II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 25 July 1990

on aid granted by the Italian Government to a manufacturer of ophthalmic products (Industrie Ottiche Riunite — IOR)

(Only the Italian text is authentic)

(92/329/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 those comments,

Whereas :

I

Industrie Ottiche Riunite SpA (IOR) was created in 1969, when Filotecnica Salmoiraghi merged with Officine Galileo di Marghera. From 1975 to 1983 IOR's only shareholder was Finmeccanica, from 1983 to 1986 Sofin, both belonging to the public holding IRI.

In October 1986 IOR was partly privatized. 50 % of its shares were sold to the private group Finalp for their nominal value Lit 2 billion on 15 October 1986 and the assets of its contact lenses division were sold to the Ciba-Geigy group. The privatization was completed in March 1989, when Finalp took over the other 50 % of IOR's shares as well.

Before its partial privatization IOR was never a profitable company. Its losses amounted to Lit 8,2 billion in 1982, 5,6 billion in 1983, 6,5 billion in 1984, 11,5 billion in 1985 and 11,9 billion in 1986, which corresponds to 31, 18, 19, 26 and 24 % respectively of its annual turnover. These losses were made good by its public shareholder. The losses IOR made in 1985 and expected in 1986 up to 15 October were covered by an advance of Lit 17 339,9 million by Sofin ; within the framework of the partial privatization of IOR in October 1986, Sofin waived its claim to this sum.

The Commission was not notified of this step under Article 93 (3).

II

The Commission, upon learning that Sofin had provided Lit 17,3 billion to IOR and had subsequently waived its claim to this sum and considering that such action can constitute State aid, invited the Italian Government to provide information by letters dated 30 November 1987, 20 January 1988 and 13 April 1988.

The Italian Government replied by telexes dated 29 February and 13 June 1988, providing incomplete information on the privatization and stating that Sofin's action was a normal shareholder's decision and not a form of State aid.

After an initial investigation of the available information the Commission considered that the Lit 17,3 billion awarded to IOR by its public shareholder did constitute State aid falling under the prohibition laid down in Article 92 (1), to which none of the exemptions set out in the said Article appeared to be applicable.

Neither could the Commission exclude the possibility that the financing of IOR after 15 October 1986 contained additional elements of State aid. On 3 November 1988 the Commission therefore decided to initiate the procedure laid down in Article 93 (2) regarding that aid and invited the Italian Government by letter dated 25 November 1988 to submit its observations.

III

By letter dated 25 January 1989 the Italian Government submitted its observations under the procedure. It stated that Sofin had invested approximately Lit 7 billion in IOR between 1983 and 1986 in order to improve its productivity and efficiency. It stressed that Sofin, by covering IOR's losses, had acted as any investor in a similar position would have done, because Sofin — being the one and only shareholder of IOR until October 1986 — was in any case liable under Italian law for IOR's debts.

The Italian Government also emphasized Finalp's commitment in 1986 to improve IOR's situation, by providing bank guarantees, by investing Lit 14 billion and by means of synergies with other companies it owns.

IOR's financial results in 1987 bore witness to its successful restructuring. Consequently the Italian Government did not subscribe to the Commission's point of view that the payment of Lit 17,3 billion by Sofin constituted State aid. If the Commission should nevertheless interpret this intervention as constituting aid, the Italian Government believed that the exemptions set out in Article 92 (3) should apply to it, given the similarities between this case and three others, which had been cited in the Commission's Seventeenth Report on Competition Policy (points 224, 227 and 229) where the Commission had closed the procedure.

By letter dated 16 February 1989 the Italian Government provided 11 annexes to its letter of 25 January, mainly containing factual information on IOR's accounts and privatization.

In reply to five additional questions put by the Commission by letter dated 11 October 1989, the Italian Government provided information by means of a telex message dated 19 December 1989. These questions concerned a payment of Lit 5 661 million by Sofin to IOR in 1987; the conditions on which Sofin had lent Lit 6 000 million to IOR; the conditions on which Sofin had remained a 50 % shareholder between 15 October 1986 and 15 March 1989; the financial details of the partial privatization in October 1986; other possible candidates for taking over IOR. Notably on the latter subject, additional information was provided by letter received on 12 June 1990 and in a bilateral meeting on 6 July 1990.

In the course of consulting other interested parties, observations were also submitted by Finalp, Sofin and IOR; none of them considered that the Italian Government's actions contained elements of State aid and they agreed with the Italian Government that, even if there were such aid elements, they would surely be compatible with the common market.

The Governments of three other Member States, namely Germany, Denmark and the Netherlands, submitted observations within the framework of the procedure supporting the Commission's decision to initiate the procedure.

All observations made by third parties were submitted to the Italian Government by letter dated 18 September 1989 inviting its comments. These comments were sent to the Commission by telex message dated 17 January 1990.

IV

The provision of funds to public enterprises by their shareholder may involve elements of State aid. In order to verify whether such a provision constitutes aid, it would in the first place be appropriate, ignoring any social elements or regional or sectoral policy, to consider whether under similar circumstances a private shareholder would go ahead with such a step on the basis of the same conditions in the light of expected profitability.

Regarding IOR the Commission notes that this company's accumulated losses amounted to Lit 43 700 million between 1982 and 1986, compared with a share capital of Lit 4 000 million.

It is the Commission's opinion that a private investor would not have paid almost eleven times his original investment in five years, in order to be able to dispose of half of the investment at its nominal price, as Sofin did in 1986. Consequently the provision of Lit 17 339,9 million by Sofin in 1986, first in the form of a credit, later as a grant, constitutes State aid.

Within the framework of the procedure the Italian Government claimed that Sofin had acted as any investor in a similar position would have done by covering IOR's losses, because it was the one and only shareholder of IOR until 15 October 1986 and therefore liable under Italian law for all its debts. The liquidation of IOR would consequently have entailed even higher costs for Sofin.

The Commission cannot subscribe to this point of view. A private investor will normally be reluctant to become the one and only shareholder of a company, if as a consequence he must assume unlimited liability for it; he will make sure that this additional risk is outweighed by additional gains.

In the case of IOR the Commission notes that Finmeccanica (IRI group) became the one and only shareholder of IOR in 1975, when it took over the shares held by Montedison. In 1983 IRI transferred IOR from Finmeccanica to Sofin. According to the information provided by IOR, which was not contradicted by the Italian Government, IOR never had a profitable year between its creation in 1969 and 1988, after its partial privatization. It is the Commission's view that Finmeccanica, Sofin and more generally IRI, by becoming the one and only shareholder of IOR, accepted a risk which a private investor would have refused.

Consequently Sofin's status as unique shareholder of IOR in 1986 in no way alters the qualification made above, that the sum of Lit 17 339,9 million provided by Sofin in 1986, in order to cover part of IOR's losses, constitutes State aid.

Another point made by the Italian Government, by Sofin and by IOR concerned Finalp's financial engagements, which they viewed as a counterpart to the steps taken by Sofin. Finalp would notably finance Lit 14 000 million investments in IOR — in reality it financed Lit 20 000 million — would make IOR profitable again and would release Sofin from its obligations and guarantees as sole shareholder of IOR.

It is the Commission's opinion that Finalp's commitment to restore IOR's profitability was of benefit to itself and to IOR, but much less so to Sofin, which withdrew from IOR completely in March 1989 when it disposed of the remaining 50 % of IOR's shares to Finalp. Finalp's action therefore does not alter the Commission's opinion that the steps taken by Sofin, which related to the period before 15 October 1986, constituted State aid.

The Commission also verified whether additional aid elements were contained in the prices at which the assets of IOR's contact lenses division were sold to Ciba-Geigy and the shares of the remainder of IOR to Finalp in 1986 and 1989.

Ciba-Geigy paid Lit 130 million for the assets of IOR's contact lenses division, which price was well below their book value at the time. Finalp paid the nominal value for the shares of the remainder of IOR — Lit 1 000 per share — in 1986 and 1989.

The Commission notes that in 1986 Sofin invited an accountant other than its regular accountant to establish the current theoretical value of IOR on 31 December 1985. The outcome was a value of minus Lit 32,455 million on that date.

That same year, Sofin invited five possible candidates to take over IOR to submit a bid ; when doing so Sofin did not impose any prior conditions which might have influenced the price offered. Of these five candidates, three were interested in buying IOR. Of these three, Finalp's bid was the most attractive, in terms of the price offered as well as the prospects for continuity.

Given that Finalp had no interest in IOR's contact lenses division, Sofin sold the assets of this division — which made monthly losses of Lit 200 million — to Ciba-Geigy, the only candidate it could find, the price being the result of bilateral negotiations.

Having examined the information provided by the Italian Government, Sofin, Finalp and IOR, the Commission accepts that the terms on which IOR was privatized are comparable to those Sofin might have obtained in an open bid and that, consequently, the privatization of IOR did not entail additional elements of State aid.

Finally, the Commission also investigated the transition period between 15 October 1986 and 15 March 1989, in which Sofin still held 50 % of IOR's shares, in order to ensure that, in this period, Sofin had not financed a disproportionately large part of IOR's restructuring programme.

The Italian Government stressed within the framework of the procedure that Sofin had received a fixed dividend on its 50 % stake in IOR, which had been set at Lit 536 million for 1988 and Lit 898 million for 1989. Sofin also received interest — equal to the prime rate awarded by banks — on a loan of Lit 6 billion to IOR.

Even though one may question whether the financial status of IOR justified the use of the prime rate, the Commission is willing to accept that the co-financing of IOR between 15 October 1986 and 15 March 1989 did not entail further elements of State aid.

Consequently, the Commission identifies one aid to IOR, amounting to Lit 17 339,9 million, granted in 1986.

V

By the end of 1985 IOR had a workforce of 494, mainly involved in the production of ophthalmic lenses of glass and of organic matter, traditional as well as contact lenses.

There is trade between Member States in ophthalmic lenses, either unmounted (Nimexe 9001) or mounted (Nimexe 9004) as shown in the following tables :

Exports of lenses (Nimexe 9001 + 9004) from Italy to other Member States

Year	to other Member States (ECU million)	Percentage of total intra-Community exports (in %)
1985	34,1	13
1986	43,7	14
1987	48,7	15
1988	50,1	15

Imports of lenses (Nimexe 9001 + 9004) into Italy from other Member States

Year	from other Member States (ECU million)	Percentage of total intra-Community imports (in %)
1985	29,6	12
1986	32,7	12
1987	34,2	12
1988	41,2	12

There is competition between manufacturers of ophthalmic lenses. According to the date provided within the framework of the procedure, IOR accounted for 27 % of Italian production of lenses in 1985, 27,7 % in 1986 and — further to the split-off of its contact lenses division — 22,2 % in 1987.

No precise data on IOR's market share in the Community are available. An approximation was provided by Sofin, according to which IOR's sales of contact lenses in 1984 amounted to 3,8 % of total consumption in 1983 in Italy, Germany, France and the United Kingdom. By extrapolating these data on the basis of population, IOR's market share for contact lenses in the Community of Ten in 1983/84 was approximately 3,2 %. For traditional ophthalmic lenses made of glass, IOR's sales represented 4,5 % of consumption in the four large Member States, which can be extrapolated to an approximate market share of 3,8 % in the Community of Ten in 1983/84. Similarly, its market share for plastic lenses was 7,7 % in the four large Member States and approximately 6,5 % in the Community.

The traditional position of expensive brand lenses has gradually been eroded by cheaper, less known alternatives, a growing part of which is imported from third countries.

The Community as a whole is a net exporter of ophthalmic lenses, albeit with a decreasing margin, as shown in the following table.

Exports and imports of the Community to/from third countries

(ECU million)

Year	Exports EUR-12	Imports EUR-12
1985	41,2	21,5
1986	38,9	22,1
1987	38,3	25,2
1988	37,8	27,9

Where financial assistance from the State strengthens the position of certain enterprises compared with that of others competing with them in the Community, it must be deemed to affect those other enterprises.

Consequently, the aid which the Italian Government has granted to IOR affects trade between Member States and distorts or threatens to distort competition within the meaning of Article 92 (1).

VI

By not notifying the Commission, at the proposal stage, of its decision to grant aid to IOR, the Italian Government failed to fulfil its obligations pursuant to Article 93 (3).

The Commission — making use of a possibility given to it by Article 93 (2) and by the Court of Justice in its Judgment of 12 July 1973 in Case 70/72 [1], confirmed in its Judgment of 24 February 1987 in Case 310/85 [2] — can require Member States to recover aid granted without prior notification, where such aid is found to be incompatible with the common market, from the recipients thereof.

VII

The exceptions to the general incompatibility of the aid set out in Article 92 (2) are inapplicable in this case in view of the nature of the aid which is not directed towards attainment of that provision.

Article 92 (3) lists the aid whic may be considered compatible with the common market. Compatibility with the Treaty must be viewed in the context of the Community as a whole and not in that of a single Member State. In order to ensure the proper functioning of the common market and to take into account the principles laid down in Article 3 (f) of the Treaty, the exceptions to the principle of Article 92 (1) set out in paragraph 3 of that Article must be interpreted strictly when any aid scheme or any individual aid award is examined.

[1] [1973] ECR 813.
[2] [1987] ECR 901.

In particular, they may be applied only where the Commission establishes that, without the aid, the free play of market forces would not by itself induce potential recipients to act in such a manner as to contribute to the attainment of one of the objectives sought.

To apply the exceptions to cases which do not contribute to the attainment of such an objective, or where the aid is not essential to that end, would be tantamount to granting undue advantages to the industries or firms of certain Member States, the financial position of which would be bolstered, and might affect trade between Member States and distort competition without this being justified in any way within the meaning of Article 92 (3).

The Italian Government has been unable to give, or the Commission to discover, any justification for a finding that the aid in question falls into any of the categories of exception provided for in Article 92 (3).

With regard to the exceptions provided for in Article 92 (3) (a) and (c) for aid that promotes or facilitates the development of certain areas, the Commission notes that IOR is located at Porto Marghera (Venice). The standard of living there is not abnormally low and there is no serious unemployment there within the meaning of the exception provided for in Article 92 (3) (a), nor is the area in which Porto Marghera is located at present included among those receiving special regional assistance within the meaning of the exception provided for in Article 92 (3) (c). Finally, aid granted in order to cover losses is not designed to contribute to the development of certain economic areas, as set out in the Commission's principles of coordination of regional aid systems [1].

As to the exceptions provided for in Article 92 (3) (b), the aid in favour of IOR is intended neither to promote the execution of an important project of common European interest nor to remedy a serious disturbance in the Italian economy; neither has the Italian Government advanced any arguments in favour of a possible application of these exceptions.

As to the exceptions provided for in Article 92 (3) (c) in favour of aid to facilitate the development of certain economic activities, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, the Commission notes that the aid granted to IOR by the Italian Government via Sofin in 1986 was based on losses sustained by IOR before 15 October 1986.

Without the aid in question IOR would have had to shut down, thereby enabling competitors in Italy, in other Member States and in third countries to expand.

It is the Commission's well-established policy not to consider that loss-compensation facilitates the development of a mature economic activity but, on the contrary, to consider that such aid, more than any other, alters trading conditions in the Community to an extent contrary to the common interest. Consequently, the aid granted in order to compensate IOR's losses does not qualify for the exception set out in Article 92 (3) (c).

The fact that IOR was partly privatized in 1986 and subsequently underwent restructuring due to Finalp's efforts in no way alters this conclusion. Neither can the alleged similarities between this aid and other cases mentioned by the Italian Government lead to a different finding. The Commission must verify the compatibility of every aid on its own merits, taking into account all particularities of the sectors and regions, the type of aid, and the conditions of trade and competition, which may change over time.

Consequently, none of the exemptions provided for in Article 92 can apply to the aid in question.

VIII

In conclusion, the aid of Lit 17 339,9 million is unlawful, the Italian Government having failed to fulfil its obligations pursuant to Article 93 (3) of the EEC Treaty. Furthermore, as set out above, the aid is incompatible because it does not meet the conditions which are required in order to benefit from one of the exemptions provided for in Article 92 (3).

The Commission has decided that in this particular case, repayment of the aid should not be demanded. This decision is based on the time which has passed between the date the aid became known to the Commission and the date this Decision was taken. This long interval would be difficult to justify with respect to the case-law of the Court of justice [2] concerning procedural time limits,

[1] OJ No C 31, 3. 2. 1979, p. 9.

[2] Order of the Court of 11 July 1979 in Case 59/79, Fédération Nationale des Producteurs de Vins de Table v. Commission, [1979] ECR p. 2425, and Judgment of 24 November 1987 in Case 223/85, RSV v. Commission, [1987] ECR p. 4617.

HAS ADOPTED THIS DECISION:

Article 1

The aid granted by the Italian Government to Industrie Ottiche Riunite in 1986 amounting to Lit 17 339,9 million is declared incompatible with the common market. The aid is furthermore unlawful for breach of procedure.

Article 2

This decision is addressed to the Italian Republic.

Done at Brussels, 25 July 1990.

For the Commission

Leon BRITTAN

Vice-President