II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 7 October 1987

concerning Law 1386/1983 by which the Greek Government grants aid to Greek industry

(Only the Greek text is authentic)

(88/167/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular the first subparagraph of Article 93 (2) thereof,

Having given notice in accordance with the above Article to interested parties to submit their comments and having regard to these comments,

Whereas :

I

By Decision of 29 October 1986 communicated to the Greek Government by letter dated 17 November 1986 (SG (86) D/1317) the Commission informed the Greek Government that it had opened the procedure pursuant to the first paragraph of Article 93 (2) of the EEC Treaty in respect of Law 1386/1983 for the organization for the financial reconstitution of undertakings. ([1])

Law 1386/1983 creates an organization for the financial reconstitution of undertakings. This organization operates under the name of Business Reconstruction Organization SA (BRO). The purpose of the BRO is to contribute to the social and economic development of the country through the financial rejuvenation of undertakings pursuant to Law 1386/1983 ; the import and application of foreign technology and the development of Greek-based technology ; the establishment and operation of socialized or mixed economy undertakings.

For the purposes of carrying out these objectives the BRO may take over the administration and operational handling of undertakings undergoing rejuvenation or socialized undertakings ; participate in the capital of existing undertakings or of undertakings which may be brought into being ; grant loans of all kinds to undertakings in which it has a participatory interest and likewise provide guarantees for the security of such loans ; issue bonded loans in Greece or abroad subject to the conditions and procedures laid down in the relevant provisions ; acquire bonds issued by the State or by the organizations controlled by the State and likewise loan agreements issued by undertakings, organizations and banks ; make over shares, in particular to employees or their representative bodies, to local government bodies or other legal persons in public law, to charitable institutions, to social bodies or private persons ; take out loans from the Greek State, the Bank of Greece or other financial institutions in Greece or abroad, guaranteed or unguaranteed by the Greek state and accept deposits from legal persons in public law, public organizations and undertakings in which it has a participatory interest.

An undertaking is made subject to the applications of the law and controlled by the BRO by decision of the Minister for the National Economy following the rendering of an opinion by an advisory committee. This may occur when any one or more of the following conditions are met : the company has suspended or ceased trading for financial reasons ; it has stopped making payments ; it has been placed in receivership or is under temporary administration or in any form of liquidation ; it has debts five times the sum of its company capital and visible reserves and is manifestly unable to meet its obligations ; it is of interest to national

([1]) OJ No C 332, 24. 12. 1986, p. 2.

defence or of vital importance in the exploitation of sources of national wealth; it is requested to be made subject to this law.

The procedure for invoking the law is that the Minister for the National Economy issues a decision to be published in the Government Gazette making an undertaking subject to the implementation of this law following an application by the undertaking itself; an application by the Manpower Employment Organization; an application by the state bank which has matured claims against the undertaking; an application by creditors of the undertaking; an application by the final or interim trustee or by the receiver.

The issue of a decision by the Minister for the National Economy making an undertaking subject to the implementation of the law allows for the BRO to take over the administration of the undertaking. The BRO also makes arrangements regarding the obligations of the undertaking so as to ensure its viability in particular by increasing the capital via new subscriptions or the conversion of existing liabilities into shares, and restructuring of existing liabilities.

II

The Business Reconstruction Organization set up by Law 1386/1983 is part of the organizational structure of the Greek State. The capital of the organization is subscribed and held either by the Greek State or by the State and local government bodies, employees bodies, state-controlled banks and public sector undertakings. The BRO is administered by a board of management made up of a chairman and eight members. The chairman and two members are appointed and removed by decision of the Minister for the National Economy, one member by the general federation of Greek workers, and the remainder by the general meeting of shareholders, these latter being organizations in the public sector. Law 1386/1983 states specifically that in all areas of jurisdiction and in all dealings with the administrative authorities the organization shall enjoy without exception all the procedural privileges and prerogatives of the State.

The financial resources of the BRO are obtained directly from the State. The initial share capital of Dr 2 000 million divided in to 200 000 shares of a nominal value of Dr 10 000 each was fully paid up by the State within four months of the law coming into effect. By a decision of the Minister for the National Economy published in the Government Gazette this capital was increased to a total of Dr 5 000 million. Law 1386/1983 states that the resources of the BRO shall come from subventions from the budget of the Ministry for the National Economy and from the public investment programmes and from other subsidies, gifts, requests and receipts from handling operations. Actions undertaken by the BRO for the purpose of implementing the decisions of the Minister for the National Economy pertaining to the rejuvenation of undertakings made subject to this law are exempt from every tax, stamp duty, levy and generally any imposition payable to the State or to third parties with the exception of monies payable to municipalities and communes.

The objectives, special status and financing resources of the BRO are such as to place it in the public sector. Its activities are covered by the decision of the Commission conveyed to Member States by letter dated 17 September 1984 (SG (84) D/11853) on the application of Articles 92 and 93 of the EEC Treaty to public holdings in company capital. In this communication the Commission laid down clear guidelines for the interventions of the type carried out by the BRO. In particular it defined the conditions under which interventions by the public sector would be considered *a priori* State aid within the meaning of Articles 92 and 93 of the EEC Treaty, namely that where the State acted in a manner in which a private person or legal entity in the open market would not act, such an intervention was *a priori* to be regarded as State aid. Such actions therefore were to be notified to the Commission pursuant to the conditions of Article 93 (3) of the EEC Treaty. The interventions of the BRO fall into this category.

The interventions of the BRO provide State aid for companies subject to such interventions in that the conversion of their outstanding debts into equity relieves them of a high level of interest payment and by cleaning up their balance sheets provides for additional financial advantages which would not otherwise be available to them. These advantages result directly from the financial resources, powers and status of the BRO as a semi-State (para-statal) body.

The companies in which the BRO intervenes and which it restores to viability account for a large percentage of Greek industrial production and are major exporters. They compete in intra-Community trade with companies not receiving similar benefits to those flowing from the BRO intervention. These companies therefore may be said to receive State aid within the meaning of Article 92 (1) of the EEC Treaty which distorts or threatens to distort competition and affects trade between Member States and which is incompatible with the common market.

Examination of Law 1386/1983 showed that the provisions regarding the method to be adopted for increasing the capital of companies taken under control of the BRO infringed Articles 25 *et seq.* and 29 *et seq.* of Council Directive 77/91/EEC [1], Second Directive on Company Law. If a Member State proposes a measure incorporating State aids which infringes Community rules other than the State aids provisions of the Treaty, the procedures of Articles 92 and 93, although they grant a wide discretion to the Commission, may not nevertheless produce a result which is contrary to those rules. Accordingly, the Commission is unable to exercise its discretionary powers pursuant to Article 92 (3) until such infringements have been eliminated.

[1] OJ No L 26, 31. 1. 1977, p. 1.

III

Within the framework of the procedure and the consultation of other interesed parties the Greek Government replied formally by letter dated 8 January 1987 (ref. 3082.26/194); observations were received from the governments of two other Member States and one industrial federation. In addition six interventions were received from Greek companies in the framework of the procedure.

The Greek Government in its reply to the opening of the procedure pursuant to Article 93 (2) contested that the conversion of the company's debts into equity amounted to aid as it argued that there was no injection of fresh money but simply an accounting operation in the accounts of the company. On the other hand, the Greek Government justified the total operations by among others, the fact that owing to the structure of the capital market in Greece, and particularly the lack of stock exchange facilities, companies had got into difficulties because they had had to borrow loans at high rates of interest.

The general thrust of the Greek Government's response was that law 1386/1983 and the operations of the BRO represented a necessary response to the particular economic situation and developments in Greece. They contended that it was necessary in the light of the economic reform programme and that in considering the application of Articles 92 and 93 the Commission should take into account Protocol 7 of the Act of Accession of Greece which stated that in the application of Articles 92 and 93 of the EEC Treaty it will be necessary to take into account the objectives of economic expansion and the raising of the standard of living of the population. The Greek Government gave a detailed explanation of the operations of the BRO and information on the companies in which it had intervened. It expressed its willingness to inform the Commission of significant individual cases of intervention.

In the framework of a separate exchange of letters and discussions, the Greek Government undertook that the relevant provisions of Law 1386/1983 would be amended so as to make it compatible with the provisions, referred to above, of the Second Directive on Company Law.

IV

Article 92 (1) of the EEC Treaty provides that aid meeting the criteria laid down therein is in principle incompatible with the common market. The exceptions provided for in Article 92 (2) are not applicable in this case because of the nature of the interventions which are not directed towards attainment of the objectives of this paragraph. Article 92 (3) lists aid which may be compatible with the common market. Compatibility with the Treaty must be determined in the context of the Community as a whole and not that of a single Member State. In order to ensure the proper functioning of the common market, and having regard to the principle embodied in Article 3 (F) of the Treaty, the exceptions provided for in Article 92 (3) must be construed narrowly when any aid scheme or any individual aid award is scrutinized. In particular they may be invoked only when the Commission is satisfied that without the aid, market forces alone would be insufficient to guide recipients towards patterns of behaviour that would serve one of the objectives of the said exceptions.

With regard to the exceptions provided for in Article 92 (3) (a), aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious under-employment, while Greece may be regarded as meeting these definitions, the concept of regional development to which this exception is linked is based essentially on the provision of aid for new investment or major expansions or conversions of undertakings involving large-scale investments of a physical nature and the costs associated with these. In the case of Law 1386/1983 the interventions of the BRO in respect of companies that have fallen into financial difficulties and the consequent restoration of their balance sheets cannot be said to fall under the prescriptions of this exception.

V

As regards the exception provided for in the first phase of Article 92 (3) (b), aid to promote the execution of an important project of common European interest, this cannot apply as Law 1386/1983 is not intended to promote the execution of such a project. It is orientated purely towards the development of the Greek economy.

As regards the application of the second part of Article 92 (3) (b) however, aid to remedy a serious disturbance in the economy of a Member State, these conditions may be said to apply. The economic situation in Greece had been constantly deteriorating up to October 1985. Both internal and external imbalances had created a difficult situation which demanded firm policy measures. In particular the Greek authorities were confronted with very serious external payments and pressures on the exchange rate in September 1985. Thus, on 11 October 1985, they introduced an economic stabilization and recovery programme. This programme included measures to devalue the drachma by 15 %; the introduction of a non-interest-bearing import deposit scheme; a complete overhaul of wage indexation; a major fiscal adjustment; a tightening of credit and monetary policy. The European Community recognized the implications of the situation in Greece by agreeing to measures which would normally be regarded as infringements of the EEC Treaty and applied the measures provided for pursuant to Article 108 of the Treaty. In particular Greece was granted a Community loan of 1 750 million ECU and also permitted to continue the grant of subsidies to exports for a limited period of time.

By the time the austerity programme was instituted many Greek companies had got into financial difficulties as a result of the previous policy on wages, limits on making workers redundant, price controls, interest rates and over-valuation of the Greek drachma. It must be regarded as important that Greek companies maximize their economic performance if the objectives of the austerity programme are to be achieved. Given the major effort the Greek Government is undertaking to reverse past policies in the October 1985 stabilization programme, Law 1386/1983 and the operations of the Business Reconstruction Organization may be regarded as an integral part of such a programme. The individual interventions of the BRO have covered 45 companies. Of these 22 have been placed into liquidaton as being beyond redemption. The remaining 23 account for approximately 20 % of the industrial employment of Greece and a considerably larger percentage of its industrial output and international trade. If such a large section of Greek industry were to be allowed to go into liquidation it would have major negative effects on the possible achievement of success of the austerity programme. It may be concluded, therefore, that the conditions of Article 92 (3) (b), second part, could be applied to Law 1386/1983 and the operations of the Business Reconstruction Organization, particularly in view of Protocol 7 of the Greek Accession Treaty referred to above.

Nevertheless, the Commission is empowered in a decision authorizing a general scheme of State aids to impose conditions resulting from its assessment of the scheme including, where relevant and necessary, an obligation to notify individual significant cases so that these may be considered from the point of view of their impact on intra-Community trade and competition. In this the Commission must have regard to considerations of Community policy. This results from the judgment of the Court in case 730/79, Philip Morris versus Commission (1) where the Court clearly indicated (paragraphs 24 and 25) that the assessment involved in operating the exceptions provided for in a, b, and c, of Article 92 (3) are to be made 'in the Community context'. The Commission can therefore require notification of significant individual cases of application of the Law as part of its necessary monitoring of the scheme as a whole and as input to its eventual reassessment of it in the light of the hoped for beneficial effect over a period of this general remedial measure on the Greek economy. In respect of this position it should be noted further that the Commission used an approach on the above lines in broadly analogous cases of general aid schemes in the period 1974 to 1975, in particular for Denmark, France and Italy.

In the terms of Article 92 (3) (b) aid, in order that it may be considered compatible with the common market, must be in the nature of a remedy for the perceived serious disturbance in the economy of the Member State concerned. Since, as in this case, it will then be a matter of granting aid to companies which, although basically viable, have run into difficulties threatening their survival, it follows that the operation must not result in their being left in a stronger competitive position *vis-à-vis* industries in other Member States than would otherwise occur had those difficulties not arisen in the first place. Accordingly the aid must not promote expansion of production capacity nor must it merely shift the problem without finding a genuine solution to the social and industrial problems facing the Community as a whole or even aggravate the situation still further in the medium or long-term future. Moreover, the effect should not be to obstruct or even compromise the specific aid policies already in existence and applied in certain sensitive sectors.

The application of Article 92 (3) (c) to Law 1386/1983 does not appear relevant in this case as the measure is not designed to contribute to the development of certain economic areas or certain economic activities in the sense in which this Article has been interpreted by the Commission in its decisions on State aid cases. There are no economic area objectives in Law 1386/1983. The concept of development of economic activities in the case of this law is also not that usually presented to the Commission in the sense that such development particularly in the case of systems of rescue aids has normally involved a programme of restructuring often in the sense of capacity reduction, rationalization of production, etc. The interventions of the BRO are on a more limited scale to do with a financial recovery by the undertakings in question. Both the law itself and the situation in which it operates are without precedent in the application of the State aid rules in recent years.

In view of the above it may be concluded that Law 1386/1983 qualifies for an exception under the terms of Article 92 (3) (b), second part. However, bearing in mind the decision of the Court in the Philip Morris case cited above and other aspects of the Law already referred to, the Commission must retain control over the application of the measure in question. Therefore the Commission,

HAS ADOPTED THIS DECISION:

Article 1

The Commission has no objections to the implementation of Law 1386/1983 subject to the conditions set out below:

1. The Greek Government shall, by 31 December 1987, amend the relevant provisions of Law 1386/1983 so as to bring it into conformity with Articles 25 *et seq.* and 29 *et seq.* of Directive 77/91/EEC.

(1) ECR 1980, p. 2671.

2. The following conditions shall apply as long as the present conditions of Law 1386/1983 on the operations of the BRO apply. They shall continue to apply for any interventions of the BRO carried out before its proposed change of status and statutes.

(a) The Greek Government shall notify the individual cases of intervention in firms made subject to the law employing 300 or more persons in the case of non-sensitive branches and 100 or more persons in the case of sensitive branches;

(b) the Greek Government shall ensure that in all cases where companies are taken under control of the BRO pursuant to Law 1386/1983 there are no increases in capacity or combined capacity if companies are merged or taken over and that all necessary measures of restructuring are taken to ensure the viability of the firms in question;

(c) the Greek Government shall notify to the Commission pursuant to Article 93 (3) EEC any aid proposed under any other Greek aid scheme to firms subject to intervention by the BRO;

(d) the Greek Government shall ensure the compliance by the BRO with the specific aid policies applying to the steel, shipbuilding and synthetic fibre sectors.

Article 2

The Greek Government shall inform the Commission within two months of the notification of this Decision, of the measures it has taken to comply herewith.

Article 3

This Decision is addressed to the Hellenic Republic.

Done at Brussels, 7 October 1987.

For the Commission

Peter SUTHERLAND

Member of the Commission