COMMISSION

COMMISSION DECISION

of 26 January 1994

requiring France to suspend the payment to Groupe Bull of aid granted in breach of Article 93 (3) of the EC Treaty

(Only the French text is authentic)

(Text with EEA relevance)

(94/220/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 93 (2) and (3) thereof,

Whereas :

(1) In a letter dated 6 December 1993, the French authorities informed the Commission that they intended to proceed with a further recapitalization of Groupe Bull ('Bull'), amounting to FF 8,6 billion of which FF 7 billion would be subscribed to by the French State and the remainder by France Télécom.

The letter also stated that, of this total amount FF 4,5 billion would be paid by the French State in respect of Bull's 1993 financial year. The French authorities have indicated to the Commissioner responsible for competition policy that the French State has already made this payment, a fact subsequently confirmed by the French Permanent Representation. Moreover, it is understood that the capital injection from France Télécom, amounting to FF 1,6 billion, has also been paid.

These payments were made in breach of Article 93 (3) of the EC Treaty and, taking account of the fact that the Commission has not already taken a decision on these aids, must therefore be deemed to be unlawful.

(2) By letter dated 8 December 1993, the Commission asked the French Government to delay making the capital injections until it could take a decision in respect thereof, in addition, this letter requested full details of Bull's plans for restructuring.

On 17 December 1993, the Commission wrote a further letter to the French authorities stating, in connection with the amount of the capital injections not paid for 1993, that it required full details regarding the capital injections ; it enclosed a list of points to this effect.

In addition, the letter stated that, if a reply setting out the requested data had not been received within 15 working days, the Commission would be obliged to initiate the Article 93 (2) procedure and take a suspensory decision in respect of the measure.

(3) The deadline for a response within 15 working days expired on 11 January 1994. Whilst a reply was received on 11 January referring to both of the above letters of the Commission, no answers to any of the questions raised were provided.

(4) On the basis of the information available to it the Commission understands the aid measure to consist of a further capital injection, by the French State, amounting to FF 2,5 billion.

That injection can be considered to be aid, as it would not be made by a private investor acting under normal market economy conditions. This is evidenced by the critical financial condition of Bull and the fact that all but FF 4 billion of the current recapitalization is forecast to be eliminated by the end of Bull's restructuring.

Moreover, the injection does not meet the criteria set out in either the 1984 Communication from the Commission concerning public authorities' holdings in company capital or the 1993 Commission Communication concerning public undertakings in the manufacturing sector.

(5) In view of the above, and as the Court of Justice has acknowledged in its judgment of 14 February 1990 in Case C-301/87 (Boussac) [1], where an infringement of Article 93 (3) has been committed, the Commission is entitled to take an interim decision requiring the Member State in question, being in this case France, to suspend immediately the payment of this aid to Bull and to provide the Commission with all the documents, information and particulars necessary for examining the compatibility of the aid with the common market.

Furthermore, pursuant, therefore, to existing case law, should France fail to comply with this Decision by not suspending the payment of the aid, the Commission could, while pursuing its examination of the substance of the case, refer the matter to the Court of Justice direct in order to have such an infringement of its Decision established, in accordance with the second subparagraph of Article 93 (2).

Given the direct effect of Article 93 (3) [2] and the clear and unconditional requirement that the payment of the aid be suspended immediately, this Decision must apply in full throughout the French legal system without any need to amend the legislative instrument introducing the aid by means of further legislation or regulations.

The Commission points out in this respect that, as is made clear in the case law of the Court of Justice, not only national courts but also national administrative authorities, including local or regional authorities, have to apply Community law rather than national law where there is a conflict between the two [3].

The Commission has also extended, by means of a separate Decision taken on 26 January 1994, the procedure provided for in Article 93 (2) in respect of this aid since it takes the preliminary view that, on the basis of the information available to it, the aid is not compatible with the common market pursuant to Article 92 (1), nor with the functioning of the European Economic Area Agreement pursuant to Article 6 (1) thereof, and that it cannot at this stage qualify for the derogations provided for in Article 92 (2) and (3).

The Commission points out that, should a negative final decision on this aid be taken subsequently, the Commission may require any unlawful aid that has been paid in breach of the procedural rules provided for in Article 93 (3) to be repaid [4]. The abolition of the aid would involve its repayment together with interest, at the commercial rate upon which the French reference rate [5] is based, running from the date on which the unlawful aid was granted. This measure is necessary in order to restore the *status quo* [6] by removing the financial benefits which the firm receiving the unlawful aid has improperly enjoyed since the date on which the aid was paid,

HAS ADOPTED THIS DECISION:

Article 1

France shall suspend forthwith the payment of further aid for Bull, and specifically the planned capital injection amounting to FF 2,5 billion, such aid having been granted in breach of Article 93 (3); it shall communicate to the Commission, within 15 days, the measures which it has taken to comply with this requirement.

Article 2

France shall, within 30 days of notification of this Decision, provide all information relevant to a substantive assessment of the aid referred to in Article 1, and specifically the information requested in the Commission's letter to the French authorities of 17 December 1993.

Article 3

This Decision is addressed to the French Republic.

Done at Brussels, 26 January 1994.

For the Commission

Karel VAN MIERT

Member of the Commission

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[1] (1990) ECR I, p. 307.

[2] See judgments in Case 77/72 Capolongo, (1973) ECR p. 611, Case 120/73 Lorenz, (1973) ECR, p. 1474 and Case 78/76 Steinicke, (1977) ECR, p. 595.

[3] See judgments in Case 166/77 Simmenthal, (1978) ECR, p. 629 and Case 103/88 Costanzo, (1989) ECR, p. 1839.

[4] See judgments in Case 70/72 Kohlegesetz, (1973) ECR, p. 813 and Case 310/85 Deufil, (1987) ECR, p. 901. See also Commission Communication (OJ No C 318, 24. 11. 1983, p. 3).

[5] OJ No C 31, 3. 2. 1979, p. 9; Annex, paragraph 15.

[6] See judgment in Case C-142/87 Tubemeuse, (1990) ECR, p. 959.