COMMISSION

COMMISSION DECISION

of 14 July 1998

concerning State aid in favour of 'Porcelanas del Norte SAL (Ponsal)/Comercial Europea de Porcelanas SAL (Comepor)'

(notified under document number C(1998) 2364)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(1999/88/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 Article 93 of the Treaty to interested parties to submit their comments,

Whereas:

I

On 30 April 1997 the Commission, having received several complaints since the beginning of 1995 and having sent Spain a letter of formal notice on 30 April 1996, decided to initiate proceedings under Article 93(2) in respect of the aid granted to Porcelanas del Norte SAL (Ponsal).

Ponsal, which is a producer of porcelain, tableware and ornamental ceramics, was set up in 1957 in Pamplona (Navarre). In the mid-1980s it encountered financial difficulties, which lasted for many years. To remedy this situation, it drew up a restructuring plan in 1994, which provided in particular for the firm to move from the centre to the outskirts of Pamplona and for the modernisation of its plant through investment in new machinery.

Under the restructuring, Ponsal had received from the Government of Navarre considerable amounts of aid which, however, had not been previously notified to the Commission. According to press reports submitted by the complainants, the aid consisted of a bank guarantee (ESP 1 200 million), a job-creation grant (ESP 100 million), a 20 % investment subsidy for investment in fixed assets and a waiver of tax and social security contributions by the public authorities (ESP 3 100 million).

In March 1995, in response to a preliminary request for information, the Spanish authorities confirmed in writing that the Government of Navarre had indeed granted aid in order to support the restructuring of Ponsal. The aid, however, had been granted under Regional Law (Ley Foral) 1/1985 of March 1985, which introduced a scheme for rescuing and restructuring firms in difficulty and which preceded Spain's accession to the Community. The scheme had been notified to the Commission as existing aid in March and May 1986. The Commission had not objected to it so far.

Since the Commission had serious doubts about whether to accept this reply or not, in particular with regard to the defence that the aid was based on an existing aid scheme, and since further requests for detailed information were answered reluctantly, it decided on 30 April 1996 to require Spain to demonstrate that the aid to Ponsal was part of an existing aid scheme.

In their reply of July 1996, the Spanish authorities managed to provide the evidence requested. Among the different aid measures referred to by the complainants, however, only the guarantee of ESP 1 200 million was covered by Regional Law 1/1985. For the other aid measures under investigation, no justification could be found within the scheme.

In addition, the Commission discovered that, according to the Spanish authorities' reply, certain corporate bodies were linked to Ponsal and with the aid which was supposed to have been granted to the firm (originally Ponsal, but subsequently Comercial Europa de Porcelanas SAL (Comepor)) and that, in this context, it was not clear why the company name had been changed.

By letter dated 26 July 1996, the Spanish authorities were therefore again requested to comment on the inconsistencies concerning Ponsal.

In their reply of 10 October 1996, the authorities confirmed that, in order to overcome Ponsal's delicate economic situation, the restructuring plan of 1994 had also provided for the introduction, in accordance with Spanish bankruptcy law, of suspension of payments proceedings, under which Ponsal's public creditors had waived ESP 3 100 million in claims by the Government of Navarre and the social security authorities out of a total debt owed to the public authorities of ESP 4 350 million. After Ponsal had been wound up, a new company, Comepor, was founded, which continued Ponsal's business.

In addition, the Spanish authorities pointed out that, in connection with the firm's move from the centre to the outskirts of Pamplona, they had granted further aid to the new firm Comepor, namely an investment premium of ESP 570 million covering 20 % of the total new investment and a grant of ESP 500 000 per job created (up to 250 jobs).

According to the Spanish authorities, the new aid, previously unknown to the Commission, was not notifiable since it was covered by another existing aid scheme, the Law of 23 June 1982, whose purpose is to promote investment. This aid scheme was communicated to the Commission shortly after Spain joined the Community, in March and May 1986, and the Commission had not objected to it so far.

In the meantime, the Commission received press reports according to which Comepor had received additional aid of ESP 750 million.

The Commission carefully examined all information provided by the Spanish authorities in the light of the Community rules on State aid. It reached the conclusion that most of the aid measures quoted by the Spanish authorities were indeed covered by existing aid schemes.

However, regarding the aid of ESP 500 000 per job created, which was supposedly based on the June 1982 investment promotion scheme, the Commission found that the scheme laid down a maximum grant of ESP 400 000 per job created and that the Navarre authorities had exceeded the ceiling.

In addition, the Commission had serious doubts about the implementation of the Ponsal suspension of payments proceedings, in particular regarding the waiver of ESP 3 100 million in public claims. It could not be ruled out that the company had been liquidated simply in order to allow new industrial projects, using new aid and the assets of the previous (non-viable) company.

Finally, the Spanish authorities did not notify or explain the new aid of ESP 750 million which, according to the press reports, had been granted to the company.

The Commission therefore decided on 30 April 1997 to initiate Article 93(2) proceedings in respect of:

(a) the ESP 3 100 million waived by the public authorities under the suspension of payments proceedings;

(b) the investment grants for job-creation, in so far as they exceeded the ceiling laid down in the Navarre aid scheme of June 1982;

(c) the additional aid of ESP 750 million for which the Commission had not received any official information from the Spanish authorities.

II

By letter dated 1 July 1997 the Spanish authorities replied to the Commission's Decision to initiate Article 93(2) proceedings.

They first indicated that the new plant was located at Cordovilla in the municipality of Cendea de Galar, which, according to the regional aid map for Spain accepted by the Spanish authorities in their letter dated 26 September 1995, was part of an Objective 2 area.

They then emphasised the dramatic financial situation of Ponsal before the restructuring plan had been drawn up. They claimed that, before the suspension of payments proceedings were implemented, Ponsal's assets were ESP 1 720 million but its debts ESP 5 091 million.

According to the Spanish authorities, the suspension of payments proceedings, under which the public authorities waived claims amounting to ESP 3 100 million, was the only one of the various methods of liquidation provided for in Spanish law which made it possible:

— to take on Ponsal's workers in the new firm Comepor,

— for the liquidated firm to achieve reasonable prices for its assets which reflected their real value, and

— for the public creditors to be reimbursed at least in part (otherwise these claims would not have been met).

The Spanish authorities, however, did not support those arguments with any comparative cost calculations for the different methods of liquidation.

As regards the grant of ESP 500 000 per job created, the Spanish authorities pointed out that the amount of aid provided for in the Regional Law of June 1982 had been amended on two occasions. It had first been increased to ESP 750 000 by Regional Law 6/1985 of April 1985, and then reduced again to ESP 500 000 by Regional Law 15/1986 of November 1986. The two Regional Laws had not been notified to the Commission, since they constituted existing aid for which there was no such requirement.

As regards the new aid of ESP 750 million, the Spanish authorities stated that this was a loan which had been granted to the new firm, Comepor, by the State-owned corporation Navarra de Financiación y Control SA (Nafinco). The loan had been granted under market conditions (interest rate: 6,86 %) against collateral (Comepor, backed by the firm's shares). It was necessary to keep the firm in business, as the restructuring programme of 1994 had failed and the firm was still making a loss.

Lastly, the Spanish authorities stated that, due to the failure of the first restructuring, a new restructuring plan would most probably be drawn up, which, once finalised, would immediately be submitted to the Commission. In any case, the new restructuring would require additional State aid, which would be notified to the Commission beforehand.

III

By letter dated 21 October 1997 the Commission forwarded to the Spanish authorities for comment the observations of third parties (namely the Liaison Office of the European Ceramics Industries, Cerame-Unie, and a Spanish competitor of Ponsal), which it had received following publication of the initiation of proceedings in the Official Journal of the European Communities of 9 August 1997.

(a) Cerame-Unie focused on the negative impact of the aid on the ceramics industry, where there was huge overcapacity. Many firms in the sector had invested in restructuring their production and distribution processes over the last 10 years. These firms were suffering from unfair competition from Ponsal/Comepor, which, instead of carrying out real restructuring measures, had tried to face the situation with the help of State aid and was therefore able to sell its products below market price.

(b) The Spanish competitor began by questioning the line taken by the Spanish authorities, namely that the aid granted to Ponsal/Comepor was based on existing schemes, and rejected the Spanish authorities' view on this matter. It then asserted that the investment premium granted to Comepor when the firm moved should not have been granted, since the new plant was not located in a depressed area as defined in Article 92(3). Moreover, it emphasised the financial difficulties it had got into as a result of the aid granted to Ponsal/Comepor. This enabled the latter to pursue an unfair pricing policy, with which it, the competitor, could not compete, since it received no State aid at all.

IV

By letter dated 21 November 1997, the Spanish authorities replied to the third parties' observations.

In response to Cerame-Unie's observations, the Spanish authorities denied that the aid to Ponsal/Comepor could have had a negative impact on the European ceramics market. Ponsal/Comepor's exports accounted for only 0,004 % of total intra-Community exports and concerned only the low-price segment, in which the company did not compete with other European Union producers but only with outside manufacturers.

Regarding the Spanish competitor's allegations, the Spanish authorities replied that there could be no connection between the competitor's economic problems and the aid to Ponsal/Comepor. The competitor's problems had already arisen in 1992/93, whereas Ponsal/Comepor had not received any aid until 1994. In addition, the competitor operated in a market sector (catering china) which was different to that of Ponsal (household china).

V

Following a further exchange of correspondence and a series of bilateral meetings, the Spanish authorities submitted, by letter dated 8 April 1998, an extensive statement (including numerous enclosures in support of their various arguments) concerning the firm's current financial situation and the different measures in respect of which the Commission had initiated the Article 93(2) proceedings.

First of all, they confirmed that the 1994 restructuring plan had failed completely and that now, departing from their original plans to try a second restructuring, they were discussing whether to liquidate the firm in its entirety, since it had proved impossible to restore it to viability. The liquidation would be carried out in full compliance with the Spanish bankruptcy law applicable in such cases. No new aid would be granted in support of the liquidation process or in connection with a possible sale of the firm's assets.

As regards the waiver of the ESP 3 100 million of public claims under the Ponsal suspension of payments proceedings in 1994 to 1995, the Spanish authorities first pointed out, and then submitted proof, that they had acted in full compliance with Spanish bankruptcy law. They then reiterated that the waiver was the only one of the various methods of liquidation in Spanish law which allowed the public creditors to be reimbursed, at least in part (ESP l 200 million out of a total of ESP 4 300 million). These claims would otherwise not have been recovered. As evidence, the authorities produced the financial results which the public creditors would have obtained if they had followed the other methods allowed by Spanish law. Thus, if they had requested bankruptcy proceedings, they would only have recovered a maximum of ESP 600 million, since, under Spanish bankruptcy law, the workers' claims of ESP 1 000 million would have had priority and the costs of the bankruptcy proceedings would have exceeded ESP 200 million. In the event of a simple liquidation of the firm's assets without bankruptcy proceedings, the assets would have been sold without detailed supervision, which, as experience shows, brings a much lower return than regular liquidation proceedings.

Regarding the ESP 500 000 subsidy per job created, the Spanish authorities submitted copies of the two legal acts by which the original legal basis for these grants, the Regional Law of 1982, was amended. These amendments confirmed that the amount of aid per job created had first been increased to ESP 750 000 by Regional Law 6/1985 of April 1985 and then reduced again to ESP 500 000 by Regional Law 15/1986 of November 1986. Both legal acts referred to the original basis of 1982 and did not contain any other amendment of it.

As for the new aid of ESP 750 million, the Spanish authorities repeated that this was a loan which had been granted to the new firm Comepor by the State-owned corporation Navarra de Financiación y Control SA (Nafinco). The loan was granted under market conditions (interest rate: 6,86 %) against collateral (Comepor, backed by the firm's shares) in support of the restructuring process and to allow the firm to continue its activities in spite of the difficult financial situation. Nevertheless, the Spanish authorities admitted in the same letter of 8 April 1998 that the collateral was not sufficient since, given the firm's continued losses, the value of its shares was nil.

VI

The Article 93(2) proceedings have clarified the situation of Ponsal and the circumstances under which the firm received public financial support. A number of conclusions can be drawn about the measures in respect of which the Article 93(2) proceedings were initiated. Thus:

(a) The Spanish authorities showed that the waiver of ESP 3 100 million on the occasion of Ponsal's liquidation does not constitute State aid within the meaning of Article 92(1) of the EC Treaty. The alternative calculations submitted by the Spanish authorities confirm that, if one of the other methods of liquidation provided for in Spanish law had been followed, the losses would have been higher. The authorities also showed that Spanish bankruptcy law had been fully complied with.

(b) The grant of ESP 500 000 per job created certainly constitutes aid within the meaning of Article 92(1) of the EC Treaty. The Spanish authorities, however, proved that these payments were based on existing aid schemes within the meaning of Article 93(1) of the EC Treaty and were therefore not notifiable under Article 93(3) of the EC Treaty. The amendments to the Regional Law of 1982, i.e. Regional Law 6/1985 of April 1985 and Regional Law 15/1986 of November 1986, which had been communicated by the authorities, both make reference to their respective precedents. The scheme by which the aid ceiling was increased to ESP 750 000 per job created pre-dated Spain's accession to the Community and was thus existing aid. The Regional Law by which the ceiling was reduced again to ESP 500 000 was not notifiable either, since it concerned only the reduction of an existing, and hence authorised, aid ceiling and did not alter the substance of the original 1982 aid scheme.

(c) Regarding the ESP 750 million loan, it has to be stated that this support constitutes aid for the purposes of Article 92(1) of the Treaty. Even though this credit was awarded under market conditions as far as interest rates are concerned, the security for it was by no means sufficient. The value of the collateral — the value of the Comepor shares — was nil, as the

Spanish authorities themselves admit. Thus, if the private-investor principle is applied, it has to be concluded that no private bank would have granted such a loan to a firm in Comepor's situation under the same conditions as the public authorities.

The aid could distort competition and affect trade between Member States. There is a vigorous trade in goods in the tableware industry between Spain and other Member States. According to data provided by Eurostat, in 1996 Spain exported 7 131 tonnes of tableware products (ECU 28,7 million) to other Member States and imported 8 239 tonnes (ECU 26,8 million). In 1997 the figures were 6 986 tonnes (ECU 29 million) and 9 072 tonnes (ECU 35,1 million) respectively. Comepor, although having a rather limited market share, participates in this market. This is clearly demonstrated by the third parties' reactions. Thus, the aid granted to Comepor certainly improved the firm's position in the common market *vis-à-vis* other competitors, which do not receive any State support.

Since the aid was not based on an approved aid scheme it was notifiable individually in accordance with Article 93(3) of the Treaty. Spain did not comply with this requirement. Consequently, the granting of the aid was definitely illegal.

Furthermore, it is not possible in this case to apply the exceptions laid down in Article 92(2) of the Treaty when one considers the features of the aid and the fact that no attempt was made to satisfy the conditions for such application.

In addition, it has to be pointed out that Comepor is not situated in an area eligible for regional aid under Article 92(3)(a) of the EC Treaty.

Nor was the purpose of the credit to facilitate the economic development of a depressed area within the meaning of Article 92(3)(c) of the EC Treaty but to help a firm in economic difficulties to continue its activities in the sector.

Lastly, the loan does not comply with the derogation set out in Article 92(3)(c) of the EC Treaty, read in conjunction with the Community guidelines on State aid for rescuing and restructuring firms in difficulty [1].

As regards the classification of the ESP 750 million loan as rescue aid, it must be pointed out that, when it obtained the loan, Comepor was certainly a firm in difficulty, unable to recover through its own resources. According to the said guidelines, rescue aid may take the form of assistance with liquidity, by way of loan guarantees or loans bearing normal commercial interest rates (point 3.1). The ESP 750 million loan, whose interest rate was in keeping with market conditions, meets this criterion. The Spanish authorities, however, did not provide any evidence that, at the time when the loan was granted, there was any link between the loan and the possible restructuring measures, which, under point 3.1 of the guidelines, is a compulsory requirement for the approval of rescue aid. Thus, during the proceedings, it became clear that the aid was aimed only at maintaining the status quo and putting off the inevitable; in the meantime, the unresolved industrial and social problems were transferred to other, more efficient producers and other Member States, whilst no support was given to a restructuring process which should have been undertaken when the rescue aid was granted.

During the proceedings the Spanish authorities could not show that the loan they had granted fulfilled all these requirements. Thus, the loan cannot be approved, since it does not fulfil the criteria set out above.

The ESP 750 million loan to Comepor cannot be described as restructuring aid either, since it was not linked in any way to the restructuring measures provided for in the 1994 restructuring plan but was paid because the restructuring had completely failed and the firm continued to suffer financial difficulties. In addition, it should not be forgotten that the Spanish authorities themselves admitted that it was impossible to restore the firm to viability.

Furthermore, the aid was likely to distort competition unduly. According to the information available to the Commission (Panorama of EU Industry 1997), there is excess capacity in the ceramic goods industry. The sector was hit by a significant decline in consumption in 1992 and 1993 (3,2 % a year), which could not be made good in subsequent years. Thus, the large gap between production capacity (value: ECU 15 163 million in 1993) and demand (value: ECU 12 834 million in 1993) in the past will not decline in future (estimated value of production in 1998: ECU 19 470 million; estimated value of consumption in 1998: ECU 15 650 million). In view of this trend, the loan granted to Comepor could seriously harm the firm's competitors.

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

Taking all the abovementioned facts into account, the Commission is forced to conclude that the loan of ESP 750 million granted to Comepor by Navarra constitutes aid to which none of the derogations in Article 92(3) applies.

VII

Where aid is deemed incompatible with the common market, the Commission requires the Member State to reclaim it from the recipient (Commission communication of 24 November 1983 ([2]); see also the judgments of the Court of Justice in Case 70/72 Commission v. Germany ([3]) and Case 310/85 Deufil v. Commission ([4])). This holds good for the aid granted to Comepor which is the subject of this Decision; that aid must therefore be refunded. This requirement is not altered by the fact that Comepor is to be liquidated and disappear from the market. The recovery of the aid is not regarded as impossible, since Comepor's assets will be sold and the creditors will be paid out of the profits of that sale.

The aid will be refunded in accordance with Spanish law, including the provisions concerning interest due for late payment of amounts owing to the Government, which interest will run from the date when the aid was granted (letter from the Commission to the Member States SG (91) D/4577 of 4 March 1991; see also the judgment of the Court of Justice in Case C-142/87 Belgium v. Commission ([5])).

In accordance with the decisions of the Court of Justice, the recovery of aid means that the said provisions are to be applied in such a way that the recovery required by Community law is not rendered impossible in practice. Any procedural or other difficulties in regard to the implementation of the measure cannot have any influence on its lawfulness ([6]),

HAS ADOPTED THIS DECISION:

Article 1

The loan of ESP 750 million provided by the State-owned corporation Navarra de Financiación y Control SA to Comercial Europa de Porcelanas SAL is illegal, since it was granted in breach of the Spanish authorities' obligation to inform the Commission, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid, as is laid down in Article 93(3) of the EC Treaty.

The aid is considered incompatible with the common market within the meaning of Article 92(1) of the Treaty as it does not meet the conditions for any of the derogations contained in Article 92(2) and (3) of the Treaty to apply.

Article 2

Spain shall ensure that the aid referred to in Article 1 is revoked and recovered in full, including interest, within two months of the date of notification of this Decision.

The aid shall be recovered in accordance with the procedures and provisions of Spanish law and shall include interest, from the date of its award until the date it is actually repaid, 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 Spain.

These provisions shall apply in such a way that the recovery required by Community law is not rendered impossible in practice. Any procedural or other difficulties with regard to the implementation of the measure shall not have any influence on its effectiveness.

Article 3

The Spanish Government shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

Article 4

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 14 July 1998.

For the Commission

Karel VAN MIERT

Member of the Commission

([2]) OJ C 318, 24. 11. 1983, p. 3.
([3]) [1973] ECR, p. 813.
([4]) [1987] ECR, p. 901.
([5]) [1990] ECR, I-959.
([6]) See footnote 5, paragraphs 58 to 63.