COMMISSION DECISION

of 4 October 1995

concerning aid granted by the Netherlands to the truck producer DAF

(Only the Dutch text is authentic)

(Text with EEA relevance)

(96/76/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 16 November 1993, the Commission informed the Dutch 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 Dutch government in the new DAF company (DAF Trucks NV) as well as of any possible aid elements contained in the dissolution of the former DAF company (DAF NV) and requested it to submit its comments within one month from the date of that letter.

In opening the procedure, the Commission expresed its serious doubts as to the compatibility of the aid for the following reasons :

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

— the rescheduling since 1990 of the first TOK *(Technische Ontwikkelingskrediet)* loan resulted in a not yet quantified important saving to the company,

— the justification for and the moment of granting the latest TOK loan,

— the granting of part of the notified research subsidy prior to approval by the Commission,

— the postponement by the NIB of the first repayment on a loan of Fl 30 million,

— the granting of bridging loan,

— 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,

— the sale of the assets of the old company 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 Commission added that aid could be subjected to appropriate strict conditions. Such conditions could only be imposed by a final decision folowing this procedure.

II

Following the opening of procedure, the Dutch government submitted its comments by letter dated 2 February 1994. By letter dated 14 September 1994, the Commission received supplementary information from the Netherlands in response to the Commission's detailed questionnaire of 14 June 1994.

In order to prepare the visit to the DAF plants in Eindhoven and Westerlo, the Commission requested additional information in its letter of 14 November 1994, addressed to both the Belgian and the Dutch governments. By letter dated 23 January 1995 the Dutch government replied to those questions. The company visit 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 8 February 1995, the Commission raised some final questions to which the Dutch and Belgian authorities replied at their meeting with Commission staff on 14 February 1995.

[1] OJ No C 31, 2. 2. 1994, p. 9.

On 6 March 1995, a further meeting was held between the Commission and the Dutch and Belgian authorities, focusing 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 procedrue 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.

On 7 April 1995, the Dutch authorities, following a further bilateral contact on 28 March 1995, provided the Commission with further information on the circumstances of the bankruptcy and take-over of DAF NV.

On 24 April 1995, the Commission asked the Dutch authorities to provide further information on the circumstances of the take-over, necessary in order to formulate a draft decision. By letter dated 23 May 1995, the Dutch authorities answered that request of information.

By letters dated 24 May and 7 June 1995 the Dutch authorities supplied further information on the aid provided to DAF NV before its receivership.

III

By letter dated 16 February 1994, the Commission requested the Dutch 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 Dutch government replied by letter of 19 July 1994, basically arguing that this offer came too late.

On 15 February 1994 the NIB submitted its comments following the initiation of this procedure. On 28 February 1994, several shareholders of DAF Trucks NV — the VDL Groep, Nationale Nederlanden, DAF Trucks NV and Evicar — submitted their comments. On the same day, the Commission also received comments from DAF Trucks NV as well as from the Dutch receivers of DAF NV following the publication of the opening of procedure 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 Dutch authorities' reaction to the comments of the abovementioned interested parties, who all supported their opinion, is contained in the fax dated 23 March 1995.

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

IV

With regard to the rescheduling since 1990 of the first TOK loan, NTG *(Nieuwe Truck Generatie)*-TOK, the Dutch Government argued that:

— it was not certain whether a notification was required because of the fact that they were acting in conformity with standard commercial practice as regards this TOK loan. By rescheduling the loan, in their view, they better secured its repayment. They could not agree with the parallel, drawn in the opening of the procedure, with the Volvo Cars case because that case concerned a loan by the State as a shareholder and not a TOK loan, which is granted on the basis of an approved scheme,

— whether a TOK loan is repayable depends on the commercial success of the products developed by the aided project. This instrument is approved by the Commission. If the project fails there is no aid since there is no product which can distort the competition and if the project succeeds there is no question of aid either because interest is charged until the loan is fully repaid. In fact, since the part of the TOK loan which relates to the costs made for the F 80, which failed, has not been remitted, as it could have been under the rules of a TOK loan, the company even has to repay more since it has to repay the entire loan, relating to the F 80 and the F 95, and this only with the profits of the F 95. Relating the repayment to the profits offers more control possibilities and was decided after long discussions with DAF NV. As regards securities, it is unusual to ask for securities for TOK loans since they involve risky projects and it is only when commercial borrowers are reluctant to finance a project that companies apply for a TOK loan.

With regard to the latest TOK loan, NML *(Nieuwe Medium Line)*-TOK, awarded in 1991, and increase with a second tranche in 1992, the Dutch government argued that:

— this TOK loan concerned innovative products. Detailed information was provided to prove that the new medium truck series (DAF 75/85) were innovative products in the truck market,

— the company was suffering losses at that time but DAF was listed on the stock exchange and had effected a successful share issue. As far as the loan increase in July 1992 is concerned, the Netherlands argued that even at that time they had no doubts about the continuity of the company because the long-term prospectives were good. It was only in November 1992 that the first signals emerged concerning DAF's solvency problems. After that, events moved very fast,

— the Dutch authorities further argued that they might recover the amount paid of Fl 33,5 million plus interest charges as they have registered it as an unsecured debt with the receivers of DAF NV.

As regard the research subsidy of Fl 1,55 million, the Dutch government argued that:

— this first payment was made subject to approval of the notified aid by the Commission. It corresponded to 80 % of the aid proposed in respect of research expenditure effected prior to mid-1992. For further research realized until the receivership DAF did not receive any advance,

— this notified aid is compatible with the guidelines for the motor vehicle industry because it is genuine R&D aid in support of the development of technologies concerning cleaner and less energy-consuming diesel engines,

— the Dutch government further argued that they might recover this amount by registering it as an unsecured debt by the receivers of DAF NV.

With regard to the postponement by the NIB of the first repayment of Fl 2,5 million on a loan of Fl 30 million, the Dutch authorities argued that since the term was never suspended and DAF weas never awarded suspension of payment for this redemption, the relevant part of the loan was no longer subordinated but became an unsecured debt like the other unsecured debt. Moreover several other commercial loans were at that time not repaid by DAF NV. Consequently, there is no difference in the behaviour of the different lenders towards DAF NV. The position of the Dutch State is thus in conformity with commercial practice and contains no State aid.

With regard to the bridging loan of Fl 120 million, of which Fl 60 million was guaranteed by the State, and which had to allow the company to continue its activities for three weeks in order to reduce as much as possible the losses occuring from non-activity, the Dutch government stated, similar to the abovementioned reasoning, that sufficient security was provided. Furthermore, the receivers expressed the expectation that the credit would be fully repaid. In the meantime, the authorities have confirmed that the loan has been fully reimbursed, including interest charges.

With regard to the State participation of Fl 155 million in DAF Trucks NV, i.e. 41,78 % of the equity capital, the Dutch government argued that:

— no aid element is involved since it was based on a business plan which is different from the restructuring plan made up before the suspension of payment and of which the feasibility was assessed by external consultants,

— the private investors participated on the same basis and their participation under equal conditions proves that one could have confidence in DAF Trucks NV. As far as the distinction between A and B shares is concerned the Dutch government claimed that holders of B stocks have the same dividend rights as regards their extent and also the potential arrears to B shares will be taken over. From 1 January 2000, the distinction will lapse,

— except for the economic argument, great importance should be attached to the impact of the company on the Objective 2 area, South East Brabant, where DAF is located,

— as regards the 'legal succession', changing DAF NV into DAF Trucks NV, referred to in the opening of the procedure, the Dutch authorities stated that the shareholders of the two companies are not the same, that DAF Trucks NV has a different production plan and that the business plan is different from the former restructuring plan. Furthermore, 46 % of DAF NV's shareholders were unknown. The participation of the Flemish Region as well as of the Dutch State are two separate decisions of two different authorities. The Flemish Region held no participation in the former DAF companies and the Dutch government's participation was limited to 1,8 %. Therefore, it cannot be maintained that the new company is the legal successor of the former one,

— in preparation for the plant visit, as well as during the visit, the Dutch authorities and the company provided a lot of evidence to support their view that the business plan which formed the basis of their participation is duly executed and has nearly produced the level of profits forecast by the plan so that dividends have been paid to the shareholders. As such, their investment in DAF Trucks NV is profitable and reflects a normal business attitude,

— finally, the public participation in DAF Trucks NV has fallen below 50 % since the sale by the Dutch and Flemish authorities of 100 million shares. Therefore, they have achieved the combined level of shareholding reflected in the shareholding agreement.

As regards the purchase of the assets and the role of the public authorities, the Dutch government argued that:

— other interested parties had the opportunity to bid since there has been a daily publicity since January 1993. Besides the candidate shareholders of DAF Trucks NV, nobody else had bid by 20 February 1993, the date on which an agreement in principle was reached between the receivers and the secured banks concerning the price of the assets. The offer of Klesch on 24 February therefore came too late. Moreover, in the interest of the company, the receivers had to act fast given that it is well known that in the case of sale as a going concern continued uncertainty could have further damaged the commercial position and value of the company,

— the fixed settlement price (407 million) is higher than the liquidation value (256,8 million), but lower than the fair market value on a going concern basis (498,075 million). The selling price is a fair price, otherwise the independent receivers would not have sold at that price and the judge would not have approved the transfer. Moreover, under the Dutch legal system, the Dutch State cannot exert any influence on the receivers. The price obtained is a fair price obtained after commercial negotiations and it has to be taken into account that DAF's position was deteriorating. Furthermore, the secured creditors have to agree with the purchase price while the receivers decide in the interest of the non-secured creditors. The valuation reports by independent appraisers and the assessment made by the receivers of the purchase price in the light of this valuation exclude the possibility of any aid element.

The position of the Dutch State was further reinforced by their legal advisers and the receivers of DAF NV who argued that under Dutch bankruptcy law:

— the winding up of DAF NV and the related asset transaction took place in accordance with current Dutch law on company winding-up. Dutch law affords the receivers freedom regarding the method of sale but private sales are generally given preference. So, by taking the initiative to find a buyer, the receivers of DAF NV acted within the law,

— only the secured and not the unsecured creditors have to give their consent to a sales agreement so that the Dutch State as an unsecured creditor could not have blocked the sales agreement,

— a company in the course of creation can legitimately be a party to a sales agreement and such an agreement — even being oral and not fully complete and not yet approved by the supervisory judge — has legal binding effects on all the parties concerned so that the Dutch State, at the time it was informed about a possible higher offer, could not have withdrawn from such an agreement. The receivers were also bound by the agreement of 20 February 1993, so that they were no longer free to enter into negotiations concerning the offer of Klesch & Company which had simply come too late and was subject to contract,

— even under the hypothesis that the receivers could nevertheless have accepted the alternative higher bid, the difference would have been paid to Ofasec, given its securities on all the assets of DAF Group, and would have indirectly benefited the privileged and non-privileged creditors of the UK assets. So, the Dutch State — not having granted credit to the UK companies of DAF — could not have benefited from the higher price.

V

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

— the non-notified new and rescheduled development credits ('TOK') awarded to the former DAF of which Fl 35,6 million was outstanding, as well as the rescheduling of earlier development credits, of which the effect could not yet be quantified, may constitute illegally granted State aid and may be incompatible with the provisions of the guidelines on State aid for the motor vehicle industry. The same held for the research subsidy of Fl 1,55 million,

— even when it was evident that the former DAF was in serious financial difficulties, the Dutch government omitted to secure its interests in the company by means of requiring sufficient collateral before rescheduling old financial arrangements. The Fl 2,5 million postponement of repayment on an earlier NIB loan, which the Dutch government could not recover from the former DAF, may therefore constitute State aid,

— given that the bridging loan was at the time not in proportion to the involvement of the Dutch government in the former DAF as a shareholder or a secured creditor, the Fl 7,5 million which was so far not repaid may constitute State aid,

— 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 participation by the Dutch State in the risk capital of the new company (Fl 155 million equity capital and Fl 45 million risk-bearing loans by the Dutch government) 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.

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 Belgian authorities to DAF, it is the Commission's final view with regard to the rescheduling in 1990 of the first TOK loan (NTG-TOK) that:

— despite the fact that the original loan was awarded in 1983 on the basis of an approved aid scheme, the rescheduling of this loan in 1990 when the motor vehicle guidelines were in operation had to be notified. Around the same time, the Commission was dealing with a notification concerning Case C 3/92 (development loans awarded by the Dutch State and Volvo Car Corp. to Volvo Car BV) which also concerned a modification of the repayment scheme and which was notified to the Commission. The Dutch government must therefore have known that the rescheduling had to be notified. Moreover, they could not identify any other TOK loan where a similar rescheduling had taken place. In such circumstances, there were at least doubts as to the existence of State aid elements in such loan revisions [1],

— the rescheduling did contain additional State aid since it consisted of making repayment necessary only in years of profits and this at a moment when the company was suffering heavy losses, thereby providing an additional financial support to the company. The Commission valued this financial advantage at Fl 10 742 000 at the date of receivership (2 February 1993) assuming a rather optimistic scenario of three years of losses in the period 1993 to 2002 and sufficient profits in all other years to reimburse the necessary instalments. This calculation takes account of the interest advantage obtained by DAF NV between the award of the aid and the date of receivership, using the reference rate by which the net grant equivalent of regional aid in the Netherlands is calculated. Under this revised repayment schedule the loan would be fully repaid in the year 2002 instead of 1998,

— the rescheduling also permitted the conversion of the reimbursement covering the year 1989 and due on 1 October 1990 into a loan at 8 % which was again postponed in January 1993. This increases the aid at the rescheduling by an amount equal to Fl 6 979 000,

— the NTG-TOK loan was granted for the development of a new heavy truck (F 95) range. Even if the Dutch government argued that since part of the TOK loan was used for developing another truck series F 80, which failed, and could have been remitted, it is *stricto sensu* normal under the TOK rules to claim that the company has to repay the entire loan from the turnover of the F 95, considering that the aid contract did not specify that the project would generate two trucks. So, repayment could legitimately be based on the revenues of the single truck developed by the aided project,

— the Dutch Government did not ask for any securities although they knew the financial situation, since they were shareholders of the company. While the Commission recognizes that this would be an exceptional measure, it is equally convinced that the agreed rescheduling is exceptional given that the Dutch authorities could not provide any other similar example in the long history of TOK loans.

With regard to the latest TOK loan (NML-TOK) awarded in 1991, and increased by a second tranche in 1992, it is the Commission's view that:

[1] OJ No C 318, 24. 11. 1983, p. 3.

— illegal aid was awarded through this TOK loan since it had not been notified. This TOK loan enabled the company to renew its model range at a time when it would not have been possible to finance such expenditure entirely from its own resources or other external borrowings,

— TOK loans represent an approved aid system which does not only contain State aid in case of failure but also in case of success given that they are awarded at an interest rate below the market rate and the interest is compounded to the capital without charging compound interest. The Commission values the aid given on the date of receivership as Fl 35 990 000 constituted by Fl 33 489 000 principal and Fl 2 501 000 interest charges. This includes the interest advantage obtained by the company between the award of the aid and the date of receivership, using the reference rate by which the net grant equivalent of regional aid in the Netherlands is calculated. The fact that the Dutch State only requests reimbursement from the bankrupt company DAF NV of Fl 35 597 000, leaves an amount of Fl 393 000 which constitutes the abovementioned additional aid element of the loan,

— granting a new TOK loan in 1991 was not economically justified since DAF already faced difficulties in the repayment of the first TOK loan. The repayment of the older loan had to be made in years of profitability of the company; the reimbursement of any new TOK loan would necessarily affect that profitability in the future, thus jeopardizing the recovery of the old loan,

— as far as the increase of the NML-TOK loan of July 1992 is concerned, this was even more questionable since it had been granted at a time of severe financial difficulties for the company, which went into receivership half a year later.

As regards the research subsidy of Fl 1,55 million, this amount was paid as an advance to aid, outside any approved system, which was notified to the Commission for approval. As such, it clearly constitutes State aid as it alleviated the company from part of its normal R&D expenditure.

With regard to the postponement by the NIB on the first repayment of Fl 2,5 million on a loan of Fl 30 million, the Commission shares the point of view of the Dutch authorities that the Dutch State did not act differently than other unsecured creditors of DAF NV. Therefore, this instalment of a public loan which was not reimbursed by DAF NV before the receivership does not constitute State aid.

With regard to the outstanding amount of the bridging loan of Fl 7,5 million, guaranteed by the Dutch State, the Commission received confirmation from the Dutch authorities that the entire sum of the loan including interest charges has in the meantime been reimbursed. As such, this unnotified State aid has disappeared.

With regard to the State participation of Fl 155 million, i.e. 41,78 % of the shareholding of the new company, the presumption mentioned in the opening of the procedure that the State participation may constitute State aid can, according to the Commission, not be maintained. Considering that the State provided capital under the same conditions as the private shareholders, whose holding has real economic significance, and that the examination of the business plan has proven that a reasonable return on the shareholders' capital can be expected it must be concluded that this shareholding corresponds to the market investor principle [1]. It does not, therefore, contain any State aid.

As regards the sale of the assets of the former DAF company to the new company and the role of the public authorities in it, it is the Commission's view that, as the oral agreement of the 20 February 1993 was binding for all the parties involved, the Dutch State could not have unilaterally withdrawn from that agreement even when it was afterwards informed of a possible more attractive offer. Moreover, the legal advisers of the Dutch State and the receivers have demonstrated that any higher sale price than the one paid by DAF Trucks NV could not have benefited the Dutch State as an unsecured creditor of DAF NV but rather the creditors of the UK subsidiaries of DAF. Therefore, it can be concluded that the public authorities as creditors of DAF NV have acted as a private investor in the bankruptcy proceedings.

It must be stressed that under Dutch law the receivers of DAF must act independently and the State is not therefore in a position to issue instructions to the receivers. While it can be economically argued that DAF Trucks NV obtained a financial advantage in the form of a purchase price for these assets which was lower than could have been obtained in a competitive bid, it is not mandatory for the receivers to organize such a bid. Considering also the information at their disposal and the time pressure imposed on them by the lenders of the bridging loan, it is fair to conclude that the receivers have complied with the law. Finally, it was confirmed that the two companies (DAF NV and DAF Trucks NV) are legally different entities, fully independent one from another.

[1] See Commission communication on the financial relations between Member States and public undertakings — OJ No C 273, 18. 10. 1991, p. 2.

As regards the three remaining elements of State aid to DAF NV referred to above, it must be concluded that they fall within the provisions of Article 92 (1) of the EC Treaty and Article 61 (1) of the EEA Agreement because there is a very high level of intra-Community trade in the European van and truck markets wherein DAF NV was actively participating, as it captured respectively 2,7 % and 8 % of these markets in 1992, its last year of existence.

VI

By not notifying the abovementioned two remaining aid measures related to two different TOK loans and by advancing Fl 1,55 million on a notified research loan before its approval by the Commission, which were all granted to DAF NV before its bankruptcy, the Dutch government has infringed Article 93 (3) of the EC Treaty. Since the Dutch 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 unlawful.

VII

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, none is applicable.

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 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 State aid to this industry, thereby limiting the scope of discretion under point (c) of Article 92 (3).

As explained above and in the opening of the procedure, the Commission is convinced that both aid measures were notifiable under the motor vehicle industry guidelines, which were in operation at the time of the aid award (1990, 1991 and 1992). The Commission has therefore to consider whether these aid measures were compatible with the assessment criteria of those guidelines.

While the region of South East Brabant where the plant of DAF is located in the Netherlands has recently been considered by the Commission as an Objective 2 area, the area was at the time the aid was granted (1990, 1991 and 1992) not a regionally assisted area within the meaning of points (a) or (c) of Article 92 (3) of the EC Treaty nor can any of these aid measures be considered as having a regional objective.

As regards the Fl 1,55 million advance to a notified but not approved R&D aid, the Commission has obtained evidence that DAF NV, before its receivership, spent Fl 18,3 million on a project known as Volem (accelerated development of low emission engines) which according to its motor expert contains sufficient elements of pre-competitive research to justify the level of aid actually paid. This concerns, in particular, the research relating to the study of air flow of the engine by using mathematical computer models with visual display of air flow rigs. Therefore, this grant is in conformity with the guidelines for assessment of R&D aid of the guidelines on State aid to the motor vehicle industry and thus satisfies the conditions for the application of the exception provided in point (c) of Article 92 (3).

As regards the rescheduling of the NTG-TOK loan, the provisions of the guidelines relating to rescue and the restructuring aid are the only relevant provisions given that the company had already obtained the maximum possible aid under the approved TOK aid scheme and, therefore, any increase of the aid intensity cannot be deemed necessary for attaining the original objective of the aid.

The rescheduling of the TOK-loan in December 1990 which enabled DAF NV not to reimburse part of that loan during the difficult years 1990 to 1992, in which the company made accumulated consolidated losses of Fl 880 million, contains rescue aid elements which could only have been approved in exceptional circumstances. According to the guidelines, such aid 'must be linked to a

satisfactory restructuring plan, and only granted where it can be demonstrated that the Community interest is best served by keeping a manufacturer in business and by reestablishing its viability. It will be necessary to ensure that the aid will not allow a beneficiary to increase its market share at the expense of its unaided competitors. In cases were certain companies still have excess capacity, e.g. in the commercial vehicle sector, the Commission may require reductions in capacity in order to contribute to the overall recovery of the sector'. While DAF NV suffered at that time from excess capacity, the company did not develop and implement a restructuring plan which included the reduction of its surplus capacity. Only at the end of 1992, when the financial situation had deteriorated to such a point that its banks threatened to cut the credit lines, did DAF NV draft a radical restructuring plan including the reduction of part of its surplus capacity. This plan was never put into operation given that the company entered into receivership in February 1993 when it failed to secure finance for such a plan.

With regard to the award of the NML-TOK loan, different provisions of the guidelines are relevant. Under aid for R&D the framework stipultes that 'the Commission will continue to have a positive attitude towards aid for pre-competitive R&D. However, the Commission will ensure, in keeping with its Framework on State aid for R&D [1], at the same time that a clear distinction is established between genuine research and development and the introduction of new technologies inherent to production investment (modernization)'. Under aid for modernization and innovation, the guidelines stipulate that 'in the context of a genuine internal market for motor vehicles, competition between producers will become even more intense and the distortive impact of aid will be greater. Therefore, the Commission will take a strict attitude towards aid for modernization and innovation. These are activities to be undertaken by the companies themselves and normally financed from their own resources or by commercial loans as part of their normal company operation in a competitive market environment'. ... 'Proposed aid for innovation will be examined in order to determine whether it really relates to the introduction of genuinely innovative products or processes at Community level'. Under aid for environmental and energy saving, the guidelines state that 'the development of less polluting and energy saving vehicles is a standard requirement for the industry, partly imposed by Community legislation, and should thus be financed from the company's own resources.'

Taking into account the advice of its motor industry expert, the Commission is of the view that the activities aided by the TOK loan do not constitute pre-competitive research which can be classified as either basic or applied research. The aided project concerned the last development stage of new medium-sized truck models and the engineering costs related to the industrialization of those models. As such, it relates to the development and pre-industrialization phases of the R&D cycle. The aided activities took place between January 1991 and July 1992 i.e. shortly before the DAF 75 and 85 series were introduced into the market (autumn 1992). Any pre-competitive research described in part in the documentation provided by the Dutch authorities must have taken place in the early stages of the project (1988 to 1990) which were not aided by the TOK loan or were the object of the Volem project separately notified for R&D aid (see *supra*).

Upon analysis of the material provided by the Dutch authorities, and in particular upon review of the comparative tests of this model series with its competitors, it is also the view of the expert consulted by the Commission that the new model series does not represent an innovation neither as regards its design concept nor as regards performance in terms of fuel efficiency, operating costs, output, noice or exhaust emissions. This does not imply any negative view on the merits of the products which are systematically classified in market surveys as among the best in the market segment of medium trucks in Europe.

As prescribed by the guidelines, the development of new models, which are less polluting and more fuel efficient than their predecessors, is a standard requirement for a truck company in order to remain competitive on the European truck market. Such normal business activity should in principle not be aided.

Consequently, for the latter two aid measures the conditions which have to be satisfied in order to apply the exception provided in point (c) of Article 92 (3), as specified by the motor vehicle industry guidelines, are not met.

In view of all the foregoing considerations, the two former aid measures in support of the DAF NV are not only illegal because the Dutch government did not fulfil its obligations under Article 93 (3) but are also incompatible with the common market as they do not meet the conditions which must be satisfied in order to apply any of the exceptions set out in Article 92. Consequently, they are also incompatible with the functioning of the EEA Agreement.

[1] OJ No C 83, 11. 4. 1986, p. 2.

VIII

As explained in the opening of the procedure, the Commission would check, if the assessment of the case should confirm that any illegal and incompatible State aid was granted to the old DAF company which could not be recovered from the liquidated company, whether such aid should be reimbursed by the new DAF company, DAF Trucks NV.

Given the earlier conclusion that DAF NV and DAF Trucks NV are legally entirely different companies and that the assets of DAF NV were sold in compliance with the Dutch bankruptcy procedure, the Commission should not require the recovery of these aid measures from DAF Trucks NV, even if it would later appear that these aid measures cannot be (entirely) reimbursed by the company in liquidation, DAF NV,

HAS ADOPTED THIS DECISION :

Article 1

The Fl 1,55 million aid paid by the Dutch government to DAF NV in advance of the Commission's approval of a notified R&D aid project is illegal. However, it is compatible with the common market by virtue of point (c) of Article 92 (3) of the EC Treaty and, therefore, is compatible with the functioning of the EEA Agreement.

Article 2

The two aid measures awarded by the Dutch government to DAF NV in the context of the TOK aid scheme and valued respectively at Fl 17 721 000 and Fl 393 000 on the date of the receivership of the company, calculated on the basis of the reference rate used for the calculation of the net grant equivalent of regional aid in the Netherlands, are 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 3

The Dutch government shall recover from DAF NV the amount of aid referred to in Article 2, which includes interest 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 the Netherlands.

Article 4

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

Article 5

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 4 October 1995.

For the Commission

Karel VAN MIERT

Member of the Commission