COMMISSION DECISION

of 30 April 1997

concerning the application to the steel firm Ferdofin Srl of Italian Law No 95/1979 on receivership arrangements for large firms in crisis

(Only the Italian text is authentic)

(Text with EEA relevance)

(97/754/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community,

Having regard to Commission Decision No 2496/96/ECSC of 18 December 1996 establishing Community rules for State aid to the steel industry [1], and in particular Article 6 (5) thereof,

Having given interested parties notice to submit their comments [2], and having regard to those comments,

Whereas:

I

By letter dated 22 March 1996 the Commission informed the Italian authorities of its decision to initiate proceedings under Article 6 (4) of Commission Decision No 3855/91/ECSC (replaced with effect from 1 January 1997 by Decision No 2496/96/ECSC) in respect of the application of Italian Law No 95/1979 on receivership arrangements for large firms in crisis, known as the Prodi Law (hereinafter 'Law No 95/1979'), to Ferdofin Siderurgica Srl (hereinafter 'Ferdofin').

According to the Commission's information, based essentially on what was communicated by the Italian authorities, it was apparent that:

1. Ferdofin was in a very difficult financial situation; the firm's balance sheet as at 30 June 1994 and its profit and loss account showed that: (i) its cumulative losses totalled Lit 251,6 billion; (ii) there was, in relation to a capital of Lit 80 billion, a deficit on own funds of Lit 170,9 billion; (iii) medium- and long-term debts and debts towards credit institutions totalled Lit 526,5 billion, compared with assets of Lit 429,5 billion, much of which was already mortgaged;

2. in view of the foregoing, Ferdofin had, by Ministerial Decree of 28 December 1993, been placed under the procedure provided for in Law No 95/1979, which, among other things, enabled the firm's debts to be frozen, including those contracted with public credit institutions;

3. given Ferdofin's financial situation, it had not been able to obtain any funding from private banks without a public guarantee.

On the basis of these facts, the Commission had serious doubts as to whether the aid in question, granted under Law No 95/1979, was compatible with the common market.

It therefore decided to initiate proceedings under Article 6 (4) of Decision No 3855/91/ECSC in respect of the application of Law No 95/1979 to Ferdofin.

II

As part of the proceedings, the Commission invited the Italian Government to submit its comments, and informed the other Member States and interested parties by publishing the decision initiating the proceedings [3].

In letters dated 24, 25 and 26 June 1996, the United Kingdom Government, Wirtschaftsvereinigung Stahl, Siderinsa and BISPA (the British Iron and Steel Producers Association) sent comments to the Commission, which forwarded them to the Italian authorities on 1 August 1996.

In their comments, all the above third parties expressed support for the Commission's decision to initiate proceedings. They argued in particular that Law No 95/1979 constituted by definition State aid in that it enabled the Italian State, through discretionary powers conferred on the Minister for Indusry, to intervene to save firms undergoing an extremely serious financial crisis. Since the measures concerned contravened Article 4 (c) of the ECSC Treaty, the third parties concerned called on the Commission to rule them incompatible with the common market for coal and steel.

In response to the initiation of the procedure and to the comments from the other interested parties, the Italian Government put forward the following arguments (points 1 to 9 below):

[1] OJ L 338, 28. 12. 1996, p. 42.
[2] OJ C 151, 25. 5. 1996, p. 10.
[3] See footnote 2.

1. the purpose of the receivership arrangements for large firms is to enable the company's assets to be put into liquidation and consequently the creditors' claims to be satisfied while avoiding — wherever the necessary conditions are met — the dispersion of its business activities and the resulting loss of jobs. To that end, the firm is allowed to continue trading under the responsibility of an administrator who draws up a restructuring plan and manages the business for the two-year period that is necessary in order to complete the procedure for transferring the firm's activities to third parties. If, on the other hand, the administrator finds that the conditions are not met for a return to profitability, closure of the activities is decided and the firm is wound up;

2. as in the case of other insolvency procedures, the provisions of Royal Decree No 267/1942 (the Bankruptcy Law) also apply to the receivership arrangements for large firms, one of the results of which is that the debtor is dispossessed of his assets and no longer has the right to manage and dispose of them. A clear distinction is also drawn between the company owning the assets and all the business activities; the latter are sold off on the basis of values determined by sworn experts and the proceeds are distributed among the company's creditors;

3. once the company's activities (i.e. its physical assets, not its shares) have been sold off, the procedure continues and the company owning them is responsible for taking all the steps involved in the winding-up and other legal action (e.g. liability actions against former directors);

4. the provision made under the receivership arrangements for large firms for the firm to stay in business in no way differs from the bankruptcy procedure, which also allows for trading on a provisional basis;

5. it should be stressed that there is no principle in Italy's bankruptcy law — or indeed in that of the other Member States — whereby the business activities of a firm which has become insolvent should necessarily be broken up;

6. the purpose of the bankruptcy procedure is to remove the firm from the control of the entrepreneur who let it become insolvent and to pay the creditors with the proceeds of the sale of its assets. Whether the assets are split up and sold separately after business activities have been shut down or whether the business assets are sold en bloc while they are still in operation matters little provided that the creditors are paid. It is for this very reason that the bankruptcy procedure allows for the possibility of trading on a provisional basis;

7. in the light of the foregoing it is difficult to see how placing a firm under the receivership arrangements for large firms instead of the ordinary bankruptcy procedure can constitute State aid. The concept of State aid under Community law entails the existence of a beneficial effect on a firm's balance sheet, enabling it to compete with its rivals under preferential conditions. This does not occur when a firm is placed under the receivership arrangements for large firms since the firm itself does not derive any financial advantage from the procedure: the provisions governing continuation of the firm's activities do not impose any financial burden on the State;

8. the Community guidelines on State aid for rescuing and restructuring firms in difficulty [1] describe in detail the type of measures involving aid that must be notified in advance to the Commission. The guidelines refer to financial measures such as capital injections, loans, tax concessions and loan guarantees, but make no mention of legal arrangements governing management of the winding-up of firms that have been declared insolvent;

9. the statement that the Minister for Industry has discretion in deciding whether or not to place a firm under the receivership arrangements for large firms clearly stems from a misunderstanding of the relevant legal provisions. Initiation of the receivership procedure is not dependent on a discretionary decision by the administration but results from a court decision in cases where an insolvent firm meets the requirements laid down by Law No 95/1979 (it must have not less than 300 employees and debts towards the banking or social security system in excess of a limit laid down each year). We are therefore not dealing here with a derogatory measure but with a generally applicable procedure laid down by law for managing the winding-up of large firms in such a way as to avoid dispersion of their assets and thereby save jobs.

Lastly, after stating that Ferofin had not received the guarantee provided for by Article 2 (a) of Law No 95/1979 pending the Community authorization procedure, the Italian authorities formally notified their decision to withdraw that request for authorization.

III

It must first be established whether the public measures in question constitute State aid falling within the scope of Community law.

[1] OJ C 368, 23. 12. 1994, p. 12.

With regard to the Community provisions that may be applicable in this case, it should be recalled that Ferdofin produces steel products listed in Annex I to the ECSC Treaty and is therefore bound by the rules of that Treaty.

Article 4 (c) of the ECSC Treaty, which is the Community provision applicable in this case, states that subsidies or aid granted by States in any form whatsoever are recognized as incompatible with the common market for coal and steel and are accordingly abolished and prohibited within the Community. The only possible exceptions to this general prohibition are set out in full in Decision No 2496/96/ECSC. They concern aid for research and development (Article 2), aid for enviromental protection (Article 3) and aid for closures (Article 4).

It should be noted here that the Italian authorities have not, in the extremely detailed comments they have submitted, invoked any of the abovementioned exceptions with a view to justifying the public measure in question.

Scrutiny of the text in fact clearly shows that the public measure concerned does not qualify under any of these exceptions since it is intended, in particular, to enable Ferdofin to remain active on the market and to restore the necessary liquidity for pursuing its activities with a view to being sold off.

Having taken note of the Italian authorities' decision, following the initiation of proceedings, not to grant a State guarantee, the Commission has to determine whether Law No 95/1979 itself constitutes State aid in the light of the Community provisions, and more specifically the ECSC Treaty.

It should be stressed in this connection, in reply to the comments submitted by Italy, that unlike normal bankruptcy proceedings under Italian law the arrangements in question are not open to all firms but reserved for large firms, employing at least 300 people, which have become insolvent.

The arrangements clearly concern only large insolvent firms given the possible public interest in their continuing operation and recovery and in saving the jobs involved.

Under Law No 95/1979 together with the Decree placing the firm under the receivership arrangements for large firms, issued by the Minister for Industry in agreement with the Minister for the Treasury, the firm is allowed to continue trading for a period of two years, which may be extended up to a maximum of five years, under the responsibility of one or three administrators appointed by the Government. During that period, the administrator(s) must draw up a restructuring plan, subject to the approval of the supervisory authority, listing the plant and equipment to be restarted or added to, the plant or units to be transferred and any new business arrangements.

The receivership procedure ends if a composition is approved, or total assets are distributed, or credit is exhausted, or there are insufficient assets or if the firm is once again able to meet its liabilities on a regular basis.

There are grounds for concluding that the provisions in question cannot be regarded as general measures falling outside the scope of the Community rules on State aid, for the reasons set out in points 1 to 3 below:

1. in several respects the receivership procedure for large firms depends on the exercise of the discretionary powers vested in the public authorities, particularly as regard authorization of the firm to continue trading (Article 2 of Law No 95/1979 and Article 4 of the draft amending legislation). The discretionary nature of such authorization has been consistently confirmed by the Italian administrative courts (1);

2. contrary to the argument put forward by the Italian authorities, a firm's continued trading under the receivership arrangements for large firms is not equivalent to trading on a provisional basis under Article 90 of the Bankruptcy Law. Scrutiny of the relevant provisions clearly show that while trading on a provisional basis is an exception allowed in the interests of creditors with a view to increasing the value of the assets to be distributed as part of a procedure designed to ensure that all creditors are on an equal footing, continued trading under the receivership arrangements for large firms is the normal effect of a procedure designed to protect the firms concerned from the consequences of their insolvency and to allow the economic activity to continue;

3. this difference is reflected in the system of juridical supervision. While normal bankruptcy procedures include checks of both legality and substance by the courts, including supervision of the economic advisability of transactions carried out by those actively involved in the procedure, namely the administrator and the delegated judge, the receivership arrangements for large firms are subject to review by the administrative court, which is empowered to deal only with the legality of administrative acts and has no right to monitor the economic desirability of transactions. It should also be pointed out that Laws No 95/1979, and in particular Article 1 thereof, provides that the firms to which it applies are subject to the receivership arrangements for large firms 'with the exception of bankruptcy'. The rules thus clearly state that receivership is an exception to the normal bankruptcy procedures.

(1) Administrative Court of Lazio, Section III, 30. 11. 1985, n. 1986; Council of State, Section VILS, 29. 7. 1991, n. 492.

Moreover, the Court of Justice of the European Communities has consistently held, *inter alia* in its judgment of 2 July 1974 in Case 173/73 Italy v. Commission, that application of the Community rules on State aid — in particular when determining whether measures taken by States correspond to the definition of State aid laid down by Community law — is dependent not on the causes or objectives of the measures but on their effects.

To the extent that the effect of national rules is to favour certain firms or products — firms with more than 300 employees in the case in point — by allocating State resources to them, thereby distorting competition and affecting intra-Community trade, they fall within the scope of Article 4 (c) of the ECSC Treaty and possibly also Articles 92 and 93 of the EC Treaty.

On the question of the transfer of State resources, the receivership arrangements for large firms entail a number of financial benefits involving the transfer of resources from the State or having an impact on the State budget, in particular:

— debts towards the tax authorities and public social security bodies may qualify for exemption from individual enforcement proceedings and for suspension of interest payments (Articles 51 and 55 respectively of the Bankruptcy Law),

— as regards social security contributions, the firm qualifies for exemption from the payment of fines and penalties for non-payment of contributions,

— the Bankruptcy Law provides for separate enforcement proceedings for the collection of taxes on income, so that delays in payment incur a fine, in addition to interest payments and other penalties; this procedure is not applicable to firms under the receivership arrangements for large firms, which means they are not subject to fines for delay,

— under Article 5 (a) of Law No 95/1979, the registration charge on transfers of ownership of firms or parts of firms under the receivership arrangements is set at the token sum of Lit 1 million (about ECU 526).

These measures constitute State aid in so far as the State waives its claims on the firm covered by the receivership arrangements.

In the light of the foregoing, the measures provided for by Law No 95/1979 must be regarded as State aid; it remains to be determined whether such aid is compatible with the common market for coal and steel. It should be borne in mind here that in the context of the EC Treaty the compatibility of the aid scheme could possibly be assessed on the basis of the Community guidelines on State aid for rescuing and restructuring firms in difficulty, whereas in the context of the ECSC Treaty it can be determined only in the light of the general ban laid down in Article 4 (c) of that Treaty and the three possible exceptions set out exhaustively in Decision No 2496/96/ECSC. As has already been stated, not only have the Italian authorities not invoked any of the abovementioned exceptions with a view to justifying the State measure in question, but scrutiny of the text also shows that the State measure concerned cannot concern enviromental protection, research and development or closures.

IV

It must be concluded that application of the receivership arrangements for large firms has enabled Ferdofin to avoid its liabilities towards the tax authorities and public social security bodies, which is tantamount to a transfer of State resources through lost revenue from the taxes and contributions owed by the firm concerned.

The firm's tax accounts as at 31 December 1995 show that it benefited from a suspension of payments in respect of the following debts:

(a) Lit 10 786 million owed to the INPS;

(b) Lit 723 million owed to the INAIL;

(c) Lit 2 301 million owed to the tax authorities;

(d) Lit 100 billion owed to banks controlled directly or indirectly by the State.

V

In the light of the foregoing, in particular Part III, it must be concluded that the comments submitted by the Italian authorities cannot substantially alter the Commission's initial assessment, as set out in its decision to initiate the proceedings, that the measures provided for by Law No 95/1979 constitute State aid which is incompatible with the common market for coal and steel.

The aid which Ferdofin has received must therefore be deemed incompatible with the common market since it does not qualify for any of the derogations laid down in Decision No 2496/96/ECSC from the prohibition enshrined in Article 4 (c) of the ECSC Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Ferdofin has received in the context of the application to it of Law No 95/1979, through suspension of the payment of the following debts:

(a) Lit 10 786 million owed to the INPS;

(b) Lit 723 million owed to the INAIL;

(c) Lit 2 301 million owed to the tax authorities;

(d) Lit 100 billion owed to banks controlled directly or indirectly by the State,

is illegal since it was granted in breach of Article 6 (2) of Decision No 2496/96/ECSC.

It is also incompatible with the common market for coal and steel in pursuance of Article 4 (c) of the ECSC Treaty.

Article 2

Italy shall recover the aid referred to in Article 1 in accordance with the provisions of Italian law relating to the recovery of amounts owed to the public authorities. In order to counteract the effects of the aid, interest shall be charged on the amount of the aid from the date on which it was granted until the date it is reimbursed. The interest rate applicable shall be that used by the Commission to calculate the net grant equivalent of regional aid schemes in the period in question.

Article 3

Italy shall forthwith cease to apply the provisions of Law No 95/1979 in respect of the failure by Ferdofin Siderurgica Srl to pay debts contracted with public bodies and enterprises.

Article 4

Italy shall inform the Commission, within two months of the notification of this Decision, of the measures taken to comply herewith.

Article 5

This Decision is addressed to the Italian Republic.

Done at Brussels, 30 April 1997.

For the Commission

Karel VAN MIERT

Member of the Commission