COMMISSION DECISION

of 27 March 1996

concerning aid granted by Italy to Altiforni e Ferriere di Servola, an ECSC company in special administration, located in Trieste, Italy

(Only the Italian text is authentic)

(Text with EEA relevance)

(96/515/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Article 4 (c) thereof,

Having regard to Commission Decision No 3855/91/ECSC of 27 November 1991 establishing Community rules for aid to the steel industry [1],

Having given notice, pursuant to Article 6 (4) of the abovementioned Decision, to other Member States and interested parties to submit their comments and having regard to those comments,

Whereas:

I

FACTS AND PROCEDURE

Following a complaint lodged by one of the firm's competitors, the Commission, by letters dated 28 February and 13 July 1994, asked the Italian Government for information regarding aid allegedly received by the steel undertaking Altiforni e Ferriere di Servola (hereinafter referred to as 'AFS').

By letters dated 17 March and 4 August 1994 from the Minister for Industry, Trade and Craft Trades, the Italian Government, while stating that no aid was granted to AFS, acknowledged that a State guarantee had been granted under Article 2a of Italian Law No 95/1979 to AFS for loans granted to it by a number of banks.

On the basis of the information at its disposal, including that provided by the Italian Government, the Commission ascertained that:

(i) AFS had accumulated debts more than five times the size of its share capital. It was in so poor a financial situation that, having been declared insolvent by a national court, it was placed under the 'special administration' procedure (amministrazione straordinaria) provided for in Italian Law No 95/1979;

(ii) the State guarantee granted under Law No 95/1979 allowed AFS to secure funds in order to remain in business;

(iii) credit granted to AFS and guaranteed by the Italian Government amounted to Lit 26,5 billion;

(iv) AFS did not pay the Italian Government any premium or other consideration in exchange for the guarantee.

In the light of the foregoing, the Commission informed the Italian authorities that it had serious doubts on the question whether, under normal market conditions, any credit would have been granted to AFS and whether a private institution would have given it a guarantee in view of its insolvency. The Commission pointed out that, in line with its practice and in the light of Court of Justice case-law, any State guarantee granted to a firm in difficulty which could not have been financed by private financial institutions or which was granted on more favourable conditions than those normally made in the financial market constitutes State aid, whether or not the guarantee has been activated.

As it was difficult at that stage for the Commission to determine whether the aid was compatible with the common market, it decided on 23 November 1994 to initiate the procedure provided for in Article 6 (4) of Decision No 3855/91/ECSC in respect of the aid in question. It informed the Italian Government of its decision by letter dated 12 December 1994, asking the Italian authorities why they failed to fulfil their obligation to notify the aid.

On 19 September 1995 the abovementioned letter was published in the *Official Journal of the European Communities* [2] in order to give the other Member States and interested parties the opportunity to submit their comments.

[1] OJ No L 362, 21. 12. 1991, p. 57.

[2] OJ No C 242, 19. 9. 1995, p. 4.

II

THE OBSERVATIONS OF OTHER INTERESTED PARTIES

In the course of this procedure, the Commission received comments from the German and the United Kingdom Governments, as well as from the British Iron and Steel Producers Associations (Bispa) and the German cast iron associations (Roheisenverband). The observations can be summarized as follows:

— the German and the United Kingdom Governments, Bispa and Roheisenverband fully supported the Commission decision to initiate the procedure,

— in particular, the United Kingdom Government pointed out that State loan guarantees constitute State aid if they artificially supported the operations of an insolvent company, even if they are not activated. The United Kingdom authorities feel that the entire sum guaranteed by the State was State aid and they asked the Commission to require that the guarantee be revoked and the company pay the Italian Government sums equivalent to the premium that would have been payable in respect of a guarantee granted by a private financial institution,

— Bispa stressed the fact that, given the hopeless financial situation of the company, as amply illustrated in the Commission's decision to open the procedure, it was quite clear that AFS was able to continue in operation because of the State loan guarantees granted which led directly to the continuing injury suffered by the British producers. The producers of light long products found found it increasingly difficult to complete fairly on the Italian market where AFS was a significant player,

— the German Government and Roheisenverband pointed out that AFS could remain active in the market thanks to large amounts of State aid granted by the Italian Government in addition to the guarantee in question; they drew the attention of the Commission to a Lit 4,5 billion State aid granted by the Friuli Venezia Giulia Region to AFS with a view to protecting the environment.

III

THE OBSERVATIONS OF THE ITALIAN GOVERNMENT

On 29 November 1995 the Commission sent the Italian Government a copy of the comments received, asking the Italian authorities to reply, if they wished to, within 15 days. By letters dated 10 and 22 January and 21 February 1996, the Italian authorities submitted their comments. The Italian Government reiterated the position it had already put forward when the Commission decided to initiate the procedure pursuant to Article 6 (4) of Decision No 3855/91/ECSC.

The Italian authorities contested the Commission's legal assessment of the case, maintaining that this kind of guarantee, granted unde Article 2a of Italian Law No 95/1979, whose main aim is not to safeguard ailing companies but maintain employment, did not constitute State aid. In any case, even assuming the contrary, the Italian authorities took the view that in determining whether in the present case the public intervention should be regarded as State aid, the Commission should attach decisive importance to the fact that the State guarantee had never been activated. This fact was sufficient, in the Italian Government's view, to rule out the possibility that the guarantee constitutes State aid.

In addition, the Italian Government pointed out that:

— as regards the failure to notify in advance the guarantee given by the State to AFS in respect of the discounting of commercial bills for a total of Lit 26,5 billion, the Italian authorities informed the Commission about the operation and the application of Law No 95/1979 in the early years of its implementation (early 1980s), giving details of the working of the Treasury Ministry guarantee,

— the Treasury Ministry guarantee, which was a one-off measure introduced pending finalization of AFS' restructuring programme, was given on 5 May 1993 in respect of commercial bills discounted on or before 30 June 1993. The guarantee had expired and at no time during its period of validity was it activated,

— after 30 June 1993 AFS carried out further discounting of commercial bills through the banking system or factoring companies, using only private insurance policies; thus, it appeared that the major difficulties experienced by the firm did not prevent it from finding funds without the benefit of a State guarantee,

— finally, it was stated that consideration was being given to amending the rules governing State guarantees under Law No 95/1979 to the effect that firms in 'special administration' would have to make a payment to the State based on the size of the guarantee they received and in line with normal market conditions. A similar measure could apply to AFS should the Commission consider this to be necessary. By letter dated 9 March 1995, the Italian authorities agreed with the Commission that the State guarantee, granted without any charges, does constitute State aid and that they were therefore considering amending Law No 95/1979.

IV

The German Government and Roheisenverband, after pointing out that AFS could remain on the market thanks to the considerable amounts of State aid granted by the Italian Government in addition to the guarantee in question, drew the Commission's attention to a Lit 4,5 billion State aid granted by the Friuli Venezia Giulia Region to AFS for environmental protection purposes. The Commission wishes to make it clear that the sole subject of the present procedure is the State guarantee given to AFS. Accordingly, unless it decides to extend the scope of the Article 6 (4) procedure initiated on 23 November 1994, the Commission is not empowered to include in this final decision other State aid allegedly granted to AFS. This being said, it must be stressed that, according to the information in the Commission's possession, the Lit 4,5 billion of aid for environmental protection, while being planned, has not been awarded yet. The other State aid allegedly granted to AFS will be investigated separately from this procedure.

As regards the claim by the Italian authorities that they did not fail in their duty to notify the guarantee in advance, the Commission feels bound to remind them that in 1989 it addressed two letters on State guarantees to the Member States [1]. In the letters, the Commission pointed out that, since it would normally assume that guarantees given by the State direct, or indirectly through other financial institutions, could be ragarded as being State aid, such guarantees had therefore to be notified to the Commission prior to being granted.

AFS is a company falling under Article 80 of the ECSC Treaty because it has produced products listed in Annex I to the ECSC Treaty. It follows that the aid in question, granted in the form of a State guarantee, should have been notified to, and authorized by, the Commission prior to being granted, in accordance with Decision No 3855/91/ECSC. The Commission notes that, even if the Italian Government had not regarded the guarantee as constituting aid, it should have notified the Commission of the grant pursuant to Article 6 (2) of the abovementioned Decision, which requires Member States to inform the Commission of any plans for transfers of State resources to steel undertakings. It is apparent from the facts before the Commission that the actions of the Italian Government allowed AFS to receive considerable financing.

The Commission accordingly regards the State guarantee granted to AFS as an illegal aid on the ground that the Italian authorities failed to give prior notification.

[1] Commission letters to Member States SG(89) D/4328 of 5 April 1989 and SG(89) D/12772 of 12 October 1989.

As to the reasoning put forward by the Italian authorities to the effect that no aid was involved in the guarantee since it was not activated, the Commission regards this as totally irrelevant on the ground that the competitive distortion occurs from the moment the firm is enabled to remain in business as a result of the State's intervention, i.e. from the moment the company is able to borrow money backed by the State guarantee.

As for the remaining observations put forward by the Italian authorities, the Commission must repeat that, in line with past Commission decisions and with the Court's case-law, State guarantees for loans are a particularly insidious form of State aid whose distortions of competition are liable to be extremely severe, in particular where guarantees are granted to ailing companies or those with poor prospects. State guarantees can artificially support the operations of an insolvent company which, unable to be funded under normal market conditions, would be compelled either to increase its capital or to close down.

Aid granted to certain enterprises in the form of a State guarantee for loans contracted with private financial institutions has a number of features which it shares to some extent with the acquisition of public holdings. That is why, as in the case of the acquisition of public holdings, the Commission looks for the presence of aid in a State guarantee by comparing it with the conditions the recipient company would have obtained on the open market and, first and foremost, by assessing whether the recipient company would have found any private guarantor on the open market.

There are reasons to believe that no State aid is involved in a State guarantee as long as:

— the beneficiary firm is in a financially sound position,

— the beneficiary firm is able to obtain a private-sector loan without a State guarantee,

— a guarantee is provided against payment by a firm of a premium corresponding to the usual commercial rate in the light of the risk incurred by a lender of private loans for the same duration and on comparable terms.

On the other hand, there are reasons to believe that State aid is involved in a State guarantee in cases where the beneficiary would not, without the State guarantee, find a financial institution prepared to grant a loan on any terms or where, assuming that a private guarantor would have been found, no premium was paid to the State for the guarantee. In the first case, particularly with regard to ailing firms when their financial position is well known and the repayment prospects are anything but certain, the aid may be as high as the amount effectively covered by that guarantee; in the second case the aid is limited to the premium not paid by the beneficiary.

Therefore, the Commission takes the view that a State loan guarantee can be regarded as not being State aid only if the firm could have obtained the same guarantee from a private financial institution, and, this being the case, only if the company is paying the same premium to the government as would have been payable to a private guarantor.

In the case in point, it is worth recalling that AFS obtained the guarantee under Italian Law No 95/1979, which applies only if it is established by an independent court that the following three conditions are met:

(a) the firm employs more than 300 people;

(b) debts are at least five times greater than the firm's capital;

(c) the firm is insolvent, i.e. it is incapable of paying its debts in a normal way.

It is agreed that AFS meets all three conditions. It is also agreed that no premium was paid by AFS to the Italian State for the guarantee. Despite the Italian authorities' assurance about their willingness to make AFS pay a premium and to modify Italian Law No 95/1979 to the effect that firms would have to make a payment to the State calculated in accordance with normal market conditions, the Commission is bound to observe that nothing has been done until now either to recover at least the premium which should have been paid by AFS or to modify the law.

In the light of the above factual and legal considerations and given AFS's extremely poor financial situation and its legal status as a company in 'special administration', it appears unlikely that:

(a) it would have been able to secure funds to continue its business, without the State guarantee;

(b) it would have been able to obtain the same guarantee from a private guarantor on the open market given the risks involved.

The burden of producing evidence to rebut these two conclusions lies with the Italian authorities. The Commission notes that the Italian authorities did so by supplying documentary evidence to show the capacity of the company to obtain from a private investor a similar guarantee under normal market conditions.

On the basis of the information in its possession, in particular that obtained at the end of the investigation, the Commission has established that, once the State guarantee expired on 30 June 1993, AFS carried out further discounting of commercial bills. In doing so, it used a private guarantee granted by SIAC, an Italian insurance company. This is a company in which are represented some of the largest Italian private insurance groups, like Generali, through Aurora Assicurazioni, La Fondiaria, Società Reale di Assicurazioni, Assitalia, Toro Assicurazioni, Allianz Pace, Compagnia di Assicurazione di Milano, Il Duomo as well as Banca Popolare di Novara, one of the largest private banks in Italy. The guarantee, which expired on 30 September 1994, was granted at a premium of 3,6 % a year of the guaranteed amount; it was, however, agreed that the amount of the premium to be paid for each four-month period could not be less than Lit 200 million, regardless of the amount of credit actually guaranteed during the period in question.

In the light of the foregoing, the Commission concludes that the granting of the State guarantee without charging any premium constitutes State aid since AFS could not have obtained such a guarantee on the open market. On the other hand, it appears that the guarantee as such does not constitute State aid since it would have also been given by a private bank under normal market conditions.

As regards the compatibility of such aid with the common market for coal and steel, Article 4 (c) of the ECSC Treaty provides that it is incompatible with the common market and subsidies or aid granted by States, in any form whatsoever, must accordingly be abolished and prohibited.

In partial derogation from Article 4 (c), Articles 2 to 5 of Decision No 3855/91/ECSC, adopted with the unanimous assent of the Council pursuant to Article 95 of the ECSC Treaty, establish rules authorizing the granting of aid to the steel industry in certain specific cases, as well as aid for research and development, environmental protection and closures.

On the basis of the information at its disposal the Commission has come to the conclusion that the State guarantee at issue is not covered by any of the abovementioned rules, so that none of these could properly be invoked in the present case. In fact the Italian Government has not invoked any of these derogations.

V

It follows that the State aid in the form of a State guarantee granted to the ECSC undertaking AFS without any premium being required in exchange is illegal and incompatible with the common market for coal and steel. The Commission, having regard to the information gathered and in particular to that concerning the financial conditions under which the private guarantee was granted by SIAC, concludes that the State aid in question is equal to the premiums which should have been paid under the private guarantee agreement,

HAS ADOPTED THIS DECISION:

Article 1

The State aid in the form of a State guarantee covering an amount of Lit 26,5 billion granted from 5 May until 30 June 1993 under Article 2a of Italian Law No 95/1979 by the Italian State to AFS without being subject to payment of a premium is illegal and incompatible with the common market for coal and steel, within the meaning of Article 4 of the ECSC Treaty.

Article 2

The aid is equivalent to the premium which AFS should have paid under normal market conditions for a guarantee similar to that granted by the State. Italy shall recover the aid from the recipient company.

Repayment shall be made in accordance with the procedure and provisions of Italian law, with interest based on the reference rate used in the assessment of regional aid schemes, starting to run on the date on which the aid was granted until the date of effective reimbursement.

Article 3

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

Article 4

This Decision is addressed to the Italian Republic.

Done at Brussels, 27 March 1996.

For the Commission

Karel VAN MIERT

Member of the Commission