II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 27 November 1991

on the conversion activities of French public industrial groups outside the steel and coal industries and excluding the Compagnie Générale Maritime, pursuant to Articles 92 to 94 of the EEC Treaty

(Only the French text is authentic)

(92/266/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 the interested parties notice to submit their comments in accordance with Article 93, and having regard to those comments,

Whereas :

I

By letter dated 28 March 1989, the Commission requested from the French authorities various details of the conversion activities of public industrial groups outside the steel and coal industries and excluding the Compagnie Générale Maritime. This information was to reach it by the end of June 1989. By letter dated 27 June 1989, the French authorities asked for the deadline to be extended by three months. Their request was granted.

By letter dated 14 November 1989, the French authorities answered as to substance the Commission's letter of 28 March 1989 but gave no details of the conversion activities in question. The Commission therefore asked for further information in a letter dated 20 December 1989.

The French authorities replied by letter dated 15 February 1990 but again gave no details of the conversion activities in question. It was only in a letter dated 18 April 1990 that some of the information was provided. That information was to be supplemented by 'a forthcoming letter' which the Commission did not receive before the initiation of the procedure provided for in Article 93 (2) of the Treaty.

II

The conversion companies are subsidiaries (or divisions) of major industrial groups. They provide various forms of assistance (grants, subsidized loans, acquisitions of holdings, other equity or near-equity funding, free advisory services, etc.) in specific geographic areas, to mitigate the effects of restructuring undertaken by the industrial groups controlling them. Although their assistance is intended primarily for small and medium-sized enterprises (SMEs), it is not in principle restricted to any particular type of firm.

In the period 1988 to 1990, the amounts allocated to conversion by various groups were as follows (in millions of French francs and, in brackets, in millions of ecus as an indication of the order of magnitude) :

[...].

III.

A.

The Commission had already examined the conversion activities of French public groups in the steel and coal industries and the Compagnie Générale Maritime, applying Articles 92 to 94 of the Treaty. In a Decision of

17 February 1988 (1), communicated to the French authorities by letter dated 25 February 1988, the Commission considered that the loans, sometimes accompanied by debt write-offs, granted by the conversion companies Sodinor, Solodev, Sodilor, Socadev, Somidev, Sodicentre, Sodicar and Sorid, subsidiaries of the Usinor and Sacilor groups, contained aid elements within the meaning of Article 92 (1) of the Treaty. By Decision of 31 May 1989 (1), communicated to the French authorities by letter of 15 June 1989, the Commission considered that the loans and the provision of services and advice by Sofirem and Finorpa, conversion subsidiaries of the Charbonnages de France group, contained elements of aid within the meaning of Article 92 (1) of the Treaty. It also considered that injections of equity or near-equity funding by these companies could in certain specific cases conceal an aid element and required the submission of six-monthly reports on their application. Lastly, a similar position to that adopted concerning Sofirem and Finorpa was applied to Atlantique Developpement, a conversion subsidiary of Compagnie Générale Maritime. The Commission sent its Decision of 14 June 1989 (1) on this matter to the French authorities by letter dated 16 June 1989.

B.

The Commission based its view that the activities of the abovementioned conversion companies contained aid elements on the following considerations:

— the activities of these companies do not conform to the practices of traditional financial institutions. Loans are granted at lower rates than those the recipients would have obtained from commercial banks, they are frequently granted without guarantees, contrary to custom, and sometimes accompanied by write-off clauses. Similarly, the services and advice are provided free of charge or below cost, which is not normal market practice. The activity of these companies therefore consists in subsidizing enterprises,

— the companies are essentially financed by State resources for which provision is made in the finance laws. The resources are sometimes channelled to the parent companies but, in that event, the latter pass them on to the conversion companies,

— the conversion companies are controlled by the State. Their Boards, which lay down policy, are made up of representatives of the public parent companies, the State and sometimes local authorities. In the case of Sofirem, the State appoints a government commissioner and a state controller who have the right, in particular, to veto decisions taken by the Board.

These three factors are sufficient for the activities of the conversion companies to be considered as aid or as containing an element of aid within the meaning of Article 92 (1) of the Treaty. The activities of these companies in their relationships with assisted enterprises do not correspond to the behaviour of a private entrepreneur; using State resources, the companies subsidize enterprises according to rules established by State-controlled bodies.

This assessment is confirmed by the gradual development of the companies. Initially restricted to conversion operations connected with job cuts in their parent companies, their scope was extended at the request of the public authorities to other conversion projects. Sofirem, the conversion arm of Charbonnages de France, is involved in conversion operations in various non-coal industries in the areas of Moulins, Montluçon, Issoire and Brioude and helps to offset the effects of anticipated redundancies in customs, the railways and related activities in Modane. Sacilor's conversion company, Sodinor, operates in the area north-east of Lille, assisting the restructuring of the textiles industry. This shows that the conversion companies have lost their original specificity and are increasingly acting as the arms of the state in the same way as traditional development agencies.

C.

The Commission based its view that the aid provided by the conversion companies in question was regional aid on the fact that the aid was for investment and job creation in specific areas where the socioeconomic situation was characterized by the conversion of declining industries.

The Commission would approve aid of the kind notified by the French authorities only when the area was a recognized regional aid zone (2) and on condition that the aid from the conversion companies combined with other regional aid did not exceed the ceiling imposed for the

(1) Decision not published in the Official Journal.

(2) Commission Decision 85/18/EEC (OJ No L 11, 12. 1. 1985), as amended and supplemented on several occasions, most recently on 28 March and 4 April 1990 (Decision not published).

region. Where an area was not a recognized regional aid zone, the Commission insisted on compliance with the criteria for aids of minor importance (1).

IV.

The conversion activities dealt with in this Decision are being undertaken by:

— Electricité de France (Délégation aux implantations industrielles and Safidi),

— Elf Aquitaine (BDE and Sofrea),

— Thomson (Geris),

— Péchiney (Sofipe),

— Rhône-Poulenc (Sopran),

— Entreprise Minière et Chimique (Sodiv).

Although in their letter of 18 April 1990, the French authorities did not commit themselves on whether the activities in question ranked as aid under Article 92 of the Treaty, they seemed to reject such a classification. They argued that:

— private industrial groups both in France (BSN, CGE and Saint-Gobain) and abroad undertake similar activities,

— the public industrial groups on which the companies depend 'are, as major local employers, merely assuming responsibility for the survival of part of the economic fabric';

— the companies in question have no direct financial link with the public authorities.

V.

The Commission had doubts about this approach. Without calling it into question a priori, it considered that the statements of the French authorities were not proven: no detailed data and figures were provided to show that the behaviour of the public industrial groups in this matter was similar to that of private industrial groups. Similarly, the resources of the conversion companies could be regarded as public resources. The Commission also based its position on the analysis carried out in respect of steel and coal conversion companies and the CGM and considered that at first sight there was no difference between the activities of the latter companies and those described above in Section IV. Finally, the Commission took account of what the Court of Justice held in its Judgments of 6 July 1982 (ground 21) and 30 January 1985 (see in particular 'there is no necessity to draw any distinction according to whether the aid is granted directly by the State or by public or private bodies established or appointed by it to administer the aid').

On 17 December 1990 and 16 January 1991, therefore, it decided that, in order to confirm or invalidate the arguments of the French authorities, it was necessary to initiate the procedure provided for in Article 93 (2) of the Treaty. The French authorities were informed of this by letter dated 23 January 1991 and the other Member States and interested parties by a notice published in the Official Journal of 20 April 1991 (2). As part of the procedure, the French authorities replied by letters dated 25 April, 30 April and 14 June 1991. The authorities of another Member State also replied by letter of 16 May 1991. That letter, which supported the views of the Commission as set out in its notice, was communicated to the French authorities by letter dated 10 June 1991. No comments were received from them concerning the letter.

VI.

In their letters of 25 and 30 April and 14 June 1991, the French authorities maintained, clarified and argued their initial position.

They claimed that, in their opinion, conversion activities were normal activities of major industrial groups in a market economy, the proof being that private groups undertake identical activities.

They confirmed that the conversion companies referred to in section IV were financed only from the own funds of the groups concerned.

They clarified their position, stating specifically that, in their view, the activities of the conversion companies referred to in Point IV did not constitute aid.

Lastly, they supplied the Commission with detailed information and figures on the activities of the companies in question and on those of private industrial groups.

The French authorities particularly stressed the fact that the conversion companies were a market-based response on the part of the groups that set them up; that there was no conflict between the public and private sectors, or between French and other groups; that, in order to be acceptable, industrial restructuring must be accompanied by a policy of solidarity with regard to workers and regions and that this was the aim of the large groups in their policy of protecting and safeguarding the local industrial base; that conversion activities form part of an overall strategy of the major groups rather than a deliberate method of allocating public funds and, lastly, that there is no difference between the public and private sector approaches.

(1) Unpublished Decision, communicated to Member States by letter of 28 February 1985.

(2) OJ No C 105, 20. 4. 1991, p. 5.

VII.

The Commission examined the information supplied by the French authorities to check whether it bore out the latter's arguments.

It started by comparing the conversion activities of public and private industrial groups (A).

It also checked the origin of the resources of the conversion companies referred to in section IV (B), and looked into each aspect of the control exercised by the State over those companies (C).

A.

The Commission considers that the activities of conversion companies operating on the market like a private entrepreneur do not constitute aid within the meaning of Article 92 (1) of the Treaty.

It therefore sought to compare the conversion activities of the groups listed in Section IV with those of five private groups [...].

It found that all the groups systematically had recourse to conversion in order to mitigate the effects of their restructuring.

The Commission also found that the conversion operations carried out by both public and private groups had a twofold aim :

— the first was to create jobs to replace those shed by the group. In other words, a group considers that it is essential to good internal management to help employees it is unable to re-employ either through geographical mobility within the group or through social measures, to find other employment by making direct grants to firms recruiting them or indirectly by providing assistance for the creation of expansion of other firms. Conversion thus primarily consists in the direct or indirect redeployment of workers in a given group,

— the second objective is to mitigate the effects on a region of cutbacks in the activities of the groups concerned. It is not an internal objective (redeployment of workers) but an external aim which can result in conversion operations even if there are no job losses within the group.

The Commission endeavoured to determine whether conversion operations falling into the second category, which could be regarded as a task in the general interest, were carried out only by public groups. It concluded that they were not : conversion activities were undertaken, even if there were no job losses in a group, by both public (EdF) and private [...] groups, the latter having now completed most of its restructuring in specific geographical locations.

The Commission also noted that there was no significant difference between the funds allocated by private and public groups to conversion activities. To make the comparison, the Commission used two indicators :

— the amounts paid by the groups,

— the grant equivalent of those amounts.

The first indicator covers all the amounts paid by the groups irrespective of form. It measures the size of the funds allocated to conversion by the groups. The second indicator represents the grant equivalent of these amounts, as it is expedient for loans in particular to be expressed in grant equivalent. The grant equivalent was calculated applying the usual discounting criteria. It expresses the conversion costs to the groups. Each indicator was related to the number of jobs shed by the group or to be shed at the conversion site. The calculations were made for the last three financial years for which data were available (1988, 1989 and 1990). The results are as follows :

(in French Francs)

	Entreprise Minière et Chimique	Péchiney	Rhône-Poulenc	Thomson	Elf-Aquitaine	EdF	[...]	[...]	[...]	[...]	[...]
Amounts paid											
Jobs lost	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Grant equivalent											
Jobs lost	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

They do not reveal any significant or clear-cut difference between public and private groups. [...] heads the list as biggest spender per job lost, but is closely followed by a private group [...]. [...] spends more than two of the public groups concerned. As regards cost per job lost, the private groups generally spend more than the public groups.

The forms of assistance provided by the different groups are set out in the following table :

[...]	[...]	[...]	[...]	[...]
— Seven year equity loans at 9 % without guarantees — Advisory services	— Five, seven or 10-year loans at 6 % or 7 % with guarantees — Possible write-offs	— Medium- or long-term-loans at basic bank rate less 2 points, with guarantees — Possible write-offs — Advisory services	— Medium- or long-term loans at 9 % without guarantees — Possible write-offs — Grants — Advisory services	— Loans for average of seven years, at 7 % (exceptionally 5 %) with guarantees — Exceptionally : equity loans and acquisition of holding

[...]	[...]	[...]	[...]	[...]	[...]
— Nine-year loans at average rate of 5,8 %, usually with guarantees — Exceptionally, five-year loans, equity loans and grants	— Grants — Exceptionally, asset transfers, loans, advisory, services	— Grants — Advisory services	— Seven-year loans at average rate of 5,06 % without guarantees — Advisory services	Medium- or long-term loans at average rate of 5,5 %	Grants

The Commission cannot deduce from the table any major difference in the forms of assistance granted by public and private groups.

In particular, it cannot conclude that the assistance provided by the public groups is more favourable than that granted by the private groups. On average, private groups have recourse more often to grants, which are more beneficial to the recipient than subsidized loans, the forms used more often by public groups. Subsidized loans are granted at lower rates by private groups (5,5 % for [...], 5,06 % for [...]) than public groups (between 5,8 % and 9 %). Similarly, while loans made by [...] and [...] are without guarantees, the same is true of those granted by the conversion company of [...], whereas a majority of those granted by public groups involve guarantees.

Finally, the Commission also noted that the conversion operations of the groups concerned are always limited, like those of the private groups, to cutbacks in the parent company. The companies thus never engaged in conversion activities not related to their group. In this respect, too, their behaviour is identical to that of private groups.

In conclusion, the Commission has not found that the conversion activities of public and private groups in France were significantly different. The activities of the public groups do not therefore constitute aid within the meaning of Article 92 (1) of the Treaty.

B.

The Commission nevertheless checked whether the capital contributions made to the public enterprises had been increased to cover anticipated conversion expendi-

ture. To that end, it compared the capital contributions made by the State to the groups concerned in 1988, 1989 and 1990 and the amounts paid by the groups, over the same period, for conversion activities. It noted that no capital was allocated by the State in the years concerned to the Rhône-Poulenc, Entreprise Minière et Chimique and Electricité de France groups, which had disbursed [...], [...] and [...] respectively for conversion operations. As regards the other three groups (Thomson, Péchiney and Elf-Aquitaine), the Commission did not find any links between the amounts paid for conversion operations and the allocations of capital: none of the groups received any capital contribution in the three years in question. The amounts granted are generally 'round figures' (e.g. FF 1 billion) which do not appear to correspond either to advances on expenditure or to repayments for conversion expenditure.

Lastly, the Commission calculated the ratio of the groups' conversion expenditure to their self-financing capacity. It found that the average ratio ranged between [...] and [...], with the exception of EMC, where it reached about [...]. These ratios show that investment in conversion forms a very small part of the groups' activities. The disparity between the amounts also suggests that the groups have not been instructed to allocate a specified percentage of their operating funds to conversion and that the amount allocated depends more on a group's own requirements: thus the groups with the highest ratio [...] is also the one with a wholly-owned subsidiary [...], which is to be shut down in the next 10 years.

This analysis confirms the Commission's assessment that the conduct of the conversion companies is quite clearly comparable to that of well-informed major industrial groups operating in a market economy.

C.

The French authorities confirmed that the conversion activities of the public industrial groups were not initiated by the State. They also stated that the conversion companies were not included in the 'planning contracts' which bind public groups and the State in France in the area of resources and objectives. Lastly, with the exception of the conversion company set up by Elf-Aquitaine (Sofrea), the legal structure of the companies does not seem to point to any State control: there are no State representatives on the Boards and no State controller or government commissioner has been appointed to the companies. Sofrea, however, has a government commissioner who has no voting rights on the Board or any administrative powers.

In short, it seems that the State does not interfere as a public authority in the operation of the companies in question.

Non-interference by the State is further evidence of the fact that the activities of the companies in question are in the nature of operations of enterprises.

VIII.

The Commission therefore considers, on the basis of the foregoing and Section VII in particular, that the conversion activities of the public industrial groups outside the steel and coal industries and excluding the Compagnie Générale Maritime do not constitute aid within the meaning of Article 92 (1) of the Treaty. It considers that the public groups indeed endeavoured in the present case, like certain private groups, to derive a number of benefits from their conversion operations, such as 'indirect material profit', 'maintaining the group's image' and 'redirecting its activities'. In its Judgment of 21 March 1991 [Italy v. Commission — ENI-Lanerossi] (ground 21), the Court of Justice ruled that such activities are legitimate and cannot constitute aid within the meaning of Article 92 (1) of the Treaty.

IX.

The Commission bases its conclusion chiefly on an analysis which compares the conversion activities of the public groups covered by this Decision with those of private groups. On this basis, the activities of the conversion companies do not in the present case constitute aid within the meaning of Article 92 (1) as they are consistent with the behaviour of a private entrepreneur. The conclusion reached in the present case does not mean that any such future activities may not contain elements of State aid, nor does it obviate the need for conversion companies to give prior notification of all planned measures pursuant to Article 93 (3) of the Treaty. Such measures may be exempted under Article 92 (1) only if the Commission is able, as in the present case, to conclude that the activity of public groups is similar to that of private groups.

Since the State is the principal shareholder of the groups that have conversion companies, the Commission cannot rule out the possibility of the State making use of certain conversion companies in the future, notably for regional development purposes, in which case the activities of such companies would be regarded as aid within the meaning of Article 92 (1). By way of example, the French authorities had contemplated at one stage (1) granting public funds to Sodiv, the conversion company set up by EMC, to enable it to expand and redirect its activity. Nor can it be ruled out that public groups might alter their behaviour in future, for example by diverging from the practices of private groups, which would mean that their behaviour would qualify as aid under Article 92 (1).

That is why the Commission considers it necessary to ask the French Government to notify it in advance of any annual budget set aside, by each of the public industrial groups referred to in this Decision, for conversion activities, and to communicate to it the annual reports on the conversion activities of public and private groups. The purpose of the reports, the layout of which is given in the Annex hereto, is to enable the Commission to determine, on the basis fo actual performance, whether or not aid has been granted under Article 92 (1) and whether such aid, if any, is compatible with the common market. The Commission would remind the French authorities of their obligation to notify it in advance of all measures liable to constitute such aid in accordance with Article 93 (3) of the Treaty, as interpreted in the case-law of the Court of Justice, and their general duty to cooperate under Article 5 of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The conversion activities concerned by this Decision and untertaken by:

— Electricité de France (Délégation aux implantations industrielles and Safidi),
— Elf-Aquitaine (BDE and Sofrea),
— Thomson (Geris),
— Péchiney (Sofipe),
— Rhône-Poulenc (Sopran),
— Entreprise Minière et Chimique (Sidiv),

up to and including 1990, do not constitute aid within the meaning of Article 92 (1) of the Treaty.

Article 2

The French authorities shall notify the Commission, before its adoption, of the annual budget earmarked for conversion activities by each of the groups listed in Article 1.

They shall also furnish the Commission with an annual report on the conversion activities of the groups in question and on those of private groups. The report shall have to reach the Commission no later than 31 March of each year and cover the activities of the preceding year. The section of the report concerning the groups listed in Article 1 shall be drawn up in accordance with the layout given in the Annex to this Decision.

Article 3

The French Government shall inform the Commission no later than two months from the date of this Decision of the internal measures it has taken to comply with Article 2 of this Decision.

Article 4

This Decision is addressed to the French Republic.

Done at Brussels, 27 November 1991.

For the Commission
Leon BRITTAN
Vice-President

(1) The plan has since apparently been dropped.

ANNEX

REPORT ON YEAR *n* FOR SUBMISSION TO THE COMMISSION BY 31 MARCH OF YEAR *n* + 1

GROUP .....(1)

A. **Degree of State control (2)**

1. Were the conversion activities ordered by the State ?
2. Do the statutory bodies of the conversion companies include members appointed by the State ? (3)
3. Are there any specific monitoring bodies (State controller, government commissioner) ? (4)
4. Do the planning contracts concluded between the State and the groups provide for conversion activities ?
5. Has the conversion been used for conversion operations outside the company group ? (5)
6. Has the State exercised control over the company by any other means ? (6)

B. **State resources**

1. Capital contributions or other resources granted for year *n* by the State to the group. (7)
2. Was part of the amount in B.1 specifically earmarked for conversion ? (8)
3. Has the group received a specific 'conversion' contribution ? (9)
4. Ratio of conversion expenditure to self-financing capacity of the group.

C. **Conversion operations**

1. Nature of conversion activities undertaken. (10)
2. Resources allocated to conversion. (11)
3. Grant equivalent of those resources. (12)
4. Past and expected future job losses at the sites. (13)

Footnotes

(1) Complete one form per group.

(2) The term 'State' has the meaning given in the case-law of the Court concerning Articles 92 to 94 of the EEC Treaty.

(3) If the answer is in the affirmative, state their absolute and relative number and their role.

(4) Cf. (3).

(5) If the answer is in the affirmative, state which ones and under what conditions.

(6) For example, seconding of staff, etc.

(7) Means total resources allocated to the group and not those relating to conversion.

(8) Answer yes if contracts between the State and the group, Parliamentary debates or other sources indicate that overall amounts granted comprise an amount specifically intended for conversion. State the amount.

(9) Answer yes if amounts not included in point B.1 (footnote (7)) were granted to the group for conversion activities.

(10) This should include a description of the type of measure (loan, direct grant, etc.) and the terms.

(11) Indicate the resources intended for conversion in year *n* and total expenditure since the conversion operation started (give date) up to year *n* inclusive.

(12) Resources should be converted into grant equivalent. The aggregate total defined in footnote (11) should also be given.

(13) It is necessary to distinguish between :

— job losses offset through transfers within the group, and

— job losses which have given rise to social measures (e. g. early retirement).

The aggregate total (see footnote (11)) should also be given.