II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 4 October 1995

concerning aid granted by the Flemish region of Belgium to the truck producer DAF

(Only the French and Dutch texts are authentic)

(Text with EEA relevance)

(96/75/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 regard to the Agreement establishing the European Economic Area, and in particular point (a) of Article 62 (1) thereof,

Having given the parties concerned the opportunity to submit their comments, in accordance with the abovementioned Articles [1],

Whereas :

I

By letter dated 2 December 1993, the Commission informed the Belgian government of its decision to initiate the procedure provided for in Article 93 (2) of the EC Treaty in respect of the public intervention of the Flemish Region of Belgium in the new DAF company as well as of any possible aid elements contained in the dissolution of the former DAF company and requested it to submit its comments within one month from the date of that letter.

In opening the procedure, the Commission expressed its serious doubts as to the compatibility of the aid with the common market for the following reasons :

— the public interventions concerned a company in difficulties, operating in a sector which suffers from surplus capacity,

— the public participation in the new DAF company, (including an equity participation and a risk-bearing loan) could possibly not be in conformity with standard company practice in a market economy,

— no premium was charged for the transfer from the old to the new company of commercial loans which partly contained a State guarantee,

— the sale of the assets of the old company DAF to the new company and the role of the public authorities may imply that a financial advantage, in the form of a lower purchase price of those assets, has been conferred on the new company.

Since the guidelines on State aid to the motor vehicle industry apply, the Commision added that aid could be subjected to appropriate strict conditions. Such conditions could only be imposed by a final decision following this procedure.

II

Following the opening of the procedure, the Belgian Permanent Representation submitted the comments of the Flemish government by letter dated 23 February 1994. By letter from the Belgian Permanent Representation dated 12 October 1994, the Commission received supplementary information from the Flemish authorities in response to the Commission's detailed questionnaire of 14 June 1994.

[1] OJ No C 31, 2. 2. 1994, p. 4.

In order to prepare the visit to the DAF plants in Westerlo and Eindhoven, the Commission requested additional information in its letter of 14 November 1994, addressed to the Flemish authorities and the Dutch government. By letter dated 23 January 1995 the Dutch government replied to those questions. The two company visits took place on 30 January 1995, followed by a final meeting between the Commission, the authorities of both Member States, and DAF's management in Eindhoven on 1 February 1995.

By fax dated 6 February 1995, the Commission raised some final questions to which the Dutch and Flemish authorities replied at their meeting with Commission staff on 14 February 1995.

On 6 March 1995, a further meeting was held between the Commission and the Flemish and Dutch authorities, focussing on the circumstances of the receivership of DAF NV and its take-over by DAF Trucks NV. During the discussion, some questions relating to the bankruptcy procedure were raised by the Commission. The answers drawn up by the legal advisers of the Dutch State dated 23 March 1995 were faxed to the Commission on the same day. At the meetings focused on the Dutch receivership, the Belgian authorities did not formally submit any comments.

III

By letter dated 16 February 1994, the Commission requested the Belgian government to submit its comments on observations made by Klesch & Company Limited which the Commission received on 30 November 1993. That company had argued that it submitted an offer, subject to contract, to the receivers on 24 February 1993 for the same assets purchased by DAF Trucks NV. Their offer was rebuffed because, in their view, the receivers wished to sell the assets to a government-led group below the market price.

The Belgian government replied by letter of 12 October 1994, basically arguing that they were never informed about such offer.

On 28 February 1994, several shareholders of DAF Trucks NV — the VDL Groep, Nationale Nederlanden, DAF Trucks NV and Evicar — submitted their comments following the opening of procedure. By that date the Commission had also received comments from DAF Trucks NV as well as from the Dutch receivers where they stated they were ready to send further information if necessary. By letter dated 1 June 1994, the Commission addressed a request for information to the receivers who answered on 1 August 1994.

The comments of the abovementioned parties, who all supported the view expressed by the Belgian government, were transmitted to the latter for its observations on 18 May 1995. The Belgian authorities did not formally react to them.

The Commission did not receive any comments from other interested parties or from Member States following the publication of the opening of the Article 93 (2) procedure in the *Official Journal of the European Communities.*

IV

In the view of the Flemish authorities, a distinction has to be made with regard to the State participation between the subordinated loan and the share capital.

As regards the subordinated loan of Bfrs 370 million, the Flemish government argued that the loan was granted by the NMKN and not by the Flemish Region and is thus not paid from State resources and consequently cannot contain State aid. In 1984, the NMKN had awarded an investment credit of Bfrs 2,1 billion to a Belgian company NV DAF Trucks, which was absorbed by DAF België NV and, therefore, the credit was transferred to the latter company in 1990. When this company was declared bankrupt on 26 February 1993, this credit was guaranteed by a mortgage on the buildings and a pledge on the business concern, both in the first rank, and by guarantees of the State as well as the Flemish Region. When DAF Trucks Vlaanderen took over DAF België NV this credit was transferred again and by this transfer Bfrs 370 million was subordinated. Since this transferred part of the credit is guaranteed by the Flemish Region, the NMKN does not consider this loan as subordinated or risk-bearing. So, if the subordinated loan could contain a State aid element, it can relate only to the public guarantee covering that amount. However, the Flemish government admitted that awarding subordinated loans does not constitute a regular practice of Belgian financial institutions and that only one other subordinated loan was awarded by the NMKN during the same period, apart from the DAF case.

As regards the actual participation by the Flemish authorities in DAF Trucks NV, the NV Truck Financiering, which is founded and financed by the Gewestelijke Investeringsmaatschappij voor Vlaanderen (called 'GIMV') has participated in the equity capital of the NV DAF Trucks Vlaanderen to an amount of Bfrs 251,3 million and in the risk capital of the NV DAF Trucks to an amount of Bfrs 743,2 million. Thus, the Flemish Region holds an indirect participation of 25,13 % in the Begian subsidiary and a direct participation in the parent company of 10,78 %. The Flemish Government argued that, apart from the dinstinction between A and B shares, the Flemish Region as well as other shareholders participated under equal conditions. Moreover, the Flemish Region sought to acquire only preferred A shares in NV DAF Trucks and

only B shares which are also the preferential shares in NV DAF Trucks Vlaanderen. From 1 January 2000, the distinction between the A and B shares will lapse. Furthermore, the Flemish Region, as other investors, based its decision on a business plan, different from the former restructuring plan, whose feasibility was assessed by external consultants and which showed good prospects of viability and profitability. Also, the Flemish Government attached great importance to regional interests and to the possibility of maintaining a good part of DAF's workforce. Hence, the Flemish Region did not participate under less favourable conditions than the other shareholders.

As regards the 'legal succession', the Flemish government points out that this is only the case when all the assets and liabilities are transferred to the new company and in the case at issue only the assets were transferred for an amount of Fl 75 million. Of this amount, 3 million was paid in cash and 72 million was paid by a transfer of debts to the new company, which constitutes a normal form of payment. NMKN, as secured creditor agreed with this form of payment provided the mortgage, the pledge and the State and regional guarantee were preserved, which has been the case. Taking into account the abovementioned arguments and the fact that the new company would no longer be a full-line truck manufacturer, the Flemish government concludes that there is no question of legal succession.

With regard to the risk premium, linked to the transfer of the partly privileged and partly subordinated credits to the new company, which contained a public guarantee, the Flemish government argued that the State and regional guarantee were maintained but that the total value of the guarantee was decreased to Bfrs 1 014,6 million keeping, however, the level of interest rate in line with the market rate. The subordinated part was covered by the Flemish Region guarantee while the rest of the transferred credit is covered, like the original credit, by a mortgage and a pledge in the first rank in favour of the NMKN, and partly by a State and Region guarantee. In order to maintain the Flemish Region guarantee, an additional premium was charged and paid but it was based only on the increased amount of outstanding guarantee, i.e. Bfrs 390 million. In line with the approved aid system and in the light of the duration of the loan, a 1,5 % premium or Bfrs 5,975 million was charged to the company and 0,5 % to the lending financial institution.

With regard to the purchase price of the Belgian assets and the role of the public authorities in the sale of the assets, the Flemish government argued that:

— according to Belgian bankruptcy law, the Belgian subsidiary was declared bankrupt on 26 February 1993, as a receivership (*surséance van betaling*) does not exist. Three administrators (*curatoren*) were appointed, who must sell the company's assets at as high a price as possible and divide the proceeds of sale among the creditors. They exercise their duties under the supervision of a judge (*rechter-commissaris*). As such, total independence of any public authority is safeguarded by law,

— the rapidity of the sale constitutes a normal practice since the administrators were dealing with the sale of a company as a going concern which would normally result in a higher price than a piecemeal sale of the assets,

— the secured creditors agreed with the proposal purchase price of Fl 75 million and no other creditor protested against the contemplated sale,

— in January and February 1993, there was a lot of publicity with regard to DAF's problems, also on an international level. Although other interested parties had the opportunity, no other potential buyer made an offer. Neither the Belgian administrators, nor the supervisory judge were ever informed of any higher bid made to the Dutch receivers for the assets of DAF located in Belgium,

— the sale of assets of DAF België NV was decided on 2 March 1993 after meetings with the president of the relevant commercial court and the supervisory judge, on the basis of available independent appraisal reports forwarded by the prospective buyers. Put under pressure by these candidate buyers, the administrators had no other option than to seek the court's agreement for the sale at the price of Fl 75 million,

— the future of DAF België NV was linked to that of the Dutch parent company. The purchase as a going concern of DAF België NV was only possible in the framework of a global purchase of at least a part of the assets of the Belgo-Dutch company,

— the total purchase price of the assets was higher than the liquidation value and lower than the value as a going concern (or value as part of a global sale). By accepting the proposed purchase price, at least the liquidation could be avoided. The task of the receivers is to sell the bankrupt's estate at as high a price as possible, which they have tried to do.

With regard to the purchase price of the assets purchased by DAF Trucks NV, the Flemish government argued that :

— the global sale price for the Dutch and Flemish assets of DAF NV of Fl 482 million based on independent appraisal reports was higher than the liquidation value of Fl 293,5 million and lower than the value as part of a global sale of Fl 640 million on the basis that it would continue as a going concern. However, the difference as regards the last-named sum is explained by the lower production planned by the new owners, by the fact that only part of the assets remained as a going concern because the company had declined during the receivership, by commercial obligations that had to be taken over as well as some creditors' claims, by the need to put the Eindhoven plant back into order and by the need to recruit 3 500 employees. Thus, according to the Flemish government, the price reflected a fair market value and did not contain a State aid element,

— all the shareholders took their investment decision on the basis of a business plan the feasibility of which was assessed by external consultants. This business plan is not as stated by the Commission, the same plan as the restructuring plan which existed when the company went into receivership (full line-manufacturer against manufacturer of medium-sized and heavy trucks). The business plan gives the new company good prospects of viability and profitability and for this reason private investors were sought to participate,

— the Flemish authorities attached great importance to regional interests and to the possibility of mantaining a large part of the old workforce. DAF Trucks NV would continue to employ 3 500 people and would allow the production of cabins and axles in Westerlo to continue. The Flemish government argued that since the necessary investments existed at Westerlo and since the number of 3 500 was meant for the two new companies, which offers some room for flexibility, these conditions are not in conflict with the private investor principle and do not limit the optimal allocation of resources. The Flemish Region has operated like an ordinary investor who invests its capital with a view to normal long-term remuneration (see the Court of Justice's judgments in Cases C-305/89 and C-303/88).

V

When initiating the Article 93 (2) procedure, the Commission cited the following public interventions of the Flemish Region in favour of DAF which required further analysis with regard to Article 92 of the EC Treaty and for the following reasons :

— the sale of the assets of the former DAF to the new company and the role of the public authorities may imply that a financial advantage in the form of a lower purchase price of those assets, including new technology and a large stock of unsold trucks, at a price lower than could have been obtained in a competitive bid, has been conferred on the new company. This made it possible for the new legal entity, but essentially the same company as before, to continue to compete without the burden of the past,

— the terms of the public participation in the risk capital of the new company (Bfrs 983,7 million equity capital and Bfrs 370 risk-bearing loan) should be examined in the light of the private investor principle and be compared with the terms at which private investors participated in the new company. To the extent that these measures contained State aid elements to the new company, the business plan should be examined in the light of the provisions of the guidelines on State aid for the motor vehicle industry as regards restructuring aid,

— the fact that no premium for the public guarantee was requested by either the Belgian State or the Flemish Region on the Bfrs 644,5 million commercial debt which has been transferred by the NMKN from the old to the new company.

Consequently, immediately in opening the procedure, the Commision concluded that all aid granted to the belgian subsidiary of the old DAF company was fully recovered in the sale of those assets, so that there was no State aid granted by the Belgian authorities to the former DAF company in this context.

Following a detailed examination of the information received during the course of this procedure as well as the procedure with regard to aid granted by the Dutch authorities to DAF, it is the Commission's view as concerns the sale of the assets of DAF België NV and the role of the public authorities in the sale that the administrators have acted in an independent manner, as was required of them. Considering the economic dependency of those assets on the assets of the parent company, for which a global price was already agreed beforehand subject to the acceptance by the Belgian administrators of the offer for the Belgian assets of DAF NV, they have sold those assets at a reasonable price, which is superior to the liquidation value of those assets. While it can be argued from an economic point of view that DAF Trucks Vlaanderen NV obtained a financial advantage in the form of a lower purchase price of those assets than possible in a competitive bid, it is not mandatory for the administrators to organize such a bid. Considering also the information at their disposal and the time pressure imposed on them by the prospective

buyers, it is fair to conclude that the administrators have carried out their duties by selling the assets in question at as high a price as possible. Finally, it was confirmed that the two companies (DAF België NV and DAF Trucks Vlaanderen NV) are legally different entities, fully independent one from another.

As regards the sale of the assets of the parent company DAF NV and the role of the public authorities in that sale, reference is made to the parallel decision taken by the Commission in case C-38/93.

With regard to the State participation in the risk capital of DAF Trucks NV and DAF Trucks Vlaanderen NV, the presumption mentioned in opening the procedure that the State participation may constitute State aid can, according to the Commission, not be maintained. Upon verification of the shareholders' agreement and other relevant material, it must be concluded that the State provided risk capital under the same conditions as the private shareholders, whose holding has real economic significance. Detailed examination of the business plan has shown that a reasonable return on the shareholders' capital can be expected. Reviewing also the comments on the conditions attached by the Flemish authorities to their shareholding, it must be concluded that this shareholding corresponds to the market investor principle (1). It does, therefore, not contain any State aid.

With respect to the risk premiums on the public guarantees on commercial and risk-bearing loans to DAF Trucks Vlaanderen NV charged or not charged by the Belgian State or the Flemish Region, it is the Commissions's view that this transfer and rescheduling of loans and guarantees by the NMKN and the public authorities is in conformity with Belgian law and practice. While the Commission shares the view of the Flemish authorities that this transfer of debt does not mean that the new company is the legal successor of the old company, it cannot be concluded that the old company has in part already paid, for the benefit of the new company, the risk premiums on the public guarantees.

DAF Trucks Vlaanderen NV is benefiting from a State guarantee of Bfrs 223,35 million and a guarantee from the Flemish Region of Bfrs 791,25 million. In only paid a risk premium of 1,5 % on Bfrs 395 million to the Flemish Region, coprresponding to the degree of increase in guarantee by the Flemish Region. It is also worth noting that the decrease in guarantee by the Belgian State more than compensates for the said increase. By not paying the risk premium of 1,5 % on the remaining public guarantees provided by the Belgian State and the Flemish Region totalling Bfrs 619,6 million, the new DAF company obtained an artificial financial advantage which the Commission valued at Bfrs 9,294 million at the moment of transfer of the debt and guarantees.

Considering that DAF Trucks Vlaanderen NV produces axles and cabins for the trucks sold by DAF Trucks NV on the highly competitive European truck market where DAF holds a 6,8 % share (above 6 tonnes GVW), it must be concluded that this aid measure falls under the provisions of Article 92 (1) of the EC Treaty and Article 61 (1) of the EEA Agreement.

VI

By not notifying the abovementioned aid measure in favour of DAF Trucks Vlaanderen NV, the Belgian government has infringed Article 93 (3) of the EC Treaty. Since the Belgian government did not notify the aid measures in good time, the Commission was not able to submit its comments on the measures before they were implemented. As the aid was thus granted in breach of Article 93 (3) of the EC Treaty, it is unlwaful.

VII

It is the Commission's view that the illegal aid of Bfrs 9,294 million awarded to DAF Trucks Vlaanderen NV in the form of not charging the usual risk premium on Bfrs 619,6 million of public guarantees taken over from the bankrupt company DAF België NV, is not compatible with the EC Treaty.

Article 92 (1) lays down the principle that, except where otherwise provided, aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade among Member States, incompatible with the common market. However, Article 92 (2) and (3) set out the circumstances in which such aid is or may be allowed.

Article 92 (2) specifies certain types of aid that are compatible with the common market. Because of the character, location and purpose of the aid in question, it does not satisfy the criteria specified.

Article 92 (3) adds that other aid may be compatible with the common market. Compatibility must be determined in the context of the Community and not of a single Member State. In order to safeguard the proper functioning of the common market and, taking into account

(1) See Commission communication on the financial activities between Member States and public undertakings (OJ No C 273, 18. 10. 1991).

the principles of Article 3 (g) of the EC Treaty, the exceptions to the principle set out in Article 92 (1) to be found in Article 92 (3) must be construed narrowly when scrutinizing any aid scheme or individual award.

In particular, the Commission has, for the motor vehicle industry, adopted Community guidelines setting out the criteria for assessing the compatibility with the common market of aid to this industry, thereby limiting the scope of discretion under Article 92 (3).

Given that the aid was awarded to the subsidiary of a motor vehicle manufacturer producing truck axles and cabins, and that the aid was not based on an approved aid scheme and was not linked to a particular project, such aid should have been notified according to the guidelines for State aid to the motor vehicle industry. The Commission has therefore to consider whether this aid was compatible with the said assessment criteria.

It is the Commission's view that the aid was evidently not linked to any of the six initial criteria listed in the guidelines namely rescue and restructuring aid, regional aid, investment aid for innovation or fundamental rationalization, aid for research and development, aid for environmental protection or energy saving and aid for vocational training. The Belgian authorities have, moreover, not argued that any such objectives were envisaged by this financial investment. In particular, although the area where the plant is located is eligible for regional aid under point (c) of Article 92 (3), it must be concluded that the aid under examination does not correspond to a normal application of regional aid nor can it be considered as having a regional objective. This therefore leaves the seventh case, namely operating aid. The guidelines provide that no new operating aid will be authorized in this sector, given the particular distortive effects of such aid and the absence of any link with the abovementioned objectives.

Consequently, the Commission must conclude that the Bfrs 9,29 million operating aid awarded by the Belgian authorities to DAF Trucks Vlaanderen NV is not compatible with the conditions which have to be fulfilled in order to apply the exception provided in point (c) of Article 92 (3), as specified in the Community guidelines on State aid to the motor vehicle industry.

In view of all the foregoing considerations, the aid measure in support of the DAF Trucks Vlaanderen NV is not only illegal because the Belgian government did not fulfil its obligations under Article 93 (3) but is also incompatible with the common market as it does not meet the conditions which must be satisified in order to apply any of the exceptions set out in Article 92. Consequently, it is also incompatible with the functioning of the EEA Agreement,

HAS ADOPTED THIS DECISION :

Article 1

The aid awarded by the Flemish Region of Belgium to DAF Trucks Vlaanderen NV and valued at Bfrs 9 294 000 on the date of its award is illegal and incompatible with the common market within the meaning of Article 92 (1) of the EC Treaty and, therefore, incompatible with the functioning of the EEA Agreement.

Article 2

The Belgian government shall recover the Bfrs 9 294 000 from DAF Trucks Vlaanderen NV and shall charge interest on this amount from the date of its award at a rate equal to the percentage value on that date of the reference rate used for the calculation of the net grant equivalent of regional aid in Belgium.

Article 3

The Belgian government shall inform the Commission within two months of the date of notification of this Decision of the measures taken to comply.

Article 4

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 4 October 1995.

For the Commission

Karel VAN MIERT

Member of the Commission