II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 25 November 1998

on State aid granted by Italy to Enirisorse SpA

(notified under document number C(1998) 3866)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2000/334/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 called on interested parties to submit their comments pursuant to the provisions cited above [1],

Whereas:

I

By letter dated 13 January 1996 the Commission informed the Italian Government of its decision to initiate the Article 93(2) procedure in respect of aid granted in the form of a capital injection by ENI to the sub-holding Enirisorse SpA (hereinafter referred to as 'Enirisorse'). Enirisorse was wholly owned by the Italian State holding company ENI, which in turn at the time of the events in question was controlled by the Italian Government through the Ministry of the Treasury, the majority shareholder.

Background

By Decision 98/212/EC [2] the Commission terminated proceedings concerning the injection of capital into Enirisorse by ENI between 1992 and 1996. The capital injections, which were part of a restructuring plan, amounted to a total of ITL 1 819 billion. The Decision was notified to Italy by letter of 2 May 1997.

In Decision 98/212/EC the Commission found that the capital injections amounting to ITL 1 819 billion were compatible with the common market and the EEA Agreement pursuant to Article 92(3)(c) of the EC Treaty and Article 61(3)(c) of the EEA Agreement, provided that the Italian Government complied with certain conditions. The main conditions, for the purposes of the present Decision, were as follows:

— Italy was to honour the commitment to complete the restructuring plan by privatising the companies and production sites of Enirisorse and liquidating it completely by 31 December 1998,

— the income from privatisation was to be used to cover any further liquidation costs,

[1] OJ C 70, 6.3.1998, p. 5.

[2] OJ L 80, 18.3.1998, p. 32.

— the Italian Government was to set up a procedure to monitor the implementation of the Decision.

The first half-yearly report reached the Commission on 11 November 1997. It showed that the sale of Pertusola Sud, one of the remaining companies owned by Enirisorse SpA which manages a zinc-production plant in Crotone, had not yet taken place, contrary to the restructuring plan notified by Italy and approved by the Commission.

The problems surrounding Pertusola Sud had been of major importance in Decision 98/212/EC. At the time, Italy had said that the company would be closed down or sold to an interested buyer by the end of 1997. In the second scenario, the buyer was to convert the production complex from zinc to nickel. These were the terms in which the closure or sale of Pertusola Sud appeared in the restructuring plan for Enirisorse, notified to the Commission and restated in Decision 98/212/EC.

Given that the Enirisorse's operating losses for 1997 were apparently attributable to the activities of Pertusola Sud, the Commission counted on the closure or sale of the company to a private buyer in order to achieve the ultimate aim of the restructuring plan, i.e. the final liquidation of Enirisorse.

The same report revealed that in 1997 ENI had given Enirisorse fresh capital injections amounting to ITL 133 billion. This new capital was used partly to cover the operating costs of Pertusola Sud and the cost of liquidating Enirisorse. The new capital injections were not provided for in the restructuring plan notified to the Commission and therefore were not taken into consideration in Decision 98/212/EC. The new capital injections were not notified to the Commission and were therefore made illegally.

The Commission therefore had to examine these new capital injections as new aid measures, illegal because granted in breach of the prior notification pursuant to Article 93(3) of the Treaty.

As it had on the basis of the information gathered in the first stage of its investigations, the Commission came to the conclusion that the capital injections carried out by ENI in 1997 were unlikely to yield a sufficient financial return, given that Enirisorse would be liquidated very soon. Therefore, it could not be claimed that ENI was acting as a private investor. In any case, Enirisorse had suffered serious losses for over five years; a private investor would have restructured or liquidated the company much sooner, in order to avoid prolonged losses.

The Commission had serious doubts as to the compatibility of the capital injections with the common market, since they did not seem to qualify for the derogations under Article 92(2) and (3) of the Treaty. It therefore decided to initiate the Article 93(2) procedure in respect of the new capital injections.

II

Following publication of the notice on the initiation of the procedure [3] by letter of 6 April 1998 the Government of the United Kingdom submitted its own comments in support of the Commission's arguments. The UK authorities said that, given the financial situation of Enirisorse, the new capital injections made by ENI were inconsistent with the action of a private investor.

By letter of 4 May 1998 the company Union Minière, a zinc producer and direct competitor of Pertusola Sud, submitted its comments, also in support of the Commission's arguments. Union Minière said that the new capital injections given to Enirisorse concerning the financial years 1997 and 1998 intended to cover the losses of its subsidiary Pertusola Sud constituted State aid which was not notified and therefore illegal. The new aid clearly and unduly distorted competition in the market in zinc, already suffering from structural overcapacity.

No other Member State or interested party submitted comments to the Commission. The comments of the United Kingdom and Union Minière were forwarded to the Italian Government by letter of 28 May 1998.

III

In its reply to the letter initiating the procedure and to the abovementioned comments by third parties, the Italian Government challenged both the Commission's Decision to initiate the procedure and the comments by the third parties, in so far as:

— the capital injection in question amounting to ITL 133 billion was notified to the Commission as part of the monitoring procedure provided for in Decision 98/212/EC,

— of the total ITL 134 billion, ITL 34 billion were intended to cover losses of Pertusola Sud, while the remaining ITL 99 billion served to cover costs relating to Enirisorse. The ITL 99 billion was used to help complete the restructuring plan approved by the Commission; this

[3] See footnote 1.

further injection of ITL 99 billion should be considered as in effect authorised, even though it was not formally included in the aid provided for in the plan, given that the Commission had stipulated, in Article 3(b) of Decision 98/212/EC, that Italy should communicate any further liquidation costs,

— the amounts (ITL 99 billion) intended to cover the costs of liquidating and closing down an undertaking cannot possibly distort competition since the recipients are undertakings which are permanently ceasing their activities and leaving the market.

With regard to the ITL 34 billion paid to Pertusola Sud, the Italian Government recognises the fact that Enirisorse gave capital injections totalling ITL 34 billion to Pertusola Sud in 1997 in order to compensate the company's losses. However, it goes on to state that:

— when the Commission adopted Decision 98/212/EC, it knew that Pertusola Sud was to lose ITL 48 billion that year. Therefore, by imposing the sale or closure of Pertusola by the end of 1997, the Commission implicitly approved continuation of activities up to that date and the consequent compensation of losses accumulated in 1997,

— the Pertusola Sud plant is situated near Crotone in an area which qualifies for regional aid under Article 92(3)(a) of the Treaty; the aid in question should therefore be considered compatible with the common market in the light of those Treaty provisions.

IV

Enirisorse was set up in 1991 as a non-operating holding company, intended to optimise the economic and financial resources of the ENI Group and with the basic objective of entrusting the administration of the Group's holdings, mainly in mining activities, to a single centre of responsibility. In fact, ENI and its shareholder at the time (the Ministry of the Treasury) decided in 1991 to pull out of the non-core business so as to make the core business profitable again by separating it from loss-making activities. The ultimate aim was to privatise the holding company Enirisorse.

To that end, Enirisorse formulated a plan of one-off aid measures including, for the purposes of this Decision, closure of the Pertusola Sud plant by the end of 1997, or sale to an interested buyer who would turn the complex into a production unit for nickel.

At the end of the five-year period 1992 to 1996, Enirisorse had received from its sole shareholder, ENI, capital injections of ITL 1 819 billion for the purpose of implementing the plan. In its Decision 98/212/EC the Commission found that this aid was compatible, subject to the terms and conditions set out in the notified restructuring plan. In the same period, Enirisorse also expected to receive about ITL 840 billion from the sale of companies and areas of business.

V

Whether the capital injections constitute State aid

In order to assess whether the capital injections totalling ITL 133 billion constitute State aid, the Commission examines the flow of capital between the Italian State, the main shareholder at the time, and Enirisorse in the light of the market economy investor principle as set out in the Commission's communication to the Member States on public undertakings in the manufacturing sector [4]. According to this principle, State aid is involved if the financial transaction would not have been undertaken by a private investor operating under normal market economy conditions.

As the time of the events in question, i.e. 1997, alongside the Italian State, which was by far the largest shareholder, other private investors held shares in ENI. Nevertheless the Ministry of the Treasury, which held most of the shares in ENI at the time, played a leading strategic role in determining the Group's business decisions.

The capital injection of ITL 133 billion, the subject of the initiation of the procedure, was financed by proceeds that would otherwise have benefited ENI's shareholders, in particular its controlling shareholder, the Italian State. Consequently, the funds which ENI made available to Enirisorse must be considered State resources within the meaning of Article 92(1) of the Treaty.

The Commission has good reason to suppose that the capital injections made by ENI totalling ITL 133 billion will yield an insufficient, or rather non-existent financial return, given that the measures consist basically in covering the losses of a company, Pertusola Sud, which should already have been liquidated, and unspecified liquidation costs which the Commission does not see why ENI should undertake, unless it has a specific legal obligation to do so.

If there is no such legal obligation, which it was up to the Italian State to prove, ENI's conduct does not conform to that of a private investor operating under market economy

[4] OJ C 307, 13.11.1993, p. 3.

conditions, since it could not count on a profitable return in proportion to the amount of the capital injection, and in fact would have to give up hope of even the smallest return on the investment, given the decision to liquidate Enirisorse in any case by 31 December 1998.

It certainly cannot therefore be claimed that ENI acted as a private investor when it decided to make further, fresh capital injections of ITL 133 billion. A private operator would have liquidated Enirisorse, limiting the liquidation costs as much as possible and taking action only if it had a specific legal obligation to do so. From the evidence at its disposal, the Commission must conclude that ENI did not act in response to a legal obligation connected with the normal procedures for liquidating a company.

The measures in question therefore constitute State aid.

VI

The illegality of the State aid

As to the legality of the aid in question, in its reply to the initiation of the procedure the Italian Government maintains that the injection of ITL 133 billion was notified to the Commission as part of the monitoring procedure provided for in Decision 98/212/EC.

The Commission must point out in this regard that the information concerning the new capital injection, one among the many items of information sent to the Commission in the context of the monitoring procedure, should have been notified formally, since this was new aid, not included in the amounts authorised in Decision 98/212/EC. In any case, the Italian authorities did not comply with the obligation to give prior notice before implementing the aid, as stipulated by the Court of Justice, in particular in its judgment in Case 120/73 *Lorenz* v *Germany* ([5]).

The Italian authorities themselves agree that the new injection of ITL 133 billion was not included in the ITL 1 819 billion authorised by the Commission. However, they claim that, of the ITL 133 billion, ITL 99 billion was used to help complete the restructuring plan approved by the Commission. The further injection of ITL 99 billion should be considered as in effect authorised, even though it was not formally included in the aid provided for in the plan, given that the Commission had stipulated, in Article 3(b) of Decision 98/212/EC, that Italy should communicate any further liquidation costs.

([5]) [1973] ECR 1471.

The Commission cannot accept this argument in so far as Article 2 of Decision 98/212/EC expressly stipulated that the proceeds of privatisation of Enirisorse could not be used by ENI to invest in other companies owned by ENI, but had to be used to defray any further liquidation costs of Enirisorse. This means that, although the Commission might have foreseen further liquidation costs at the time it adopted its Decision, it was clear from the wording of this Article that, as far as the Commission was concerned, any such costs were to be met using revenue from the privatisation of Enirisorse's companies, certainly not using new State aid in the form of fresh capital injections, as was in fact the case.

There is also no basis to the claim by the Italian authorities that the Commission, knowing that Pertusola Sud would lose a further ITL 48 billion in 1997 and having accepted that it would close by 31 December 1997, implicitly authorised the compensation of those losses.

The fact that the Commission was aware that Pertusola Sud was to suffer further losses does not in any way imply that it approved new aid to cover such losses. It was entirely reasonable, as may be seen from Decision 98/212/EC, that Enirisorse should have compensated the losses of Pertusola Sud using revenue from privatisations carried out in the medium term, or at least using the holding company's own internal funds, without having recourse to a new and absolutely unplanned injection of capital, as was in fact the case.

The measures in question therefore constitute illegal State aid in so far as they were not notified by Italy to the Commission before being granted and, *a fortiori*, were not authorised by the Commission pursuant to Article 93(3) of the Treaty.

VII

Compatibility of the aid with the common market

As to the compatibility of the aid, the Italian Government maintains first of all that the amounts intended to cover the costs of liquidating and closing down an undertaking cannot possibly distort competition in the common market or affect trade between Member States, since the recipients are undertakings which are permanently ceasing their activities and leaving the market.

This claim has no basis in the present case. It is directly contradicted by the comments of Union Minière, a competitor of Pertusola Sud, which complains that the aid allowed the

company to remain active on the zinc market, thus distorting competition with other zinc producers.

In this case, the companies which benefited directly or indirectly from the aid in question are still active on the market, often still producing, as in the case of Portovesme and Pertusola Sud which, although put into liquidation a few months ago, is still an active zinc producer. Without the aid in question it would have had to be sold or closed down some time ago.

Therefore, the argument put forward by the Italian authorities cannot be accepted, since the liquidation costs in question have had direct or indirect repercussions on companies still active on the market.

Italy also claims that, in any case, the Pertusola Sud plant is situated near Crotone in an area which qualifies for regional aid under Article 92(3)(a) of the Treaty. The aid in question should therefore be considered compatible with the common market in the light of those Treaty provisions.

The Commission would point out in this regard that Article 92(3)(a) of the Treaty allows the Commission, in derogation from the ban on State aid which affects trade between Member States and distorts competition, to declare as compatible with the common market, 'aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, where such aid does not adversely affect trading conditions to an extent contrary to the common interest'.

In this context the Commission has authorised regional aid, having established the viability of the company involved. In other words, regional aid is authorised in so far as it can effectively bring an advantage to the region, almost always in terms of employment, linked to the viability over time of the undertaking receiving the aid. In any case it is clear, as confirmed by successive Court judgments (see, most recently, the judgment of the Court of First Instance in Joined Cases T-126/96 and T-127/96 *EFIM and BFM* v *Commission* [6] that the Commission cannot, even in the context of the application of Article 92(3)(a), waive consideration of the Community interest, i.e. it must never confine itself to verifying the regional specificity of the measures involved without assessing their impact at Community level.

In the case in point, Italy simply invokes a regional derogation for a company in liquidation, with no prospect of any viability even in the medium term. This means that the capital injection can lead to no concrete advantage in terms of employment, since the Italian authorities themselves acknowledge that in any case Pertusola Sud, already in liquidation, will close by 31 December 1998.

Nor does the measure in question appear to serve any regional policy purpose, since aid to liquidate companies cannot be said to be aimed at 'promoting the economic development' of an area. It is, in fact, a further measure aimed at keeping Pertusola Sud active on the market at all costs for another few months, with no industrial, economic or regional logic behind it.

Therefore, as far as the cited provisions of Article 92(3)(a) are concerned, the Commission must conclude that the ad hoc aid measures in question were not taken as part of a government strategy effectively promoting regional development, such as would qualify for the derogation in question. The case file does not even show that the aid was granted to create jobs in an assisted area. On the contrary, all the evidence suggests that these are ad hoc measures aimed at the industrial survival at all costs of companies still controlled by Enirisorse, and in particular Pertusola Sud.

As to possible compatibility of the new aid under Article 92(3)(c) of the Treaty, the Commission would stress that this provision was not directly cited by the Italian authorities during the procedure. However, the Commission would repeat that State aid may qualify for this derogation provided that it does not adversely affect trading conditions to an extent contrary to the common interest. As for restructuring aid, the only aid which might possibly be cited in the present case, the Community guidelines on State aid for rescuing and restructuring firms in difficulty [7] state that this type of aid is extraordinary and cannot be renewed, unless this is justified by exceptional circumstances. In this case the aid in question, which was new and in addition to the aid already authorised by Decision 98/212/EC, goes against the 'one-off' condition, since there are no new, exceptional circumstances which might justify authorisation by the Commission.

VIII

On the basis of the above considerations, the Commission concludes that the aid in the form of capital injections of ITL 133 billion, questioned in the decision to initiate the procedure, does not qualify for any of the derogations under Article 92(3)(a), (b) or (c) in so far as it is not intended to promote the economic development of areas where the standard of living is abnormally low or to restructure

[6] Judgment of 15 September 1998; ECR II-3437, point 101.

[7] OJ C 283, 19.9.1997, p. 2.

undertakings which are to be closed down soon and in any case before 31 December 1998.

When it initiated the procedure, the Commission reminded the Italian authorities that any aid granted illegally is liable to be followed by a Commission decision requiring the Member State in question to recover it, and, in this case, the Commission considers it necessary to recover the aid in order to restore the fair competition which prevailed before it was granted,

HAS ADOPTED THIS DECISION:

Article 1

The State aid granted by Italy in 1997 to Enirisorse SpA in the form of capital injections totalling ITL 133 billion is incompatible with the common market.

Article 2

1. Italy shall take all necessary measures to recover from Enirisorse SpA the aid which has already been unlawfully paid.

2. Recovery shall be effected in accordance with the procedures of Italian law. The amounts to be recovered shall include interest from the date on which the aid was paid to Enirisorse until the date on which it is effectively recovered. The interest shall be calculated on the basis of the reference rate used to calculate the net grant equivalent of regional aid.

Article 3

Italy 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 Italian Republic.

Done at Brussels, 25 November 1998.

For the Commission

Karel VAN MIERT

Member of the Commission