a) SA.50787 (2021/C) (ex 2018/N): Aid for restructuring of orchards.

(b) SA.50837 (2021/C) (ex 2018/N): Aid for the construction of drip irrigation in orchards, hop fields, vineyards and nurseries.

(10) With the two notifications, Czechia intended to replace existing aid measures SA.46621 (2016/XA) and SA.46972 (2016/XA), exempted on the basis of Commission Regulation (EU) No 702/2014 ([5]), in order to enlarge the group of eligible beneficiaries by large enterprises. To this end, upon their approval by the Commission, the aid schemes were to replace these block-exempted schemes.

2.2. The common features of the two schemes

2.2.1. *Objective*

(11) With notification SA.50787 (2021/C) (ex 2018/N), the Czech authorities aimed to grant aid for planting orchards, grown in compliance with the integrated production method.

(12) With notification SA.50837 (2021/C) (ex 2018/N), the Czech authorities aimed to grant aid for the construction of functional drop irrigation in orchards, hop fields, vineyards and nurseries in Czechia.

2.2.2. *Duration*

(13) The exempted aid scheme SA.46621 (2016/XA) was in place from 17 October 2016. The exempted aid scheme SA.46972 (2016/XA) was in place from 7 December 2016. Both exempted aid schemes were replaced on 12 January 2021 by the notified aid schemes SA.50787 and SA.50837.

(14) With the opening decision, both notified aid schemes SA.50787 and SA.50837 were approved for the future until 31 December 2024.

2.2.3. *Beneficiaries*

(15) Under both schemes SA.50787 and SA.50837, aid can be granted to enterprises of all sizes, active in the primary agricultural production.

([4]) During the preliminary procedure, Czech authorities acknowledged that recovery proceedings were launched at national level for large beneficiaries that received aid on the basis of block exempted schemes. On 29 May 2020, no aid had been recovered given that the concerned beneficiaries had brought their cases to courts.

([5]) Commission Regulation (EU) No 702/2014 of 25 June 2014 declaring certain categories of aid in the agricultural and forestry sectors and in rural areas compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union (OJ L 193, 1.7.2014, p. 1).

2.2.4. *Legal basis*

(16) The legal basis for both schemes SA.50787 and SA.50837 and also for the previous block-exempted aid schemes SA.46621 (2016/XA) and SA.46972 (2016/XA), is constituted by the following acts:

(1) Act No 252/1997 Coll. on agriculture, as amended;

(2) Rules for granting contributions based on §§§ 1, 2 and 2d of Act No 252/1997 Coll, on agriculture (hereinafter 'Principles for granting aid').

2.2.5. *Budget*

(17) The overall budget of the aid scheme SA.50787 (2021/C) amounts to CZK 1 400 million (approx. EUR 52,4 million ([6])).

(18) The overall budget of the aid scheme SA.50837 (2021/C) amounts to CZK 560 million (approximately EUR 21 million ([7])).

(19) Both aid schemes are financed from the State budget. Aid is granted in the form of direct grants. The granting authority for both schemes is the State Agricultural Intervention Fund (*Státní zemědělský intervenční fond*).

2.3. **Description of the aid scheme SA.50787 (2021/C)**

(20) Aid under this aid scheme can be granted to newly planted orchards in Czechia outside the capital, Prague. Aid is granted in a year of planting.

(21) Aid can be granted for the planting of fruit varieties listed in the table in the Interpretation document of the subsidy program, grown in the system of integrated production, which does not exceed the fixed heavy metal limits ([8]).

(22) Eligible for aid are the following costs:

(1) Costs of preparatory works: stock fertilisation, soil preparation (deep plowing, cultivation, fertilisation, preparation before planting), project preparation (varieties selection, pollinators, direction of the buckles, geometric orientation of the plot), installation of fences, dimensioning of planting, ditches preparation;

(2) Costs of planting material, including the transport on the planting plot and short-term storage;

(3) Costs of preparation of the planting material for planting and costs of planting;

(4) Costs of protectors and their installation, scourer and its installation, support poles and binding in a year of planting.

(23) Aid can be granted up to 50 % of eligible costs and within the following maximum amounts:

(1) up to 240 000 CZK/ha (approx. EUR 9 000 ([9])) of orchards planted with eligible apple, pear, apricot, peach, plum, cherry and sour cherry species on an area of at least 1 ha per one species, where the minimum number of trees is 800 per ha;

(2) up to 120 000 CZK/ha (approx. EUR 4 500 ([10])) of orchard planted with eligible apple, pear, apricot, peach, plum, cherry and sour cherry species on an area of at least 1 ha per one species, where the minimum number of trees is 400 per ha;

(3) up to 60 000 CZK/ha (approx. EUR 2 250 ([11])) of orchards planted with eligible small fruit species (currants, gooseberries, raspberries) on an area of at least 0,5 ha per one species. The minimum number of seedlings must be 3 000 per ha.

([6]) CZK to EUR exchange rate on 17.9.2020: 1 CZK = 0,03743 EUR.
([7]) CZK to EUR exchange rate on 17.9.2020: 1 CZK = 0,03743 EUR.
([8]) Cf. recital (25) of the opening decision.
([9]) CZK to EUR exchange rate on 17.9.2020: 1 CZK = 0,03743 EUR.
([10]) CZK to EUR exchange rate on 17.9.2020: 1 CZK = 0,03743 EUR.
([11]) CZK to EUR exchange rate on 17.9.2020: 1 CZK = 0,03743 EUR.

(24) The investments under this scheme aim at improving the overall performance and sustainability of the agricultural holdings.

(25) The same measure was not provided for in the Czech Rural Development Programme ('RDP') of Czechia 2014–2020. Although the RDP contained the measure 'Integrated fruit production', according to the Czech authorities these two measures did not overlap but were complementary. While the State aid is granted for planting the orchards, financing under the rural development measure was provided for already existing orchards. Applicants could apply for both, the State aid financing for establishing orchards and then the subsequent financing under the RDP for their maintenance. In such case, they must have submitted two soil analyses attesting the respect for chemicals' limit values.

(26) The Commission found that the scheme was consistent with the objectives pursued by the RDP of Czechia 2014–2020, specifically with the objective of contributing to enhancing the competitiveness of the agricultural primary production and improving the quality of primary produce (recitals (92) and (93) of the opening decision). Moreover, the Commission concluded that the aid had positive environmental impact, as the integrated production method leads to lower heavy metals quantities in the soil (recital 94) of the opening decision).

2.4. **Description of the aid scheme SA.50837 (2021/C)**

(27) Under this scheme, aid can be granted for the following costs:

(1) the purchase or lease purchase of machinery and equipment up to the market value of the assets;

(2) general costs linked to the expenditure referred to in the previous point.

(28) Aid can be granted up to 50 % of eligible costs and the beneficiaries may receive up to CZK 72 000 (approx. EUR 2 700 ([12])) per hectare of constructed drip irrigation.

(29) Investments supported under this scheme do not concern improvement of existing irrigation installations or elements of irrigation infrastructure, but only newly built drop irrigation installation.

(30) In compliance with Directive 2000/60/EC of the European Parliament and of the Council ([13]), Czechia communicated to the Commission the river basin management plan for the entire area in which the investments take place, as well as for any other areas whose environment may be affected by the investment. The measures taking effect under the river basin management plan in accordance with Article 11 of that Directive and of relevance to the agricultural sector have been specified in the relevant programme of measures.

(31) According to the Czech authorities, the investments covered by this aid scheme may result in a net increase of the irrigated area affecting a given body of ground or surface water. In this context, the Czech authorities confirmed that the investments do not affect bodies of ground-or-surface water whose status has been identified as less than good in the relevant river basin management plan for reasons related to water quantity.

(32) According to the Czech authorities, the scheme has a positive environmental impact, as the drip irrigation method has, compared to other types of irrigation, water saving effect. The drip irrigation is expected to bring the water savings of at least 30 %, to fight against drought, and, in this way, improve the stability of production and increase its quality, while economising the water use.

(33) The Czech authorities confirmed that an environmental analysis must demonstrate that the aided investments will have no negative environmental impact. To this end, each application for aid is assessed individually.

([12]) CZK to EUR exchange rate on 17.9.2020: 1 CZK = 0,03743 EUR.

([13]) Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 327, 22.12.2000, p. 1.

(34) The aid grant is conditional upon submitting a water management permit, issued by the competent water authority which assesses, inter alia, the effects of the project on the different components of the environment.

(35) Further, the aid is conditional upon putting in place the water consumption metering at the level of a supported investment.

(36) The Czech authorities undertook to ensure, in respect of the river basin district in which the investment takes place, a contribution of the different water uses to the recovery of the costs of water services by the agricultural sector consistent with Article 9(1) first indent of Directive 2000/60/EC having regard, where appropriate, to the social, environmental and economic effects of the recovery as well as the geographic and climate conditions of the region or regions affected.

(37) The Commission found that the scheme was consistent with the objectives pursued by the RDP of Czechia 2014–2020, specifically with the objective of contributing to enhancing the competitiveness of the agricultural primary production and improving the quality of primary produce (recitals (92) and (93) of the opening decision). Moreover, the Commission concluded that the aid had positive environmental impact, as the integrated production method leads to lower heavy metals quantities in the soil (recital 94) of the opening decision).

3. GROUNDS FOR INITIATING THE PROCEDURE

3.1. Unlawfulness of the aid schemes

(38) The aid schemes SA.50787 and SA.50837 were notified to the Commission on 29 March 2018 and 6 April 2018 respectively. The Czech authorities confirmed that they were implemented already prior to their notification.

(39) In view of the fact that Czechia failed to respect its obligation under Article 108(3) TFEU, in the opening decision ([14]) the Commission found that the aid already granted to large undertakings before the notification of the schemes SA.50787 and SA.50837 constituted new aid, which it considered as unlawful aid within the meaning of Article 1 (f) of Council Regulation (EU) 2015/1589 ([15]).

3.2. Compatibility of the aid with the internal market

(40) In compliance with Article 107(3) TFEU, the aid may only be considered compatible with the internal market if it can benefit from one of the derogations provided for in that Article. In the cases at hand, the Commission examined whether the derogation in Article 107(3)(c) TFEU, as interpreted by the relevant provisions of the 2014 European Union Guidelines for State aid in the agricultural and forestry sectors and in rural areas ([16]) (hereinafter 'the 2014 Guidelines'), was applicable.

(41) Under Article 107(3), point (c), TFEU, aid may be considered compatible with the internal market, if it is found to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

(42) The aid schemes were also assessed in light of the 2014 Guidelines, which were in force at the time of the approval of the schemes SA.50787 and SA.50837.

(43) Specifically, in its opening decision, the Commission assessed the compatibility of the two schemes SA.50787 and SA.50837 with the internal market on the basis of Part I. ('Common assessment principles') and Part II., Chapter 1.1.1.1 ('*Aid for investment in tangible assets and intangible assets on agricultural holdings linked to primary agricultural production*') of the 2014 Guidelines.

([14]) Cf. recital (64) of the opening decision.

([15]) Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification) (OJ L 248, 24.9.2015, p. 9).

([16]) OJ C 204, 1.7.2014, p. 1, amended by the Notice published in OJ C 390, 24.11.2015, p. 4.

(44) On the basis of that assessment, the Commission concluded in its opening decision that the aid which would be granted **after** the approval of the two aid schemes and after the notification of the decision to the Czech authorities, was compatible with the internal market pursuant to Article 107(3), point (c), TFEU.

(45) However, at that stage, the Commission could not draw the same conclusion as regards the aid granted to large undertakings **prior** to the notification and approval of the two aid schemes SA.50787 and SA.50837 by the Commission decision. The assessment of those aid schemes showed that while the aid was compatible with the specific conditions of Part II., Chapter 1.1.1.1 of the 2014 Guidelines, doubts existed in relation to the presence of an incentive effect and, consequently, on compatibility of such aid with the internal market pursuant to Article 107(3), point (c), TFEU, for the following reasons.

(46) In compliance with point (66) of the 2014 Guidelines, an aid could only be found compatible with the internal market if it had an incentive effect. Further, pursuant to that point, an aid had an incentive effect if it led to changing the behaviour of an undertaking in such a way that it engaged in an additional activity in which it would have not engaged without the aid or in which it would have engaged in a restricted or a different manner.

(47) In compliance with point (70) of the 2014 Guidelines, the Commission considered that an aid did not present an incentive for a beneficiary wherever work on a project or activity had already started prior to the aid application by the beneficiary to the national authorities. Such an aid application had to include at least the applicant's name and the size of the undertaking, a description of the project or activity, including its location and start and end dates, the amount of aid needed to carry it out and the eligible costs.

(48) Pursuant to point 35(25) of the 2014 Guidelines, 'start of works on the project or activity' meant the earlier of, either the start of the activities, or the construction works relating to the investment, or the first legally binding commitment to order equipment or employ services or any other commitment that made the project or activity irreversible.

(49) In addition, pursuant to point (72) of the 2014 Guidelines, large enterprises had to describe in the application the situation without the aid, referred to as the counterfactual scenario and submit documentary evidence in support of the counterfactual described in the application. Pursuant to point (73) of the 2014 Guidelines, the granting authority was required to carry out a credibility check of the counterfactual and confirm that the aid had the required incentive effect.

(50) In relation to that additional condition applicable to large undertakings to submit the counterfactual scenario, in the opening decision the Commission referred to the definition of micro, small and medium-sized enterprises (SMEs), as provided for in Annex I to Regulation (EU) No 702/2014 ([17]) and to the relevant case-law of the Union Courts ([18]).

(51) Pursuant to Article 2(1) of Annex I to Regulation (EU) No 702/2014, the category of SMEs was made up of enterprises which employ fewer than 250 persons and which had an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million.

(52) Pursuant to Article 3(1) of Annex I to Regulation (EU) No 702/2014, an 'autonomous enterprise' was any enterprise, which was not classified as a partner enterprise within the meaning of paragraph 2 or as a linked enterprise within the meaning of paragraph 3 of that Article.

(53) Pursuant to Article 4(2) of Annex I to Regulation (EU) No 702/2014, where, at the date of closure of the accounts, an enterprise found that, on an annual basis, it had exceeded or fallen below the headcount or financial ceilings stated in Article 2, this would not result in the loss or acquisition of the status of medium-sized, small or microenterprise unless those ceilings were exceeded over two consecutive accounting periods.

([17]) Regulation (EU) No 702/2014 was replaced by Commission Regulation 2022/2472 of 14 December 2022 declaring certain categories of aid in the agricultural and forestry sectors and in rural areas compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union (OJ L 327, 21.12.2022, p. 1). Annex I to that Regulation was not modified.

([18]) Cf. recitals (105) to (113) of the opening decision.

(54) Recitals (109) to (113) of the opening decision contained the following reasoning in this context.

(55) Recital 40 of Regulation (EU) No 702/2014 explains that the definition of SME used for the purpose of that Regulation is based on the definitions laid down in Commission Recommendation 2003/361/EC ([19]), in order to eliminate differences that might give rise to distortions of competition and to facilitate coordination between different Union and national initiatives concerning SMEs as well as for reasons of administrative clarity and legal certainty.

(56) Recital 39 of Regulation (EU) No 702/2014 explains the underlying reason of exempting SMEs from the notification requirement of Article 108(3) TFEU: '*SMEs play a decisive role in job creation and, more generally, act as a factor of social stability and drive the economy. However, their development may be limited by market failures, leading to SMEs suffering from typical handicaps. SMEs often have difficulty in obtaining capital or loans, given the risk-averse nature of certain financial markets and the limited collateral that they may be able to offer. Their limited resources may also restrict their access to information, notably as regards new technology and potential markets. To facilitate the development of the economic activities of SMEs, this Regulation should therefore exempt certain categories of aid in favour of SMEs from the notification requirement of Article 108(3) of the Treaty*.'

(57) As expressed in the numerous judgments of the Union Courts, only enterprises that suffer from the handicaps typical of an SME should be entitled to the advantages deriving from that status. According to the case law of the Union Courts, the definition of an SME has to be interpreted strictly, as the advantages afforded by the SME status are in most cases (in particular in the area of State aid) exceptions to general rules ([20]). It is necessary to remove from that qualification of SMEs groups of enterprises whose economic power may exceed that of genuine SMEs, even if they formally meet the criteria laid down in the SME Definition ([21]). It must also be ensured that the SME definition is not circumvented by purely formal means. ([22]) In accordance with this case law, if an enterprise concerned, does not suffer from the handicaps typical of an SME, the Commission is entitled to refuse to recognise it as an SME. This case law is guided by the principle of *effet utile,* preserving the useful effect of Union law.

([19]) Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

([20]) Case C-110/13 *HaTeFo*, EU:C:2014:114, paragraph 32.

([21]) See in particular the judgments in the following Cases (emphasis added).

— C-516/19 *NMI Technologietransfer*, EU:C:2020:754, paragraphs 31–34 (in a case relating to the interpretation of the SME Definition under the GBER, Commission Regulation (EU) No 651/2014); '*34 That test is thus intended to gain a better understanding, as is apparent, inter alia, from recital 9 of the 2003 Recommendation, on which, as stated in recital 30 of Regulation No 651/2014, the concept of 'SME' defined in Annex I to that regulation is based, of the economic position of SMEs and to* ***remove from that qualification of SMEs groups of enterprises whose economic power may exceed that of genuine SMEs, with a view to ensuring that only those enterprises which really need the advantages accruing to the category of SMEs from the different rules or measures in their favour actually benefit from them*** *(see, by analogy, judgment of 27 February 2014, HaTeFo, C-110/13, EU:C:2014:114, paragraph 31).*'

— C-91/01 *Italy v Commission*, EU:C:2004:244 paragraphs 31, 50–54 ('*51. Accordingly, the independence criterion must be interpreted in the light of that purpose, as stated by the Advocate General in point 33 of his Opinion, so that an enterprise which is owned as to less than 25 % by a large enterprise and thus* ***formally meets the criterion, but in reality belongs to a large group of enterprises, may not nevertheless be regarded as meeting the criterion***.'),

— C-110/13 *HaTeFo*, EU:C:2014:114, paragraph 34, 39 ('*34 Therefore the fourth subparagraph of Article 3(3) of the Annex to the SME Recommendation must be* ***interpreted in the light of that objective****, so that* ***enterprises which do not formally have one or other of the relationships*** *referred to in paragraph 28 above, but which, because of the role played by a natural person or group of natural persons acting jointly****, nevertheless constitute a single economic unit, must also be regarded as linked enterprises*** *for the purposes of that provision, since they engage in their activities or in part of their activities in the same relevant market or in adjacent markets (see, by analogy, Italy v Commission, paragraph 51))*',

— T-137/02, *Pollmeier v Commission*, EU:T:2004:304, paragraphs 61–62. ('*62 Accordingly, Article 1(3) and (4) of the annex to Recommendation 96/280* ***must be interpreted in the light of that purpose,*** *so that the data for an enterprise, even one which is owned as to less than 25 % by another enterprise, must be taken into consideration in calculating the thresholds mentioned in paragraph 1 of the same article where those* ***enterprises, even though formally distinct, constitute an economic unit*** *(see, to that effect, Italy v Commission, paragraph 51).*')

([22]) Cases C-91/01 *Italy v Commission*, EU:C:2004:244, paragraph 50; C-110/13, *HaTeFo*, ECLI:EU:C:2014:114, paragraph 33.

(58) Article 4(2) of Annex I to Regulation (EU) No 702/2014 provides a facility for SMEs to preserve their status despite changes that are considered temporary and subject to volatility (*'unless those ceilings are exceeded over two consecutive accounting periods'*). It would be against the *effet utile* principle to provide such a facility for enterprises that, as a result of a change in ownership following a merger or acquisition, have in reality a permanently changed structure, pushing them on a lasting basis above the relevant headcount or financial ceilings allowed for an SME. It follows that if the economic reality shows that a given enterprise is not a genuine SME, even if this particular situation is not described in Article 4(2) of the SME Definition in Annex I to Regulation (EU) No 702/2014, such enterprise should not benefit from an SME status following such a change in ownership.

(59) Therefore, in line with the consistent interpretation of the Commission, relying on the principle of *effet utile*, as expressed in the case law of the Union Courts related to the SME definition (recital (57)), Article 4(2) of Annex I to Regulation (EU) No 702/2014 does not apply in the case of enterprises that exceed the relevant SME ceilings as a result of a change in structure or ownership following a merger or acquisition. In such a case, the relevant moment for the assessment is the time of the transaction (by which they permanently became part of a larger undertaking) and not the time of closure of the accounts of the applicant legal entity.

(60) On that basis, recital (114) of the opening decision contained the following conclusion: While until the approval of these two aid schemes, aid in favour of small and medium sized agricultural undertakings can be granted on the basis of the corresponding block exempted measures under Regulation (EU) No 702/2014, there is no approved aid scheme in place which would allow for aid to large undertakings. It follows that aid was granted to large undertakings in breach of the notification obligation pursuant to Article 108(3) TFEU.

(61) As explained above in recital (10), both aid schemes SA.50787 and SA.50837 were intended to replace the existing block exempted measures SA.46621 (2016/XA) and SA.46972 (2016/XA), in order to provide the basis for granting aid also to large enterprises.

(62) The Czech authorities confirmed that under both block-exempted schemes, investment aid was granted to some undertakings that were initially considered as SMEs at the moment of aid granting. According to information submitted by the Czech authorities on 8 November 2018 ([23]), the administrative *ex post* check by those authorities showed that these beneficiaries did not comply with the definition of an SME, laid down in Annex I to Regulation (EU) No 702/2014, as interpreted in the case law of the Union Courts related to that definition. On that basis, the Commission considered in the opening decision ([24]) that these recipients were large enterprises at the moment of granting the aid.

(63) In its opening decision, the Commission recalled that no counterfactual scenario was requested for the investment aid granted on the basis of exempted schemes pursuant to Regulation (EU) No 702/2014, because such aid had to be limited to SMEs ([25]). The Commission therefore raised doubts as to whether the beneficiaries, which were large enterprises and which received aid on the basis of one or both block-exempted schemes (recital (62)), submitted in fact the counterfactual scenario ([26]).

(64) Since the submission of the counterfactual scenario, together with the supporting documents, constituted one of the requirements linked to the presence of incentive effect of aid for large undertakings, the Commission concluded that the aid granted to large undertakings prior to the notification of the two aid schemes SA.50787 and SA.50837 did not seem to have an incentive effect.

(65) Further, the Commission raised doubts as to the proportionality of the aid granted to large enterprises prior to the notification of schemes SA.50787 and SA.50837, in particular the criterion of the net-extra cost approach under points (95) to (97) of the 2014 Guidelines. The Commission considered that, in the likely absence of the counterfactual scenario ([27]), the Czech authorities could not ensure that the aid amounts corresponded to the net extra costs of implementing the investment in the area concerned, by comparing it to the scenario without aid ([28]).

([23]) Ref. No.: 3957-2/2018-SZEU-ZEMZP, Additional information submitted by the Czech authorities and annexed Notices on initiation of administrative proceedings.
([24]) Cf. recitals (104) to (114) of the opening decision.
([25]) Cf. recital 115 of the opening decision.
([26]) Cf. recital 115 of the opening decision.
([27]) Cf. recital 115 of the opening decision.
([28]) Cf. recital 121 of the opening decision.

(66) In light of that reasoning, the Commission concluded in the opening decision that doubts existed as to the presence of an incentive effect and compliance with the proportionality principle of aid granted to large undertakings prior to its approval by the Commission ([29]).

(67) On those grounds, the Commission initiated the procedure pursuant to Article 108(2) TFEU and invited all third parties that may have been affected by this aid as well as Czechia to submit their comments. At the same time, the Commission invited Czechia to provide all information that may help assess the aid.

4. **OBSERVATIONS BY CZECHIA**

(68) In their submission to the opening decision, the Czech authorities confirmed that the two block exempted schemes (SA.46621 (2016/XA) and SA.46972 (2016/XA)) were limited to SMEs and explained that the only reason for granting the aid also to large enterprises was the erroneous assessment by the Czech authorities of the size of those beneficiaries. The Czech authorities stated that the limitation of the aid to SMEs was made clear by reference to Article 14 of Regulation (EU) No 702/2014 in the national legal basis and it did not have to be repeated there in another form. They further explained that administrative errors occurred, by which certain large undertaking beneficiaries were wrongly considered as SMEs at the time of granting the aid and the *ex post* check of the authorities showed that that initial assessment was erroneous.

(69) Czechia confirmed that in January 2019 it initiated recovery procedures in relation to aid granted to seven identified beneficiaries, which were large enterprises at the moment when they received the aid. These recovery procedures related to aid granted under one or both block exemptions in years 2016 and 2017.

(70) The Czech authorities explained that the objective of the Czech Ministry of Agriculture was to provide aid in those two years only to SMEs. The legal basis (the national rules of the subsidy program) contained a reference to Article 14 of Regulation (EU) No 702/2014, which limited the aid to SMEs. Therefore, it did not contain questions on relevant additional conditions applicable to large enterprises (counterfactual scenario, proportionality criterion).

(71) At the same time, the Czech authorities considered in their submission to the opening decision that despite the absence of the counterfactual scenario and its assessment by the national authorities, the incentive effect of the aid, incorrectly granted to large undertakings, could be considered to be present.

(72) In that regard, the Czech authorities argued that investments in the restructuring of orchards and in irrigation entail high costs, which the beneficiaries would not carry out without the aid. In the view of the Czech authorities, this is confirmed by the fact that as from 2018, when no approved aid scheme in favour of large enterprises was in place, no new orchards were planted by large enterprises and, likewise, no investments in drip irrigation infrastructure were carried out. On that ground, the Czech authorities considered that the large beneficiaries that received aid in 2016–2017 on the basis of one or both block-exempted schemes would not have carried out the investments without the aid.

(73) Czechia therefore considers that the incentive effect was *de facto* present in these cases.

(74) Likewise, in view of the Czech authorities, this aid was proportionate, because the maximum aid amount for investments in restructuring of orchards was capped at CZK 240 000 per hectare, while the real costs could reach approximately CZK 500 000 and more for the large enterprises. Given the maximum possible aid amount, the Czech authorities considered that even without the assessment of the counterfactual scenario, it could be assumed that the internal rate of return of the project was reasonable and that the aid did not lead to its increase above the usual level.

([29]) Cf. recitals 116 and 122 of the opening decision.

(75) Czechia furthermore added that the situation, where large enterprises do not invest in orchard planting and in drip irrigation infrastructure, is very negative. The Czech authorities explained that in Czechia the acreage of fruit orchards has been for a long time in decline, with the high and increasing percentage of old orchards.

5. **COMMENTS FROM INTERESTED PARTIES**

(76) The Commission received submissions from five third parties – all beneficiaries of the aid, either under one or both aid schemes. Therefore, in compliance with Article 1(h) of Regulation (EU) 2015/1589, they can all be considered as interested parties.

(77) All these five beneficiaries are concerned by the recovery procedure mentioned in recital (69). The other two beneficiaries concerned by the recovery procedures (RBQ SADY s.r.o., and M+A+J s.r.o.) did not submit any comments.

(78) The submissions from these five beneficiaries confirmed that:

(1) All five beneficiaries indicated in at least one of their aid applications in 2016 and 2017 their status as a large undertaking and not as an SME at the moment of granting the aid. In any event, their large enterprise status was visible from the submitted documentation accompanying the id applications. They submitted that it was not clear to them at the time that the aid was limited only to SMEs. They added that the national legal basis ('Principles for granting aid', recital (16)) did not include the size of a beneficiary among the eligibility conditions.

(2) All five beneficiaries explained that the granting authority (State agricultural and intervention fund) carried out a subsequent *ex post* check, which confirmed that the aid was used in compliance with its objective and identified no misconducts or faults.

(3) In January 2019, the Czech Ministry of Agriculture initiated the recovery procedures concerning seven beneficiaries.

(4) The recovery decisions addressed to seven beneficiaries stated that the aid was granted to them in breach of the EU law and of the national legal basis, from which it stems that such aid was available only to micro enterprises and SMEs. The aid beneficiaries did not meet this condition.

(5) In September 2019, all five beneficiaries that submitted their comments to the opening decision filed separate lawsuits before the Municipal Court of Prague, seeking the annulment of the recovery decisions of the Czech Ministry of Agriculture.

(79) Summary of the submissions to the opening decision:

Comments from POMONA Těšetice a.s. ([30])

(80) POMONA Těšetice a.s received aid under both aid schemes in December 2016.

(81) In its submission, POMONA Těšetice a.s submitted that the granting decision established legitimate expectations. The company claims that the aid was used in compliance with the objective laid down in the legal basis.

(82) POMONA Těšetice a.s explained that on the basis of the national legal basis ('Principles for granting aid', recital (16) it was not possible to conclude that aid was to be limited to SMEs only. The company claimed that it correctly indicated its size of a large enterprise in the aid application.

(83) POMONA Těšetice a.s. included in the submission the counterfactual scenario, explaining the situation without the aid and submitted that the aid was proportionate.

Comments from ÚSOVSKO EKO s.r.o. ([31])

(84) ÚSOVSKO EKO s.r.o. received aid for restructuring of orchards (aid scheme SA.50787) in December 2016 and in December 2017.

([30]) a.s. = 'akciová společnost' = joint-stock company.
([31]) s.r.o. = 'společnost s ručením omezeným' = private limited company.

(85) ÚSOVSKO EKO s.r.o. submitted that it had acted in good faith and invoked legitimate expectations because in the aid applications for both years it correctly indicated its status of a large enterprise. ÚSOVSKO EKO s.r.o. submitted copies of its aid applications for both years which show that only the aid application for year 2017 included the question on the size of the aid applicant. The company indicated its size of the large enterprise.

(86) ÚSOVSKO EKO s.r.o. claims that the decision of the Ministry of Agriculture on the withdrawal of aid was illegal, as it substantially violated the provisions on administrative proceedings.

(87) ÚSOVSKO EKO s.r.o. claims that the national legal basis ('Principles for granting aid' (recital (16)) at the time between years 2008 and 2018 did not explicitly lay down the condition that beneficiaries must be SMEs. The national legal basis defined eligible beneficiaries as 'entrepreneurs engaged in agricultural production' ([32]). According to ÚSOVSKO EKO s.r.o., only as from 2015 the national legal basis referred to Article 14 of Regulation (EU) No 702/2014 ([33]), but without explicitly excluding large undertakings from the group of the eligible beneficiaries. Moreover, the definition of the eligible beneficiaries remained unchanged.

(88) According to ÚSOVSKO EKO s.r.o, in years 2015–2017 the Czech Ministry of Agriculture was not aware of the fact that on the basis of Regulation (EU) No 702/2014, the investment aid could not be granted to large undertakings. The explicit exclusion appeared in the national legal basis only in 2018 and, as of that year, USOVSKO EKO s.r.o. has not applied for aid anymore.

(89) ÚSOVSKO EKO s.r.o. included in the submission to the Commission the counterfactual scenario, explaining the situation without the aid. The company considers that the aid had an incentive effect and was proportionate.

Comments from ÚSOVSKO AGRO s.r.o.

(90) ÚSOVSKO AGRO s.r.o. received aid under both aid schemes in December 2017.

(91) In its submission, ÚSOVSKO AGRO s.r.o. claimed that it had acted in good faith and invoked legitimate expectations because in both aid applications it correctly indicated its status of a large undertaking. ÚSOVSKO AGRO s.r.o. submitted copies of its aid applications. In both, the company indicated its size of the large enterprise.

(92) ÚSOVSKO AGRO s.r.o. considers that the decision of the Ministry of Agriculture on the withdrawal of aid is illegal, as it substantially violates the provisions on administrative proceedings.

(93) Like the other beneficiaries that submitted their comments to the opening decision, ÚSOVSKO AGRO s.r.o. also submitted that the national legal basis ('Principles for granting aid', recital (16)) did not, between years 2008 and 2018, explicitly lay down the condition that beneficiaries must be SMEs. The national legal basis defined eligible beneficiaries as 'entrepreneurs engaged in agricultural production' ([34]). As from 2015, the national legal basis referred to Article 14 of Regulation (EU) No 702/2014, but without explicitly excluding large undertakings from eligible beneficiaries. Furthermore, the definition of eligible beneficiaries remained unchanged.

(94) According to ÚSOVSKO AGRO s.r.o, in years 2015–2017 the Czech Ministry of Agriculture was not aware of the fact that on the basis of Regulation (EU) No 702/2014 the aid could not be granted to large enterprises. Such explicit limitation appeared in the national legal basis only in 2018 and, as of that year, USOVSKO AGRO s.r.o. has not applied for aid anymore.

(95) ÚSOVSKO AGRO s.r.o. included in the submission the counterfactual scenario, explaining the situation without the aid. The company considers that the aid had an incentive effect and was proportionate.

([32]) Act No 513/1991 Coll., Section 2, later Act No 89/2012 Coll., Section 420.
([33]) Article 14 Regulation (EU) No 702/2014: 'Aid for investments in tangible assets or intangible assets on agricultural holdings linked to primary agricultural production'.
([34]) Act No 513/1991 Coll., Section 2, later Act No 89/2012 Coll., Section 420.

Comments from SADY CZ s.r.o.

(96) SADY CZ s.r.o. received aid under both aid schemes in December 2017.

(97) SADY CZ s.r.o. submitted copies of its aid applications. One aid application correctly indicated that the company was a large enterprise. According to the other aid application, the company was medium enterprise. SADY CZ s.r.o. explained this discrepancy by an administrative error and supported this explanation by the excerpt from the Corporate register, which was attached to both aid applications and which demonstrated that it was a large enterprise.

(98) Since the size of an enterprise was correctly stated in (one) aid application, SADY CZ s.r.o. submits that the Commission had been mistaken in the opening decision in stating that the Czech authorities 'granted aid to large undertakings, which they considered to be SMEs'. According to SADY CZ s.r.o., the Czech authorities were in fact aware that the aid was granted to a large undertaking, as it was explicitly indicated in the aid application. The Czech authorities therefore could not had considered this beneficiary as an SME.

(99) According to SADY CZ s.r.o., the Czech authorities repeatedly checked that the conditions for granting the aid were complied with.

(100) SADY CZ s.r.o. stated in the submission to the opening decision that the national legal basis ('Principles for granting aid', recital (16)) did not set out the size of the beneficiary as an eligibility condition.

(101) SADY CZ s.r.o. argued in the submission to the opening decision that the aid nevertheless had an incentive effect and was proportionate and that these two conditions were verified by the Czech authorities. SADY CZ s.r.o. claimed that it prepared, before applying for aid, an internal document entitled 'Investment intention for orchard renewal' in which it assessed the profitability of the project and proved the incentive effect and proportionality of the aid (on the basis of internal rate of return, net present value, index profitability, payback period). This document was, however, not submitted to the granting authority. SADY CZ s.r.o. included this document in its submission to the Commission. SADY CZ s.r.o. insists that it cannot be sanctioned for the administrative negligence of the Czech authorities.

(102) Referring to Article 6(3) of Regulation (EU) No 702/2014, SADY CZ s.r.o. suggested that aid received on the basis of the two block-exempted schemes could be considered as an ad-hoc aid granted to large enterprises on the basis of the quoted Article.

Comments from Lužanská Zemědělská a.s.

(103) Lužanská Zemědělská a.s. received aid for restructuring of orchards in years 2016 and 2017.

(104) Lužanská Zemědělská a.s. submitted that the aid application form in 2016 did not contain a question concerning the size of an applicant, therefore it could not indicate its size of a large enterprise. In 2017, the aid application form already included this question and Lužanská Zemědělská a.s. correctly indicated it as a large undertaking. In both years, the company also submitted an excerpt from the Corporate register, which demonstrated its ownership structure.

(105) Like other third parties, which submitted their comments to the opening decision, Lužanská Zemědělská a.s. also pointed out that the national legal basis ('Principles for granting aid', recital (16)) did not include the size of a beneficiary among the eligibility conditions. In addition, referring to Article 6(3) of Regulation (EU) No 702/2014, Lužanská Zemědělská a.s. claims that that Regulation explicitly allowed aid to large undertakings. Thus, according to the exact wording of the Principles for granting aid, eligible for aid was 'an entrepreneur active in agricultural production' (without further limitation of the size of the applicant).

(106) According to Lužanská Zemědělská a.s., the Commission had been mistaken in the opening decision in stating that the Czech authorities 'granted aid to large enterprises, which they considered to be SMEs'. The Czech authorities were in fact aware that aid was granted to a large enterprise – because the business size of Lužanská Zemědělská a.s. was explicitly indicated in the aid application for year 2017 and in year 2016 it was clear from the submitted excerpt from the Corporate register.

(107) Lužanská Zemědělská a.s. further claims that, despite the fact that on the 2017 aid application form it had indicated its size as a large undertaking and its large enterprise status should have been known to the authorities from its accompanying documents, formally speaking, it was not a large enterprise at the moment of the aid applications in 2016 and 2017. That is because:

(a) Lužanská Zemědělská a.s. became part of Agrofert ([35]) in July 2016, therefore, in compliance with the wording of Article 4(2) of Annex I to Regulation (EU) No 702/2014, it did not lose its SME status when it applied for aid in September 2016 and then in September 2017.

(b) Lužanská Zemědělská a.s. argued in its submission to the opening decision that that Article must not be interpreted contrary to its wording, as such interpretation would be contrary to the basic requirements for legal certainty of the EU law addressees, and, to this end, refers to the judgment in case C-310/98 Met-Trans, paragraph 32 ([36]).

(c) Lužanská Zemědělská a.s. further invoked legitimate expectations, as in its view, aid was proportionate and had an incentive effect. According to the company, the Czech authorities repeatedly checked that the conditions for granting the aid are complied with.

(108) Lužanská Zemědělská a.s. reiterates that it cannot be sanctioned for the failure of the Czech authorities to request a counterfactual scenario. The company asserts that it was able to submit its internal analysis before granting the aid and that it would be a '*very formalistic approach, which would wholly ignore the economic reality and above all the purpose for which the aid is in practice granted*'.

(109) The company included in its submission the financial and profitability analysis of the investment project. The Commission notes that these documents are dated on 11 March 2021, i.e. after the aid was granted and after the granting decisions were revoked by the granting authority and the recovery procedure initiated. That date coincides with the date of the submission of the comments to the opening decision and there is no indication as to when it was actually prepared.

(110) Lužanská Zemědělská a.s. also argued that in compliance with Article 6(3) of Regulation (EU) No 702/2014, such aid was available also to large enterprises as an ad-hoc aid.

6. **TRANSMISSION OF THE THIRD PARTIES' COMMENTS TO CZECHIA**

(111) In compliance with Article 6(2) of Regulation (EU) 2015/1589, the Commission submitted the third parties' comments to Czechia by letter of 25 April 2022 and invited the latter to submit its observations within one month of the date of the letter.

(112) The Czech authorities responded by letter of 23 May 2022 and then submitted further information by letter of 24 August 2022.

(113) In the first letter, dated on 23 May 2022, Czechia confirmed that the arguments submitted by the third parties were very similar to those brought forward by them in the national court proceedings, which they all initiated against the recovery decisions of the Ministry of Agriculture of Czechia.

([35]) Large enterprise.

([36]) Judgment of 23 March 2000, 'Met-Trans', joined cases C-310/98 and C-406/98, EU:C:2000:154, paragraph 32.

(114) Czechia agreed with the argument of the third parties that the aid was used in accordance with its objectives, despite being granted to large enterprises that were ineligible under the block exempted schemes and at a time when no aid to large undertakings was notified. The Czech authorities also agreed that the aid had incentive effect despite the absence of the counterfactual scenario, because such investments would not have been carried out without aid, mainly because of their high costs. The Czech authorities also reiterated that despite the absence of the assessment of the counterfactual scenario, the projects' internal rate of return was reasonable, and the aid did not lead to its increase above the usual levels.

(115) As regards the reported absence of the explicit restriction on the size of eligible beneficiaries in the national legal basis, Czechia reiterated that the intention and the meaning of the legal basis was to grant aid exclusively to SMEs. To this end, the national legal basis in years 2016 and 2017 stipulated that the aid was granted on the basis of Article 14 of Regulation (EU) No 702/2014, i.e. it followed that it was available only to SMEs. The Czech authorities pointed out that none of the beneficiaries concerned by the aid recovery disputed the fact that they were large enterprises, therefore, the Czech authorities initiated the recovery procedures.

(116) As regards the state of play of the seven national court proceedings, the Czech authorities informed that, at the time of that letter, in five cases the Municipal Court in Prague had already ruled and dismissed the claims. Two claimants (Sady CZ s.r.o. and Lužanská Zemědělská a.s.) withdrew their claims. In one remaining case (RBQ SADY s.r.o.), the Court's decision was pending.

(117) The Czech authorities explained that in all judgements issued, the Municipal Court in Prague found that the Ministry of Agriculture rightly issued the recovery decisions. At the same time, the Court referred to § 15(3)(c) of Act No 218/2000 Coll. on budgetary rules, as in force at the time when the recovery procedures were initiated. That provision stipulated that the reimbursement of a subsidy which was already paid on the beneficiary's account cannot be ordered, if the reason for the recovery was that the aid was granted in violation of the EU or national law. The Municipal Court in Prague thus found that although the Ministry of Agriculture was obliged to initiate procedures for the aid recovery, § 15(3)(c) of Act No 218/2000 Coll., as in force at the time when the recovery was initiated, precludes the Ministry from enforcing the effective recovery of such aid.

(118) In the letter of 24 August 2022, the Czech authorities explained that § 15(3) of Act No 218/2000 Coll. was amended as of 1 January 2022 and letter (c) was deleted.

(119) However, the Czech authorities maintained that, as found by the Municipal Court in Prague, notwithstanding the amendment, the principle of legal certainty precludes from recovering the granted aid, as the amendment of Act No 218/2000 Coll. cannot be applied retroactively.

7. **LEGAL ASSESSMENT OF THE AID**

7.1. **Existence of aid within the meaning of Article 107(1) TFEU**

(120) According to Article 107(1) TFEU, '[s]ave as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.

(121) In its opening decision ([37]), the Commission came to the preliminary conclusion that the conditions of Article 107(1) TFEU were fulfilled and, therefore the notified schemes SA.50787 and SA.50837 constituted State aid within the meaning of that Article.

(122) This preliminary conclusion was not put in question in any of the comments received from the third parties and from Czechia. Moreover, Czechia itself notified the schemes as State aid measures.

([37]) Cf. recitals 58 to 62 of the opening decision.

(123) The qualification of a measure as aid within the meaning of that Article therefore requires the following cumulative conditions to be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage on its recipient; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and affect trade between Member States.

(124) Due to the fact that the notified aid measures are governed by an act on the basis of which, without further implementing measures being required (recital (16)), individual aid awards may be made to undertakings defined within the act in a general and abstract manner (Sections 2.2.3, 2.2.4, 2.3 and 2.4), the Commission considers that they are aid schemes within the meaning of point (35)(4) of the 2014 Guidelines. The schemes may only be considered compatible with the internal market if they can benefit from one of the derogations provided for in the TFEU (see also Section 7.2).

(125) The schemes are imputable to the State as they are based on the legal acts described in recital (16) and are implemented by State authority (recital (19)). They are paid from the State budget, thus through State resources (recital (19)).

(126) The schemes confer an advantage on their beneficiaries in the form of direct grants (recital (19)). The schemes thus relieve those beneficiaries of costs, which they would have to bear under normal market conditions.

(127) The schemes are selective since aid is awarded only to certain undertakings, specifically to undertakings active in primary agricultural production.

(128) Pursuant to the case law of the Court of Justice, aid to an undertaking appears to affect trade between Member States where that undertaking operates in a market open to intra-EU trade ([38]). The beneficiaries of aid operate in the sector of primary agricultural production, where intra-EU trade takes place ([39]). This sector is thus open to competition at EU level and therefore sensitive to any measure in favour of the production in one or more Member States. Therefore, the scheme is liable to distort competition and to affect trade between Member States.

(129) The Commission therefore confirms its preliminary conclusions set out in recitals (58) to (62) of the opening decision and reiterates that the aid granted under the two schemes constitutes State aid within the meaning of Article 107(1) TFEU.

7.2. **Existence of schemes**

(130) Pursuant to Article 1(d) of Regulation (EU) 2015/1589, an 'aid scheme' is defined as any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner.

(131) In its opening decision ([40]), the Commission also preliminarily concluded that both aid measures SA.50787 and SA.50837 constituted schemes within the meaning of that definition and point 35(4) of the 2014 Guidelines, as their legal basis did not require further implementing measures for the granting of the aid and identified the beneficiaries in a general and abstract manner. The same legal basis and conclusion on the existence of schemes applies to the block-exempted aid schemes SA.46621 (2016/XA) and SA.46972 (2016/XA), which were applicable at the time in 2016 and 2017, when the aid to large undertakings was unlawfully granted.

(132) As regards the qualifications of the aid measures as schemes, two third parties – SADY CZ s.r.o. (recital (102)) and Lužanská Zemědělská a.s. (recital (110)) submitted that the aid granted to them constituted in fact ad hoc aid pursuant to Article 6(3) of Regulation (EU) No 702/2014.

(133) As regards that argument, the Commission recalls at first the definition of an ad hoc aid. Pursuant to Article 2(13) of Regulation (EU) No 702/2014, '*ad hoc aid*' means aid not granted on the basis of an aid scheme.

([38]) See in particular the judgment of 13 July 1988, *French Republic v Commission of the European Communities*, C-102/87, EU:C:1988:391.
([39]) In 2022, the EU agri-food trade totalled EUR 401,5 billion during the year (Source: Eurostat).
([40]) Cf. recital 63 of the opening decision.

(134) However, in the present case, the Commission notes that the aid received by SADY CZ s.r.o. and Lužanská Zemědělská a.s. was granted on the basis of the national rules of the subsidy program (the legal basis mentioned in recital (16)) without further implementing measures being required. In fact, the aid to large undertakings was erroneously granted in the context of the block exempted schemes, which in reality were only open to SMEs. There was no individual ad hoc aid to large undertakings notified to the Commission before the aid was granted to these beneficiaries. The only notification that concerned large undertakings was when Czechia notified the schemes SA.50787 and SA.50837, after the grant of the aid to large undertakings had taken place. The aid to the large undertakings in 2016 and 2017 was also founded on the same national legal basis that applied to the block exempted schemes and which was also indicated later in the notification of the schemes SA.50787 and SA.50837. In other words, the aid under those notified schemes was implemented in the past, whereas no ad hoc aid or scheme was notified to the Commission before their implementation and they were also not covered by the block-exemption Regulation (EU) No 702/2014 for the reasons set out below (recitals (138) to (164)).

(135) The national legal basis provides the essential elements of the aid (eligible cost and aid intensities) and defines the beneficiaries in an abstract and general manner. On this basis, Czech authorities granted aid to the beneficiaries without any margin of discretion allowing them to influence the essential elements of the aid and the conditions under which it was granted. In light of the explanation submitted by the Czech authorities (recital (68), the Commission considers that granting of aid to large enterprises on the basis of the block-exempted schemes was the outcome of the administrative error and not the exercise of any discretionary power.

(136) The Commission therefore concludes that the aid unlawfully granted to the large undertakings before the notification of the schemes SA.50787 and SA.50837, but in accordance with their legal basis and on equal terms as the aid granted to SMEs under that legal basis, was granted in the context of two aid schemes within the meaning of Article 1(d) of Regulation (EU) 2015/1589. Consequently, the Commission does not accept the argument of SADY CZ s.r.o. and Lužanská Zemědělská a.s. that the aid which was granted to them could constitute ad hoc aid pursuant to Article 6(3) of Regulation (EU) No 702/2014 (see also recitals (142) to (164)).

(137) In any event, the Commission cannot accept as compatible *ad hoc* aid that does not fulfil all the compatibility conditions of Regulation (EU) No 702/2014 (see recitals (149) to (161)).

7.3. **Classification of the schemes as unlawful**

(138) In its opening decision, the Commission considered that the aid was granted to large enterprises without prior notification to the Commission pursuant to Article 108(3) TFEU. ([41]) At the same time, the aid granted to large undertakings could not be found compatible under the block-exempted schemes, as Article 14 of Regulation (EU) No 702/2014 applied only to SMEs. Consequently, the Commission' preliminary opinion was that such aid to large undertakings constituted new aid, which was unlawful within the meaning of Article 1(f) of Regulation (EU) 2015/1589.

(139) In their submissions to the opening decision, both Czechia and the third parties confirmed that the aid was granted to some large enterprises prior to the dates of the notifications of the aid schemes SA.50787 and SA.50837 to the Commission.

(140) The Commission recalls that two third parties – SADY CZ s.r.o. (recital (102)) and Lužanská Zemědělská a.s. (recital (110)) suggested that the aid granted to them constituted in fact ad hoc aid pursuant to Article 6(3) of Regulation EU (No) 702/2014. Accordingly, in their view, such aid would not qualify as unlawful aid, since the block exempted schemes were published in compliance with Regulation (EU) No 702/2014.

([41]) Cf. recitals 64-65 of the opening decision.

(141) For the analysis of that claim, the Commission refers to Article 3 of Regulation (EU) No 702/2014, which laid down the conditions for the exception of aid from the notification requirement of Article 108(3) TFEU. The said Article stipulated that aid schemes, individual aid granted under aid schemes and ad hoc aid were compatible with the internal market within the meaning of Article 107(2) or (3) of the Treaty and were exempted from the notification requirement of Article 108(3) of the Treaty provided that such aid fulfilled all the conditions laid down in Chapter I of that Regulation, as well as the specific conditions for the relevant category of aid laid down in Chapter III of that Regulation.

(142) The Commission assesses therefore whether the aid granted to SADY CZ s.r.o. and Lužanská Zemědělská a.s, and by analogy also to other large enterprises, could be considered an ad hoc aid on the basis of Articles 1 and 6 of Regulation (EU) No 702/2014.

7.3.1. *Scope of beneficiaries under Regulation (EU) No 702/2014*

(143) Article 1 of Regulation (EU) No 702/2014 sets out the scope of that Regulation.

(144) Pursuant to paragraph 1(a)(i) of Article 1 of Regulation (EU) No 702/2014, that Regulation applied to aid in favour of micro, small and medium sized enterprises (SMEs) active in the agricultural sector, namely primary agricultural production, the processing of agricultural products and the marketing of agricultural products, except for Articles 14, 15, 16, 18 and 23 and Articles 25 to 28 which only applied to SMEs active in the primary agricultural production.

(145) The Commission recalls that Article 14 of Regulation (EU) No 702/2014 laid down the conditions of aid in favour on investments linked to primary agricultural production and thus constituted the legal foundation for both block-exempted schemes SA.46621 (2016/XA) and SA.46972 (2016/XA). As noted above (recital (134), the aid to large undertakings was erroneously granted by the Czech authorities in the context of the block exempted schemes, which in reality were only open to SMEs. The aid to the large undertakings in 2016 and 2017 was also founded on the same national legal basis that applied to the block exempted schemes and which was also indicated later in the notification of the schemes SA.50787 and SA.50837. In other words, the aid under those notified schemes was implemented in the past, whereas no ad hoc aid or scheme was notified to the Commission before their implementation and they were also not covered by the block-exemption Regulation (EU) No 702/2014 for the reasons set out below.

(146) Pursuant to paragraph 1(b) to (e) of Article 1 of Regulation (EU) No 702/2014, the following categories of aid could be granted to all enterprises, without applying the limit of the size:

‘(b) aid for investments for the conservation of cultural and natural heritage located on agricultural holdings;

(c) aid in favour of making good the damage caused by natural disasters in the agricultural sector;

(d) aid for research and development in the agricultural and forestry sectors;

(e) aid in favour of forestry.’

(147) As regards other aid categories included in Regulation (EU) No 702/2014, Article 1, paragraph 1(a)(i) of Regulation (EU) No 702/2014 did not provide for any derogation from the restriction of limiting aid to SMEs under Articles granted 14, 15, 16, 18, 23 and Articles 25 to 28.

(148) It follows that only the aid categories listed in Article 1, paragraphs (b) to (e) of Regulation EU (No) 702/2014 were available to large enterprises, either on the basis of the block-exempted scheme or as ad hoc aid. All the other types of aid covered by the scope of that Regulation, including Article 14, were limited to SMEs. That in itself is sufficient to dismiss the claim of categorising the aid to the large enterprises as ad hoc aid under Regulation EU (No) 702/2014.

(149) Further, the Commission recalls that pursuant to Article (3) of Regulation EU (No) 702/2014, aid schemes, individual aid granted under aid schemes and ad hoc aid shall be compatible with the internal market within the meaning of Article 107(2) or (3) of the Treaty and shall be exempted from the notification requirement of Article 108(3) of the Treaty provided that such aid fulfilled all the applicable conditions laid down in that Regulation.

(150) Pursuant to Article 6(1) of Regulation (EU) No 702/2014, Regulation (EU) No 702/2014 applied only to aid which had an incentive effect.

(151) Pursuant to Article 6(2) of Regulation EU (No) 702/2014, aid was considered to have an incentive effect if the beneficiary submitted a written application for the aid to the Member State concerned before work on the project or activity has started.

(152) In the opening decision, the Commission did not question that the aid applications were correctly submitted, and the investigation confirmed that this condition was met and that no aid was granted without the aid application preceding such grant.

(153) Pursuant to Article 6(3) of Regulation EU (No) 702/2014, ad hoc aid granted to large enterprises was considered to have an incentive effect if, in addition to ensuring that the condition laid down in paragraph 2 (of that Article) was fulfilled, the Member State verified, before granting the ad hoc aid concerned, that documentation prepared by the beneficiary established that the aid would result in one or more of the situations listed in paragraphs (a) to (d) of paragraph 3 of that Article.

(154) Pursuant to recital (24) of Regulation EU (No) 702/2014, as regards any ad hoc aid covered by that Regulation granted to a beneficiary which is a large enterprise, the Member State had to ensure, in addition to the conditions on the incentive effect applicable to SMEs, that the beneficiary had analysed, in an internal document before the aid application, the viability of the aided project or activity with aid and without aid. The Member State had to verify that this internal document confirmed a material increase in the scope of the project or activity, a material increase in the total amount spent by the beneficiary on the aided project or activity or a material increase in the speed of completion of the project or activity concerned. It should have also been possible to establish the incentive effect on the basis of the fact that the investment project or the activity would not have been carried out as such in the rural area concerned in the absence of the aid.

(155) In the Commission's opinion, the document described in recital (24) of Regulation EU (No) 702/2014 and requested pursuant to Article 6(3) of that Regulation was in its substance, in fact, equivalent to the counterfactual scenario. Moreover, like the counterfactual scenario, the Member State had the obligation to verify, before granting the ad hoc aid, that documentation prepared by the beneficiary established that the aid would result in one or more of the situations listed in paragraphs (a) to (d) of paragraph 3 of that Article.

(156) In the opening decision, the Commission expressed its doubts that beneficiaries, which were large undertakings at the time of aid granting, submitted the counterfactual scenario ([42]).

(157) During the investigation, the Czech authorities did not provide information which would indicate that they had verified, before granting the aid, if that documentation prepared by the beneficiary established that the aid met the conditions laid down in Article 6(3), paragraphs (a) to (d) of Regulation EU (No) 702/2014. Rather, the previous explanation of the Czech authorities that the aid was granted to some large enterprises because they were incorrectly considered as SMEs, confirms, in the Commission's view, that the conditions specific to aid for large enterprises, were not applied in this case.

([42]) Cf. recital (115) of the opening decision.

(158) SADY CZ s.r.o. and Lužanská Zemědělská a.s., the two beneficiaries that invoked the argument of ad hoc aid pursuant to Article 6(3) of Regulation EU (No) 702/2014, did not specify whether they submitted the internal documents required pursuant to Article 6(3) of that Regulation for the *ex ante* assessment by the national authorities. They both, however, submitted to the Commission the copies of their aid applications, which allow to conclude that such documentation was not included in the aid applications. The same applies to all other large enterprises that submitted observations on the opening decision. The Czech authorities did not specify in their submission whether they obtained or not the internal documents required pursuant to Article 6(3) of Regulation EU (No) 702/2014 for the *ex ante* assessment. They limited themselves to the view that the aid granted to large enterprises fulfilled the incentive effect criterion and was proportionate (recitals (71) to (74)). The Commission therefore concludes that the Member State' authorities did not verify *ex ante* the compliance with Article 6(3) of Regulation EU (No) 702/2014.

(159) Pursuant to Article 6(4) of Regulation EU (No) 702/2014, by way of derogation from paragraphs 2 and 3 of that Article, measures in the form of tax advantages were deemed to have an incentive effect, provided that the conditions set out in that paragraph were fulfilled. The aid under the investigation was granted as a direct grant and not as a tax advantage. Therefore, that derogation did not apply.

(160) Neither did apply the derogation from an incentive effect set out in Article 6(5) of Regulation EU (No) 702/2014, which listed the categories of aid that were not required to have or were deemed to have an incentive effect. The aid in favour of investments was not covered by that derogation.

(161) On that ground, the Commission concludes that the conditions laid down in Article 6(3) of Regulation (EU) No 702/2014 were not fulfilled and, consequently, in compliance with Article (3) of that Regulation, Regulation EU (No) 702/2014 could not apply to that aid.

(162) Accordingly, the Commission does not accept the argument of SADY CZ s.r.o. and Lužanská Zemědělská a.s. that the aid which was granted to them (or to other large enterprises) constituted ad hoc aid pursuant to Article 6(3) of Regulation EU (No) 702/2014.

7.3.2. *Conclusion*

(163) Given that such aid did not fulfil all the conditions laid down in Chapter I of Regulation (EU) No 702/2014, in compliance with Article 3 of that Regulation ([43]), it could not be exempted from the notification requirement of Article 108(3) TFEU.

(164) The Commission concludes that the Czech authorities did not fulfil their obligation set out in Article 108(3) TFEU because they granted the investment aid to some beneficiaries prior to its notification and approval by the Commission. The Commission therefore maintains that such aid must be considered as unlawful aid within the meaning of Article 1(f) of Regulation (EU) 2015/1589.

7.4. **Compatibility of the aid with the internal market**

(165) Under Article 107(3), point (c), TFEU, aid may be considered compatible with the internal market, if it is found to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

(166) In its opening decision, the Commission carried out detailed examination of the compatibility of the two schemes SA.50787 and SA.50837 (including the aid already implemented to large enterprises) with ([44]) the Union State aid rules applicable at that time. In the case at hand, these were Part I ('Common assessment principles') and Part II, Section 1.1.1.1 ('Aid for investment in tangible assets and intangible assets on agricultural holdings linked to primary agricultural production') of the 2014 Guidelines, which were in force at the time the aid was granted ([45]) to large enterprises.

([43]) See also judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 59.
([44]) Cf. recitals (70) to (89) of the opening decision.
([45]) Cf. recital (69) of the opening decision.

(167) As regards the compatibility of the schemes with the specific conditions laid down for the investment aid in Section 1.1.1.1 of the 2014 Guidelines, the Commission concluded on preliminary basis that both schemes (including the aid already implemented to large enterprises) met those conditions.

(168) As regards the assessment of the compatibility of the schemes with the common assessment principles under Article 107(3) TFEU, set out in Part I of the 2014 Guidelines, the Commission came to different preliminary conclusions as regards the aid granted prior to its notification and the aid which was to be granted only after its approval and notification of the Commission decision to Czechia.

(169) While the Commission's preliminary opinion confirmed that the latter aid complied with the common assessment principles ([46]), the same conclusion was not reached as regards aid already granted to large enterprises prior to its notification. Specifically, the Commission raised doubts as to whether such aid was proportionate and presented the incentive effect ([47]).

(170) The Commission recalls that doubt existed whether the large enterprises – which received aid erroneously in the context of the block-exempted schemes and which in essence implemented schemes SA.50787 and SA.50837 before their notification – submitted the counterfactual scenario and whether that aid granted complied with the net-extra cost approach set out in points (95) to (97) of the 2014 Guidelines. The Commission reasoned that in the likely absence of the counterfactual scenario, the Czech authorities could not have in fact ascertained that the aid amounts were proportionate and corresponded to the net extra costs of implementing the investment in the area concerned, by comparing it to the scenario without aid.

(171) The Commission recalls that all beneficiaries that submitted their comments to the opening decision indicated in at least one of their aid applications in 2016 and 2017 their status as a large undertaking and not as an SME at the moment of granting the aid. In any event, their large enterprise status was visible from the submitted documentation accompanying the id applications.

(172) All beneficiaries that submitted their comments to the opening decision also confirmed that the Czech authorities did not request the counterfactual scenario despite them indicating in the aid applications or accompanying documentation that there were large enterprises.

(173) All beneficiaries that submitted their comments to the opening decision (recitals (76) to (110)) claimed that the aid had an incentive effect despite the absence of the counterfactual scenario and its verification by the Czech authorities. The majority of them included such counterfactual scenario in the submission to the Commission. This opinion of the beneficiaries that submitted their comments to the opening decision was supported by the Czech authorities (recital (71)).

(174) The Commission assesses the arguments on the presence of an incentive effect in light of the relevant points of Section 3.4 of Part I of the 2014 Guidelines.

(175) Pursuant to point (70) of the 2014 Guidelines, the aid did not present the incentive for the beneficiary wherever the work on the relevant project or activity had already started prior to the aid application by the beneficiary to the national authorities.

(176) Pursuant to point (72) of the 2014 Guidelines, in addition to information set out in point (71) of those Guidelines, large enterprises had to described in the aid application the situation without the aid, referred to as the counterfactual scenario or alternative project or activity and submit documentary evidence in support of the counterfactual described in the application.

(177) Further, pursuant to point (73) of the 2014 Guidelines, when receiving the aid application, the granting authority had to carry out a credibility check of the counterfactual and confirm that the aid had the required incentive effect.

([46]) Cf. recital (102) of the opening decision.
([47]) Cf. recitals (116) and (122) of the opening decision.

(178) The copies of the aid applications and accompanying documentation submitted to Commission confirm that the large enterprise beneficiaries that submitted their comments to the opening decision, submitted the aid applications before the aid was granted to them.

(179) However, the investigation confirmed beyond doubt that none of the aid applications by large enterprises included the counterfactual. It follows that the Czech authorities did not check and did not confirm that the aid to large enterprises had an incentive effect before granting the aid to large enterprises.

(180) It stems from points (72) and (73) of the 2014 Guidelines that both conditions had to be fulfilled before the aid was granted, i.e. the situation without the aid had to be described by the aid applicant in the aid application and had to be verified by the granting authority in advance of the aid grant. If these two conditions are not fulfilled, the presence of the incentive effect remains hypothetical and not proven.

(181) The Commission stresses that the incentive effect of the aid cannot be assumed but must be demonstrated by the aid applicant and confirmed by the granting authority before the aid is granted. Further, point (72) of the 2014 Guidelines required that the counterfactual is described in the aid application. That point or any other point of the 2014 Guidelines did not provide for any alternative demonstration of the counterfactual scenario. The Commission therefore cannot accept or assess the *ex post* counterfactual scenarios, which the large enterprise beneficiaries submitted with their comments on the opening decision.

(182) Accordingly, the preliminary view that the aid did not present an incentive effect is confirmed.

(183) As regards the criterion of proportionality, the Commission recalls the rules which applied to the aid at issue at the time of its granting to large enterprises:

(184) Pursuant to point (95) of the 2014 Guidelines, in case of investment aid granted to large enterprises under the notified aid schemes, Member States had to ensure that the aid amount was limited to the minimum on the basis of a 'net-extra cost approach'.

(185) Pursuant to point (97) of the 2014 Guidelines, the Member State had to ensure that the aid amount corresponded to the net extra costs of implementing the investment in the area concerned, compared to the counterfactual scenario in the absence of aid. To this end, the method provided for in point (96) of those Guidelines had to be used together with maximum aid intensities as a cap. Further, the aid amount could not exceed the minimum necessary to render the project sufficiently profitable, for example, it could not lead to an increase of its investment return rate ('IRR') beyond the normal rates of return applied by the undertaking concerned in other investment projects of a similar kind or, if these rates were not available, to an increase of its IRR beyond the cost of capital of the undertaking as a whole or beyond the rates of return commonly observed in the sector concerned.

(186) The above rules on proportionality of the aid likewise required that this criterion was checked and confirmed before the aid was granted to large enterprises.

(187) In the opening decision, the Commission expressed its doubts that the aid granted to large enterprises prior to its approval by the Commission, complied with the net-extra cost approach pursuant to points (95) to (97) of the 2014 Guidelines ([48]). In that regard the Commission pointed out that in the (at that stage) likely absence of the counterfactual scenario, the Czech authorities could not ensure that the aid amounts corresponded to the net extra costs of implementing the investment in the area concerned, by comparing it to the scenario without aid.

(188) The investigation confirmed that the large enterprises did not submit, together with the aid application, the counterfactual scenario. Therefore, the Czech authorities did not have the available information which would have allowed them to check and confirm that the aid complied with the net-extra cost approach pursuant to points (95) to (97) of the 2014 Guidelines. The Commission points out that neither the quoted points (95) to (97) of the 2014 Guidelines, nor any other point of those Guidelines provided for an alternative demonstration of the net-extra cost approach. Consequently, the preliminary doubt that the proportionality of aid granted to large enterprises was not ascertained, is confirmed.

([48]) Cf. recital (133) of the opening decision.

(189) The Commission therefore considers that the aid granted to the large enterprises prior to the date of the notification of the aid schemes SA.50787 and SA.50837 cannot be regarded as compatible with the internal market under the derogation provided for in Article 107(3), point (c), TFEU, since that aid did not fulfil the conditions on the presence of an incentive effect and proportionality as set out in the applicable provisions of the 2014 Guidelines.

(190) One of the aid beneficiaries (i.e. Lužanská Zemědělská a.s.) claims in its comments on the opening decision that, despite the fact that on the 2017 aid application form it had indicated its size as a large undertaking and its large enterprise status should have been known to the authorities from its accompanying documents, formally speaking it was not a large enterprise at the time of the aid granting in the years 2016 and 2017 and therefore the granted aid was compatible under Regulation (EU) No 702/2014 (recital (107)). The company argues that it became part of Agrofert (a large enterprise) in July 2016, therefore, in compliance with the wording of Article 4(2) of Annex I to Regulation EU (No) 702/2014, it had not lost its SME status for the next two years, i.e. when it applied for aid in September 2016 and then in September 2017.

(191) The Commission states at the outset that Lužanská Zemědělská contradicts its own aid applications in 2016 and 2017 which either explicitly indicated its size as a large undertaking or at least its large enterprise status should have been known to the authorities from its accompanying documents. Already on that basis the *ex post* change in the undertaking's position is not credible or acceptable. As Czechia submitted, the aid to large enterprises was granted by mistake (recital (68)) and in its *ex post* review it did not consider Lužanská Zemědělská a.s. as an SME ([49]).

In any event, the Commission adds that such interpretation of Article 4(2) of Annex I to Regulation EU (No) 702/2014, as proposed by Lužanská Zemědělská, is not in line with the interpretation of the SME definition by the Union Courts, which is based on the principle of *effet utile*. The Commission explained its interpretation of Article 4(2) and of the SME definition in the opening decision ([50]) (as recalled in recitals (54) to (60)). That reasoning stands and was not disputed by the Czech Republic or by any of the third parties.

(192) In the opening decision ([51]), the Commission concluded that it would be against the principle of *effet utile* to provide such a facility for enterprises that exceeded the headcount or financial thresholds because of the permanent change in structure, i.e. as a result of a change in ownership following a merger or acquisition. Such change pushes the relevant headcount or financial ceilings up on a lasting basis and, thus, these variables are no longer subject to economic performance of a company. The Commission considers that in such case the economic reality shows that a given enterprise is not a genuine SME. It follows that, even though this particular situation is not explicitly set out in Article 4(2) of the SME Definition in Annex I to Regulation (EU) No 702/2014, based also on the case law of the Union Courts and the principle of *effet utile*, such enterprise should not, following a permanent change in ownership, benefit from a SME status.

(193) Instead, where an enterprise exceeded the relevant SME ceilings as a result of a permanent change in structure or ownership, following a merger or acquisition, the relevant moment for the assessment is the time of the transaction (by which an enterprise permanently becomes part of a larger structure) and not the time of closure of the accounts of the applicant legal entity.

(194) In compliance with that interpretation, the Commission finds that Lužanská Zemědělská a.s. (or any other large enterprise beneficiary) cannot invoke Article 4(2) of Annex I to Regulation (EU) No 702/2014 for justifying its size as an SME at the moment of the aid applications submitted in 2016 and 2017. Instead, the Commission considers that Lužanská Zemědělská a.s.became the large enterprise at the moment when it became permanently part of Agrofert and not only after it exceeded, due to this ownership change, the headcount or financial thresholds stated in Article 2 of that Annex over two consecutive accounting periods. Therefore, the aid granted to Lužanská Zemědělská a.s. (or any other large enterprise beneficiary) is not covered by the block exemption under Regulation (EU) No 702/2014 (since Article 14 of that regulation applies only to SMEs and the aid could not be considered as ad hoc aid to large enterprises (recitals (144), (147) and (148) and the aid is both unlawful and incompatible.

([49]) Cf. recital (104) of the opening decision.
([50]) Cf. recitals (108) to (113) of the opening decision.
([51]) Cf. recital (112) of the opening decision.

8. **CONCLUSION**

(195) The Commission concludes that the aid granted to large enterprises in the form of direct grants constitutes State aid within the meaning of Article 107(1) TFEU. The Commission finds that Czechia had unlawfully implemented the aid schemes SA.50787 and SA.50837 by granting aid to large enterprises before the notification, in breach of Article 108(3) of the TFEU.

(196) Further, the foregoing analysis shows that such aid cannot be declared compatible with the internal market.

(197) It follows that the State aid granted by Czechia to large enterprises under the schemes SA.50787 and SA.50837 before their notification is unlawful and incompatible with the internal market.

9. **RECOVERY**

(198) According to Article 108(2) TFEU and the established case law of the Union Courts, the Commission is competent to decide that the Member State concerned shall alter or abolish aid when it has found that it is incompatible with the internal market ([52]). The Union Courts have also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation ([53]).

(199) In this context, the Union Courts have established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage, which it had enjoyed over its competitors on the internal market, and the situation prior to the payment of the aid is restored ([54]).

(200) In line with the case law, Article 16(1) of Regulation (EU) 2015/1589 states that '*where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (recovery decision). The Commission shall not require recovery of the aid if this would be contrary to a general principle of Union law*'.

(201) Thus, Czechia is obliged to recover unlawful and incompatible aid (recitals (195) and (196)) from all the beneficiaries which were large enterprises at the moment such aid was granted, unless it fulfilled all conditions of Commission Regulation (EU) No 1408/2013 ([55]) or the application of a general principle of EU law as claimed during the formal investigation. Recovery shall cover the time from the date when the aid was put at the disposal of the beneficiary until effective recovery. The amount to be recovered shall bear interest until effective recovery.

Alleged application of the EU principle of legal certainty to the case at stake

(202) The Czech authorities have already identified seven large enterprise beneficiaries and launched the appropriate procedures seeking to recover unlawful aid granted in the years 2016–2017 under one or both block-exempted aid schemes (recital (69)). However, the Czech authorities submit that recovery procedures could not be completed by the actual recovery of the aid from the beneficiaries, for the reasons explained in recitals (117) to (119) of this decision. Relying on the national Court' judgements and on the national law in force at the time of the initiation of the recovery procedures, specifically on § 15(3)(c) of Act No 218/2000 Coll. on budgetary rules, the Czech authorities invoke the principle of legal certainty.

([52]) Judgment of 12 July 1973, Commission v Germany, C-70/72, EU:C:1973:87, paragraph 13.
([53]) Judgment of 21 March 1990, Belgium v Commission, C-142/87, EU:C:1990:125, paragraph 66.
([54]) Judgment of 17 June 1999, Belgium v Commission, C-75/97, EU:C:1999:311, paragraphs 64 and 65.
([55]) Commission Regulation (EU) No 1408/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid in the agriculture sector (OJ L 352, 24.12.2013, p. 9).

(203) The Commission considers that § 15(3)(c) of Act No 218/2000 Coll. on budgetary rules, as in force at the time when the recovery procedures were launched, was in contradiction with the applicable EU rules on the recovery of unlawful aid, as expressed in numerous judgements of the Union Courts, illustrated below.

(204) It stems from the case law of the Union Courts that if aid has been granted pursuant to a block exemption regulation although the conditions laid down to qualify for exemption under that regulation were not satisfied, the granting of that aid was in breach of the notification requirement and must, therefore, be considered to be unlawful ([56]). State aid not covered by a block exemption regulation is to remain subject to the notification requirement laid down in Article 108(3) TFEU ([57]).

(205) According to the case law, Article 108(3) TFEU must be interpreted as meaning that that provision requires the national authority to recover on its own initiative aid that it has granted pursuant to a block exemption regulation when it finds, subsequently, that the conditions laid down by that regulation were not satisfied ([58]).

(206) Where a national authority finds that aid which it has granted pursuant to a block exemption regulation does not satisfy the conditions laid down to qualify for the exemption provided for by that regulation, it is the duty of that authority to adopt the appropriate measures to cure the unlawfulness of implementation of the aid, so that the aid does not remain freely available to the beneficiary until such time as the Commission's decision is made, including that of recovering on its own initiative the aid that was unlawfully granted ([59]).

(207) Further, the Commission recalls the principle of primacy of the EU law established by the jurisprudence of the Union Courts ([60]), according to which EU law prevails where a conflict arises between an aspect of EU law and of national law. Under that principle, national courts are under a duty to give full effect to the provisions of EU law, including, if needed, by refusing (on their own motion) to apply any conflicting provision of national legislation.

(208) In accordance with the Court's settled case-law, both the administrative authorities and the national courts that are called upon, within the exercise of their respective powers, are under a duty to give full effect to provision of EU law that have direct binding effect on the authorities of the Member States ([61]).

(209) The Commission further points out that national courts must take into account the legal situation resulting from the ongoing procedures before the Commission, even if it is provisional ([62]). This means that, while the investigation procedure is ongoing, national courts must draw legal consequences from the opening decision itself and take all appropriate action to address the potential breach of the standstill obligation.

(210) The Commission also recalls the case law of the Union Courts, which refer to the duty of the national authority to which there has been submitted an aid application that may fall within the scope of a block exemption regulation to examine carefully, taking account of the information submitted to it, whether the aid applied for meets all the relevant conditions laid down by that regulation and to reject that application if one of those conditions is not satisfied ([63]).

([56]) Judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 87.
([57]) Judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 86.
([58]) Judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 95.
([59]) Judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraphs 92 and 89.
([60]) Judgment of 5 February 1963, Van Gend en Loos v Administratie der Belastingen, C-26/62, EU:C:1963:1; judgment of 15 July 1964, Costa v E.N.E.L., C-6/64, EU:C:1964:51; judgment of 9 March 1978, Amministrazione delle finanze dello Stato v Simmenthal, C-106/77, EU:C:1978:49.
([61]) Judgment of 5 March 2019, Eesti Pagar *AS*, C-349/17, EU:C:2019:172, paragraphs 90 and 91 and judgment of 14 September 2017, The Trustees of the BT Pension Scheme, C-628/15, EU:C:2017:687, paragraph 54.
([62]) Judgment of 21 November 2013, Deutsche Lufthansa, C-284/12, EU:C:2013:755, paragraph 38.
([63]) Judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 93.

(211) The Commission considers that § 15(3)(c) of Act No 218/2000 Coll., as in force at the time of the initiation of the recovery procedures and applied in the present case by the national Court, impedes the effective implementation of the EU rules on the recovery of unlawful and incompatible aid, because it explicitly excluded the possibility of the effective recovery of the aid already paid where the reason for the recovery was that the granting decision breached the EU law ([64]).

(212) It stems from the settled case law of the EU Courts that the principles of the primacy and effectiveness of European Union law mean that Member States and aid beneficiaries cannot rely on the principle of legal certainty to limit recovery in case of a conflict between national and European Union law. In such a case, the European Union law prevails and national rules must be left unapplied or interpreted in a way that preserves the effectiveness of European Union law ([65]).

Alleged existence of legitimate expectations of the third parties

(213) The large enterprise beneficiaries which submitted their comments to the opening decision claimed in their submissions to the Commission that the granting decisions of the Czech authorities created legitimate expectations as regards the compatibility of the aid. They put forward several factors which in their view demonstrate that they could legitimately expect that the aid granted to them complied with all applicable conditions. The arguments of most of the third parties were that the Czech authorities were fully aware of their large enterprise status at the time of granting the aid and that the aid was proportionate and had an incentive effect despite the absence of the counterfactual scenario. According to the third parties, the Czech authorities repeatedly checked that the conditions for granting the aid were complied with and did not point to any deficiencies (before the *ex post* verification determined that they were not SMEs and hence received aid erroneously (recitals (78) to (110)).

(214) The Commission recalls that it is settled case-law ([66]) that the right to protection of legitimate expectations may be claimed by any individual who finds himself in a position in which it is shown that the EU administration gave rise to justified hopes as regards the aid granted. However, no one may plead infringement of the principle of the protection of legitimate expectations in the absence of specific assurances given to him by the administration. The grant of State aid cannot give rise to third parties' legitimate expectation that such aid is proper, if it was granted in breach of Article 108(3) TFEU ([67]).

(215) The Commission notes that the claim of the legitimate expectations brought up by the third parties in the present case relates solely and exclusively to the decisions by the national authorities.

(216) In that regard the Commission recalls that a national authority granting aid pursuant to a block exemption regulation cannot be regarded as being vested with the power to adopt a final decision finding that there is no obligation to notify the aid applied for to the Commission, under Article 108(3) TFEU ([68]).

(217) Where a national authority grants aid while misapplying a block exemption regulation, its doing so is an infringement of both the provisions of that regulation and of Article 108(3) TFEU ([69]). The same conclusion about unlawful aid in breach of Article 108(3) TFEU follows in the present case if one assesses the aid to the large enterprises as granted before the notification of the schemes SA.50787 and SA.50837.

([64]) § 15(3)(c) of Act No 218/2000 Coll., as in force until 31.12.2021.
([65]) Judgment of 5 October 2006, Commission v France ('Scott'), C-232/05, EU:C:2006:651, paragraphs 50-53.
([66]) Judgment of 20 September 1990, Commission v Germany, C-5/89, ECLI:EU:C:1990:320, paragraphs 13 and 14.
([67]) See e.g. judgment of 1 July 2010, Italian Republic v European Commission, T-53/08, EU:T:2010:267; judgment of 11 November 2004, P Demesa and Territorio Histórico de Álava *v* Commission, joined cases C-183/02 P and C-187/02, EU:C:2004:701; judgment of 13 September 2010, Hellenic Republic and Others v European Commission, joined cases T-415/05, T-416/05 and T-423/05, EU:T:2010:386.
([68]) Judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 101.
([69]) Judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 103.

(218) It follows that in such a situation, the granting of aid by a national authority cannot cause the beneficiary of that aid to hold a legitimate expectation that that aid is lawful ([70]).

(219) Besides, it is for the third parties concerned to display the required prudence and diligence and to satisfy themselves that the rules of EU law have been complied with ([71]). The Court confirmed that an economic operator exercising due care should normally be able to determine whether the procedure laid down in Article 108 TFEU has been followed ([72]). In the present case, the large enterprise beneficiaries failed to take into account in particular that the national legal basis referred to Article 14 of Regulation EU (No) 702/2014, which applies only to SMEs (recital (115)).

(220) Considering that reasoning, the Commission sees as unfounded the claims of the third parties that there was a violation of their legitimate expectations. At the same time, any possible assurances given by the national authorities to third parties cannot be invoked as an obstacle to recovering unlawful and incompatible aid.

(221) In light of the above arguments, the recipients may not rely on general principles of EU law such as legitimate expectations and legal certainty to prevent the recovery of the incompatible aid unlawfully granted to them. Consequently, the Commission considers that there is nothing to prevent the application of Article 16(1) of Regulation (EU) 2015/1589. No general principle of Union law counteracts the recovery of unlawful and incompatible aid identified in the framework of this decision.

(222) The Commission therefore concludes that the Czech authorities are under obligation to take all appropriate action to recover the aid already paid to large enterprises in order to restore the economic situation which the beneficiaries would be in without the grant of the unlawful and incompatible aid.

(223) The Czech authorities must recover the aid amounts specified in each decision granting the aid to a beneficiary ([73]) which was, at the time of the aid grant, a large enterprise within the meaning of the definition laid down in Annex I to Regulation (EU) No 702/2014, together with the recovery interests. The interests must be calculated from the date on which the aid in question was made available to the beneficiary and until its effective recovery, in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([74]) as amended by Commission Regulation (EU) 2015/2282 ([75]).

(224) As regards the beneficiaries concerned by the recovery, while some beneficiaries have been already identified, it cannot be ruled out that other beneficiaries may also be concerned. Therefore, the Commission invites the Czech authorities to implement this decision and recover the unlawful and incompatible aid from all beneficiaries which, at the time of the aid grant, did not meet the conditions of the definition of an SME, laid down in Annex I to Regulation EU (No) 702/2014.

([70]) Judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 106.
([71]) See e.g. judgment of 13 June 2000, EPAC v Commission, joined cases T-204/97 and T-270/97, EU:T:2000:148.
([72]) Judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 98.
([73]) In the recovery decisions, the Czech authorities specified the below aid amounts to be recovered. The Commission recalls that in compliance with Article 16 of Regulation (EU) 2015/1589, these aid amounts will have to be re-calculated to include interests payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery.
Pomona Tesenice: CZK 1 400 000 (EUR 60 000)
Usovsko EKO: CZK 1 000 000 (EUR 43 000)
Usovsko AGRO: CZK 4 700 000 (EUR 200 400)
SADY CZ: CZK 2 100 000 (EUR 80 200)
RBQ SADY: CZK 11 331 000 (EUR 483 000)
M+A+J: CZK 260 000 (EUR 11 000)
Luzanska zemedelska: CZK 2 830 000 (EUR 120 600)
([74]) 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).
([75]) Commission Regulation (EU) 2015/2282 of 27 November 2015 amending Regulation (EC) No 794/2004 as regards the notification forms and information sheets (OJ L 325, 10.12.2015, p. 1).

HAS ADOPTED THIS DECISION:

Article 1

The measures in favour of large enterprise beneficiaries active in primary agricultural production, for the restructuring of orchards and for the construction of drip irrigation in orchards, hop fields, vineyards and nurseries, unlawfully put into effect by Czechia before the notification of Decision C(2021)41 final, are in breach of Article 108(3) TFEU and constitute State aid in the form of two schemes.

Article 2

The State aid referred to in Article 1, unlawfully put into effect by Czechia in breach of Article 108(3) TFEU, is incompatible with the internal market.

Article 3

1. Czechia shall recover the incompatible aid referred to in Article 1 from the large enterprise beneficiaries.

2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the large enterprise beneficiaries until their actual recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 as amended by Regulation (EC) No 271/2008 ([76]).

Article 4

1. Recovery of the aid referred to in Article 1 shall be immediate and effective ([77]).

2. Czechia shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

Article 5

1. Within four months following notification of this Decision, Czechia shall submit the following information to the Commission:

   — A complete list of large enterprise beneficiaries that have received aid under the two schemes referred to in Article 1;

   — the total amount (aid principal and recovery interest) to be recovered from the large enterprise beneficiaries;

   — a detailed description of the measures already taken and planned to comply with this Decision;

   — documents demonstrating that the large enterprise beneficiaries have been ordered to repay the aid.

2. Czechia shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid 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 large enterprise beneficiaries.

([76]) 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).

([77]) Article 16(3) of the Council Regulation (EU) 2015/1589.

Article 6

This decision is addressed to the Czech Republic.

Done at Brussels, 5 April 2024.

For the Commission
Margrethe VESTAGER
Executive Vice-President