COMMISSION DECISION

of 1 March 1995

State Aid No C 1A/92 — Greek aid scheme in the pharmaceutical sector, financed by means of levies on pharmaceutical and other related products

(Only the Greek text is authentic)

(Text with EEA relevance)

(95/456/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European 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

The Greek National Organization of Pharmaceuticals (NOP) is a public entity founded by Law No 1316 of 11 January 1983.

NOP had the statutory task of protecting and improving public health, as well as the promotion of public interest in the sectors of production, import and movement of pharmaceutical and other related products ; the development of relevant commercial/industrial undertakings and the development of technology and research in the pharmaceutical sector.

Until 1991, NOP was financed through collecting directly the proceeds of (a) a levy of 15 % on the wholesale prices of all pharmaceutical products sold in the Greek market whether they originated in Greece, in another Member State or in a third country ; (b) a levy of 1 % on the wholesale prices of all cosmetics sold on the Greek market irrespective of Community, Greek or third country origin ; (c) other fees and charges imposed on the circulation of pharmaceuticals and related products in the Greek market. NOP was also financed indirectly through State budget transfers, when necessary.

Law No 1316/83 provided for the establishment of two parallel legal entities under the tutelage and control of NOP, namely the National Industry of Pharmaceuticals SA (NIP) in the field of production and the State Deposit of Pharmaceuticals SA (SDP), in the field of distribution of medicinal products. These were to be legal persons governed by private law.

The statutory task of NIP was the production, import and sale of pharmaceutical items in the internal market, the export of these items, and obtaining any other material necessary for achieving the purposes of NIP and covering the needs of the market.

The share capital of the company consisted of a single share, owned by NOP. The share capital was paid in instalments by NOP through direct tranfers from 1985 to 1989 and again in 1991. NIP also disposed of revenues from its own economic activities.

The statutory task of SDP was to import, export and market pharmaceuticals. As in the case of NIP, its share capital consisted of a single share owned by NOP. The operational costs of SDP were also paid by NOP, with profits being returned to NOP.

After 1991, by Law No 1759/88, 1821/1988 and especially Law No 1965/91, Law No 2001/1991 and Law No 2065/92, both the aim of NOP and the method of financing it were altered. Its statutory task is now to protect and improve public health and to promote the public interest as regards pharmaceuticals and other related products ; to ensure that there are adequate supplies of guaranteed pharmaceutical products of the best quality on the Greek market ; finally to promote and develop technology and research in the pharmaceutical sector.

Regarding the NOP financing, the main source of revenue of this organization is a percentage of 10 % of the product of a levy of 15 % on wholesale prices of all pharmaceutical goods circulating in the Greek market and of a levy of 1 % on wholesale prices of all cosmetic products. These levies strike indiscriminately both locally produced and imported products, whether they originate from other Member States or third countries. By Law No 1965/91, both NIP and SDP were closed down.

Within the framework of NOP and under its tutelage, an Institute for Pharmaceutical Research and Technology (IFET) has been established (Law No 1965/91). Although IFET has been established in law, it has not yet come into operation. IFET is a legal person governed by private law and its statutory tasks include the development of research in pharmaceuticals; quality control for medicines; development and import of technology in the field of pharmaceuticals and import/export of pharmaceuticals only if there is no other possibility of covering specific needs of the Greek market by other means (private importers).

IFET will be partially financed by direct transfers of NOP, by its own revenues from research activities, by loans and by the product of an eventual sale of parts of its property. Thus, a percentage of the public funds directly transferred to NOP will be channelled towards financing of IFET activities.

II

Following a complaint, the Commission requested the Greek authorities by letter dated 22 February 1991 to provide information on aid granted to NIP and SDP, owned by NOP. It also asked for details concerning the levies imposed on pharmaceutical and cosmetic products sold in Greece, which, together with an annual contribution from the State, financed NOP and thus indirectly both NIP and SDP.

The reply from the Greek authorities, dated 2 October 1991, containing general information on NOP's objectives and financial structure, was limited to a proposal to amend the law on NOP. However, the detailed information requested on several occasions by letter and during talks with the Greek authorities was not received (letter dated 25 April 1991 and meeting of the Commission with the Greek Minister of Energy on 18 November 1991).

According to information in the Commission's possession at the time the procedure was initiated, the two undertakings referred to above still received, despite a number of legislative amendments, large transfers of funds from their sole shareholder, the State.

The Commission considered that the conditions of Article 92 (1) were present and none of the derogations provided for in Article 92 (3) (a) (b) or (c) seemed to be applicable.

In the light of the foregoing, the Commission informed the Greek Government by letter of 6 February 1992 that it had initiated the procedure provided for in Article 93 (2) in respect of this scheme of aid by means of levies and invited it to present, within one month of being notified of that letter, its comments and any information relevant to the aid scheme.

By publication in the *Official Journal of the European Communities* [1], the Commission gave the other Member States and other parties concerned notice to submit their comments on the measures in question within one month of the date of publication of that notice.

III

After a request for prolongation of the initial deadline fixed for the submission of comments, which was accepted by the Commission, the Greek Government submitted its observations by letter dated 30 April 1992.

The Greek authorities replied only partially to the question formulated by the Commission, and were requested by letter dated 28 July 1992 to complete their answer.

After a request for prolongation of the deadline fixed for submission of supplementary information, the Greek Government completed its reply by letters dated 2 and 23 October 1992.

New information submitted by the Greek Government showed that this aid scheme was applied to imports and consisted of an exemption for exports of pharmaceutical and other related products (cosmetics) from Greece from all taxes and levies, including the 15 % levy and the 1 % levy. There were also transfers of funds by NOP to a small research entity, IFET. These transfers could possibly constitute aid.

A new set of questions was submitted to the Greek authorities by letter of 11 March 1993, in order to clarify the situation in the overall aid scheme. In its answer of 21 April 1993, the Greek Government notified the Commission that it was examining the possibility of revising the taxation arrangements in favour of NOP.

At the request of the Greek authorities a meeting was held on 28 May 1993 in Athens. During the meeting the representatives of the Greek Government indicated the willingness of their government to modify the existing legal framework concerning NOP, in accordance with Community legislation.

By letter of 7 June 1993, the Commission reminded the Greek authorities that following the meeting of 28 May 1993, they were expected to notify to the Commission, within 15 working days the measures they were planning to take in order to conform with Community law regarding the scheme of State aid to the pharmaceuticals and cosmetic products sector.

[1] OJ No C 48, 22. 2. 1992, p. 6.

By letter dated 18 October 1993, the Greek authorities informed the Commission that the Greek Government was planning to abolish both the refund of the para-fiscal levy of 15 % and 1 % and the transfer of a 10 % percentage of total receipts from the para-fiscal levy in favour of NOP. However, for internal reasons it had not been possible to introduce these measures in the legislative process up to that moment. By letter of 10 November 1993, the Commission informed the Greek Government that an additional period of 15 working days was granted, in order for it to elaborate and introduce the legislative texts necessary to conform with Community law.

Finally, by letter received on 28 January 1994, the Greek authorities reverted to their former argument that the levies in question were not para-fiscal taxes, since they were paid through the budget of the Ministry of Health, Welfare and Social Security. They repeated that the 10 % was an indicative percentage for calculating the level of the subsidies, so that NOP could plan ahead.

No other Member States or third parties submitted observations within the framework of the procedure further to the publication in the *Official Journal of the European Communities.*

IV

In examining whether the taxation system and the transfers of funds constitute aid within the meaning of Article 92 of the EC Treaty, a distinction has to be made between the initial scheme existing up to 1991 and the scheme existing up to the present.

From January 1983 until 1991, the measures under examination consisted of (a) financing NOP mainly by means of a levy of 15 % on all local and imported pharmaceuticals and of 1 % on other related products (cosmetics) and (b) transferring funds to the two undertakings, NIP and SDP, through NOP.

The transfer of funds from NOP to NIP amounted to Dr 6 billion for the period 1985 to 1989 and again in 1991. Of those amounts, Dr 5 billion were destined as the starting capital of NIP to which Dr 1 billion was added later. These monies were intended for the acquisition and/or construction of three pharmaceuticals factories and printing information material of a public health nature. NIP factories never came into production. As NIP did not own medicine-producing factories, it placed orders for drug production in the private sector.

The transfer of these monies allowed NIP to lower its costs and thus compete on unequal terms with its competitors in the production and marketing of pharmaceutical and other related products. The competitors, both national and other Community producers, not only had to assume all their production costs but were also obliged to finance the development and accrued competition of NOP subsidiaries, at the same time.

The funds transferred to SDP from 1985 to 1991 amounted to Dr 1 185 476 663 and were, according to the Greek Government, intended mainly to finance imports of rare and/or special medicines which the private sector was not importing (AIDS medicines, kidney disorder medicines, etc.).

These transfers allowed SDP to cover its operating costs without bearing any financial costs — thus it could compete with other potential private importers of medicines, who had to bear their full operating costs themselves.

The proceeds of levies are to be considered as public funds, when these are instituted by law. The use of public funds in a Member State to finance an organization which among other activities also promotes the development of undertakings and thus strengthens their position vis-à-vis their competitors within that State and in the Community must be deemed to affect those competitors. The fact that the transfers were financed through levies which also applied to imports from other Member States created additional advantages for the Greek pharmaceutical and cosmetics producers, since companies in other Member States were obliged to co-finance actions benefiting their Greek competitors.

After 1991 and the amendments brought about mainly by Laws Nos 1965/91, 2000/91 and 2065/92, the aid scheme at issue consisted of the following : (a) financing NOP by means of an earmarked percentage of all its revenues including the 15 % and 1 % levies on all pharmaceutical and other related products respectively ; (b) possible State aid to research and development in the pharmaceutical sector, through the creation of IFET.

Concerning the first point, it is to be noted that the system of taxation in favour of NOP provides that all revenues of NOP from all sources, including the 15 % and 1 % levies on pharmaceutical and other related products are assimilated to State revenues. They are collected directly by the Treasury and they enter into the State budget. However, a percentage of 10 % of all these revenues is transferred by legal provision to the financing of the organization (NOP). A part of these revenues is to be used to partially finance pharmaceutical research and technology activities undertaken by IFET.

When examining the compatibility of this State aid, a distinction should be made between the part of it which partially finances public health and related activities and that which partially finances applied research and development activities.

Measures to encourage public health activities relatively far from the market are unlikely to affect Community trade. The activities of NOP include public information functions benefiting the whole population in Greece, as well as certification activities for all products originating in the Greek pharmaceutical market. Certification activities benefit all Greek and foreign producers without distinction and the certification charges apply to all producers. So there is no specific, preferential treatment for the Greek pharmaceutical sector. All these activities are unlikely to affect Community trade. Thus they do not fulfil the tests set out in Article 92 (1) of the Treaty and cannot be considered to be aid.

Turning now to the other type of measures within the overall scheme, namely aid to applied research and development in the pharmaceutical sector, the following considerations are relevant. The statutory tasks of IFET as enumerated above include development and advancing of research in pharmaceuticals, quality control for medicines, development and import of technology if there is no other possibility of covering the market needs (no private importers). A percentage of the public funds transferred to NOP will be channeled to financing IFET activities.

According to the judgment of the Court of Justice of the European Communities of 25 June 1970 in Case 47/69, *Government of the French Republic* v. *Commission*(1), financing a State aid by imposing a compulsory charge constitutes an essential element of the aid and, when assessing such aid, both the aid and the method of financing should be examined for comptability with Community law.

In this particular case, even if the research bodies were to place the results of their research at the disposal of any interested parties in other Member States, this would not necessarily result in all parties genuinely and equally sharing in the benefits of the research, since even if equality of treatment were legally guaranteed, at a practical level Greek operators would inevitably be in a more favourable position.

Such research is prompted by national specialization, needs and shortcomings. In addition, operators in other Member States often pay for identical research, either directly or by paying a financial contribution to their counterpart national research centres, and therefore have no need to make use of the findings of Greek bodies.

Even in cases where proposed research aid is considered with the common market as regards both their form and their objectives, financing such aid by means of para-fiscal taxes also imposed on imported Community products has a protective effect beyond that of the aid itself, according to the aforementioned judgment of 25 June 1970.

The use of public funds (proceeds of levies) to finance a research agency which by its activity will strengthen the position of certain undertakings *vis-à-vis* their national or Community competitors, affects those competitors. Moreover, the fact that the transfers will be partly financed through levies on imports from other Member States will create an additional advantage for the Greek pharmaceutical and cosmetics sector, since companies in other Member States will be obliged to co-finance actions benefiting their Greek competitors. This measure clearly constitutes public aid within the meaning of Article 92 (1).

The establishment, until 1991, of the taxation system in favour of NOP, namely the granting of aid to NOP and through it to its subsidiaries NIP and SDP, had not been notified in advance to the Commission as it should have been, according to the procedural rules established in Article 93 (3).

Likewise, the changes brought about in 1991 to the system of granting aid to NOP as well as to IFET had not been notified to the Commission in advance as they should have been according to the procedural rules established in Article 93 (3). Consequently, in both periods the aid was and is being granted illegally by the Greek Government.

V

The volume of trade in pharmaceutical and other related products within the Community exceeded ECU 24 billion in 1991. In the same year Community trade with the four EEA countries (Austria, Finland, Sweden and Norway) in these products exceeded ECU 2,7 billion.

The Greek pharmaceuticals market, on which the undertakings in question were strongly represented, had a turnover of some ECU 320 million in 1991. In the same year exports of pharmaceutical and cosmetic products from Member States to Greece amounted to ECU 282 million. Greek exports of pharmaceutical and cosmetic products to other Member States amounted to ECU 38 million in the same year. It is clear that there existed trade between manufacturers of pharmaceutical and cosmetic products in the Community as well as competition in those products between Member States.

(1) [1970] ECR 487.

In a parallel fashion, trade and competition existed between Community manufacturers of pharmaceutical and cosmetic products and the members of the EEA (Austria, Norway, Finland and Sweden). Exports of those four countries to Greece amounted to ECU 12 million while Greek exports to those countries amounted to ECU 183 000 in the same year.

Consequently, the aid to NOP and through it to NIP and SDP until 1991, reinforced the position of Greek producers *vis-à-vis* their Community and EEA competitors. This aid, partly financed by a levy paid by their competitors, was liable to distort competition and affect Community trade within the meaning of Article 92 (1).

Likewise, the transfer of funds to NOP and through it to IFET after 1991, reinforces the position of Greek producers *vis-à-vis* their competitors. This aid is liable to distort competition and affect trade within the meaning of Article 92 (1).

VI

According to the aforementioned judgment of the Court of Justice, the fact that aid is financed by means of an obligatory contribution constitutes an essential element of the aid; when the compatibility of such aid is assessed, the aid, as well as the way it is financed, must be examined with respect to Community law.

Article 92 (1) of the EC Treaty provides that, in principle, any aid fulfilling the criteria set out therein is incompatible with the common market. The exceptions to this principle, set out in Article 92 (2), are inapplicable in this case in view of the nature and objectives of the aid.

Article 92 (3) lists aid which 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, 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.

The Greek Government has been unable to give, and the Commission to discover any regional consideration in the award of aid to pharmaceutical firms. Consequently, the derogations provided for in Article 92 (3) (a) and (c) for aid that promotes or facilitates the development of certain areas cannot be applied.

As regards the exemption provided for in Article 92 (3) (c) for aid to facilitate the development of certain economic activities, and for the period until 1991, while the aid in question facilitated the development of the individual undertakings in question, they did not appear to foster development of the activities concerned at Community level without adversely affecting trading conditions to an extent contrary to the Community interest. The aid in question allowed the recipient undertakings (namely NIP and SDP) to bear only part of their costs and thus sell at a low price, increasing their market share to the detriment of competitors, who had to finance their development from their own resources.

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

The Commission therefore considers that until 1991 the aid granted to NOP and through it to NIP and SDP, financed by means of levies on sales of pharmaceutical and cosmetic products, does not qualify for any of the exemptions provided for in Article 92 (3) of the EC Treaty.

After 1991, by transferring 10 % of all its revenues, including proceeds of the 15 % and 1 % levy to the financing of NOP, the Greek authorities continue to transfer public funds to that organization.

These transfers, in so far as they finance public health protection activities relatively far from the market, are unlikely to affect trade. Certification activities provided at a fee by NOP indiscriminately to all pharmaceutical producers do not give a competitive advantage to Greek producers. Thus these transfers cannot be considered as aid within the meaning of Article 92 (1).

The transfers used to finance applied research and technology development through NOP to IFET are likely to affect Community trade and to distort competition within the meaning of Article 92 (1). Such aid is intended to facilitate the development of the pharmaceutical sector in Greece and is unlikely to affect trade to an extent contrary to the common interest, if the research fees are paid by the Greek pharmaceutical sector itself. It could qualify, in principle, for the exemption provided for in Article 92 (3) (c).

However, this option cannot be considered because this element of the aid is partially financed by taxes imposed on products from other Member States. Thus the method of financing the aid renders it incompatible with the common market.

This aid is illegal, since it was not notified to the Commission, and must therefore be abolished, unless the method of financing it is amended, so that products from other Member States are no longer taxed.

The Commission notes that the undertakings which benefited from aid prior to 1991, namely NIP and SDP, have been wound up by Law No 1965/91 published on 24 December 1991. The surplus on the winding up has already been transferred to the State budget. Those undertakings did not produce medicinal products themselves, rather they subcontracted their production to third companies. For these reasons a reimbursement of the aid is impossible.

Finally, according to the information provided by the Greek authorities, IFET has not initiated its activities yet — no levy proceeds have been transferred to it,

HAS ADOPTED THIS DECISION :

Article 1

The aid that Greece has granted to the National Organization of Pharmaceuticals up to 1991 and through it to its subsidiaries, the National Industry of Pharmaceuticals SA and the State Deposit of Pharmaceuticals SA, aid financed through levies also imposed on imports from other Member States, is incompatible with the common market.

Article 2

The aid that Greece plans to award in the form of transfers from the State to the National Organization of Pharmaceuticals and through it to the Institute for Pharmaceutical Research and Technology, in so far as it is partially financed through a levy also imposed on imported pharmaceutical and other related products (cosmetics) is incompatible with the common market and must not be granted.

Article 3

Greece shall inform the Commission within two months from notification of this Decision of the measures it has taken to comply with this Decision.

Article 4

This Decision is addressed to the Hellenic Republic.

Done at Brussels, 1 March 1995.

For the Commission

Karel VAN MIERT

Member of the Commission